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DIGEST OF SELECTED MEDICAL LAW AND BIOETHICS CASES

Digest of selected medical law and bioethics cases concerning 5 countries (France, Italy, Netherlands, Spain, United Kingdom).

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FRANCE

PLAN

II. PERSONS WITHOUT LEGAL CAPACITY

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SUBJECT 1

CONSENT TO MEDICAL TREATMENT

A. REFUSAL OF TREATMENT

REFERENCE:

Council of State 29.7.1994, GARNIER Case

REFERENCE WORK:

Revue de droit sanitaire et social 1995 (Health and Social Law Journal) No. 1, p. 57

KEY WORDS:

doctor - breast cancer - refusal of treatment - release - homeopathic treatment - Regional Medical Council - National Medical Council - illusory remedies - penalty

LEGAL PROBLEM:

Should a doctor who respects the patient's refusal of treatment be penalised?

FACTS:

A doctor diagnosed breast cancer in a patient who refused the treatment suggested. He therefore made her sign a release but prescribed treatment based on homeopathy, phytotherapy and acupuncture. The cancer spread. The doctor referred his patient to a cancer specialist, who met with the same refusal on the part of the patient and prescribed the same type of treatment as the first doctor. A hospital doctor consulted by the patient lodged a complaint against the first doctor with the Regional Medical Council. The Regional Medical Council penalised the doctor, and the National Medical Council increased the penalty.

DECISION:

The Council of State approved the decision of the disciplinary judges that, notwithstanding the patient's refusal of surgery or radiotherapy, the doctor was guilty of misconduct warranting a penalty in agreeing to treat the patient with illusory remedies which deprived her of a chance of a cure or prolongation of her life.

B. DOCTOR'S DUTY TO INFORM

REFERENCE:

Metz Regional Court, 22.12.1994

REFERENCE WORK:

Gazette du Palais 1995, II, summary, p. 374

KEY WORDS:

gynaecologist - radiologist - 30-week foetus - risk of cardiac malformation - death of the child - duty to inform - breach - non-material damage - parents - claim for compensation

LEGAL PROBLEM:

Can a gynaecologist be held liable for breaching his duty to provide information about the risks of cardiac malformation detected in a 30-week foetus?

FACTS:

A radiologist detected a risk of cardiac malformation in a 30-week foetus and recommended the gynaecologist to carry out a further morphological examination of the heart. The gynaecologist did not make a further examination. The child died as a result of a cardiac malformation five days after birth. The parents sued the gynaecologist for damages.

DECISION:

Because the gynaecologist breached his duty to provide information, the child's parents, being unaware of the circumstances, were not able to consider terminating the pregnancy for medical reasons or prepare themselves for the child's death; they could therefore claim compensation for non-material damage.

REFERENCE:

Court of Cassation, 1st Civ., 26.3.1996

REFERENCE WORK:

Dalloz 1997, jurisprudence p. 35, note by Janick ROCHE-DAHAN

First case: X and another versus spouse Y

KEY WORDS:

genetic opinion - couple - risk of transmitting a disease - favourable genetic opinion - birth of the child - hereditary degenerative problems - medical practitioner's negligence - misconduct - causal link - desire for a child - compensation of the couple both personally and on the child's behalf.

LEGAL PROBLEM:

- In what circumstances can a practitioner be held liable for giving a favourable genetic opinion to a couple whose child was born with hereditary problems?

- Can the birth of a disabled child be regarded as a reparable prejudice and, if so, should damages be awarded to the parents and/or the child?

FACTS:

A couple consulted a medical practitioner to ascertain the risk, if any, of transmitting the husband's medical disorders to a child. The doctor gave a favourable genetic opinion after conducting examinations. A child was born with hereditary degenerative disorders affecting the husband's maternal half-brother, which the couple had not asked the doctor to diagnose. The couple sued the doctor for negligence during the examinations. The Riom Court of Appeal found the medical practitioner liable in a judgment of 25.1.1994.

DECISION:

The Court of Cassation confirmed the judgment of the Court of Appeal.

- As the couple had asked the doctor for a decisive and definite opinion as to the absence of risks, the Court was able to infer that the doctor's error had a direct causal link with the decision to conceive the child and hence with the birth of the child suffering from a hereditary disease.

- Accordingly, the Court upheld the couple's claim for damages both for themselves and for the child.

