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Headquarters:	Valladolid
Section:	1
Appeal No.:	15/2005
Resolution No.:	2048/2010
Proceeding:	Regular procedure
Repporting Judge:	JOSÉ GUERRERO ZAPLANA
Resolution type:	Ruling

SUPREME COURT.CASTILLA-LEON ADMINISTRATIVE LITIGATION CHAMBER
VALLADOLID
RULING: 02048/2010
SUPREME COURT OF CASTILLA-LEON
ADMINISTRATIVE LITIGATION CHAMBER
Section: 001
VALLADOLID
65583
ANGUSTIAS Street
Unique Identification Number: 47186 33 3 2005 0101673
Regular procedure 0000015 /2005
Issue: FINANCIAL LIABILITY OF HEALTH ADMINISTRATION
FROM Mrs. Martina
Representation: MARIA VEGA BENITO INGELMO
AGAINST - Health Department, Zurich Insurance Company SPAIN
Representation: ATTORNEY FEDERICO MONTALVO JAASKELAINEN
RULING NUMBER 2048
Mr. JUSTICE PRESIDENT
Mr. Antonio Fonseca Herrero
Mr. JUSTICE
Mr. José Guerrero Zaplana
Mrs. Raquel Reyes Martínez
Valladolid, on September 30 2010

The Chamber mentioned on this margin, considering the Appeal number 15/2005 filed by Martina, represented herein by attorney Mrs. AURORA PALOMERA RUIZ, against tacit judgment ruled by the Head of the Health Department of Castilla y León, rejects financial liability for the compensation raised in relation to the appellant´s birth which took place in the Hospital Universitario of Salamanca, on June 27 2003. Mr. Justice of the Regional Government of Castilla y León has taken part, as well as Zurich Insurance Company, represented herein by the attorney Mr. ALONSO DELGADO. The amount has been set at 390,560 Euros.

FACTUAL BACKGROUND

FIRST.- The aforementioned appellant filed an administrative litigation appeal by an application lodged before this Chamber and against the aforementioned act in this Decision which was accepted. Once legal procedure was completed, it was dated for the judgment to be given. This was put into effect by a written submission in which, after pleading the facts and *legal rationale* she deemed appropriate, she demanded her right to be recognized and compensated with the amount of 140,036.65 Euros.

SECOND.- The defendant representative responded to the appellant's contentions that, after she had alleged the acts and made *legal rationale* that she considered applicable, the defendant asked for the rejection of the present appeal.

THIRD.- After receiving the case on probation, both parties were transferred, in order to hear the conclusions. This case was brought to an end and two written submissions were made showing the statements that were of the interest of both parties.

FOURTH.- The votation act was held on September 28 2010 and the decision of this appeal was ruled on. This decision is ready for judgment.

The reporting judge of this appeal was Mr. Justice José Guerrero Zaplana.

LEGAL RATIONALE

FIRST.- The appellant files the present administrative litigation appeal against the decision of implied rejection ruled by the Head of the Health Department of the regional Government of Castilla y León, It dismissed the claim for financial liability related to the appellant´s birth that took place in the Hospital Universitario of Salamanca, on June 27 2003. The appellant bases her right to be compensated on several reasons:

-The medical history is not completed and it only includes the gynecologist intervention at the end of the birth, when this was already finished; it includes nothing during the maternal pushes.

- The patient was not informed of the possibility to give birth through the vagina or by cesarean.

- The baby was born with brachial palsy, which is considered to be disproportionate.

SECOND.- When Courts face a financial liability problem against the Health Administration, it is necessary to set a parameter which determines the degree of correctness of administrative activities to which the damage can be attributed. This will

be a tool for differentiating those cases in which the damage caused can be attributed to the administrative activity –that is, to the treatment or the absence of it- and those cases in which the damage caused is a result from the disease and its impossibility to guarantee health in every case.

The basic criterion used by the administrative litigation proceedings to determine the financial liability is Lex Artis, provided there is no other approach that could be used to determine whether the public health services have been the correct ones. This criterion is based on the basic principle supported by case-law that the duty of medical professionals is the obligation of means and not the obligation of achieving results. This means they are obligated to give medical assistance but they cannot guarantee the patient recovery. Therefore, the criterion of Lex Artis is a criterion based on the normality of medical professionals which allows determining the correctness of these acts. Moreover, it obligates the professional to act in accordance with due diligence procedures (Lex Artis). This criterion is essential because of allowing a definition of the circumstances in which there can be real liability, and so the outcome is damage and infringement of the Lex Artis.

