Judicial Documentation Center

Id Cendoj: 28079110012009100541

Body: Supreme Court. Civil Chamber

Headquarters: Madrid

Section: 1

Appeal No.: 173/2005

Decision number: 580/2009

Procedure: CIVIL

Reporting Judge: JOSE ANTONIO SEIJAS QUINTANA

Type of Resolution: Ruling

Key terms:

• x EXTRA-CONTRACTUAL LIABILITY x

• x EXTRA-CONTRACTUAL LIABILITY FOR ONE'S OWN ACTS x

• x LIABILITY FOR THE ACTIONS OF OTHERS x

• x CIVIL LIABILITY OF EMPLOYERS x

• x FAULT IN ELIGENDO x

• x FAULT IN VIGILANDO x

• x FAULT (EXTRA-CONTRACTUAL LIABILITY) x

• x FAULT OF THE AGENT (EXTRA-CONTRACTUAL LIABILITY) x

• x DAMAGE (EXTRA-CONTRACTUAL LIABILITY) x

• x ACTUAL DAMAGE (EXTRA-CONTRACTUAL LIABILITY) x

• x CERTAIN DAMAGE (EXTRA-CONTRACTUAL LIABILITY) x

Summary:

Medical social liability.

JUDGMENT

At Villa de Madrid, on July twentieth of two thousand and nine by the First Chamber of the Supreme Court, composed of the Magistrates indicated in the margin, the cassation appeal against the ruling, dictated as an appeal to the Tenth Section of the Court of Appeal of Madrid, as a consequence of judicial decrees of minor offence 280/1998, followed before the First Instance Court number 6 of Alcalá de Henares, whose appeal was prepared before the Tenth Section of the Court of Appeal of Madrid by procedural representation of Mercantil Unmequi Universal Médico Quirúrgica. S.A y Seguros, represented herein by the Attorney Ms. María Luisa Estrugo Lozano, and by the procedural representation of Ms. Apolonia, in that of her underage son Ambrosio, represented herein by Attorney Mr. Jaime Pérez de Sevilla y Guitar. Having appeared in court as defendants , Attorney Mr. Manuel Sánchez-Puelles and González-Carvajal, in the name and on behalf of Mr. Erasmo; Attorney Ms. María Luisa Mora Villarrubia, in the name and on behalf of Mercantil Winterthurand Attorney Mr. Antonio Ramón Rueda López, in the name and on behalf of Allianz Cia de Seguros y Reaseguros S.A.

FACTUAL BACKGROUND

FIRST .- 1.- Attorney Mr. Ubaldo Boyano Adanez, in the name and on behalf of Mr Inocencio and Ms. Apolonia, who in turn acts on in the name andon behalf of her underage son Ambrosio, files a complaint for major offence, against Mr. Erasmo , Unmequi-Universal Médico Quirúrgica S.A, Allianz-Ras Seguros y Reaseguros S.A., Winterthur Seguros Generales, Sociedad Anónima de Seguros y Reaseguros and pleading the facts and legal basis he considered could be applicable, he finished by asking the Court to issue a ruling by which upholding the claim the claimant would be held liable jointly and severally or, alternatively, regarding the accused Unmequi-Universal Médico Quirúrgica S.A. and up to the amount of coverage of their Policies in which respect the insurance companies should pay my represented sum of four hundred seventy-five million six hundred twelve thousand three hundred fifteen pesetas (475.612.315 pesetas), as a payment for damages suffered by the aforementioned people and her underage son Ambrosio, as a consequence of the injuries and aftermath suffered by him, and the legal interests of said sum, and all this with an expressed order as to costs.

2.- The Attorney Ms. Concepción Iglesias Martín, in the name and on behalf of Mr. Erasmo, contested the claim and putting forward the arguments of fact and law she considered applicable, finished by asking the Court to issue in its day a ruling dismissing the claims of the claimant, declaring that that there is no cause for the demands of the same, with the imposition of the corresponding costs to the claimant, as set forth by procedural Law.

