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Court: Supreme Court. Administrative Litigation Chamber (Tribunal Supremo. Sala de lo Contencioso)

Headquarters: Madrid

Section: 4th

Appeal No.: 3372/2008

Resolution No.:

Proceeding: CASSATION APPEAL

Justice: SEGUNDO MENENDEZ PEREZ

Resolution type: Judgment

Rulings:

- × ADMINISTRATIVE LITIGATION COURT ×
- × INFRIGEMENT OF LEX ARTIS ×
- × CAUSAL LINK ×
- ×INJURY ×
- × DAMAGES ×
- × TEST ×
- × ADMINISTRATION' S LIABILITY ×

Summary:

Drug-resistant epilepsy. Lack of consideration of the surgery treatment. Worsen of sequelae. Administration's liability.

DECISION

In Madrid, March 31 2010

HEARD by the Fourth Section of the Administrative Litigation Chamber of the Supreme Court (Sección Cuarta de la Sala de lo Contencioso-Adiministrativo del Tribunal Supremo) the cassation appeal brought by Mr. Florentino and Mrs. Mercedes on behalf of their minor child Mr. Jesús represented herein by Mrs. Yolanda Alonso Álvarez, solicitor (Procuradora de los Tribunales) against the decision dated May 6 2008 of the Eight Section of the Administrative

Litigation Chamber of the Superior Court of Justice of Madrid (Sección Octava de la Sala de los Contencioso-Administrativo del Tribunal Superior de Justicia de Madrid) about an action for damages against the State as a consequence of the damages and loss suffered due to an inadequate health care provided to the child of the aforementioned claimants at the Children's Neurological Services of the Niño Jesus, La Paz and Ramón y Cajal Hospitals in Madrid as a result of childhood epilepsy suffered by the child.

In this appeal, MADRID REGIONAL GOVERNMENT (ADMINISTRACIÓN DE LA COMUNIDAD DE MADRID) represented by the Lawyer of their Legal Services, and ZURICH ESPAÑA, COMPAÑÍA DE SEGUROS Y REASEGUROS, S.A., represented by Mr. Federico Olivares de Santiago, solicitor (Procurador de los Tribunales), have intervened as respondents.

FACTUAL BACKGROUND

FIRST.- In the administrative appeal number 363/2005 dated May 6 2008, the Eight Section of the Administrative Litigation Chamber of the Superior Court of Justice of Madrid (Sección Octava de la Sala de los Contencioso-Administrativo del Tribunal Superior de Justicia de Madrid) gave a judgment which decision is as follows: "**WE DECIDE**: that we **DISMISS** the appeal number **363/2005** brought by the representation of **Mr. Florentino and Mrs. Mercedes** against the Institute of Health in Madrid (IMSALUD) due to the implied decision of rejecting their claim of compensation because of administration's liability –lodged in May 17 2004– and established with the amount of 420708 euros due to the insufficient health care provided to the child Jesús of the aforementioned claimants at the Children's Neurological Services of the Niño Jesus, La Paz and Ramón y Cajal Hospitals in Madrid as a result of childhood epilepsy suffered by the child that made them go to the private healthcare, which is reconfirmed because of complying with the legal system, without paying the costs".

SECOND.- The representation of Mr. Florentino and Mrs. Mercedes has brought a cassation appeal against that judgment, lodging it according to the following ground of appeal:

Único.- Under the *article 88.1.d) of the Spanish Jurisdictional Act* (*Ley de la Jurisdicción*), due to an alleged breach of *article 106.2 of the Spanish Constitution* (*Constitución Española*) and *139-141 articles of Law 30/1992 (Ley 30/1992),* by considering there is a direct and immediate causal link between the inadequate medical treatment that the minor received and the delay in implementing the adequate surgical treatment, as well as with the damages caused with particular reference to the objective character of damage liability of the Administration.

And it ends seeking a judgment issued by the Chamber that "…to dismiss and render ineffective the judgment and to show its agreement with this ground of appeal and the requests in the first claim".

THIRD.- The representation of MADRID REGIONAL GOVERNMENT was against the other party's appeal and in his statement he submits a request to the Chamber "…to admit this statement and to issue the order dated February 2 2009".

