Roj: STS 3153/2011
Id Cendoj: 28079130042011100292
Court: Supreme Court. Litigation Chamber
Seat/Headquarter: Madrid
Division: 4
Appeal No.: 7011/2009
Resolution No.:
Procedure: CASSATION APPEAL
Reporting judge: ANTONIO MARTI GARCIA
Type of resolution: Judgment

JUDGMENT

In Madrid, May 31 2011

Heard by the Court of Fourth Section of the Third Division of the Supreme Court, herein represented by the judges mentioned in margin, the cassation appeal number 7011/2009, lodged by Mr. Valeriano, represented herein by the attorney Mr. Jorge Laguna Alonso, against the decision dated October 22 2009 by the Administrative Litigation Chamber of the High Court of Justice of Catalonia, Fourth Section, and passed in the administrative litigation appeal 1160/2005, in which the interested party contested the dismissal of his application of claim for damages arose by the Hepatitis C virus transmission, which he contracted during his duties as a Post Mortem Assistant in the Forensic Anatomical Institute in Barcelona.

The respondent is the Administration of the Regional Government of Catalonia (Generalitat de Cataluña), herein represented by Mrs. Abogado from the Regional Government of Catalonia.

FACTUAL BACKGROUND

FIRST.- The administrative litigation appeal number 1160/2005, ruled by the Administrative Litigation Chamber of the Superior Court of Justice of Catalonia against the dismissal of the claim for financial liability lodged by the appellant in March 23 2004, ended in the judgment dated October 22 2009, whose decision was: “Dismissing the administrative litigation appeal number 1160/2005, lodged by Mr. Valeriano against the Resolution dated September 1 2005 pronounced by the Department of Justice of the Regional Government of Catalonia, which dismisses the appeal for reversal lodged by the appellant against the Department of Justice Resolution dated May 19 2005. This resolution dismisses the application for determination of financial liability which was exercised by the appellant as a claim for the damages he suffered due to a similar accident, dated June 26 1997, while carrying out his duties as a dissection technician (Post Mortem Officer) in the Forensic Anatomical Institute in Barcelona.

SECOND.- Once notified of the aforementioned judgment, the appellant expresses, by means of a written statement dated November 27 2009, his intention to prepare a cassation appeal and, by Order

dated December 10, the cassation appeal is then prepared and the parties are summoned to this Division of the Supreme Court.

THIRD.- In his statement of formalization for the cassation appeal, the appellant requests abrogating and repealing the appealed sentence and declaring that the Resolutions of the Department of Justice of the Regional Government of Catalonia shall dismiss the claim for financial liability of EUR 600 000, plus a lifelong pension to compensate the remuneration he received and the disability pension, due to the grounds of appeal included in the Jurisdiction Act, article 81, section d), on infringing rules of the legal system and the case law that could be used to resolve the item under discussion, which declares as follows: "The Law 30/1992 of November 26 1992 on rules governing general government institutions and Common Administrative Procedure and the interpreting case law have been infringed due to misinterpretation of defense terms, and due to the consistent detriment of the appellant, who has a direct relationship to the judgment, since he has caused the dismissal of the administrative litigation appeal."

FOURTH.- Mrs. Abogado from the Regional Government of Catalonia, through the representation through which she has been legally conferred, requests in her notice of opposition a sentence dismissing the cassation appeal; should the sentence appealed be according to the law, the appellant shall pay the costs since it is mandatory.

FIFTH.- By order dated May 19 2011, the vote and the judgment were dated May 24 2011, when they took place.

The reporting judge was Mrs. Antonio Marti Garcia, judge of the Chamber.

LEGAL RATIONALE

FIRST.- The judgment targeted under this cassation appeal agrees to dismiss the administrative litigation appeal, since it considers that the right to make any claim for damages due to Hepatitis C virus transmission has prescribed, on the basis of the following grounds:

"And the bone of contention in this matter focuses therefore on deciding when shall the count or *dies a quo* start for the one-year limitation period, LRJPAC, Article 142.5, from the discovery of the real importance of the effects resulting from the transmission, where appropriate. On this point, the appellant apparently expects the transmission cases to be permanently open, making impossible to start the count (*actio nata*), because of the progressive deterioration caused by the inexorable progression of the disease. The Administration should then be constantly alert and expectant, in the interest of taking measures at the request of the concerned, but this is not was what can be deducted from the Supreme Court case law, who has been making the one-year limitation period more flexible until there was not only a diagnosis, but a sure or predictable knowledge about how would the disease progress. On this point, in this procedure we take into account all that was made in the administrative office to understand that the right to claim is expired since the limitation period (Article 142.5 and RD 429/1993, Article 4.2.2) is over, since the appellant was on a sick leave due to Cryoglobulinemia III caused by HCV since August 1999, when he got sense and distal peripheral neurological symptomatology in the lower

extremities, and there was no record on other proceedings determing further damages. Even if we started from the Spanish National Social Security Institute (INNS) Resolution dated February 18 2003, which states that the appellant has a total permanent disability due to Cryoglobulinemia (page 18 and 19 on), we should understand that it has prescribed and also that the symptoms described were already known in 1999.

The principle of legal certainty, in which the exercise of the rights is the enshrined, cannot involve allowing actions to remain permanently open in order to attend to new symptoms already known. Besides, five years went before the exercise of the action in 2004, when the appellant exercises all kind of actions for the declaration of rights corresponding to his total permanent disability, as well as the possible existence of corporate responsibility due to lack of security measures. It is then clearly evident that the technical assistance required an action in this respect from the discovery, thanks to an initial prognosis, of the existence of damages that would evidently mean a detriment in the future.