Attorney Ms. Concepción Iglesias Martín, in the name and on behalf of Winterthur, answered the claim by putting forward the arguments of fact and law she considered applicable, she finished by asking the Court to issue in its day a ruling by which my clients be acquitted with the imposition of the corresponding costs on the claimants.

Attorney Ms. Concepción García Suarez Cibran, in the name and on behalf of Allianz-Ras Seguros y Reaseguros S.A., answered the claim by putting forward the arguments of fact and law she considered

applicable, she finished by asking the Court to issue in its day a ruling by which the exception of necessary passive joinder be deemed necessary and, in any case, going into the merits of the matter, that the entity I represent, Allianz-Ras S.A., be acquitted as there was no fault or neglect in the acts of Doctor Erasmo, and alternatively otherwise always taking into account the limitations of the Insurance Policy coverage, and all of this with the imposition of the corresponding costs on the claimants.

Attorney Ms. Concepción García Suarez Cibran, in the name and on behalf of Unmequi-Universal Médico Quirúrgica S.A, contested the claim and putting forward the arguments of fact and law she considered applicable, she finished by asking the Court to issue in its day a ruling by which the other party's claim be dismissed in its entirety, also declaring the lack of standing of of my client with the expressly ordering costs on the claimant.

The claim having been answered and given the appropriate transfers, the respective replies and rejoinders were filed and having requested the proof of reception of the claim, it practiced what was proposed by the parties, it was declared relevant and with the result that is contained in the files.

3.- Prior to the corresponding procedural steps and the taking of evidence proposed by the parties and admitted by Her Honour Magistrate-Judge of the First Instance Court number 6 of Alcalá de Henares, she issued this judgment on July 29, 2002, of which the operative part is a as follows: *RULING: That upholding the claim expressed by the Court Representive Mr. Ubaldo Cesar Boyano Adanez, in the name and on behalf of Mr. Inocencio and Ms. Apolonia, acting in their own name and as legal representatives of their underage son Ambrosio . 1.- I shall sentence and do sentence Mercantil Unmequi Universal Médico Quirúrgica S.A., holding CIF nº A28026003, to pay the following sums: a) In favor of Mr. Inocencio, in his own name and right, the sum of 17,596,777 Pesetas (105,757.56 Euros). b) In favor of Ms. Apolonia, in her own name and right,the sum of 17,596,777 Pesetas (105,757.56 Euros). c) In favor of Mr. Inocencio and of Ms. Apolonia for accredited expenses, the sum of 173.948.385 Pesetas (1,044767,72 Euros). 2.- I must acquit and acquit Mr. Erasmo and the insurance companies Alianz Ras Seguros y Reaseguros S.A and Winterthur Seguros Generales Sociedad Anónima de Seguros y Reaseguros of the claims against them. 3.- It is inappropriate to expressly impose the costs of the proceedings.*

SECOND .- . Mr Inocencio and Ms. Apolonia having lodged appeals by the procedural representations of Unversal Médico Quirúrgica S.A. y Seguros, the Tenth Section of the Court of Appeal of Madrid, issued judgment on May 7, 2004, of which the operative part is as follows: *WE DECIDE: That dismissing the appeal lodged by Mr. Inocencio and Ms. Apolonia, represented by Attorney Mr. Ubaldo Boyano Adanez and partly upholding that expressed by Unmequi Universal Médico Quirúrgica S.A. y Seguros against the ruling dictated by Illustrious Ms. Magistrate-Judge of the First Instance Court number 6 of Alcalá de Henares, on July 29, 2002, we shall revoke and revoke partially the indicated resolution, setting the sum that the convicted must pay in favor of Mr. Inocencio and Ms. Apolonia for accredited expenses at 3,146.95 Euros (point 1.C of the judgment), and the sum to be paid to the underage son through his parents Mr. Inocencio and Ms. Apolonia at 802,601.12 Euros (point 1.d); confirming the rest of the statements of the ruling. All this with imposition of the costs of the appeal by Mr. Inocencio and Ms. Apolonia to the same and without imposing those caused by the appeal of Unmequi.*