FOURTH.- The representation of ZURICH ESPAÑA, COMPAÑÍA DE SEGUROS Y REASEGUROS, S.A., was also against the other party's appeal and in his statement he submits a request to the Chamber "…to issue a resolution upholding the judgment under appeal in its entirety".

FIFTH.- By order dated February 18 2010 the voting and the ruling of this appeal was stated in March 16 2010, date when the proceedings took place.

I Mr. Justice Segundo Menéndez Pérez.

LEGAL RATIONALE

FIRST.- The Trial Chamber (Sala de Instancia) reached the conclusion in its judgment that the health care provided to the child of the claimants was carried out in line with the lex artis, therefore the Trial Chamber considers that moral prejudices and losses claimed are not attributable. However, the Trial Chamber has them considered without indicating which are the exact facts and circumstances proven. In the second and third legal rationale of the abovementioned decision it is explained the judicial regime regarding Administration's liability and its relation with healthcare sector. In the fourth and last legal rationale, the Trial Chamber applies the judicial regime to the medical care explained in the first legal rationale, which does not reflect what has been proven. And according to what it is said in the first, it is the essence of the applicants' allegations.

Such an inaccuracy forces us to make use of the power conferred by *the article 88.3 of the Spanish Jurisdictional Act* in order to decide what should be the fate of the single ground of appeal under the *article 88.1.d) of the aforementioned Act*.

SECOND.-The facts presented, that are sufficiently substantiated according to the actions which are not in contradiction with claims that are strictly factual in nature and that can be deduced of the judgment drafting process, are the conclusion of the following report:

A). The child of the appellants, Jesús., was born in May 23 1997. When he was 27 months old, he was seen by the Children's Neurological Service of the Hospital Ramón y Cajal for having episodes of sudden head drops, jerking movements of the arms and sometimes of the legs, and periods of staring. At the beginning these episodes were just during few seconds and were repeated two or three times a day but they became more frequent in rounds from 8 to 10, 2 or 3 times a day always upon waking. In the EEG done in September 2 1999, slow and asymmetric brain bioelectrical activities with a higher wattage in the left hemisphere of the brain, and bilateral discharges and slow-wave synchronous with a persistent activity were observed. The child was undergoing Topiramate medical treatment for 50 days, which caused an decreased of the crisis but not a disappearance.

B). In October 1999, the child is seen for the first time by the Children's Neurological Service of the Hospital La Paz that diagnosed "polymorphous seizures of unknown origin" and he started a treatment with Valproic acid and Clonazepam, which made him have a control over the seizures for a period of less than a month. So Ethosuximide was added to the treatment but it increased the seizures, so it was changed to Lamotrigine which was also stopped due to the same cause, replacing Clonazepam with Clobazan. Afterwards he took Depakine and Noiafren but seizures continued waking.

C). In May 2000 he was admitted to the Hospital del Niño Jesús for two days. In August 22 2001 this Neurological Service issued a report that speaks of "encephalopathy with seizures of difficult control (a syndrome between Lennox-Gastaut Syndrome and West Syndrome)". In the report it is also said that he took Sabrilex, adding it to the last two that he took and it is stated that he continued with seizures of the same frequency, pointing out that seizures happened few hours after going to sleep at night (he wakes up) and also when waking up in the mornings or from nap. In this report, it is also said that the child is like disconnected for few seconds and has a jerk of the eyes upward and, sometimes, afterwards a sudden head drop (sic), linking series of 5 and 40 episodes with an average of around 15-20 and lasting approximately 3-4 minutes. The report of September 2001 speaks about refractory epilepsy and repeats this classification in subsequent reports. The report of June 4 2002 mentions that Ketogenic diet has been introduced in his treatment in May 5 2002, adding that any changes have not been noticed in his critical symptomatology and seizures continue every day, some of them with sudden forward drops of the head or the whole body, causing important traumatisms. In this report, it is also said that he also takes Keppra and his new diagnosis is encephalopathy Lennox-Gastaut-Like. The child continued going to this hospital every two months until March 2003. The report of April 2002 says that 20 or 30 seizures continue everyday. In the report of June it is said that the child "has been undergoing medical treatment with several different drugs including topiramate, valproic, clonazepam, clobazepam, clobazan, ethosuximide, phenobarbital, lamotrigine, vigabatrin and levetiracetam without positive results in spite of trying different combinations". In this report it

is also said that the Ketogonic diet was stopped because of not showing any changes in the seizures that "continue to be very frequent and polymorphous and he has atonic seizures, myoclonic seizures, complex partial seizures" and also that "it is thought to be justified to try a treatment with Sultiame (Oxpolot) to attempt get better his drug-resistant epilepsy". And in the report of March 2003 it is said that "it is thought to be justified to try a treatment with Zonisamide for his drug-resistant epilepsy".

