

Roj: STS 5551/2010
Id Cendoj: 28079130042010100547
Court: Supreme Court, Litigation Chamber
Place: Madrid
Division: 4
Appeal No: 984/2009
Decision No:
Procedure: CASSATION APPEAL
Reporting judge: ENRIQUE LECUMBERRI MARTI
Type of decision: JUDGMENT

Key terms:

- x FINANCIAL LIABILITY x
- x HEALTHCARE LIABILITY x
- x INFORMED CONSENT x
- x *LEX ARTIS AD HOC* x
- x *LEX ARTIS* INFRINGEMENT x

Summary:

Financial liability

JUDGMENT

In Madrid, October the Twenty-fifth, Two Thousand and Ten.

Heard by the Third Chamber, Fourth Division, of the Supreme Court, the cassation appeal number 984/2009, with pending resolution, lodged by the attorney Ms. Alicia Oliva Collar, in the name and on behalf of Mr. Constantino, against decision passed by the Eighth Division of the Administrative Litigation Chamber of the Superior Court of Justice of Madrid, on December 9, 2008, in decision number 131/2006.

Having appeared before the court as defendants the attorney Ms. Katuska Marín Martín, in the name and on behalf of the mutual insurance firm “*Asepeyo*” *Mutua de Accidentes de Trabajo y Enfermedades Profesionales de la Seguridad Social número 151*, and the Advocate of the Autonomous Community of Madrid (*Comunidad de Madrid*), in the name and on behalf of the Health Service of Madrid (*Servicio Madrileño de Salud*).

FACTUAL BACKGROUND

FIRST.- In decision number 131/2006, the Eighth Division of the Administrative Litigation Chamber of the Superior Court of Justice of Madrid passed sentence on December 9, 2008. The decision states: “We dismiss this administrative contentious appeal. Without costs.”

SECOND.- The attorney representing Mr. Constantino lodged a written cassation appeal on March 17, 2009.

THIRD.- By order dated June 1, 2009 issued by the First Division of this Chamber, the cassation appeal is admitted and, pursuant to the rules for the allocation of cases, these actions are agreed to be addressed to the Fourth Division. On July 9, 2009 these actions are deemed received and the transfer is communicated to the defendants to file an opposition.

FOURTH.- The Advocate of the Autonomous Community of Madrid presented a notice of opposition on July 28, 2009, while the attorney of “Asepeyo” presented it on September 23 of the same year.

FIFTH.- Once finished the actions, the day to vote and decide this appeal was set on October 13, 2010. It took place on the date set after checking the procedures established by law.

Being the reporting judge Mr. Justice Enrique Lecumberri Marti,

LEGAL REASONING

FIRST.- In the cassation appeal we are judging, Mr. Constantino’s attorney contested the judgment issued by the Eighth Division of the Administrative Litigation Chamber of the Superior Court of Justice of Madrid, dated on December 9, 2008, which dismissed the administrative contentious appeal lodged against the implied rejection of the claim for damages, brought before the Health Department of the Autonomous Community of Madrid and arisen from the Administration’s financial liability for defective and negligent medical care assistance by the medical practitioners in the *Hospital de Coslada*, dependent on the *Mutua de Accidentes de Trabajo y Enfermedades Profesionales de la Seguridad Social número 151*, “Asepeyo”, the defendant.

SECOND.- After concluding that the following facts were proved:

“1st The appellant was born on November 27, 1967 and works as a welder and machine technician. After some months from November 26, 1903 [sic.], he went to the Health Care Facility of *Mutua Asepeyo* in Pinto presenting left lumbosciatic pain due to the effort made when lifting a machine that day; 2nd He was initially treated with specific medication and no rest but showed no improvement, so he was examined with MNR and was diagnosed degenerative disc disease L5-S1 with left posterolateral disc herniation with signs of S1 root compromise; 3rd He was sent to the *Hospital Asepeyo* in Coslada and, after performing the correspondent

examinations, the diagnosis is confirmed; 4th After signing the informed consent, on June 25, 2004, he underwent L5-S1 discectomy, appreciating thickened nerve root trapped in the foramen and disc and performing an opening of the foramen and disc resection, being discharged on June 29, 2004; 5th Progression is slow and he presents erectile dysfunction, so by resolution on August 2, 2004 he is declared to be totally and permanently incapacitated for his normal occupation due to the following residual clinical presentation: L5-S1 disc herniation, discectomy surgery. Peridural and periradicular fibrosis. Anesthetic.”

The Chamber analyzes the claim for compensation in the light of the provisions that form the Administration’s financial liability in our legal system and reaches the following legal conclusion: “the first thing to point out is the existence of informed consent, which expressly states ‘nerve damage during the surgical procedure’ as a possible complication of the surgery he underwent, so such consent is deemed to be enough as a whole (folio 56 of the medical file); regarding the remaining matter at issue, the real problem brought up in the present appeal, we come up against two medical reports: one by the appellant and the other by the defendant. It is worth stressing that as regards the facts, extension and understanding, the defendant’s report is more complete and leads to conclude that we are facing a failed surgery syndrome due to peridural fibrosis, so it was a necessary and risky surgical intervention in which, after the correspondent preoperative study, he got a dural sac slightly torn inevitably; resulting in iatrogenic erectile dysfunction. The Court agrees with the assertion and, in accordance with which is reasoned above, concludes that there was not any infringement of the *lex artis*, so this appeal cannot meet the approval.”