Second case: Spouse Z versus Y and others

KEY WORDS:

doctor - pregnant woman - rubella tests - laboratory - positive tests - child - neurological disorders - erroneous examinations - doctor's negligence - breach - duty of care - duty to inform and advise - damage suffered by the child - damage suffered by the parents - causal link - compensation for the child - compensation for the parents

LEGAL PROBLEM:

- In what circumstances can a medical practitioner and an analysis laboratory be held liable when a child is born suffering from neurological disorders after rubella tests on a pregnant woman?

- Does the birth of a disabled child constitute reparable damage? If so, should compensation be awarded to the parents and/or the child?

FACTS:

An analysis laboratory tested a pregnant woman for anti-rubella antibodies. The test revealed that she was immunised against rubella. A child born subsequently developed serious neurological disorders caused by congenital rubella. The parents claimed damages from the laboratory for the error committed and from the doctor for breach of his duty of care and his duty to inform and advise. The husband also claimed compensation on the child's behalf for the damage it had suffered, on the ground that having to bear the consequences of rubella was due to the loss of a chance to terminate the pregnancy.

In a judgment of 17.12.1993 the Paris Court of Appeal declared the laboratory and the doctor responsible for the prejudicial consequences of the child's birth for the mother, but dismissed the claim for damages on the child's behalf on the ground that having to bear the consequences of rubella was not a reparable prejudice and did not originate from the error committed during the tests but merely from the transmission of rubella by the mother to the child in utero.

DECISION:

The Court of Cassation quashed and partially set aside the judgment of the court of first instance. The analysis laboratory's errors and the medical practitioner's breach of his duty of care and his duty to inform and advise was causally linked with the damage suffered by the child. The child should therefore be compensated for its prejudice.

REFERENCE:

Council of State (disputes section) 14.2.1997, Centre Hospitalier Régional de Nice (Regional Hospital Centre) case

REFERENCE WORK:

Gazette du Palais 1997, jurisprudence cahier 25.4.97, p. 6

KEY WORDS:

hospital - amniocentesis - risk of genetic defect - positive results - trisomic child - no causal link with misconduct - refusal to compensate the child - absence of information for parents -negligence - causal link - prejudice - loss of opportunity to terminate pregnancy - compensation of parents

LEGAL PROBLEM:

- In what circumstances can a regional hospital centre be held liable when a child is born trisomic in spite of the results of an amniocentesis examination?

- Does the birth of a trisomic child constitute a compensatable prejudice? If so, should compensation be awarded to the child and/or the parents?

FACTS:

A 42-year-old woman underwent an amniocentesis. She declared her wish to avoid any risk of a genetic defect for the child. The examination revealed no anomaly in the foetus. The child was born trisomic. The woman and her husband sued the hospital department which carried out the examination on the ground that they had not been informed of the margin of error connected with the results and they claimed damages for the prejudicial consequences of the child's infirmity both on their own account and on the child's behalf. The Lyons Court of Appeal upheld their claim in a judgment of 21.11.1991.

DECISION:

The Council of State quashed the Court of Appeal's judgment, holding that

- there was no causal link between the regional hospital centre's negligence and the child's infirmity, which was inherent in its genetic inheritance. The child could not therefore be awarded damages on that count.

- as the couple had asked the Regional Hospital Centre for a decisive diagnosis regarding the absence of risk, the Centre had indeed been negligent in failing to inform the parents of the margin for error connected with the result. Because of this negligence there had been no opportunity to terminate the pregnancy and avoid the damage which the child's infirmity entailed for its parents.

REFERENCE:

Court of Cassation, 1st Civ., 25.2.1997, H C C and other case

REFERENCE WORK:

Gazette du Palais 1997, panorama p. 17

***KEY WORDS*:**

celioscopy - intestinal perforation - risk - patient not informed - burden of proof on the doctor

LEGAL PROBLEM:

- Is a doctor obliged to provide proof of the information he has given his patient?

FACTS:

A patient suffered an intestinal perforation during a celioscopy. He sued the doctor for damages. The Rennes Court of Appeal dismissed the patient's claim on the ground that he should have proved that the doctor had not warned him of the risk of perforation.

DECISION:

The Court of Cassation quashed the Court of Appeal's judgment on the ground that it lay with the doctor to provide proof of the information he had given his patient.

REFERENCE:

Court of Cassation, 1st Civ. 14.10.1997

REFERENCE WORK:

Document d'Etudes de la Cour de Cassation, Judgment No. 1561

KEY WORDS:

clinic - confinement - midwife - gynaecologist's delay - birth of child - paralysis - duty to inform - the clinic's services

LEGAL PROBLEM:

Does a clinic have a duty to inform its patients about the services it can provide?