On June 22, 2004, an explanatory order was dictated of which the operative part is as follows "*The Court Decides 1st) To rectify the arithmetic error suffered in the F.D eighth b of the ruling in the sense exposed in this resolution granting for non-material damages to each parent 105,757.56 Euros. 2nd) To rectify the F.D tenth and the decision of the ruling which, by material error, does not reflect that the appeal interposed by Mr. Inocencio and Ms. Apolonia is partly upheld, not being considered appropriate to impose the costs caused by said appeal.*

THIRD.- 1.- The procedural representative of Mr. Inocencio and Ms. Apolonia prepared and interposed a cassation appeal against said ruling, based on the following **GROUNDS**: **FIRST**.- Under the protection of number 1 of article 477 of the Civil Procedure Law, for violation of the applicable rules for resolving the issues of the procedure. The violation of articles 1.101, 1103, 1104 y 1258 of the Civil Code, in relation to articles 1902 and 1903. 4º of the same legal text are denounced on this ground, for their lack of application. **SECOND** .- Under the protection of number 1 of article 477 of the Civil Procedure Law, due to violation of the applicable rules for resolving the issues of the procedure. This ground equally denounced the violation of articles 1101, 1103, 1104 and 1258 of the Civil Code, in relation to 1902 y 1903 .4º of the same legal text, for their lack of application. **THIRD** .- Under the protection of number 1 of article 477 of the Civil Procedure Law, due to violation of the applicable rules for resolving the issues of the procedure. Likewise the jurisprudence ruled by the First Chamber of the Supreme Court, on the revision of compensatory damages (articles 1902 y 1106 CC).

The procedural representative of Unmequi Universal Médico Quirúrgica S.A and Seguros prepared and interposed an appeal based on procedural infringement against the expressed ruling based on the following **GROUNDS**: **FIRST.-** It is solemnized under the protection of art. 12.2. of the Law of Civil Procedure under which "when for whatever reason the object of justice sought from judicial protection can only be made effective against various persons considered jointly, they all must be sued, as joint defendants, unless the law expressly provides otherwise ", in order to quash and annul the appealed decision, mentioned below, separately from the judgment in law for procedural violation. **SECOND**.- It is solemnized under the protection of article 218.1. of the Law of Civil Procedure under which "rulings shall be clear, precise and coherent with the claims and the other claims of the parties, deduced appropriately in the litigation. The required declarations shall be made, acquitting or condemning the defendant and deciding on all the issues which have been discussed" in order to quash and annul the appealed decision mentioned below, and separately from the judgment in law for procedural violation. **THIRD**.- It is solemnized in order to quash or annul the appealed decision mentioned below and separately from the judgment in law for procedural violation, under the protection of articles 209.3º, 218.2, 316.2, 348, 376, 386.1. 386.2 of the Law of Civil Procedure and 24.1. of the Spanish Constitution.

REGARDING THE CASSATION APPEAL:

The procedural representative of Unmequi Universal Médico Quirúrgica S.A y Seguros prepared and interposed a cassation appeal against said ruling, based on the following **GROUNDS: FIRST**.- It is solemnized in order to quash or annul the appealed decision mentioned below and separately from the sentence according to law under the protection of articles 26 and 28 of the Law 26/1984 of July 19, 1984

for the Defense of Consumers and Users and articles 1089, 1101, 1104. 1902, 1903 of the Civil Code. **SECOND**.-That is solemnized under the protection of art. 1103 of the Civil Code, as well as the jurisprudence of the Supreme Court, so that indemnifying sum is reduced and alternatively replaced by a lifelong income.

Remitting the acts to the Civil Chamber of the Supreme Court, by judicial decree dated February 24, 2009, it was agreed:

-To dismiss the extraordinary legal remedies based on the procedural violation and the cassation appeal to the Supreme Court lodged by the representative before the court of the company UNMEQUI UNIVERSAL MÉDICO QUIRÚRGICA S.A. Y SEGUROS against the judgment passed by the County Court of Madrid, Seventh Division, dated May 7 2004.