In this sense, the criterion of Lex Artis should be understood as the criterion of "right to information" and should only be considered unlawful damage when this criterion is not satisfied. The newest redaction of Art. 141, 1 of the Law 30/92 (based on the Law 4/99) has as a unique purpose to confirm legislatively the traditional case-law line. The Supreme Court, in its Judgment dated June 2 2009 –Rec. 10403/2004- emphasized this criterion affirming that the objective nature of the financial liability has not restricted its application in different cases involving administrative acts and medical assistance with regards to the conditions herein described and which are not necessary to be repeated. It should be emphasized that the obligation of means and not the obligation of results and, because of this, the existence of malpractice to which the damages caused can be attributed and for which a compensation is requested that, as it has already said, it is not fulfilled in this case.

THIRD.- When evaluating whether medical assistance was adequate, it is necessary to take into account that the reports of the Medical Inspectorate, the one drawn by SEGO at the request of Zurich and the one provided by this company are absolutely correct. Only the report of the appellant (drawn by a doctor, specialist in legal and forensic medicine), considers that the medical assistance was a violation of *lex artis.*

The fundamental point of the claim is the circumstances in which the shoulder dystocia appeared (the pathology that affected the appellant's child). Regarding this question, both the conclusions of the court-appointed expert's report and the report of Zurich are coincidental in many aspects that were ratified during the trial.

- The weight of the fetus was unknown and current technology is not accurate enough to know it before the birth takes place. The point at which a fetus is considered macrosomic is 4.5kg or 5kg, and this was not the case.
- Neither the weight of the mother, nor the weight gained during pregnancy, were relevant to diagnose fetal macrosomia or shoulder dystocia.
- Shoulder dystocia is not related to macrosomia and there is no scientific evidence to back up this theory.
- Cesarean section was not indicated, as there was neither fetal distress, nor suspicion of macrosomia.
- Pregnancy was not prolonged. Therefore, it could not be considered as a risky pregnancy.

Experts agree that only diabetes, macrosomia and prolonged pregnancy are criterion to consider pregnancy as risky. Therefore, they perform a caesarean section in order to avoid shoulder dystocia that unfortunately took place in this case.
The robustness of Zurich and SEGO experts is key so that this Chamber may understand that a caesarean section was not indicated and was not the correct treatment to avoid the shoulder dystocia. Doctor Eva (who wrote the Inspectorate report), even considered aberrant to undergo a caesarean section to avoid a shoulder dystocia that could in no way be predicted.

The appellant's expert insisted on the fact that, in the presence of a suspected shoulder dystocia, a caesarean section should have been done. However, the resting experts considered there were no risk factors and no reason to perform a cesarean section, as shoulder dystocia could have only been predicted if there had been macrosomia, diabetes or prolonged pregnancy.

The reports show that the treatment was adequate, as the final result was very satisfactory. It should be taken into account that shoulder dystocia causes breathing difficulties that must be solved immediately. That is exactly what happened, as there was no hypoxia and the results from the Apgar score after five minutes were absolutely normal.

The aforementioned experts are quite categorical about the child not suffering any neurological problem or repercussions at a central neurological level. They are also emphatic about the amniotic fluid color not having any consequence.

Everything supports the dismissal of the appeal, as no *lex artis* infringement has been proved: pregnancy could not be labeled as risky, caesarean section was not indicated, shoulder dystocia could not be diagnosed and, once it was, the treatment was correct and the physical consequences were minimal.

We should refer to the report drawn by Dr. Victor Manuel (SEGO), on page 30, in which every question made by these parts is answered and concludes that the treatment was correct, as shoulder dystocia could not have been diagnosed. The breathing problems that originated from shoulder dystocia were solved adequately in a matter of seconds.

FOURTH.- Regarding the informed consent requirements infringement, it is necessary to know that the aforementioned consent is considered by jurisprudence as an infringement of the *lex artis* when it is an abnormal functioning of health service. We should be reminded of what Article 8 of Law 41/2002 (and Article 17 of Law 8/2003 of Castilla y León) states. Every medical action must be consented to by the patient, once he has received all information established by Article 4 and has considered the possible options. The following paragraphs will establish the way and form in which this consent has to be given.

We should note that not respecting informed consent does not automatically give rise to liability. There must be adverse consequences caused by the medical actions, not respecting the informed consent.