D). In May 2000 the Neurological Service of the Hospital Ruber Internacional diagnosed drug-resistant epilepsy, confirming it in December 27 2000. In the "monitoring paragraph" of this last checkup it is said that the child "shows seizures with jerking movements flexing and extending the arms, nodding the head, sometimes stiffening of the body, he can stay floppy and still for 5 seconds. Some series are linked in general right after waking up from nap or nighttime sleep. In November an average of around 16 seizures a day (range of 4-32) were counted. In December an average of 23 seizures per day (range 9-41) were counted."

E). In the report issued by the Medical Officer of the claim of compensation due to administration's liability, the following paragraphs can be read as follows: The younger the age of onset "there are more possibilities of neuropsychological dysfunction so it is important to control seizures' children in its entirety". "The possibility of neuropsychological injury in the contralateral hemisphere to the site of damage is higher if epilepsy lasts longer". The "frequency of more than 100 seizures in a year and a bad state of epilepsy with tonic-clonic seizures affect neuropsychological functions".

It is also said that: "Surgery is another treatment option when drug-resistant epilepsy" (here the Medical Officer talks about other interventions in 1951 and 1986 and he says that "there are plenty of ways to perform surgery for epilepsy" and he means several techniques). "Complex partial seizures, mainly the ones that occur in the temporal lobe of the brain, are the main ones that are subject to surgery". "If this surgery had been considered at some point, it would have been performed in a center for public health" (he specifically mentions Hospital de La Princesa in Madrid). "There is no information until the moment about any request of surgery for epilepsy and seizures submitted to the public healthcare [by the parents], they resorted to private healthcare on their own initiative".

Another paragraph of this report states that: "The child has seen a doctor in several centers of the private sector in Marseille France, Santander, Barcelona, in traditional medicine and in alternative medicine". He made a brief reference to the private hospital Centro Médico Teknon in Barcelona.

F). In May 2003 this private hospital (Centro Médico Teknon) confirmed an epilepsy that occurs in the right temporal lobe of the brain, which was successfully performed in June 6 2003. In the following two years after the surgery, the child has been without seizures more than eleven months, but very light seizures came back due to stopping valproic acid but the child was free of seizures again when replacing this last drug with oxcarbazepine. The child does not use the helmet as he does not fall down anymore. He could barely speak and he had a very low verbal comprehension and attention, he experienced a change as he can understand, he developed language skills and he can even speak with full sentences. His attention-deficit hyperactivity disorder has gone. His EEGs are not normal yet but he is now going to improve his quality life with antiepileptics drugs and retraining therapy. And

G). As it is stated in the medical opinion annexed to the defence brought by the co-defendant, an unanimous consensus has not been reached but a refractory epilepsy or drug-resistant epilepsy can be considered “if seizures continue when the patient has been properly treated with several AEDs (antiepileptic drugs) for at least 2 years". It is also stated that "around half of all drug-resistant patients can fully control their seizures or get a significant improvement thanks to different surgical procedures". It is also said that “surgery must be considered in all patients suffering drug-resistant epilepsy”. As well as the treatment provided to the minor included all pharmacological advances that are recommended in order to control seizures", with the exception of zonisamide (a pretty new drug at the time of the recommendation) which could not be included in the treatment due to the parents stopped attending Hospital del Niño Jesús in March 2003.

One of the writers of the Act of Ratification of this opinion states that “it is true” that surgery was not considered at none of the public hospitals where the child was treated, by explaining that "according to the international protocols that have been regarded, surgery is performed after proving the failure of drug treatment". This writer also added that “in the first years of a child’s life, the brain is more vulnerable to suffer neurological disorders”, as well as surgery for epilepsy is performed in all hospitals where the minor was seen. The writer also considered that the epilepsy of the child "was drug-resistant epilepsy because all drugs provided to the child over more than two years have been ineffective”.