-To uphold the appeal to the Supreme Court lodged by the representative before the court of the company UNMEQUI UNIVERSAL MÉDICO QUIRÚRGICA S.A. Y SEGUROS.

-To uphold the appeal to the Supreme Court lodged by the representative before the court of Mr. Inocencio and Mrs. Apolonia, representing hereby their son Mrs. Ambrosio, against the aforementioned judgment.

-The parties will be notified so that they can express their opposition within twenty days.

2.- By an order dated May 3 2006, the attorney Mr. Javier Pérez Sevilla Guitard was party to a suit representing Mr. Inocencio and, due to the death of his wife Mrs. Apolonia, their heirs Mr. Ambrosio and Mr. Gaspar.

3.- Once the appeal is upheld and given notification vacated, an objection statement was submitted by the attorney Mrs. María Luisa Mora Villarrubia, for and on behalf of Winterthur; the attorney Mr. Manuel Sánchez Puelles González Carvajal, for and on behalf of Mr. Erasmo; the attorney Mr. Antonio Ramón Rueda López, for and on behalf of the company Allianz Compañía de Seguros y Reaseguros S.A.; the attorney Mrs. María Luisa Estrugo Lozano, for and on behalf of the company UNMEQUI UNIVERSAL MÉDICO QUIRÚRGICA S.A. Y SEGUROS; and the attorney Mr. Jaime Pérez de Sevilla y Guitard, for and on behalf of Mr. Inocencio, Mrs. Apolonia's widower, and Mrs. Apolonia's heirs, their sons Mr. Gaspar and Mr. Ambrosio.

4.- Although the trial was not requested by all the parties, it was set for the vote and the judgment on July 9 2009, when it took place. The reporting judge was Mrs. Jose Antonio Seijas Quintana.

LEGAL RATIONALE

FIRST.- The appeals to the Supreme Court that have been lodged show cause for the claim brought by Mr. Ambrosio's parents due to the damages suffered by the minor that were a consequence of the delay of the mother's cesarean. This delay caused the newborn to suffer from acute fetal distress, hypoxic ischemic encephalopathy grade 2, apnea and Candida lung and kidney infection, causing severe psychomotor retardation and hypoxic neonatal encephalopathy, as well as other injuries.

The County Court partially sustained the appeal to the Supreme Court lodged by the parents and the appeal brought by the health center, regarding the compensation to the claimants. The judgment considers that it is a proven fact that the minor's damages were caused by the excessively prolonged acute fetal distress due to the delay of the cesarean. It also stated that the main factor of such delay was the lack of appropriate staff for the cesarean, since "*while the center can have a system of doctor availability, this system did not work properly, which resulted in the damaging effect*." Consequently, the County Court acquits the gynecologist and sentences the defendant health center.

Both parties, the minor's parents and the health center, lodged an appeal to the Supreme Court against the aforementioned decision.

APPEAL LODGED BY THE PARENTS

SECOND.- The appeal is divided into three grounds. The first and the second grounds are related to the violation of the Spanish Civil Code, articles 1101, 1103, 1104 and 1258 and articles 1902 and 1903.4. Both grounds seek to review the judgment as to guilt on the gynecologist's procedure by citing the doctrine of disproportionate harm and the burden of proof application and are interested in condemning the gynecologist and the insurance companies that bonded the risk, since the appellant does not consider that they act according to *lex artis* to prevent the brain damage that was caused, and which was predictable. Both grounds are taken into consideration to be dismissed.

The disproportionate harm, as settled doctrine of this Chamber, does not involve any objective liability charge criteria, apart from the cases that the law envisages nor does it apply a procedural rule reversing the burden of proof in the cases which the procedural law does not envisage. The disproportionate harm is the harm which cannot be predicted nor explained within professional medicine and it obliges the doctor to justify the circumstances in which the harm was produced, following the principles of skill and probationary proximity. The doctor is required to explain why there is such an enormous difference between the initial risk involved in surgery and the consequence produced, such that the absence or omission of an explanation may determine the charges, which may create or lead to a finding of negligence. The existence of disproportionate harm insists on causal attribution and accusation of guilt, which modifies the general standards of medical civil liability related to the *onus probandi* on the causation relation and the presumption of guilt (Supreme Court Judgment dated October 23 2008 and the judgments mentioned in it.)