FACTS:

A patient was admitted to a clinic for the birth of her seventh child. The gynaecologist, aware of the baby's excessive size, ordered a Syntocinon drip to regulate and strengthen the contractions and left the patient in the care of the midwife. In spite of the call from the nurse faced with a dystocial confinement, the gynaecologist arrived too late. The baby was born with its left arm paralysed. The patient's husband sued the clinic and the doctor on his own account and as the child's statutory representative, on the following grounds:

- the clinic had failed in its duty of care
- the doctor had deprived the child of a chance of being born without paralysis.

In a judgment of 15 February 1995 the Montpellier Court of Appeal rejected the claim on the following grounds; firstly, in the light of an expert opinion, even if the gynaecologist could have foreseen the birth of a large baby, there was no obvious pathology which required his continuous presence with the mother and no previous case history suggesting that the confinement would be difficult; and, secondly, the clinic was not obliged to have obstetricians permanently in attendance in the labour ward nor to inform patients of this, as a qualified midwife was available whose responsibility was to call the doctor at the time of a confinement.

DECISION:

The Court of Cassation quashed and partially set aside the judgment of the Court of Appeal. According to expert opinion, there was no obvious pathology requiring the gynaecologist to be present throughout the confinement even if he could have foreseen the birth of a large baby. The gynaecologist's surgery was near the clinic; he had responded immediately to the midwife's call and had not been negligent in leaving his patient in her care. The clinic, however, was bound by a hospitalisation and care contract and therefore had a duty to inform its patients of the services it could provide (in particular, of the absence of a continuous service).

REFERENCE:

Court of Cassation, 1st Civ. 14.10.1997

REFERENCE WORK:

Document d'Etudes de la Cour de Cassation, Judgment No. 1564, P + B

KEY WORDS:

sterility - gynaecologist - coelioscopy - gaseous embolism - death - failure to provide information about the risk of embolism - dismissal of claim

LEGAL PROBLEM:

Ways of proving a doctor's duty to inform

FACTS:

During a coelioscopy to ascertain whether a patient presented an ovarian aetiology explaining her sterility, the patient died of a gaseous embolism. Her husband and son sued the gynaecologist for failure to inform them of the risk of gaseous embolism during a coelioscopy. In a judgment of 31 May 1995 the Rennes Court of Appeal dismissed their claim as the facts warranted a presumption that the practitioner had indeed informed the deceased of the risks of gaseous embolism inherent in the proposed operation.

DECISION:

The Court of Cassation confirmed the trial court's judgment and stated that the doctor's duty to inform his patient honestly, clearly and appropriately could be proved by any means.

SUBJECT 2

MEDICAL MISCONDUCT

REFERENCE:

Court of Cassation, 1st Civ., 6.12.1994, X versus Y and others case

REFERENCE WORK:

Dalloz 1995, information rapide, p. 38

KEY WORDS:

stomatologist - circumcision - child - haemorrhage - absence of care - prejudice - misconduct - insurer - absence of declaration of circumcision - absence of security.

LEGAL PROBLEM:

- In what circumstances may a medical practitioner be deemed guilty of misconduct after performing circumcision?

- In what circumstances is a medical practitioner's insurer obliged to cover his medical acts?

FACTS:

A stomatologist carried out a circumcision. The child haemorrhaged. The doctor dissuaded the parents from taking it to hospital and promised to return the following day. He did not return until 36 hours later. The child had an irreversible necrosis. The parents sued the medical practitioner. The practitioner invoked his insurance cover. The Paris Court of Appeal's judgment of 12.2.1992 was confirmed by the Court of Cassation.

DECISION:

The Court of Cassation decided that the doctor was guilty of misconduct resulting in the occurrence of the prejudice and that neither the circumcision nor the subsequent care was covered by his insurance as the doctor had not informed the insurer that he frequently performed circumcisions until a few months after the accident had occurred.

REFERENCE:

Court of Cassation, 1st Civ. 12.12.1995, INDRIGO versus FRITSCH and others case

REFERENCE WORK:

JCP 1996 IV, No. 316

KEY WORDS:

gynaecologist - obstetrician - mammoplasty - successful medical act - considerable scarring - absence of negligence.

LEGAL PROBLEM:

If a medical act was successful but involved aesthetic damage, can the practitioner be held liable if he has not committed any negligence?