THIRD.- Under *Art. 88.1.d*) of the Spanish Jurisdictional Act (*Ley Jurisdiccional*), two cassation appeals are lodged against the aforementioned sentence:

the first, due to the infringement of the Supreme Court case law relating to informed consent in the medical-surgical intervention, as this requirement is not considered to have been complied because the patient did not receive all the information about the possible complications during the intervention, as can be seen in the medical reports submitted to the court, and

the second, due to the infringement of the case law regarding the *lex artis* requirement in the medical-surgical intervention under judgments of March 26, 2004, December 18, 2006 and February 12, 1990, which partially transcribe the causal link between the intervention (negligent and with no consent) and the negative consequences arisen from it. Causal link proved in the request.

FOURTH.- In response to the terms brought in both appeals, we are going to examine them jointly.

This Chamber has repeatedly handed down decisions —among others, February 1 and 2, 2008, compiled in the cassation appeals 2033/2003 and 1216/2004 respectively— concerning the demand for informed consent, *Sanitary Act (Ley Sanitaria) 14/1986* in force, applicable to this case and referred implicitly by the appellant in both cassation appeals.

In the aforementioned judgments we said: “*Art. 10* of the Spain’s General Health Law (*Ley General de Sanidad*) expresses that, regarding to the different public health authorities and among other aspects, every individual has the right to be given personally, to his family or relatives understandable, complete and continuous information, verbal or written, about the process, including diagnosis, prognosis and alternatives —*Art. 5*— and to freely choose an option among others presented by the medical specialist in charge of his case, being required the user’s previous written consent to perform an intervention —*Art. 6*.”

In the appeal we are judging, the trial court admits, in the fourth legal basis transcribed of its judgment, that there was informed consent as in the folio 56 of the medical file the possible complication during the surgery is stated: ‘nerve damage during the surgical procedure.’

We disagree with the court of first instance’s reasoning since the paper report (and thus cyclostyled) used and signed by the patient for the surgical operation of ‘laminectomy and discectomy for disc herniation’ does not provide precise and detailed information about the possible adverse consequences and serious after-effects that the surgical intervention caused him; the report strictly observed a possible nerve damage during the performance of the surgery.

With this lack of information, the appellant was deprived of avoiding surgery and of the right to decide whether it was convenient to undergo the considerable risky operation; those risks are proved by the injuries suffered by the patient.

Thus, we conclude that this lack of information involves a *lex artis ad hoc* infringement, which reveals an abnormal functioning of the sanitary service leading to Administration’s financial liability due to damage attributable to the appellant as a consequence of the surgical intervention.

These grounds shall be deemed.

FIFTH.- In accordance with *Art. 95.2.d*) of the Spanish Jurisdictional Act, the contested judgment should be set aside and, considering the administrative contentious appeal lodged against the implied rejection of the claim for damages by Mr. Constantino’s attorney and brought before the Health Department of the Autonomous Community of Madrid, we should quash the aforementioned resolution as it does not comply with the law.

On the basis of the indemnity terms specified by the appellant, both in his administrative complaint and in his lawsuit, he request a compensation of one hundred and fifty thousand two hundred and fifty three Euros and three cents (150 253.03#). Taking into account the amounts of similar cases, we declare the right of the appellant to receive from the Administration such amount for the damages caused, plus statutory interests since the date of his complaint, July 8, 2005.

SIXTH.- After judging this cassation appeal, according to *Art. 139* of the Spanish Jurisdictional Act, the costs of this appeal should not be expressly declared.

For all these reasons, on behalf of His Majesty the King and in exercising the judging authority, arising from the Spanish people, conferred by the Spanish Constitution,

WE DECIDE

1st.- The appeal that takes place is the cassation appeal lodged by Mr. Constantino's attorney against the judgment issued by the Eighth Division of the Administrative Litigation Chamber of the Superior Court of Justice of Madrid, dated on December 9, 2008, compiled in decision number 131/2006 against the implied rejection of the claim for financial liability brought before the Health Department of the Autonomous Community of Madrid.

2nd.- We consider the administrative contentious appeal lodged by Mr. Constantino's attorney before the Eighth Division of the Administrative Litigation Chamber of the Superior Court of Justice of Madrid against the implied rejection of the claim brought before the Health Department of the Autonomous Community of Madrid, which we quash as it does not comply with the law, and we declare the appellant's right to receive from the Administration a compensation of one hundred and fifty thousand two hundred and fifty three Euros and three cents (150 253.03#), in terms of indemnity, plus statutory interests since the date of his complaint, July 8, 2005.

The costs of this cassation appeal are not expressly declared nor the cost incurred during the process.

By this judgment, we agree, mandate and sign PUBLICATION.- The judgment above has been read and published by Mr. Justice Enrique Lecumberri Marti, after public audience held on the date above, and I, the Secretary, attest.