In consequence, with regard to this doctrine, it cannot be declared that the minor's harm was due to the gynecologist's action and that the gynecologist could not properly explain the harm in a careful, consistent and coherent way. It is then deduced that he acted with the diligence required by the medicine, so he cannot be blamed for the effects resulting from a defective attendance service provided by the Center. The good doctor's diligence in every act and treatment involves not only fulfilling his duties and the protocol in accordance with the techniques provided for by medical science and envisaging a good practice, but also applying the aforementioned techniques with the care and precision required by the circumstances and risks inherent in each intervention, according to its nature and circumstances, (Supreme Court Judgment dated October 19 2007 and the judgments cited within.)

As the judgment stated, the decision of carrying out the cesarean section "*was made about 15h, but it did not start until 16.45, due to reasons that cannot be charged to the doctor, since until making such decision, the medical evidence prove that he acted in accordance with the diligence required: patient's exams, graph study, treatment orders –patient's position, oxygen administration–, ultrasound scan, cardiotocography… Once the decision was made (about 15h), the center's doctor-on-duty system caused the delay in surgery; besides, in contrast to what the appellant, reversing the burden of proof, seems to suppose, it has not been proved that the aforementioned doctor had left the center after making the decision*," nor that he took part in the medical center's administration. Furthermore, it is not only certainly proved that the decision regarding the cesarean section was made at 15h, but also, despite the patient's positive development, the team members had been alerted before that moment about the "possibility of performing a cesarean section so they could be easily located in case the surgery was required. This was doctor Eramo's orders", so he cannot be charged for "*not anticipating after 13h that the situation would end up in performing the cesarean section, since the patient's condition improved, after the given treatment, at 14h20*." In short, the delay was not when making the decision on the cesarean section, but in not performing it within the time required, and it cannot be argued that the doctor should have made the decision before due to its urgency, since he made the decision as soon as he evaluated that the cesarean section was required.

On the other hand, the fact that the minor was permanently monitored from the 12h has been proved, "*and this cannot be considered a miscarriage of justice because of the fact that the monitoring graphs are not included in the court order, since the court of first instance bases this evaluation on other evidential means*." Nor can we consider a miscarriage of justice the fact that the microtomy in the fetal blood was not carried out because the minimal cervical dilation required had not been reached, nor that the amnioscopy to determine the presence of meconium was not carried out when this test provides no data about fetal distress, but not on its intensity, so it cannot be stated that performing this test could have provided any new information different from the information obtained through the cardiotocography or that transferring the patient could have been a better solution, since, in the light of the timeline and surrounding facts and circumstances, it is possible that the decision involved minor delay in the performance of the cesarean procedure.

In short, we a facing a substitution of the appellant's criteria for the Court's criteria, which cannot be done given the facts that have been taken into account to deliver the judgment, whose review is intended through the analysis and exam of the evidence.

THIRD.- The third ground seeks for the review of the amount of compensation and for a total and complete indemnification for the suffered damages, citing an infringement of the Civil Code, articles 1902 and 1106. This ground is dismissed. The duties of quantifying the damages to be compensated belong to the Court, after the proven evidence have been heard and the principle of indemnity has been considered, under the cover of the articles 1902 and 1106 of the Civil Code. These duties are the result of an assessment act,for which the Court is at complete liberty to use objective systems for guiding purposes, such as the scale attached to the Law of Civil Liability and Motor Vehicle Insurance,which gives the same compensation treatment for traffic accident damages and damages caused by other