FACTS:

A gynaecologist/obstetrician performed a mammoplasty on a patient for a functional purpose. The operation was successful, but the patient suffered considerable scarring. She sued the doctor.

DECISION:

The Court of Cassation decided that negligence could not be inferred solely from the unsuccessful nature of the medical act and from the occurrence of a prejudice, which might be connected with the medical act performed without being due to negligence.

REFERENCE:

Court of Cassation, 1st Civ., 21.5.1996, BONNICI versus BOUCHARD Clinic and others case

REFERENCE WORK:

Bulletin Civ., 1, No. 219
Revue trimestrielle de droit civil (4), October-December 1996, p. 913

KEY WORDS:

clinic - surgical operation - infection - presumed liability - absence of negligence

LEGAL PROBLEM:

In what circumstances may a clinic be held liable if a patient contracts an infection during an operation?

FACTS:

A patient underwent a surgical operation in a clinic and contracted an infection. He sued the clinic and the surgeon. The Court of Appeal dismissed his claim.

DECISION:

The Court of Cassation specified that a clinic is presumed liable for an infection contracted by a patient during an operation carried out in an operating theatre unless it can prove the absence of negligence on its part. The Court of Cassation then rejected the appeal on the ground that the clinic's methods met the required standards, which excluded any inadequate asepticisation of the operating theatre.

REFERENCE:

Court of Cassation, 1st Civ., 18.3.1997, X and others versus Y and others

REFERENCE WORK:

Dalloz 1997, information rapide, p. 118

KEY WORDS:

doctor - patient - action for damages - judicial authority - deontological code - possibility of relying on it

LEGAL PROBLEM:

Can the provisions of the medical deontological code be relied upon in support of a claim for damages against a doctor by his patient before a judicial authority?

FACTS:

A patient who sustained a prejudice on account of his doctor sued the latter for damages in the civil courts, basing his claim on the provisions of the medical deontological code.

DECISION:

A party may plead violation of the provisions of the medical deontological code in support of a claim for damages against a doctor, and it lies with the judicial authorities alone to decide on such a claim, notwithstanding the institution of disciplinary proceedings.

SUBJECT 3

MEDICALLY-ASSISTED PROCREATION

REFERENCE:

Council of State, 21.1.1994, P.M.A. (medically assisted procreation) Federation and Federation of General and Equivalent Hospitals, Application No. 118 858

REFERENCE WORK:

Revue de droit sanitaire et social (Health and Social Law Journal), 1994, No. 3, p. 444

KEY WORDS:

medically-assisted procreation - authorisation - retroactivity - decrees of 8.10.1988 - Commission Nationale de Médicine et de Biologie de la Reproduction (National Commission for Reproductive of Medicine and Biology).

LEGAL PROBLEM:

- Is medically-assisted procreation a high-technology activity?

- Is the licensing of an establishment to practise medically-assisted procreation retroactive in its effect?

- Is the regulating authority empowered to set up a specific consultative body for medically-assisted procreation, ie the National Commission for Reproductive Medicine and Biology.

FACTS:

The Medically-assisted Procreation Federation and the Federation of General and Equivalent Hospitals applied for the abrogation of the decrees of 8.10.1988 regarding medically-assisted procreation. The application was implicitly rejected. Both federations therefore appealed to the Council of State.

DECISION:

- Medically-assisted procreation is not a high-technology activity.

- The licensing of an establishment to practise medically-assisted procreation is not retroactive in effect, and the regulating authority has the right to appoint the National Commission for Reproductive Medicine and Biology as a specific consultative body on medically-assisted procreation, as it is purely an advisory body and the manner in which it is composed is compatible with its consultative character.

REFERENCE:

Court of Cassation, 1st Civ., 9.3.1994, Mrs L versus Mr M

REFERENCE WORK:

Les petites affiches, 28.12.1994, No. 155, note by Xavier DAVERAT

KEY WORDS:

artificial insemination - child - parental authority - woman involved in a homosexual relationship - man involved in a homosexual relationship.

LEGAL PROBLEM:

Who should have parental authority over a child born as a result of the insemination of a woman involved in a homosexual relationship with the sperm of a man also involved in a homosexual relationship?

FACTS:

Mr M and Mrs L, both involved in homosexual relationships, decided to have a child by the insemination of the later with the former's sperm. A child was born. The parents recognised the child before it was born. Mrs L moved house with the child. Mr M applied for the joint exercise of parental authority. The family affairs court dismissed his application but granted him right of access. The Bordeaux Court of Appeal upheld his application in a judgment of 22.4.1994.

