Roj:	STS 3364/2010
Id Cendoj:	28079130042010100315
Organ:	Supreme Court. Administrative Division.
Seat:	Madrid
Section:	4
Nº of appeal:	4403/2008
Nº of resolution:	
Procedure:	APPEAL
Judge:	SEGUNDO MENENDEZ PEREZ
Type of resolution:	Judgment
Rulings: • x FINANCIAL LIABILITY x • x HEALTH DEPARTMENT x • x HEALTH LIABILITY x • x DIAGNOSTIC ERROR x	
Summary: Financial Liability.	

JUDGMENT

In Madrid, on June 16, two thousand and ten.

HEARD by Section IV of the Administrative Division of the Supreme Court (Sección Cuarta de la Sala de lo Contencioso-Administrativo del Tribunal Supremo) the appeal filed to the ADMINISTRATION OF VALENCIA, represented and directed by Counsel of its legal services, against a sentence of Section II of the Administrative Division of the Supreme Court of Justice of Valencia, dated July 9, 2008, on claim of Financial Liability filed to the Health Service of the Ministry of Health of the *Generalitad Valenciana*, on account of medical assistance during gestation of his son Pedro Jose.

They have made themselves known in this appeal, as defendants, the University UNIVERSIDAD MIGUEL HERNÁNDEZ DE ELCHE, represented by Barrister of the Courts Mr. Santos Gandarillas y Carmona, Ms. Soledad and D. Porfirio, represented by Barrister of the Courts Ms. Consuelo Rodriguez Chacón.

FACTUAL BACKGROUND

FIRST. - In the administrative appeal number 1485/2005, the Section II of the Administrative Division of the High Court of Justice of the Valencian Community, dated July 9, 2008, dictated judgment which sentence reads as follows: "**We give judgment: First.** – Upheld, in part, the administrative appeal filed by Ms. Soledad and Mr. Porfirio against the dismissal due to silence of the claim of financial liability made in reason of the medical service received during the gestation of his son Jose Pedro. **Second. -** Declared the above-mentioned act as contrary to law, as annulling and leaving it without effect, recognizing as particular legal situation the right to compensation in respect of financial liability by the *Generalitad Valenciana* in favor of Jose Pedro for the amount of 1 500 euros per month according to the CPI, to date, plus the corresponding amounts from the date of his birth depreciated to the CPI, plus interest; and in favor to Ms. Soledad and Mr. Porfirio the amount of 75 000 euros each, valuation of today, currently with no payments of interest. **Third. –** Not to make any pronouncement on costs.

SECOND. - On June 18, 2009 the First Division of this Court, issued an order which provisions

literally read: "**THE DIVISION AGREES**: To declare the dismissal of the appeal filed by the Lawyer of the *Generalitad Valenciana*, as authorized, against the judgment of 9 July 2008 issued by the Administrative Division of the High Court of Justice of the Valencian Community (Section II), in the appeal number 1485/05, in respect of compensation given to the child's parents; this resolution is firm; and, the uphold of the appeal in relation to the compensation granted to the child; referring the proceedings to Section IV of this Chamber, in accordance with rules governing the distribution".

THIRD. - The procedural representation of the ADMINISTRATION OF VALENCIA, has prepared an appeal against the mentioned judgment based on the following grounds:

First. - With under procedural protections in Article 88.1.c) of Jurisdiction Act, for violation of the rules governing the judgment, we submit the breach of Article 33.1 of Jurisdiction Act of the Administrative Court (Ley de la Jurisdicción Contencioso-Administrativa) for incurring the judgment with procedural inconsistency between what is intended in the application submitted and what is recognized in the final judgment.

Second. - With under procedural protections in Article 88.1.d) of Jurisdictional Law, for breach of rules of the legal system and case law applied to resolve the issues under discussion, understanding that the final judgment is violating Art.139.1 and 2 of Act 30/92, of November 26, on the Legal Regime of Public Administrations and Common Administrative Procedure and the jurisprudence of the Supreme Court that here appoints.

Third. - Under the same procedural protections, the final judgment incurs a violation of Article 140 of Act 30/1992, of November 26, on the Legal Regime of Public Administrations and Common Administrative Procedure, that attends a concurrent assumption of responsibilities of the Public Administrations in the production of the injury and despite agreeing on the legal event and thus have recognized both defendants, the final judgment only condemns the Administration of the *Generalitad Valenciana*, and referred in the judgment as an action not legally provided in the event of concurrent liability of Public Administrations.

He ends by pleading the Chamber to "... give resolution considering the grounds for this appeal."

FOURTH. - The procedural representation of Ms. Soledad and Mr. Porfirio opposed the appeal lodged by the opposing party and plead in his letter to the Chamber to "... give judgment declaring there are no grounds to appeal, and to order to the appellant Administration to pay the costs."