reasons. The consequence is that the judgment can only be reviewed in a cassation appeal if it is proven wrong or illogical *a quo* (Supreme Court Judgment dated May 14 2008 and the judgments cited therein.) This is not the case, because from the point of view of the proven evidence and of the scale, the quantification made by this Chamber, through the criteria detailed, is coherent in reference to the application of the correction factors for additional moral damage and the need for the assistance of another person, excluding the compensation for the permanent assistance of another person, since this concept has already been included in the correction factor for permanent damage –people with big disabilities need assistance. The quantification is also coherent in reference to adapting the home to the severe minor's condition, since this damage has not been properly proved by the appellant. Therefore, the correction factor is invalid and the damages to the house due to adaption and the expenses of its works will be paid by the victim, in accordance to the principle that the article 217 of the Civil Procedural Law expounds today. We also exclude the expenses from the physical therapist, swimming lessons and APHISA membership fees, since we are dealing with hypothetical future expenses and damages. Because of this, they cannot be used for a future judgment, according to the case law doctrine then applied; which, by the way, was much flexible than the current law configuration (article 220 of the Civil Procedural Law 2000), as stated the judgment dated November 2 2005 and the judgment mentioned in it.

APPEAL LODGED BY UNIMEQUI UNIVERSAL MEDICO QUIRÚRGICA, S.A Y SEGUROS

FOURTH.- The appeal is based on two grounds. The first ground is related to the infringement of the articles 26 and 28 of the Law 26/1984 for the Protection of Consumers and Users, and of the articles 1089, 1101, 1902 and 1903 of the Civil Code, since no employee was guilty. It is dismissed. Deficient medical service can make liable the employees, but also the establishment who renders the service. To start with, employees can be made liable for a negligentor guilty act, in keeping with the criteria established by the article 1902 of the Civil Code. This liability is at the same time an assumption essential to establish the vicarious liability, in accordance to the article 1903 IV of the Civil Code, unless there is no functional dependence on the person charged with the damage. It must be kept in mind that this liability is based on dependent or subordinate relationship between the person who causes the damage and the sued employer and that the damage must be caused while the person responsible is carrying out his duties. It is not an objective liability, but it is based on the principle of guilt inherent in the selection or monitoring of the people for who someone else must vouch, for the violation of the duty of care in the reproachable selection of the subordinate or the monitoring of his activity for this development (Supreme Court Judgment dated January 5 2007, all of them.)

The medical center can be held liable because the aforementioned liability does not exclude the center itself, as stated in the article 1902 of the Civil Code, as long as liability can be attributed a deficient or irregular service caused by omission or by failure to comply with the duties related to organization, vigilance or service control. We are facing vicarious liability in the strict sense: the liability responds to the deficient service which the center must render and which is carried out by qualified staff and the corresponding organization, staffing and coordination (Supreme Court Judgment dated May 22 2007.)

The liability is imputed from the existence of the conditions underlying article 1902 of the Civil Code. The article not only requires, apart from the damage, the reproach of guilt or violation of good medical practice, but also the proof of the causal relation, both in factual and juridical terms, between the active or passive action of the person that caused the damage and the resulting effect, because the claim of liability on the doctors, the medical staff and the medical center is based on a lack of diligent action and precautionary measures, regardless of one person's omission, and has no objective character. The causality is established between the performance of the hospital service and damage, without rest on mere conjecture or possibilities, what is called "qualified probability" (Supreme Court Judgments dated November 31, 2001 and January 5, 2007.)

This Chamber has also admitted the precepts invoked from the Law for the Protection of Consumers and Users related to a deficient medical service, even though the Chamber points out that the criteria for imputation from the aforementioned law must focus on the functional aspects of the health service, without affecting the damages attributable directly to the medical actions (Supreme Court Judgments dated February 5 2001, March 26 2004, November 17, 2004, January 5, 2007 and May 22, 2007.) This is what the Supreme Court Judgment dated July 1 ,1997 did when it presented as criteria for imputation the articles 26 and 28 of the General Law for the Protection of Consumers and Users. The article 26 of this law states that the liability for damages falls on the service producers or providers "unless there is evidences of proper execution of the statutory demands and requirements and other precautions and diligence requested by the product, service or action nature", while the article 28, section 2, mentions specifically the "medical services" and links the damages produced during the proper use and consumption of the goods and services to the fact that "due to its own nature or because so it has been statutory regulated, the services must include an specific level of meticulousness, efficacy and security guaranteed, from an objective point of view, and they must involve technical, professional and systematical quality control, so that the proper conditions for the consumer or user are achieved (Supreme Court Judgments February 5, 2001 and January 5, 2007.)

