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N ას-33-406-05, 13 April, 2005
Chamber of Civil, Entrepreneurial and Bankruptcy Affairs

Composed: M. Gogishvili (Chairman)

L. Gochelashvili (Presenter),

T. Todria

Subject of the Dispute: Compensation for pecuniary and non-pecuniary damages

Descriptive Part:

On 19 November 2003, N.V. submitted a lawsuit in Court against the respondent LLC "… Hospital" for reimbursement of pecuniary and non-pecuniary damages. The plaintiff noted that on 10 August 2002 he applied to LLC "…" and doctor K.D. diagnosed him with "left pelvis-hip joint coxarthrosis"; the diagnosis was confirmed in other clinics and has a treatment method of total endoprosthesis. According to the lawsuit, before the operation the plaintiff was not given any explanation. In the clinic, he was told that if he paid 2000 USD in advance, he would be operated on, provided an imported prosthesis and in two months would be completely recovered. On 10 August 2002, the plaintiff was placed in the clinic, and on 11 August, he was operated on for left pelvis-hip joint total endoprosthesis by Girchevi-type prosthesis. He left the hospital 10 days later.

After one month, the plaintiff could not move the operated leg; the patient's leg had been shortened and became lame and the prosthesis came out. Two months after the operation, the leg would swell while leaning. The wife of the plaintiff explained the conditions to the doctor who advised regular movements.

After conditions deteriorated, the patient (plaintiff) was X-rayed and he was advised for a second operation in the clinic. For this operation, a doctor requested 800-900 USD. The plaintiff was able to pay only 200 USD.

On 5 March 2003, the plaintiff had the second operation, and on the 10th left the hospital. According to the doctor's advice, the patient had to have bed rest for one month. After that time passed, with his spouse's help he tried to walk; he took some steps and felt severe pain. He phoned the clinic doctor, who prohibited him from walking. The doctor said that because of the patient's age, the body is exhausted and rejected the cement.

On 17 April 2003, the plaintiff was operated on for a third time. He left the hospital after the fifth day, while he had high temperature and unbearable pains.

After one month, the wife of the plaintiff contacted the doctor to remove the medical yarn. The doctor on duty removed the medical yarn and explained to the wife of the plaintiff that the clinic was ready to conduct a fourth operation and requested 1100-1200 USD. The plaintiff could not afford that and refused the offer for the fourth operation.

According to the plaintiff, there is pecuniary and non-pecuniary damage because of three ineffective operations that damaged his health. For this reason, he requests reimbursement of 2700 USD in pecuniary damage and 500000 GEL in non-pecuniary damage.

The respondent rejects the lawsuit and considers that the plaintiff's application must be refused because of its reasoning and that it's groundless. According to the respondent, the patient's above-mentioned diagnosis was confirmed in other clinics and the only proper treatment is left pelvis-hip joint total endoprosthesis. The patient agreed to conduct the operation for the amount of 2000 USD. He would have known from the beginning that the prosthesis would not be an ultra-modern one. The ultra-modern prosthesis is much more expensive, but in spite of this, Girchevi-type endoprosthesis is currently used in medical practice.

The first post-operation period was because of the complexity of the undergone operation. The patient underwent the post-operation planned treatment. On the tenth day, the patient left the hospital in satisfactory condition and was prescribed ambulatory treatment. In the patient's history and form [1]27[*] it is mentioned that the patient needed a post-operational rehabilitation treatment course (workout treatment, massage, physiotherapy). The patient, because of economic conditions, could not afford the mentioned treatment, and he started to walk without the doctor's permission. After the operation, the patient had bed rest for two months, and afterwards, in spite of the mentioned circumstances, he walked for six months, which confirms the fact that the operation was conducted properly.

According to the 5 March 2004 decision of the Court Chamber a court medical examination was held.

By the decision of 22 November 2004 of the Tbilisi Circuit Court Board of Civil, Entrepreneurial and Bankruptcy Affairs, the lawsuit was partially satisfied in favor of the plaintiff and the respondent was imposed to pay pecuniary damage of 2200 USD and non-pecuniary damage of 10 000 GEL.

The Civil Court Board concluded the following circumstances:

[*] Translator's note: No name is given for form 27 and the superscript 1 exists in the original without footnote

The international "Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine" (4 April 1997), which provides that any medical interference in the field of health, including research, should be conducted with appropriate professional obligations and standards. Article 4 of the memorandum[†] provides that doctor's obligation is not only the recovery of the patient but improvement of health, relief from pain and patient's psychological welfare. (Ratified 27.05.2000).

In this particular case, the respondent not only did not fulfill the requirement of the convention, but because of improper action of the respondent, the plaintiff sustained long-lasting physical and mental suffering. According to Article 3, paragraph "ო" of the law on Health Protection, medical malpractice is the accidental or inappropriate diagnosis of the patient's condition or treatment, which in this particular case became the cause of the damage.