DECISION:

The Court of Cassation confirmed the judgment of the Bordeaux Court of Appeal on joint parental authority on the ground that this was in the child's interest as the father's recognition of the child had not been disputed, which was in accordance with the provisions of Article 374 of the Civil Code.

REFERENCE:

Court of Cassation, 1st Civ., 29.6.1994, Mr V versus Mrs Y

REFERENCE WORK:

Revue trimestrielle de droit civil, 1994, p. 842, and Bull., Cass. I, p. 165, No. 226.

KEY WORDS:

host mother - artificial insemination - child's relationship by descent

LEGAL PROBLEM:

What relationship by descent applies to a child born of a host mother through artificial insemination?

FACTS:

A couple in which the wife was sterile asked another woman to be inseminated with the husband's sperm and to carry the child. The child was born. The host mother and the husband recognised the child, who was then handed over to the couple as the host mother had consented to their full adoption of the child. However, the wife ran away with the child, applied for full adoption and commenced divorce proceedings. The Regional Court allowed the application for full adoption. The couple divorced. In a decision of 22.01.1992, the Poitiers Court of Appeal partly set aside the first-instance court's decision and decided on the simple adoption of the child by the mother.

DECISION:

The Court of Cassation decided, to begin with, that, in accordance with the principle of the indisposability of the human body and the inalienability of civil status, "an agreement whereby a woman undertakes, even on a non-pecuniary basis, to conceive and bear a child, then to abandon it at birth" was null and void.

It quashed the Court of Appeal's decision on simple adoption because the whole process deriving from the agreement with the host mother was an abuse of the institution of adoption.

REFERENCE:

Regional Court of Paris, 10.1.1996

REFERENCE WORK:

Revue trimestrielle de droit civil 1996, No. 2, p. 377, note by J HAUSER

KEY WORDS:

spouses - husband's child - adoption - loan of the womb - suspicion

LEGAL PROBLEM:

Can a woman adopt her husband's child when the existence of an agreement on the loan of a womb is suspected?

FACTS:

A couple married, and some time afterwards the wife applied to adopt a baby born of her husband's alleged affair with another woman, the baby having been abandoned by its mother at birth.

DECISION:

The Paris Regional Court rejected the adoption application on the following grounds: firstly, that the father's biological relationship with the child should be verified in order to prove the adoption of the husband's child and, secondly, that the biological mother should be informed of her possible rights with regard to the child in order to prevent any abuse of the adoption system.

REFERENCE:

Court of Cassation, 1st Civ., 9 January 1996

REFERENCE WORK:

Dalloz 1996, jurisprudence p. 376, note by Frédérique DREIFUSS-NETTER

KEY WORDS:

Post-mortem implant of an embryo

LEGAL PROBLEM:

Can an embryo be implanted "post-mortem" when the beneficiary couple has been dissolved by the death of the husband?

FACTS:

A married couple signed an embryo implant agreement with a hospital. The agreement specified that the implant could be carried out only in the presence of both spouses and that if the couple was dissolved, the embryos would be destroyed. The husband died. The hospital refused to hand the remaining frozen embryos over to the wife. The wife applied to the Regional Court for a ruling that the embryos should be implanted "post-mortem". First the Regional Court, then the Toulouse Court of Appeal (on 18.4.1994) ordered the destruction of the embryos.

DECISION:

The Court of Cassation set aside the Appeal Court's decision in that it ordered the destruction of the frozen embryos and declared that their storage would be terminated in the absence of a recipient therefore, pursuant to Article 9 of the law of 29.7.1994 on medically-assisted procreation.

REFERENCE:

Constitutional Council, 27.7.1994, SEGUIN and others

REFERENCE WORK:

Grandes décisions du Conseil Constitutionnel, Dalloz, 8th edition, p. 847
Dalloz 1995, Jurisprudence, p. 238

KEY WORDS:

bioethical laws of 29/7/1994 - embryos - children - respect of the individual - constitutional principles.

LEGAL PROBLEM:

Are the bioethical laws of 29.7.1994 compatible with the constitutional principles of French law?

FACTS:

Some members of the National Assembly submitted the bioethical laws of 29.7.1994 to the Constitutional Council, with particular reference to their provisions on medically-assisted procreation, prenatal diagnosis, pre-implant diagnosis and the relationship by descent of a child born as a result of medically-assisted procreation.