THIRD.- The contention in the defence, that in the penultimate subparagraph of the first legal rationale that the judgment at first instance is constantly referring to the first legal rationale. In short: the persistence on continuing with an ineffective drug treatment is unjustified, as physicians in these hospitals perfectly knew that the child was suffering drug-resistant epilepsy, therefore they should have considered, without doing it, surgery as an option because it is an adequate treatment for epilepsy as well as a developed alternative. Consequently if the child

would have had surgery before, his neurological sequelae had not been as irreversible and considerable as they are at the moment due to the delay of the operation.

The contention is reiterated by the co-defendant in his/her single ground of appeal that under the *art. 88.1.d) of the Spanish Jurisdictional Act (Ley de la Jurisdicción)* alleges infringement of *article 106.2 of the Spanish Constitution and articles 139-141 of 30/1992 Law*, "considering there is a direct and immediate causal link between the inadequate medical treatment that the minor received and the delay in implementing the adequate surgical treatment as well as with the damages caused".

FOURTH.- This contention –alleging the lack of consideration or disregard without any reason or restriction to an alternative treatment which was recommended by the state of scientific knowledge or existing techniques– is supported by the second legal rationale. Thus, according to the *article 141.1 of 30/1992 Law*, we disagree with the Trial Chamber's assessment which contends that the healthcare provided to the minor in the public sector was according to lex artis ad hoc, as well as we disagree with the Trial Chamber's decision of rejecting their claim of compensation because of administration's liability.

After two years of treating the child with the antiepileptic drugs that were available at that time without improving or stopping the evolution of the disease –once epilepsy was found and the child had started drug treatment in September 1999– public healthcare should have considered that he was suffering drug-resistant epilepsy or refractory epilepsy. In this regard, all the information that has been said in the second legal rationale, and more particularly in point G), there is evidence that such diagnosis or consideration is necessary and should have not been rejected in the circumstances of treatment time, drugs provided and no improvements showed. Thus, public healthcare should had taken such diagnosis into consideration no later than the last quarter of 2001. The report from September 2001, which we mentioned in point C) of the second legal rationale, spoke already about refractory epilepsy, a fortiori.

On this basis, during those two years and the last quarter of 2001, the provision of adequate health care –in other words, to be aware of the state of scientific knowledge or existing techniques at that time– demanded to inform parents of surgery option, medical evaluations and diagnostic tests in order to perform surgery or reject it, the type of surgery to perform if needed and the risk/benefit ratio of surgery. Thus, parents could had taken relevant decisions knowing all this information. All the information that is discussed in points E), F) and G) of such legal rationale guarantees, without any doubt, that according to an adequate health care the information should have been provided in this case. These points also prove the omission or breach of that requirement as in all the documents provided there is nothing that indicates the contrary. As well as these points prove that what is stated in the defence does not correspond to

the information of the documents provided, so the defence stops contradicting the applicants in that part. This lack of information in the defence is not in the report issued by the Medical Officer who, in other words, states that surgery was never considered as well as this is what is stated in the Act of Ratification by one of the writers of the medical opinion that the co-defendant brought.

FIFTH.- From the aforementioned second legal rationale, it is also deduced the following:

(1). Before surgery the minor was suffering seizures every day that, except for very short periods, were constantly going worst. At the beginning seizures last just few seconds and were 2-3 times a day. In 1999 these seizures increased in rounds from 8 to 10. In November 2000 he suffered an average of around 16 seizures a day (range of 4-32) and in December an average of around 23 seizures a day (range of 9-41). According to the report dated August 2001 he suffered series of seizures of 5 and 40 episodes with an average of around 15-20 and lasting approximately 3-4 minutes. The report of April 2002 states that he suffered from 20 to 30 seizures every day. At least from June 2002, reports state that some of the seizures were with sudden forward drops of the head or the whole body, causing important traumatisms.

(2). The surgery performed in June 2003 stopped the situation explained in point F) of such legal rationale, stating that in the following two years seizures disappeared for eleven months and the ones that from time to time came up were pretty mild.

(3). At that early age, since he was two years and three months old when the disease was detected until he was six years and few days old when surgery is performed, he had been suffering seizures every day. These seizures were with an average, duration and intensity like the ones stated in, for example, the reports of August 2001 and April and June 2002, so the neurological injury that was already caused along the first two years got worst. And this is the only logical conclusion that can be drawn from the information reflected in points E) and G) of the aforementioned legal rationale.