A damaging effect caused by the medical actions without the required informed consent. In this respect, it seems appropriate to quote from the judgment by this court dated February 1 2008, passed in the appeal number 2033/2003, which, after what was expressed on March 2 2005 (cassation appeal number 8125/2000) states that the requirement of informed consent extends to alternative treatments that may take place out of the intervention performed, so the patient must demand to consent to the performance, once the patient has been duly informed about the possible alternatives to the surgery intervention. The matter considered in this appeal is precisely related to the information about the options and the appellant expected the patient to decide between the performance of a cesarean section and vaginal birth.

The content in the law 8/2003 does not seem to allow the patient to choose whether she prefers to deliver by a cesarean or by vaginal birth; the report by the company Zurich details that many women request the a cesarean, but this request does not leave the choice with the patient and, even if the decision between vaginal birth and cesarean is not completely medical, it does not belong to the patient. The expert who drew the report by SEGO is also forceful when he states that not all the requests of a cesarean performance are attended and that it is not prescribed since the law recommends only a "not so strict performance of the cesarean" only in case of diabetes and macrosomia (and neither of these circumstances was the case.)

In this case, once it has been proved by the medical reports that the cesarean is a greater intervention whose death rate is much higher than the rate of the vaginal births, leaving the choice with the patient about how to deliver, is not justified.

Starting from what has been stated above, it should be remembered that the stance that the Supreme Court has taken in this matter of lack or omission of informed consent has evolved. From considering that it created a right of serious moral damage, different and beyond the physical damage caused by the intervention, so a compensation could be claimed (judgment dated April 4 2000), it changed to a stance that states as a ruling or principle that the mere lack or absence of damage does not give rise to compensation claim, as long as the unlawful damage is not committed (judgments dated March 26 2002, February 26 2004, December 14 2005, February 23 2007, February 1 2008 and June 19 2008 and the judgments passed in our first division, the civil, dated October 23 2008 and June 30 2009.)

The only possible damage is the shoulder dystocia and this damage has not been caused by the health care that the patient received (since the aforementioned legal basis declares that it was an action under *lex artis*); So it can be considered that it is not an unlawful damage, when linking it to the lack of information.

FIFTH.- With regard to the lack of documentation, there is no record on any irregularity that may cause the violation of *lex artis* and the fact that the vital signs were not on record for a certain period of time cannot be understood as a lack of attention, particularly in a case like this where, as recorded, the final result has been positive, with the exception of the shoulder dystocia. The appellant also insists on pointing out that the assistance of a gynecologist was required: it has been proved that the system worked properly; it is the midwife who assists the women and the gynecologist only takes part when complications arise (as happened in this case.)

It is precisely due to this that the assistance of the neuro-paediatrician, required by the appellant in her claim statement, was not justified and cannot serve as a basis of the estimation for the dismissing claim.

Finally, two matters must be absolutely pointed out:

- There is not enough information, supported by documentation, about the minor's current condition. Declaring that the brachial plexus has been damaged (although all the physicians specify that the prognosis is good) is not enough as long as the current condition and the predictable progression are detailed.

- The respondent lawyer of the Regional Government of Castilla y León has provided a copy of the order by Counselor, which dismisses the claim

for financial liability; the appellant has not included this resolution in the appeal . However, since there is no record on this resolution, the possible dismissal of the appeal cannot be considered.

SIXTH.- By applying the Administrative Litigation Jurisdiction Law, Art. 139, it is not appropriate to order any of the parties who took part in this proceedings to pay the costs.

The rules mentioned by the parties and the rest of the general applicable rules for this case have been seen.

WE DECIDE

By dismissing this administrative litigation appeal lodged by the attorney AURORA PALOMERA RUIZ, through the representation of Martina that she has been conferred, against the resolution described on the first factual ground of this judgment, we must confirm the resolution under this administrative litigation appeal. All with no expressed assessment of cost on any of the parties.

This judgment shall be notified to the parties, letting them know that, a cassation appeal against the judgment can be lodged within TEN DAYS, as the law regulating the administrative litigation jurisdiction, Art. 86, declares. The count shall start from the day after the notice that shall be prepared in this court, by written means, stating the requirements in the first section of the Art. 89 of this law.

Through this judgment we pronounce it and decide it.

PUBLICATION.- This judgment has been read and published by the reporting judge, on the same day of the public hearing in the Administrative Litigation Chamber of the Supreme Court of Castilla y León, with having headquarters in Valladolid.