The complaint against these provisions with regard to embryos was as follows:

- the provisions prejudiced their right to life;

- they established a distinction between those conceived before and those conceived after the laws had been promulgated;

- they undermined respect for the inviolability of the individual;

- they disregarded the constitutional principle protecting humanity's genetic inheritance.

With regard to children, the complaint was that the provisions:

- called the rights of the family into question;

- prejudiced the right to health and to free self-development of children conceived *in vitro*;

- disregarded the principle of personal responsibility deriving form Article 1382 of the Civil Code as well as the fundamental principle recognised by the laws of the Republic by providing that no relationship of descent may be established between the donor and the child resulting from the procreation.

Finally, it was complained that the legislature had infringed the constitutional principle of the separation of powers by granting to the National Commission for Reproductive Medicine and Biology a power of concurring opinion and leaving the composition of this commission to the regulatory authority.

DECISION:

The Constitutional Council decided as follows:

Regarding embryos:

- as the legislature had considered that the principle of respect for every human being from the beginning of his or her life did not apply to embryos in vitro, it necessarily followed that the principle of equality did not apply to them either.

- there was no constitutional principle protecting humanity's genetic inheritance.

Regarding children:

- the laws of the Republic embodied no fundamental principle allowing a child to seek to establish paternity outside wedlock.

- the Preamble to the 1946 Constitution did not preclude the conditions for expanding a family being met by donations of gametes or embryos.

- the ban on giving children thus conceived the means of ascertaining the donor's identity could not be regarded as prejudicial to the protection of health.

Regarding the National Commission for Reproductive Medicine and Biology:

- the legislature had not disregarded its own jurisdiction by instituting the requirement for this commission.

Regarding all the provisions of the laws:

- the principles of the primacy of the individual, respect for individuals from the commencement of their lives, the inviolability, integrity and non-pecuniary nature of the human body as well as the integrity of the human species served to affirm respect for the constitutional principle protecting human dignity.

"In short, all these provisions implement and reconcile the applicable constitutional rules without prejudice to their scope."

SUBJECT 4

VOLUNTARY TERMINATION OF PREGNANCY

REFERENCE:

Court of Cassation, CRIM., 31.10.1996

X ... and others

REFERENCE WORK:

Dalloz 1996, information rapide, p. 64

KEY WORDS:

voluntary termination of pregnancy - anti-abortion demonstrations - penalty - offence of impeding the voluntary termination of a pregnancy

LEGAL PROBLEM:

In what circumstances can persons demonstrating against abortions in a hospital be penalised?

FACTS:

An anti-abortion commando force entered a hospital, disrupting movement in the orthogenic centre and preventing many abortions from being carried out. The Orleans Court of Appeal found the demonstrators guilty of impeding voluntary terminations of pregnancies in a criminal section judgment of 31.1.1995.

DECISION:

The Court of Cassation upheld the judgment of the Orleans Appeal Court, thus finding the appellants guilty of impeding abortions under Article L 162-15 of the Public Health Code on the ground that there was no incompatibility between Article L 162-15 of the Public Health Code and Articles 9 and 10 of the European Convention on Human Rights, since freedom of opinion and the freedom to express one's beliefs may be restricted by measures necessary for the protection of the health or rights of others.

SUBJECT 6

THE END OF LIFE

REFERENCE:

Court of Cassation, 2nd Civ., 22.2.1995, 2 cases

REFERENCE WORK:

- RTD Civ, 1995, p. 631, observation by P. JOURDAIN
- Bulletin Civ., 1995, II, No. 61

First case: SODAG Company et al versus CONSOR B et al

KEY WORDS:

vegetative state - aesthetic damage - loss of enjoyment - compensation

LEGAL PROBLEM:

Can a person in a vegetative state be compensated for aesthetic damage and loss of enjoyment?

FACTS:

A claim for aesthetic damage and loss of enjoyment was made on behalf of a person in a vegetative state. The Court of Appeal upheld the claim.

DECISION:

As the fact that a person is in a vegetative state does not preclude compensation on any count, his or her damage must be repaired in all its respects.

Second case: DECHANT versus ELBEUVIENNE Transport Company et al

KEY WORDS:

vegetative state - aesthetic damage - loss of enjoyment - pain - compensation

LEGAL PROBLEM:

Can a person in a vegetative state be compensated for personal aesthetic damage, for the loss of enjoyment caused by his or her state and for the pain experienced by him or her?

