Albacete, 2 November 2010

Section 1 of the Administrative Litigation Chamber of the Superior Court of Justice of Castilla-La Mancha

In regard to the appeal filed by the Regional Government of Castilla-La Mancha, herein represented by its judicial services, and by the insurance company Zurich, herein represented by attorney Mrs. Ana J. Gómez Ibáñez, against the ruling, dated 24 June 2008, set out by the Administrative Litigation Court n. 2 of Toledo, ordinary procedure n. 80/05 and appellants Mrs. Encarnación, Mrs. Melisa and Mr. José Pablo, herein represented by attorney Mrs. Ángela Moreno López. The honorable judge Manuel José Domingo Zaballos acts as reporting judge.

FACTUAL BACKGROUND

First.- The aforementioned court issued judgment stating the following verdict: "We partially uphold the administrative litigation appeal filed by the judicial representation of Mrs. Encarnación, Mrs. Melisa and Mr. José Pablo against the dismissal of the claim for pecuniary liability against the Health Service of Castilla La Mancha (*Servicio de Salud de Castilla La Mancha, SESCAM*) for the damages caused as a consequence of the health care provided by the Hospital Complex of Ciudad Real from 21 March 2003 onwards, date on which Mr. José Pablo underwent surgery, recognizing the appellants' right to be compensated with 102,655.04 Euros , plus legal interests starting on the date the claim was filed, which have to be paid by Sescam, without an express award of procedure costs.

Second.- Once the interest parties received the notification of the decision, the defending and convicted party filed an appeal within the time limit. Once the aforementioned appeal was accepted for processing by the Court, the appellant party was asked to make allegations, which was completed according to law.

Third.- Once the court files, the administrative file and the presented documents were passed, the appeal was filed. Since neither of the parties required a hearing and the present Court did not either, the voting and decision was due on 21 October 2010, although it took place on 28 October 2010.

LEGAL RATIONALE

First.- The ruling estimated partially the administrative litigation appeal filed by the widow and sons of Mr. José Pablo, who underwent surgery on 21 March 2003 in the Hospital Complex of Ciudad Real and died on 25 March 2003. The

partial admission of the claim is based on the ruling, since the Public Health Administration did not fulfill its information obligation –informed consent- towards the patient or his family. According to the judge, the patient was not correctly informed that the surgery could cause him quadriplegia, which it did, and led to various complications which eventually caused his death.

The representatives of the sued administration (Junta de Comunidades de Castilla-La Mancha) and Zurich, argue that even though the Court does not agree, the informed consent obligation was fulfilled as the aforementioned document was signed by the patient himself and his wife, Mrs. Encarnación, witnessed it, pages 55 and 56 of the file, that the risk of quadriplegia was between the possible complications that might occur from the surgery chosen and that the patient consented to it in order to remedy his atlantoaxial luxation and, therefore, the harmful outcome cannot be considered as unlawful, since the health professionals delivered a treatment *lex artis ad hoc* that that does not exclude the treatment delivered for the complications which appeared because of the medullar section, an infection which, eventually, caused his death.

The appellants' attorney considered in the appeal opposition document, about all the required legal and jurisprudential conditions being fulfilled in order to claim a compensation for unlawful damages, since the causal link between the complete quadriplegia at a C1 level caused to the patient during the surgery and his death was proofed, causing suffering to both the patient during the two months previous to his death and his family. The family denies that they were informed correctly about the risk of the surgery and alternatives to remedy the atlantoaxial luxation

Second.- Considering how the controversy of this appeal has been posed and although the appellant party greatly relives the procedural dialectic of the first instance, it is this Chamber that has to decide whether the ruling was correct, what is considered as wrong and attending the appellants pretensions. In other words, this Chamber must only confirm whether the informed consent, as provided by Law 41/02, which regulates the rights and obligations of health information and documentation, dated 14 November, was fulfilled, as well as the jurisprudence, constant but set individually for each case by the Supreme Court.

Article 3 points out that informed consent is "the free, voluntary and conscious approval of the patient, being of sound and disposing mind and memory, after receiving all pertinent information in order to undergo medical action"; this right does not only include receiving true information, but also "in a comprehensible and adequate way", helping him to take the right decision according to his own will (*art. 4.2).* Therefore, the doctor will have to provide the patient the following information: pertinent or important consequences that the surgery will definitely have, probable risks that personal or professional circumstances of the patient

might lead to, likely risks under normal circumstances with accordance to the experience and state of science or directly related to the type of surgery and contraindications (*art.10*).