SIXTH.- Thus, this persistent Health Administration's lack of consideration, of not to think on surgery as an option and not to inform parents of it, is a cause of such worsen, which would have not been like that if surgery had been performed at the end of 2001 or beginning of 2002 when there were proves, or there were supposed to be, of drug-resistant epilepsy suffered by the child. It would therefore only be logical that public healthcare should have considered this treatment option and the decision of performing it before the end of 2002 as the private hospital did.

We shall also state the cause-and-effect relationship between this lack of consideration and the cost of medical health care provided by such private hospital. The parents entrusted public

healthcare with the treatment of their child for more than three years, looking for an effective treatment in several public hospitals. In fact, considering a sound presumption according to human judgment, it would be logical and natural to deduce that the parents would have kept entrusting public healthcare with surgery if they had known about a treatment option.

SEVENTH.- We cannot see anything serious and justifiable in the pleadings stated by the defendant and the co-defendant nor any cause that the parents may assume regarding to the causal link. Focusing on what is important, the parents are not the ones that should have suggested the alternative treatment, assuming they haven't. The fact that in March 2003 the parents decided to entrust private hospital with the treatment of their child instead of not trying a new treatment with a new recommended drug by public healthcare, after three years and a half under ineffective drug treatment, is not a cause of sequelae's child.

EIGHTH.- The reasoning that has been set forth shall lead to considerate the ground of appeal. It is sufficient now to say about the ground of appeal that, thereby responding to the arguments alleged by the respondent and disagreeing with them, its opinion is not disagreeing with the information that the Supreme Court would have had proven, but with the legal considerations and assessments that have been taken from that information. Such vagueness in the contested judgment, which has already been explained in the legal rationale, upholds by itself this statement and the rejection of such pleadings.

NINTH.- The fact that the administrative appeal was considered inadmissible, due to not being within the jurisdiction of this civil court, by the defendant Administration, that has not been analyzed in the judgment at first instance, is devoid of any legal basis. The mere quote from the *article 2.e) of the Jurisdictional Act* and the fact that this appeal is about public administration's liability, which is different from the costs incurred on a wrongful medical attention provided by the social security, are sufficient reasons to confirm the aforementioned statement.

TENTH.- After the debate at the Trial Chamber, we conclude that it only remains to decide the adequate reimbursement to compensate the family for the damage caused due to the thoughtless running of the healthcare system. We do not have an expert opinion that assesses the severity of the neurological function and sequelae that the child suffers due to the persistence of those seizures in the previous twelve months of surgery. But regarding the young age of the child, the further negative impact of the disease when being younger, the frequency and intensity of the seizures during those months, what this period of time entailed, the suffering of the child and his parents in this time, his state of health after being intervened, the cost of the intervention, among other things; we conclude that the compensation, updated already, shall be of 200000 euros, instead of 420708 euros requested by the applicants.

ELEVENTH.- In accordance with *article 139 of the Jurisdiction Act (Ley de la Jurisdicción)* it is not appropriate to impose the costs incurred neither in the judgment at first instance nor in this cassation appeal.

For these reasons, on behalf of His Majesty the King of Spain, and in the exercise of the power of judging that emanates from the people and is conferred by the Spanish Constitution.

WE DECIDE

that the cassation appeal that the representation of Mr. Florentino and Mrs. Mercedes brings against the judgment dated May 6 2008, passed by the Eight Section of the Administrative Litigation Chamber of the Superior Court of Justice of Madrid in the administrative appeal number 363/2005, is dismissed rendering it ineffective. Instead:

1). We uphold in part the administrative appeal brought by the aforementioned representation against the implied decision to claim financial liability against the State due to the facts of the case.

2). We dismiss the abovementioned resolution on account of the unlawfulness and we sentence the Madrid Regional Government to pay the claimants an already updated compensation of two hundred thousand euros (EUR 200000).

3). We dismiss the remainder of the claims deduced. And

4). We do not pay the costs incurred at first instance and on appeal.

Thus, by this our ruling, which shall be inserted by the General Council of the Judiciary (Consejo General de Justicia) in the publication of case law of this Supreme Court, we pronounce, command and sign it. PUBLICATION.- In the same day was read and published the herein decision, I Mr. Justice Segundo Menendez Perez, and as of Secretary of the same, herein certify.