Therefore, as stated in the Judgment dated January 5 2007, "the principle of guilt on which the extra-contractual liability from the Civil Code is focused, does not preclude the criteria of imputation based on the lack of diligence and precautionary measures which, with regard to the specific rules to protect consumers, must be objectively inherent in the operation of services when this service is not rendered as could be required and expected, as long as there are no exogenous circumstances which may invalidate such criteria of imputation, giving preference, as the most recent doctrine has proposed, to lawful security expectations of service to the assessment of the employer's behavior."

That being the case, the reason seems to ignore the fact that the liability attributed to the appellant is produced by abstraction, leaving aside that the guilt of a particular practitioner had been established or, in general, a health practitioner who had participated in patient care, and is based on the fact that the damage suffered the minor took place under their control was causally linked to a the failure of the organizational service of doctors-on-duty. It is clear that a center offering a "medical-surgical and pregnancy emergency" service is obliged to take effective measures to perform a cesarean section within reasonable time, which should take an hour and fifty five minutes.

FIFTH.- Through the second ground, the appeal aims to reduce the compensation amount, since although it has been calculated within the widest margins of the compensation, the most severe possibility did not take place –there has not been any reckless or fraudulent behavior. In any case, the claim seeks an alternative compensation less costly than the life annuity. The article 1103 of the Civil Code is cited for this objective; this article authorizes the Court to fix the liability due to negligence, among other cases, where the victim's guilt and the agent's guilt coincide. The scale itself echoes this point and observes (first annex, section seven) that the elements that correct the reduction in every compensation are "the contribution of the victim to causing the accident or worsening the effects". The Court did not actually make use of its moderation power and the case could not be reviewable on appeal as long as the such power has been used in a rational, considered and logical way and the Court has not applied the scaling of the legal system improperly. The compensation is fixed by the application of the scale without regard to a possible contributory negligence and to the extent that the Board of Appeals has seen fit, based on very precise and motivated ruled that relate to the specific harm which has been deemed proven and, in particular, to the age and the degree of the disability of the child, and the resulting amount is not possible to recalibtrate through a simple difference of opinion about the margins used. The claim to serve a distinct compensatory alternative , involving the fixing of an annuity is something that although referred to in Rules 8 and 9 , section 1 of Annex scale is unacceptable at this time, not only because the claimants have not offered nor have the respondents required it in their pleadings, but also because there is no known guarantee that can assure the survival of capital over rent and how to compute a function of the circumstances that ultimately contributes to a correct calculation.

SIXTH.- The appellants of this cassation appeal are ordered to pay the costs, keeping with the article 398, with regard to the article 394, both within the Civil Procedural Law.

Given the legal principles cited, in the name of the King and the authority conferred by the Spanish people,

WE DECIDE

We rule against the cassation appeal lodged by the attorneys Mr. Jaime Pérez de Sevilla y Guitard, representing Mr. Inocencio and the heirs of Mrs. Apolinia, Mr. Gaspar and Mr. Ambrosio, and Mrs María Luisa Estrugo Lozano, representing Unimequi Universal Médico Quirúrgica, S.A. y Seguros, against the judgment dated May 7 2004 passed by the Seven Section of the County Court of Madrid. The costs are awarded to the appellants.

The corresponding documentation shall be handed in before this Court and the case and the roll of appeal shall be referred.

By means of our judgment, which will be included in the Legislative Collection, we pronounce, order and sign: Román García Valera.- José Antonio Seijas Quintana.- Encarnación Roca Trias.- signed and sealed. PUBLICATION.- Red and published by the reporting judge Mr. Jose Antonio Seijas Quintana, who acted

on the court procedure of the public hearing in the First Chamber of the Supreme Court, today before me, the Secretary. I certify.