This Chamber considers therefore that the appeal should be dismissed –the prescription is a considered judgment– and the appealed action should be confirmed, since it is within the law and the case law that applies to the statute of limitations as continuing damages.

This cause inhibits any pronouncement on the substance of the matter related to the meeting institution requisites for the financial liability."

SECOND.- The precept reported by the cassation appeal as infringed from the only motive mentioned (Law 30/1992, Article 142.5, of the rules governing general government institutions and Common Administrative Procedure) establishes as follows: "In all events, the right to claim prescribes one year after the incident of the action that causes the compensation or after the damaging effect. In the event of personal injuries, whether they have a physical or a psychological nature, the limitation period shall start from the recovery or from the decision on the extent of damages," which the lower court has not properly applied under the interpreting case law related to the continuing damages, since it states that the appellant's similar damages are not definitive, not stabilized and they shall become worse and worse, as it can be deducted from the nature of this disease, the Hepatitis C. There will be therefore ups and downs in the pathological condition, as the report written by Dr. R. Cabezas, from the Hospital de la Santa Creu I San Pau, remarks: in April 18 2005 he describes a new outbreak in the last months making the basic Hepatitis worse. There is no medical report on the actions able to verify the exact determination of damages.

The appellant is then right with regard to the need of distinguishing between permanent injuries and continuing injuries. As declared in our judgment dated May 13 2010, appeal 2971/2008, which quotes the appeal 4224/2002, dated January 18 2008, there are certain diseases that harm health in an unalterable way, cases where the legal provisions comes into play stating that the exercise of the liability action must be carried out following the principle of *actio nata*, from the determination on the extent of damages, even when the recovery is not complete before the exercise, so the damage has a predictable progression and determination, therefore, quantifiable.

It is also evident that there are cases related to health where there is no real recovery nor the possibility of determining the extent of damages; whether this is due to the nature itself of the disease, which may not allow foreseeing its likely progression, or to the development of unforeseen and not specific damages, cases where this court has been accepting of the possibility of the existence of a temporary claim, even if it has been made when the one-year limitation period, from the initial diagnosis, is over, in order to attend that impossibility of determining the exact extent of damages. This is the case of diseases whose progression is unforeseeable, such as diseases derived from the HCV or HIV transmission or such other cases where the diagnosed disease entails damages that are impossible to determine in the origin.

In these last cases, the court has recognized that if the fact that gave rise to the liability inflicts damages whose extent or importance cannot be determined in the moment in which the damaging fact takes place, the limitation period should then start to count from the moment where that determination is possible and accept that the damage can be claimed anytime as continuing for those unusual diseases whose progression is unforeseeable. So has been asserted by the judgment dated October 31 2000.

To that effect, as pointed out by the judgment dated June 25 2002, this court has endlessly "proclaimed (judgments dated July 8 1993, April 28 1997, February 14 1994, May 26 1994, October 26 2000 and May 11 2001) that the *dies a quo* for the exercise of the action of financial liability shall be at the moment when the breach effects are definitely known" (judgment dated October 31 2000) or, in other words, "the moment when the damages and their final extent become objective, the limitation period should be repelled if it is based on the disease diagnosis date (judgment July 23 1997.)

This does not mean allowing the limitation period remain open indefinitely, but it has to be so when the extent of the damages is determined, since the chronic or continuing nature of the disease does not inhibit one from knowing, at a specific moment of its progression, the extent and final damages or, at least, the damages whose recovery is intended (judgments dated December 12 2009, December 15 2010 and January 26 2011, appeals number 3425/2005, 6323/2008 and 2799/2009), nor from even later recognizing the already determined situation in professional and Social Security terms. This is just a paradox about the contemporary proceeding for the administrative and social procedures due to the same damaging effect, which is not susceptible to open the claim for damages that was definitely determined before, what, as we will see, happens in this case, where the claim is caused by the transmission that the appellants contracted of the Hepatitis C virus (HCV) during his duties as dissection technician in the Forensic Anatomical Institute in Barcelona right after he was diagnosed on July 4 1997 after suffering neurological symptomatology in the lower extremities, which caused the sick leave in August 19 1999 due to Cryoglobulinemia resulting from post-HCV liver malfunction, which resulted at the same time in a resolution dated February 18 2003 issued by the National Institute of Social Security, which describes the damages resulting from the aforementioned malfunction. The claim for financial liability lodged in March 23 2004 refers to damages whose determination was set in a specific moment and has been quantifiable since then; those damages, not stabilized back then but foreseeable after the pathological progress was already known, are the only physical damage taken into account in the administrative claim, as it was stated in the instant judgment that dismissed the administrative litigation appeal against that declaration of untimeliness.

This cassation appeal must be therefore dismissed.

THIRD.- In accordance with the Jurisdiction Law, Article 139.2, all the costs of this cassation appeal shall be imposed on the appellant, although, making use of the powers under the number three of this precept, a maximum amount of EUR 1 800 is fixed to be claimed by the respondent lawyer from the appellant, given the nature of the case, the reiterated criteria of this Chamber for similar cases and activity carried out by the parties.

WE DECIDE

We must declare and do declare there is no cause for the cassation appeal lodged by Mr. Valeriano against the judgment dated October 22 2009 in the Administrative Litigation Chamber of the Supreme Court of Justice of Catalonia, Fourth Section, passed in the administrative litigation appeal 1160/2005, which remains firm. The judgment orders the appellant to pay the costs, pointing out a maximum amount of EUR 1 8000 claimed by the respondent lawyer. By means of our judgment, which will be included in the Legislative Collection, we pronounce, order and sign. PUBLICATION.- Read and published by the reporting judge Mr. Antonio Marti Garcia, on the same day of the public hearing before me, the Secretary. I certify.