Decision № 508 of the Supreme Court of Cassation, dated June 18th, 2010, on civil case № 1411/2009, 3d Civil Division, Civil College, reported by judge Emil Tomov

Art. 45,

Art. 49 Obligations and Contracts Act (OCA)

Proceedings under Art. 290 and the following of the Civil Procedure Code (CPC).

The proceedings have been instigated upon the cassation appeal brought by P.S.D. through counsel Sv. N., against decision No. 28, dated June 17th, 2009 on civil case No. 74/2009 of the Appellate Court of Burgas, which repeals decision No. 43, dated March 10th, 2009 on civil case No. 136/2004 of the Burgas District Court and rejects on the merits in its entirety the claim for compensation for non-pecuniary damages on the grounds of art. 45 and art. 49 OCA to condemn both defendants M.V.M. and Specialized Hospital of Obstetrics and Gynecology "E" Ltd., on solidary basis; the first for negligent performance of surgical operations as an operating physician, and the second, as the Assignor.

The cassation appeal seeks the annulment of the decision for being rendered in violation of the procedural and substantive law and as unjustified. The court based its decision on erroneous assessment of evidence; some of which have not been discussed and other have been ignored. Also, in terms of the cause-effect relationship the Court has incorrectly perceived the expressed by the experts in the expanded medical expertise probability, founding thereof the conclusion for lack of complete and main proof. Expenses are claimed, arguments are expressed by counsel Sv. N.

The respondent in the cassation proceedings M.V.M. considers the complaint to be unjustified; reasons are set both personally and in the response of his legal representative the counsel St. K. In court hearing the

reasons in support of the critical findings of the appellate court are highlighted. A written defense has also been filed.

The cassation appeal has been approved for examination by ruling No. 1492, dated December 8th, 2009, of 3d Civil Division panel of the SCC; and given the grounds of art. 280, par. 1, item 3 of the Civil Procedure Code the Supreme Court of Cassation has approved an argument that for cases of non-pecuniary damage claimed by a medical error is raised the question of the specificity of identifiable facts and links between facts, the necessity of medical knowledge, engaged by the Institute as per Art. 157, par. A temporary art. 157b of the Civil Procedure Code (repealed); application of Art. 157, par. 3 (repealed) of the CPC, in correlation with the main procedural obligation of the court that is to base its decision on the circumstances of the case , as distinguish that category relations between the facts for which a special knowledge is required, from others - for which a conclusion should be constructed in accordance with experimental rules and logic as per established in the case facts, namely: eyewitness on condition identified by them in their capacity of physician during surgery procedure and on the other hand the medical report conclusion, which offers probabilistic and not clear enough answers on two crucial questions: the cause-effect relationship between the practiced surgery procedure and subsequent complications in patient, and whether the patient condition established during the subsequent surgery procedure is a result of actions of the operating physician in the previous intervention.

In relation to the raised procedural law issue, justifying the admission to examination of the cassation appeal, the Supreme Court of Cassation, 3d Civil Division, considers the following:

A substantial procedural breach of the provision of art. 188, par. 1 of the Civil Procedure Code (repealed) and art. 157, par. 3 of the Civil Procedure Code (repealed) is committed, if the court adopts medical statement with a given response of "the most probable cause" without inner conviction construction for the presence or absence of cause-effect connection and without consideration of which facts, and links between them respectively, related with the given by the expert report responses, are subject to special (in this case medical) knowledge and as per which facts the cause-effect relationship conclusion should be established, following the experimental rules and logic, assessing the evidence. If the expert witnesses show a

relevant for the responsibility reason as the "most probable" one, it does not follow to a direct conclusion about the lack of complete and main proof. It is crucial whether other causes should be excluded as a possibility due to circumstances, established under the case, but outside the subject matter of the medical opinion or on the basis of findings thereof, according to the approved evidence, including testimony. Therefore, an assessment of all evidence under the case, including at the construction of a finding on the causal–effect relationship, is an obligation of the court.

The supported by the expert witness in this case conventionality of the final conclusion they explain with the fact that the found in the ligature, during surgery on November, 26th 2001, performed in MHATEM "Pirogov", (tied) silk catgut lacks "substance" and between both operations, undergone in 1999 and in 2001 long time had been passed. It could be taken for concrescence, as a consequence of certain morbid changes. As considered a reason for the plaintiff's state, this assumption is based on the likeliness that the witnesses doctors I., A. and P. (three operating surgeons, practicing in MHATEM "Pirogov", the main of whom is chief of 2nd Urology Department) to have deceived for what they saw in the body of the operated patient, during performed operation, i.e. they were not able to distinguish silk catgut from organic tissue at performing the surgery and they have falsely reflected their operational activity.