FACTS:

An action was brought on behalf of a person in a vegetative state, claiming compensation for aesthetic damage, for the loss of enjoyment caused by his state and for the pain experienced by him. The Court of Appeal dismissed the claim.

DECISION:

The fact that a person is in a vegetative state does not preclude compensation on any count. The damage must be repaired in every respect, and the tort-feasor is required to compensate for the damage in full.

REFERENCE:

Court of Cassation, 2nd Civ., 28.6.1995, Mrs BOURDILLON and others versus DA CUNHA and others

REFERENCE WORK:

Dalloz, 1995, information rapide, p. 215

KEY WORDS:

vegetative state - physical faculties - previous resources - loss of enjoyment of life - reparation for the damage in all its respects

LEGAL PROBLEM:

Can a person in a vegetative state be compensated for losing the enjoyment of life he derived from his previous physical faculties and resources?

FACTS:

A victim of a road traffic accident was in a vegetative state with no hope of improvement. The insurer was asked to compensate the victim for losing the enjoyment of life he derived from his previous physical faculties and resources. The insurer refused to do so. In a judgment of 28.6.1995 the Lyon Court of Appeal dismissed the claim as the victim, in view of his state, was unable to feel or express any needs other than purely physiological ones.

DECISION:

The Court of Cassation quashed the Appeal Court's judgment dismissing the victim's claim on the ground that he was incapable of expressing any needs other than purely physiological ones. It ruled that the fact that a human being was in a vegetative state did not preclude compensation on any count and that the damage must be repaired in every respect.

REFERENCE:

Court of Cassation, CRIM., 20.11.1996

REFERENCE WORK:

JCP 1997, IV, No. 649

KEY WORDS:

emergency treatment - delay - medicines - absorption - fatal dose - negligence - misconduct - damage - loss of chance of survival not established - death - causal link - offence of manslaughter

LEGAL PROBLEM:

In what circumstances can delay in treating an emergency medical case constitute manslaughter?

FACTS:

A person attempted to commit suicide by absorbing a large and fatal dose of medicines. There was delay in treating him in the emergency department, and he died.

DECISION:

The delay in treating the patient in the emergency department might have cost him his chance of survival, but it was not shown that prompter action could have prevented his death. There was therefore no definite causal link between the misconduct and the damage which consisted, with regard to manslaughter, not in loss of the chance of survival but in death.

REFERENCE:

Court of Cassation, CRIM., 19.2.1997

REFERENCE WORK:

JCP 1997, II, 22889, note by J Y CHEVALIER

KEY WORDS:

road traffic accident - victim - injuries - surgical operation - surgeon - anaesthetist - resuscitation - halt - extubation - misconduct - fatal process - death - causal link - manslaughter.

LEGAL PROBLEM:

To what extent can halting the resuscitation of a patient in a vegetative state without hope of improvement constitute manslaughter?

FACTS:

A victim of a road traffic accident underwent three surgical operations in a hospital on the responsibility of a surgeon assisted by an anaesthetist. The victim died the following evening in the hospital's resuscitation department. Inquiries revealed that the anaesthetist had halted the patient's resuscitation.

DECISION:

According to the experts, the anaesthetist's decision to extubate and halt resuscitation "in defiance of all logic and all medical ethics and contrary to the rules of practice" had "hastened death and precluded any further surgical operation", and "each case of misconduct rendered the fatal process inevitable and irreversible". It was decided that the anaesthetist had not acted with the due diligence expected of him in view of his position and qualifications as well as the power and facilities available to him. He was found guilty of manslaughter.

REFERENCE:

Council of State, 5th and 6th sub-sections combined, 23.4.1997, Alix versus the Regional Hospital Centre of Rennes

REFERENCE WORK:

Dalloz 1997, information rapide, p. 136

KEY WORDS:

vegetative coma - irreversibility - present state of scientific knowledge - pain - disruption of life - loss of physical integrity - specific loss of enjoyment

LEGAL PROBLEM:

Can the victim of an accident during an operation who is in a chronic vegetative state be compensated for pretium doloris?

FACTS:

An accident during an operation left a patient in a chronic vegetative state. The hospital was sued for compensation for the patient's damage, due to his pain and suffering as well as the disruption of his life. The Nantes Administrative Court of Appeal dismissed the claim in a judgment of 10.2.1994.