According to Article 1007 of the CC (Civil Code[‡]) and Article 103 of the Health Protection Law, during treatment at a medical institution (considering the negative result of a surgical operation or any misdiagnose, etc.) the damage will be reimbursed on the basis of a general rule. A perpetrator is exempted from liability if they can prove that he has no fault in the damage.

Pursuant to the mentioned norm, the burden of proof of the liability is on the respondent. The person will be liable to reimburse for damages if there is a civil law basis for damage liability: damage, illegal and disorderly actionable fault and a causal link between the action and result. In the given case there exists all four conditions.

The plaintiff had three faulty surgical operations without result because of the respondent. He became a third group belonging to people with disabilities and limited capacity to work. The forensics center of the Ministry of Labor, Health and Social Affairs concluded that both operations were done incorrectly with technical defects. Nowadays, the plaintiff is in need of another operation: the removal of the remaining endoprosthesis and re-installation.

The Civil Court Board considered that the damage was inflicted by respondent's illegal action. There is a causal link between the action and damage and the respondent breached recognized medical treatment standards, which caused the patient's health to significantly deteriorate.

The above mentioned is confirmed by the conclusion of the "Medical Assistance, Pharmaceutical Business and Licit Drug Turnover Control Inspection" commission. The respondent in this case violated the principles of Georgian law, according to which (Article 38 of Law on Doctor's Practice) the independent individual doctor's practice should be guided only by professional standards, humanitarian principles, Georgian legislation and the respect of a patient's dignity". Article 39 of the same law establishes the obligation to inform. The mentioned commission's

[†] Translator's note: the opinion uses the word "memorandum" but likely meant "convention"

[‡] Translator's note: CC – means Civil Code of Georgia

conclusion determines that the patient was not warned of possible negative side effects and additional expenses in the case of possible re-installation of the prosthesis.

The commissioned "Medical Assistance, Pharmaceutical Business and Licit Drug Turnover Control Inspection" concluded that N.V. was operated on 11 August 2002 by use of Girchevi total[§] endoprosthesis, when the holes were fixed with cement. According to the conclusion, Girchevi total endoprosthesis method use is the outdated technological construction and it was used in medical practice approximately 25 years ago. Nowadays it is not used in medical practice. The construction, especially its components, is envisioned to be done only without cement fixation, otherwise a solid bond is not made, which resulted in it falling out and making the second operation necessary. On 5 March 2003 during the second operation, the same prosthesis had been mistakenly chosen again. The same method resulted in it falling out again for a second time and another operation become necessary. On 17 April 2003, the third operation was done. This case did not use the high-tech construction implant and, taking into account that N.V. needed the relief from the pain or its significant reduction, the operation was limited only to the moving and deepening the holes. The respondent also incorrectly prescribed post-operation rehabilitation treatment. According to the presented medical documents, the plaintiff was prescribed long bed rest after the operation, which is incorrect as bed rest cannot ensure a solid bond of the prosthesis will form. In the case of cement fixation of endoprosthesis, putting weight on the limb should start during the first or second week after the operation with the help of crutches. At the same time, the patient should undergo complex measures around the limb to reinforce the muscles. The time to walk without crutches is dependent on the quality of provided rehabilitation.

The commission's conclusion also established various violations, including that the patient did not receive the required consultations by a Neuropathologist and an Anesthesiologist, nor did he receive a consultation by a therapist as required by the hospital's internal regulations.

The board noted that the operation documentation did not list the type of operation, method of anesthesia, or the diagnosis before and after the operation. A histomorphology study of the resection of bone parts was not conducted, by which the respondent breached 15 December 2000 #¹242\ƃ order on "Anatomical Pathology Service Following Improvement". In addition, there was a breach of the law on "Patient's Rights" volume IV, Article 22, paragraph "b", namely about the informed consent letter that in all cases must be signed by the spouse or child instead of the incapacitated person. It is unclear in the medical records when drainage had been removed. The patient was allowed to end bed rest on the 8th day, when internal regulation envisages treatment for 14-21 days.

[§] Translator's note: the opinion uses the word "total" but likely meant "type"

From all the above mentioned, the Civil Court Board considered the form of fault as gross negligence. A person acting with gross negligence is someone who by his act violates obligatory care requirements to an unusually high degree.

The damage inflicted by negligence is subject to reimbursement. The Civil Court Board noted that a claim for pecuniary damage in the amount of 500 USD is unfounded. In the case files, there is no spending amount mentioned. As to paying the equivalent of 2200 USD in Georgian Lari, the parties agreed on this issue without dispute, and the court found that pecuniary damage should be imposed on the respondent.

The Civil Court Board also considered that a non-pecuniary damage fine should be imposed on the respondent in favor of the plaintiff on the basis of section 2 of Article 413. Section 2 allows compensation for physical damage or, as in the particular case, a plaintiff to claim compensation for non-pecuniary damage.