This assumption lacks of justification. The finding in the patient's body is established and the taken evidence under the case are not likely to justify more than the conclusion that the cause for the plaintiff's ill-health until the operation on November 26th, 2001 is "the engaged in the ligature silk thread" of the right ureter, found in MHATEM "Pirogov". According to the testimony of the three operating physicians and the diagnosed preoperative condition of hydronephrosis II, IIIrd degree, that is supported by the medical expertise, accepted under the case, the ureter of the right kidney of D. was found tied with a silk, non-resorbable thread and its removal, called "liberatio uretris dex" is reflected respectively in the medical diagnosis and the epicrisis. One is not born with silk thread in the body; hence the thread was placed there operationally. The likelihood is this to have happened either during the operation in 1999, performed by defendant M., or during the indisputably undergone earlier by the plaintiff, upon her acknowledgment, two operations - appendectomy in 1962 (when the plaintiff was a minor) and the second - birth through "caesarean" in 1984.

This first possibility is to exclude the others. The experts state that if the obstacle (i.e. the ligature of the ureter), caused hydronephrosis, hasn't been removed, the right kidney would inevitably be lost, but thanks to the surgical intervention in 2001, this organ has been saved. Since in case of complete impassability of the right ureter the fatal consequences for the right kidney as an organ (hydronephrosis) would have inevitably occurred in much shorter period, days after the surgery, according to the experts the "only" possible explanation is that "the imposed ligature of the uterine artery (which certainly and necessarily is performed during the operation in 1999) has led only to partial obstruction of the ureter". The quoted medical explanation of the experts has been given in the performance of their task and emphasizing that it is the only one. It contains findings based on the case data and answers the question for the causal relationship, which is positive and excludes the probability, based on the factor "time duration" between both operations. In support of this conclusion is the established by the medical records plaintiff condition after the surgery, performed by the respondent Dr. M. on April 13th , 1999, resulting in the subsequent surgical intervention in 2001. The diagnosis "hydronephrosis dextra, st. post histerectomy", made at the first admittance of the plaintiff for treatment in Pirogov Institute is undisputable, as well as the administered treatment of the right kidney nephrostoma, without any result. The performed ureteroscopy failed in restoring the right ureter impassability. D. was to undergone surgery. When answering the question of the parties in court the experts stated also other reasons for this condition as objectively possible, but these have remained hypothetical.

Given the facts thus established under the case and the relations between them, in the contested decision the appellate court had not decisively considered the above and has adopted in essence the response of the experts for "the most probable cause" as insufficient to justify a causal link. Without considering other, mentioned by the experts and comparable in likeliness reasons, that should have been reasonably excluded; the appellate court has built its conclusions in substantial breach of procedural rules.

The appellate court has committed substantial procedural violation also in the discussion of the audio evidence. They consist in the fact that there was made not difference between evidence and opinion, related to subsequent and not relevant to the witness interrogatory circumstances. Two

of the three questioned doctors expressed their opinion about whether the plaintiff kidney functioned fully in the post-operation period since 2001 and today; is the disability permanent seven years after the operation and would it be so, if the plaintiff had presented earlier at treatment in Pirogov Institute, Emergency Urology. The court erred in appraising the opinion of witnesses Dr. I and Dr. A., to deny the veracity of the facts, they testify in consistent and accurate way thereof. The testimony of the third surgeon, who took part in the operation: Dr. B., was left without discussion and reasoning in the decision. The three urologists from the operational team of Pirogov Institute, performed the operation on November 26th, 2001 were also interrogated in the case. They testify without any discrepancy about what they had seen in the plaintiff's body during the operation and that the ureter of the right kidney was tied with silk surgical thread. The operating physicians accurately and consistently testify for the "liberatio uretris dex" they performed, as reflected in the operational logs and medical history, i.e. they removed the silk thread and freed the tied ureter, along with other surgical acts required by the medical practice - insertion of urethral prostheses and others. The fact that the thread they found in the body of the plaintiff is not physically preserved as are not the records of MHATEM "Pirogov" and the operational protocol No 237, dated November 26th, 2001, does not diminish the credibility of their testimony on relevant facts of the case. By not discussing the accurate and consistent witness testimony and by adopting final conditional response on the conclusion of the triple medical expertise, rather than to comply in substance the expert findings, contained in same conclusion, the appellate court incorrectly answered the question whether there is unacceptable act of medical practice, a condition provoked by the defendant as an operating surgeon, causing injury and brought to subsequent kidney saving surgery or there is a causal connection between these facts.

Given the above, the answer to this question, crucial for the outcome of the dispute, is positive and the cause of action is proven, even if the kidney of the plaintiff was saved and was functioning as an organ, where the conclusions of the experts on the case should be fully accepted. Reasons for the health disorder found by the experts, accompanied by pain and suffering, and requiring surgery in 2001, was the partial impassability of the right ureter. The reason for this functional impassability is the fact that the ureter was affected by a ligature, filled-in with silk thread, i.e. it was tied. This is what the defendant in the capacity of operating surgeon has done on April 13th, 1999 in his private clinic. The kidney survival in this state for a period

of 945 days after the operation, theoretically commented in terms of medical probability and maintained by the defendant's defense as impossible, does not exclude the positive conclusion for the above facts. When a fact from the reality is objectified, the standing that this is impossible to have happened is unacceptable. But its explanation in this case is also possible, which is unique and given by the experts who prepared the medical expertise on the case Dr. C, Dr. R. and Dr. P. This should also be taken into consideration and the court has already stated reasons in this direction.