FIFTH. - The procedural representation of the University UNIVERSIDAD MIGUEL HERNÁNDEZ DE ELCHE also opposed to the appeal lodged by the opposing party and pleads in his letter to the Chamber to "... give judgment, in accordance with the procedural status and the claims of the University Miguel Hernandez, in consideration of the following statements:

a) Regarding the first ground of appeal, assuming to be upheld and imposing the final judgment a lump sum compensation, it should not exceed 327,273 Euros.

b) Regarding the third ground of appeal, the judgment must dismiss it and in case it is upheld and the solidarity between administrations is imposed, this solidarity can not reach the Valencia statement concerning Ms. Soledad and Mr. Porfirio, who are compensated with 75,000 Euros for each."

SIXTH. - By Order dated May 14, 2010 this appeal was pointed out to vote and failure on June 8 of the same year, same date of these procedural acts.

As Recorder Mr. Segundo Menendez Perez, Judge of the Chamber.

LEGAL REASONING

FIRST. - After the appeal was dismissed because of the insufficiency of amount on the pronouncement of the court's judgment that recognizes the father and the mother the right to compensation of 75,000 Euros each for moral damage caused (decision of the First Division of this Court dated June 18, 2009, which has already been referred in the facts), our examination of the grounds of appeal is adapted and also the scope of the judgment that we will state is limited to the other pronouncement of that judgment, which literally condemns the *Generalidad Valenciana* to satisfy a compensation in favor of the newborn "of 1,500 Euros per month according to the CPI, to date; and also to satisfy the full amount from the date of his birth depreciated with the CPI, plus any applicable interest".

All this in connection with a claim of financial liability which facts are described by the Chamber in these terms:

"[...] On December 15, 2003 [the plaintiff], born on June 20, 1964, went to the hospital *Hospital General de Elda* to undergo an amniocentesis. Once performed, the samples were submitted by the Hospital to the Genetics Laboratory, Department of Pediatrics of the Faculty of Medicine, Universidad Miguel Hernandez of Elche, which reported that the karyotype was 46, XY, normal. On May 16, 2004 she gave birth to her son Pedro Jose in that same hospital. The practitioners who assisted him suspected from the phenotype that he might have Down syndrome. Because of this reason it was sent peripheral blood to the same Genetics Unit, which confirmed the karyotype 47, XY +21, Down syndrome. The amniotic fluid sent during gestation was stored for purposes of possible checks, so, it was re-examined. The results were trisomy of chromosome 21, despite the fact it had been firstly reported as normal. Apparently, the error occurred in the extensions of the sample: it was made from a tube not extracted from [the plaintiff]."

SECOND. - The Administration of the Valencian Community, single appellant, made a first ground of appeal under Art. 88.1.c) of the LJ, which claims that the court judgment is flawed because the defect of joint incongruity or deviation, as the plaintiff requested a concrete and specific amount of 686 626,03 euros for compensation to cover the costs of multiple and diverse medical and health checks and salaried care assistance for the child with Down syndrome throughout his life. However, the final judgment gave a monthly pension for lifetime of 1,500 Euros. So, is lacking the proper correlation between what is intended in this instance and the judgment failed.

However, this difference or lack of correlation between the ruling requested and the one failed is not a defect of incongruity. The Chamber explains in detail the rationale and circumstances in the first four paragraphs of the fourth legal reasoning of its judgment. On the one hand, it is not a defect of incongruity because the nature or genre of the means of repair and the damage that is repaired do not vary, since both, the amount requested and the one given, are finally an amount of money that meets the needs of care and attention of the person living with the disease. It only varies in mode or manner in which that amount is delivered or available to the person in need. On the other, because nothing is claimed about that variation constituting or leading, for the appellant, a charge or a cost of greater importance or more harmful than that derived from the delivery of all the capital at once sought by parents for those ends. And finally, because this other mode or manner of payment of the necessary sums formulated by the Chamber in the judgment was actually asked in the letter of conclusions of the same appellant that today appeals; in which second conclusion, eighth paragraph,

can be read that in the event that the Chamber agreed that the damages are the assistance and the future social care, "would be enough to condemn the Administration to pay the bills for such assistance, as they were occurring in the field and need of the child during his life".

THREE. - The second of the grounds of appeal is made under Art. 88.1.d) of the LJ, to denounce the violation of Art. 139.1 and 2 of Act 30/1992 and case law reflected in the judgments of February 10 and March 9, 1998, June 30, 2006 and March 14, 10 May and 16 October 2007. It argues, in short, that in such cases of genetic diseases with diagnostic error, the only compensable injury is the one of moral character: the deprivation for the mother of the opportunity to decide on the interruption of pregnancy, as vis-à-vis in others cases, and particularly in those indemnified by the judgment under appeal with that monthly amount for lifetime, the present case lacks the required causal link between the health activity and the syndrome of the newborn and costs or expenses derived to it.