Pursuant to the mentioned CC Article, compensation for non-pecuniary damage should be reimbursed by a reasonable and fair amount. The goal of the compensation is the relief from mental suffering. While determining the amount for non-pecuniary damage, the Court Board takes into account the volume of pain, age, limited ability to work, the plaintiff's amount of mental anxiety, and the respondent's material wealth and considers reasonable to award the respondent with 10 000 GEL in favor of the plaintiff. The circuit court judgment was appealed by the director Q.B. of LLC "…" according to the cassation rules and requested its abolition. In the opinion of the cassation appellant, the court did not take into account that Article 1007 imposes responsibility on the medical institution in the case when there are three prerequisite factors for delictual liability: fault, illegal action and a causal link. The court used this norm but did not show the existence of the factors. The Civil Court Board did not establish the factual circumstances of the case based on appropriate evidence. As to the conclusion of the forensic examiner, the cassation appellant indicates that the court groundlessly refused the motion for appointing another forensic examiner. The cassation appellant considers that allowing the motion would have been shown different factual circumstances. The cassation appellant considers that the court breached Article 171 of the CPC[**], which caused an incorrect decision in the case.

Legal analysis Part:

The Chamber studied the case files, the basis of the cassation complaint, heard the explanations of the parties and considers that the complaint should not be satisfied for the following reasons:

The subject of the dispute is the pecuniary and non-pecuniary damage reimbursement. The respondent is a inpatient hospital, where the plaintiff underwent the same operation for the left

[**] Translator's note: CPC – means Civil Procedural Code of Georgia

leg pelvis-hip multiple times. It is established that the operations ended without result, namely that instead of recovering, the plaintiff's health condition deteriorated. This is established in the conclusion of the court forensics.

The chamber did not share the opinion of the cassation appellant on the issue that the court incorrectly concluded the factual circumstances regarding a fault of the inpatient hospital, illegal action and causal link. It is true that the circuit court referred to Article 1007 of CC, which regulates delictual liability, but the mentioned norm foresees the existence of the indicated circumstances.

In the given case, the legal basis of the plaintiff's claim is section one of Article 394 of the CC because the parties had a contractual (4 March, 2003 contract for medical service) relation. There is civil liability for breaching or not duly fulfilling the obligation. On the basis of the given norm, the creditor can claim compensation for damage. The debtor in this case is the inpatient hospital because Article 396 of the CC states that an obligor shall be liable for the actions of his legal representative and of those persons whom he employs for performance of his obligations to the same extent as for his own culpable action. As mentioned above, the chamber considers that the plaintiff alleged his claims against the appropriate respondent. As to the grounds of the application, the circuit court correctly used the appropriate norms (fault, illegal action, damage and causal link). The chamber shares the cassation appellant's opinion that the circuit court did not rule on the fault, illegal action and causal link of the respondent. The chamber shares the circuit court's opinion on the issue that, according to the conclusion of the forensic examiner on the factual circumstances about the existence of the damage, fault and causal link are established. It is established that the plaintiff's health condition deterioration was caused by the construction, namely its component that can't be used with cement fixation, because the holes did not fix with a solid bond. Weak fixation caused it to fall out, which became the reason for the second operation. During the second operation, the artificial hole fixation was again made by cement which resulted in them falling out for a second time.

The Chamber notes that the established factual circumstances by the Circuit Court indicate that the damage exists because after the operations in the inpatient hospital, the patient's health condition deteriorated instead of recovered. The civil responsibility of the respondent will be imposed in the case if there are conditions of responsibility for damages, namely if there is damage, the damage is inflicted because of an illegal action, and there is a causal link between the action and the result and the damage is caused by the perpetrator's fault. Here, there is a presumption of fault during the infliction of the damage – the perpetrator has the burden to disprove the existence of his fault. The chamber notes that the existence of fault implies refusal to comply. As to the causal link, it is established by factual circumstances. The burden of proof about illegal action and the existence of fault is on the respondent. According to the first section of Article 102 of the CPC, the respondent did not submit enough evidence about the indicated circumstances in the response application. In the disputed case, the conclusion of the court's self-appointed medial forensic examiner (Article 162 of the CPC) established that the operations were conducted incorrectly because of technical defects. The respondent did not submit evidence to disprove this. It is true that the respondent submitted a motion for a secondary forensic examiner but neither showed on what bases the examiner would be appointed (Article 173 of

CPC), nor indicated justifiable reasons why such a motion had not been submitted during the preparatory hearing of the case (Article 215 of CPC). Therefore the cassation complaint about the factual circumstance is unfounded.

The resolution part:

The Chamber was guided by Article 410 of CPC and concluded:

LLC "…'s" cassation complaint should not be satisfied.

Unchanged should be left 22 November, 2004 judgment of Tbilisi Circuit Board of Civil, Entrepreneurial and Bankruptcy Affairs.

The judgment is final, and no appeal is allowed.