It is established out of dispute that the use of such material for ligature in surgery does not meet the good medical practice, while leaving external inorganic body, that the organism cannot absorb, in a position to limit the passability of the ureter, as was found in operation at the Pirogov Institute, represents a sign of negligence. Causing harmful condition is not tolerable by the acceptable medical risk in surgery. The operational protocol, drawn by the defendant and enclosed as evidence on the case, is a private document, with unreliable date and impossible to make a conclusion of facts thereof, which excludes the author's liability. The experts' conclusions that "according to the operation protocol, dated April 13th, 1999, no violations of generally accepted surgical practice are established", underlining that before the operation specific studies should have been carried out, in order the surgeon to have a clear idea of the urinary tract and kidney function. Along with other evidence the court should have considered all evidence, which exclude the accuracy of the allegations of the defendant in relation to one part of said protocol, namely in terms of used surgical materials and the accuracy of the made ligatures.

The appeal decision should be revoked and the filed claim for condemn on solidary basis of the defendants, both perpetrator and assignor, should be admitted as legitimate and proven. Liability is sought on the grounds of art. 45 and art. 49 of OCA. Every person must redress the damage he has guiltily caused to another person, by paying compensation. The assignor is responsible as solidary defendant. The Supreme Court of Cassation should apply art. 52 of the OCA and to determine a fair in amount compensation for the suffered by the plaintiff non-pecuniary damages, as a direct result of specific, incompatible with good medical practice acts of the operating physician, hence the finding of unlawfulness in this case. Given the amount of compensation, it should be borne in mind that the function of one of the kidneys is not irreversibly lost, as alleged in the application. There is no

bodily injury, but total permanent health disorder, not dangerous to life. The plaintiff has endured pain and suffering, caused by the induced hydronephrosis, established also by the testimony of witness D. The postoperative status of the plaintiff, related to the introduced artificial body (plastic) in 2001, resulted also in pain. It should be taken into account the state of fear and uncertainty. According to Expert Decision of the Territorial Expert Medical College No. 114 of February 1st, 2002 it is established 59.5% disability with main diagnosis "hydronephrosis", after the liberalization of the right ureter by plastic surgery. In subsequent certification - Expert Decision of the Territorial Expert Medical College No. 305 of March 19th, 2003 and compensated renal function, there were defined 55% disability. By Expert Decision of the Territorial Expert Medical College No. 4 *, dated October 30th, 2003 the permanent incapacity is reduced to 40% (leading diagnosis is kidney infections); and in the last certification under the case the Expert Decision No. 783, dated July 5th, 2004 is determined a disability of 37%, related to the dysfunction of the right kidney. Given the long period for which the pain and suffering are undergone and considering the age of the plaintiff who is fifty-six, the present Court finds fair and adequate compensation in the amount of BGN 10 000. The resulting in law obligation for payment of interest will actually be added to this indemnity, starting from the date of injury on April 13th, 1999. To the full amount of the claim, stated as partial for BGN 15 000, the claim was declared excessive. The appeal decision should be upheld in this part.

Given the outcome of the case the defendants owe costs, according to the uphold part of the claim, but they are also entitled to costs in what concerns the rejected part. The costs the parties owe include fees for lawyer. In first instance the plaintiff has initially authorized counsel G., and subsequently hires to more lawyers. The costs for legal representation before this court are owed by the plaintiff P.S.D. After compensating the due to the plaintiff a total of BGN 2053 against BGN 733 she owes to the defendants, the latter should pay a BGN 1320 to the plaintiff for costs for all instances.

Considering the above, the Supreme Court of Cassation, 3rd C. D.

DECIDED:

Repeals Decision No. 28, dated June 17th, 2009 on civil case No. 74/2009 of the Appellate Court of Burgas in the part, which quashes decision No. 43, dated March 10th, 2009 on civil case No. 136/2004 of Burgas District Court to the amount of BGN 10 000 under the claim of P.S.D. for compensation of non-pecuniary damages pursuant to art. 45 and art. 49 of the CPA for solidary condemn of the defendants M.V.M. and C. S. M. and Specialized Hospital of Obstetrics and Gynecology "E" Ltd., and deliveres instead:

Condemns M. V. M. from town B., 40, Y. V. str., entrance A, ap. 6 and Specialized Hospital of Obstetrics and Gynecology "E" Ltd, town B., to jointly pay to P.S.D., PIN **********, alive, town B., L str., bl. 72 the amount of BGN 10 000 for compensation of non-pecuniary damages for pain and suffering, resulting by tort in surgical treatment, undergone on April 13th, 1999, together with the statutory interest on that amount, starting from April 13th, 1999 until the final payment, together with the amount of BGN 1320 for costs for all instances, after their compensation.

Upholds the other part of the decision of the Burgas Appellate Court.