Nor the reason can succeed, because the specific question posed has been solved in the opposite direction to that advocated in our judgment dated on November 4, 2008, issued in the appeal no. 4936/2004, about a birth of a girl with Down syndrome; the court judgment indemnified the moral damages and also "other damage to property, such as the need for a permanent fixed attention to the child", therein it is said that the basic doctrine of this Court is contained in the judgment of September 28, 2000, from which we have transcribe the legal basis fifth, followed later in the November 4, 2005, June 30, 2006 and October 16, 2007. And we concluded that besides the moral damage "comes also the compensation for purely economic injury consisting of the significantly higher cost of raising a child with Down syndrome. Taking care of a daughter with such pathology involves, of course, extraordinary expenses, that perfectly fit into the idea expressed by the above-mentioned judgment of September 28, 2000, when it speaks about neglecting some unavoidable or very important purposes by the deviation of the resources to the attention to pregnancy and childbirth and child support, in theory not provided for such purposes. In other words, the costs of raising children are not an injury under normal circumstances, but when the circumstances are not normal implying a much higher economic burden to the ordinary, this Chamber considers that it can be injury and so, the indemnification proceeds. And that "the costs that the plaintiff must meet and shall meet as mother of a daughter with Down syndrome can not be considered disconnected from the inability, caused by the health authorities, to legally terminate her pregnancy. A causal link exists between omission of the prenatal screening test of the Down syndrome and the damages, both moral and economic, experienced by the plaintiff ".

FOURTH. - The third and last of the grounds of appeal, also made under Art. 88.1.d) of the LJ, denounces the violation of Art. 140 of Act 30/1992. It argues, in short, that the judgment should had condemned jointly and severally to the Health Administration and the University Miguel Hernández de Elche, and not, as it does, just to which only recognizes the possibility of exercising in behalf of the second actions or claims it considers suitable. So, in his view, both, because it was requested the conviction of solidarity by the plaintiff in the appeal, and none of the two authorities opposed to it; and because occurs the event provided in num. 1 of that article. 140, that is, the liability arising from management deriving from joint action formulas between various administrations, as the amniocentesis test was conducted by the Genetics Unit belonging to the Faculty of Medicine of that University, under a collaboration agreement signed on June 18, 2003 between it and the Department of Health for the development of metabolic diseases programs, Genetic Consultation and Karyotypes, which contains a clause, the seventh, second paragraph that reads that the Administrations involved in finding a formula recognize jointly action according to the provisions of the article. 140 and for the purposes of the provisions of art. 18 of Royal Decree 429/1993 of March 26.

The reason must be considered, although our decision, as already proposed, only produces effects for the sole purpose of the judgment that was likely to appeal: that is, concerning the monthly compensation for lifetime of 1 500 euros.

It should be considered because the allegations on which it is based are true. The most significant among these, in fact, is that the procedural representation of the mentioned University recognized in its letter of conclusions that the liability, if any, "is of joint and several nature, considering the formula of joint action between the Autonomous Administration and the Administration of the University, and considering the Cooperation Agreement of June 18, 2003" (final paragraph of page 19 of this writing); he later added that "joint and several liability can not be rejected, because it comes from an agreement consistent with law, that no one has contested, and has become firm due to consent, and that with respect to the present case has been observed" (first paragraph of page 20); and finally it was asked in case the dismissal of the administrative appeal does not proceed, that the Chamber gave judgment condemning jointly and severally to the Autonomous Administration and the University Miguel Hernandez [so, in point b) of the pleads of the letter of conclusions].

FIFTH. - In accordance with the provisions of art. 139.2 of the LJ, the costs should not be imposed on this appeal.

Based on the foregoing, on behalf of His Majesty the King, and in exercise of the power to judge that issued by the Spanish people, the Constitution gives us,

FINAL JUDGMENT

IT IS GRANTED, by reason of the third ground of appeal, the appeal filed by the Administration of Valencia against the judgment of July 9, 2008, issued by the Section II of the Administrative Division of the High Court of Justice of Valencia in the application nº 1485/2005.

IT IS FIRMLY DECLARED, as declared in the decision of the First Division of the Third Chamber of the Supreme Court dated June 18, 2009, the pronouncement of that judgment that condemns the *Generalidad Valenciana* to pay to each of the actors the amount of 75,000 Euros.

IT IS QUASHED, the pronouncement of the judgment under appeal concerning the monthly compensation of 1,500 Euros. The Valencian Regional Government and the University *Miguel Hernandez of Elche* are jointly and severally condemned to pay this compensation; all the other components rest unchangeable.

WE DO NOT IMPOSE the costs on this appeal.

This judgment, which must be inserted by the General Council of the Judiciary in the official publication of case law that must be inserted by the General Council of the Judiciary in the official publication of the Supreme Court's jurisprudence, we pronounce final judging, we command and signed.
PUBLICATION. – It was read and published the previous judgment by the Judge Presiding this Chamber Mr. Segundo Menendez Perez, all of which I hereby certify as Secretary.