With regard to jurisprudence, in the ruling of 7 June 2010 (appeal n. 132/09) this very Chamber and Section expressed the following, extracted of its Fifth Legal Basis:

"Let us see how the high Tribunal decided on the ruling of 4 April, Chamber 3 Section 6 (appeal n. 8065/1995) previous to Law *1/2003 of 28 January*, which was applied in following cases, that the absence of informed consent entails a serious moral damage, different from the physical damage that the surgery gave rise to, since the right to know the risks of the surgery and possible alternatives was denied to the patient, making it impossible to decide whether the surgery was convenient or not and to take a decision accordingly. This situation cannot be ignored, since the autonomy principle, essential in our legal system, recognizes the patient's right to be informed, as much as possible, of his situation, to not have his right of taking decisions taken away when he is of sound and disposing mind and memory and to give him the chance to adopt measures in order to prevent risks for his health. The Supreme Court also points out that this violation of the autonomy principle implies an injury to his dignity, a recognized a legally protected value, since, according to the Constitutional Court, our Constitution establishes that dignity as a fundamental legal value that, without prejudice to its inherent rights, is closely linked to the free development of personality –*article 10*- and is a spiritual and moral value concomitant to the person, which is singularly demonstrated in life itself (Supreme Court Ruling 3, Section 6, dated 9 May 2005, appeal n. 5346/2001).

The absence of informed consent led to serious moral damage, which consists on the injury to the patient's right of autonomy, different of the physical damage that, might have been caused by the surgery. This gives rise to a pecuniary compensation by the health administration and has to be considered without taking into account if there was malpractice or not (Supreme Court Ruling 3, Section 6, dated 9 March 2005, appeal n. 2562/2001).

For what will be said in the following legal basis, the appeal shall be dismissed.

Third.- Let us see page 55 of the administrative file, in which we can find the so called "informed consent document" filled out. Procedure: Spinal instrumentation and vertebral arthritis", in which it is stated the principal objective of the surgery, the fact that the patient will need anesthesia and how it will be done (spinal fusion…) and also pointing out that "other therapeutic alternatives have been explained to the patient" (without naming the aforementioned alternatives). There is a "procedure's risks and complications" section, in which possible risks

that may occur in “any surgery” appear and, in one subsection, possible complications that might happen in spinal instrumentation and spinal arthrodesis – from a) to q)- and lastly, a paragraph in which “personal risks” for “associated pathology” in which risks and complications such as (illegible) + hepatitis could appear.

In page 56 we can see the patient’s signature and his wife’s (witness), as well as Mr. Marco’s (the responsible doctor).

As the judge appreciated, the Chamber understand that the information provided to the patient (the appellants deny that additional information was given since, quite on the contrary, they thought the surgery their father underwent was simple, almost a routine operation) did not include the risk of quadriplegia which occurred because of the displacement to the medullary canal of the iliac crest graft that was placed during the surgery and led to the spinal cord compression that would eventually cause his death. And this happened because of the lack of precise information in the informed consent a general document given to patients. The report of the Health Service Inspector of SESCAM, dated 11 February 2005, page 89, points out that the information provided was not satisfactory, even though some irreversible neurological injuries were indicated if the spinal cord was damaged. This eventually happened and caused the death of the patient. The report of the Administration concludes that the "damage done to the patient and his family was beyond the medically acceptable level of medical knowledge and development at the time the events occurred."

For the aforementioned reasons and the setup of this second instance, decided by the parties, we dismiss the appeal.

Fourth.- By statutory imperative, *art 139.2* of the Administrative Litigation Jurisdiction Regulation Law (*Ley Reguladora de la Jurisdicción Contencioso-Administrativa*), the appellant party whose pretentions are completely dismissed shall pay the procedure costs.

Having regard to the quotes articles, its concurrents and all general and pertinent articles:

WE DECIDE:

To dismiss the appeal filed by the Regional Government of Castilla-La Mancha and the insurance company Zurich against the ruling, dated 24 June 2008, upheld by the Administrative Litigation Chamber n.2 of Toledo, ordinary procedure n. 80/05, with the express imposition of the procedure costs to the appellant party.

We pronounce, pass and sign this ruling, for which a certified copy will be sent to the original record. No ordinary appeal whatsoever may be filed against this ruling.

PUBLICATION: I attest that the aforementioned ruling was read and published by the honorable Judge, on the same date it was upheld in a public hearing.
PROCEDURE: I attest that the court notified the aforementioned ruling.