DECISION:

Considering that the victim of an accident during an operation "has not felt and will not feel any pain", in view of his vegetative state which was, irreversible in the present state of scientific knowledge, and that "the disruption of his life is limited to the loss of his physical integrity", without there being any need to distinguish a specific loss of enjoyment, an administrative court of appeal made a discretionary appraisal of the facts of the case which could not be questioned before the Court of Cassation.

SUBJECT 1

PERSONS WITHOUT LEGAL CAPACITY

REFERENCE:

Court of Cassation, 2nd Civ., 24.1.1996

REFERENCE WORK:

Les petites affiches, 14.6.1996, No. 72, p. 28, note by Annick BATTEUR

KEY WORDS:

specialised establishment - mentally disabled female minor - mentally disabled male minor - deflowering - female minor withdrawn from the centre - loss of opportunity - progress - compensation - placement in another centre - remoteness - material damage to parents - compensation

LEGAL PROBLEM:

On what grounds can a specialised establishment be held liable for disabled persons in a case where a mentally disabled female minor is deflowered by a young man who is also mentally disabled?

FACTS:

A 16-year-old mentally disabled girl was deflowered by a mentally disabled male on the premises of a specialised centre for the mentally ill. The young man was expelled from the establishment, then reintegrated. The girl's parents withdrew her from the centre because of the risk of further similar incidents. They claimed compensation for the damage caused to themselves and to their daughter from the association managing the centre. In a judgment of 10.12.1992 the Caen Court of Appeal allowed the parents' claim for compensation for themselves and their daughter on the ground that her withdrawal from the establishment had interrupted her care at the only establishment close to their home and deprived her of the opportunity to make some progress there. However, the Court dismissed the parents' claim to be compensated for their non-material prejudice due to the sexual relations to which their daughter had been subjected and for their material prejudice due to the travelling expenses caused by the placement of their daughter in another establishment, as both these types of damage were too indirect to be indemnified.

DECISION:

The Court of Appeal did not draw any legal consequences from of its own findings. It dismissed the parents' claim for compensation for their non-material damage due to the sexual relations to which their daughter had been subjected and for their material damage due to the travelling expenses occasioned by the need to place her in another establishment, stating that this

damage was too indirect to be compensated for, while nevertheless deeming it necessary to consider preventing any contact between their disabled daughter and her fleeting partner, from which it was clear that the damage alleged by the parents was directly related to the facts for which the establishment had been declared responsible

REFERENCE:

Court of Cassation, 1st Civ., 24.2.1993, HAYER versus Association Régionale pour la Sauvegarde de l'Enfant Adolescent et Adulte (Regional Association for the Protection of Young Persons and Adults) et al

REFERENCE WORK:

Dalloz 1993, jurisprudence, p. 614, note by Thierry VERHEYDE

KEY WORDS:

specialised establishment - mentally disabled persons - film - intimacy of private life - invasion - protection - acts relating to the person of a protected adult - Article 500 paragraph 2 of the Civil Code - statutory representative - guardianship court

LEGAL PROBLEM:

- Does the reproduction of pictures showing mentally disabled persons in the intimate circumstances of their daily lives in a specialised establishment constitute an invasion of their privacy?

- What conditions should be met for the protection of the privacy of a mentally disabled person living in a specialised establishment?

FACTS:

Mr H made a film about the lives of mentally disabled young adults living in a specialised centre managed by the ADEJAH, subsequently replaced by the ARSEAA. The ADEJAH was responsible as guardian of most of the mentally disabled persons in the centre. The film was shown on television. The ARSEAA applied to the court for an injunction withdrawing the film from screening pursuant to Article 9 paragraph 2 of the Civil Code. The Toulouse Court of Appeal allowed the application in a judgment of 15.1.1991. Mr H applied to the Court of Cassation.

DECISION:

- The reproduction of pictures of mentally disabled persons in the intimate circumstances of their daily existence in an establishment where they lived without the authorisation of their statutory representatives is in itself an illegal invasion of their privacy.

- The Court of Appeal rightly declared that a guardian could not on his own perform the acts relating to the person of a protected adult and must apply to the guardianship court in accordance with Article 500 paragraph 2 of the Civil Code. Accordingly, after noting that a guardian had agreed to the showing of the film without the authorisation of the guardianship court, the Court of Appeal based its decision solely on these legal grounds.

REFERENCE:

Council of State, 8th and 9th sub-sections, 1.6.1994

REFERENCE WORK:

Gazette du Palais 1995, I, panorama administratif, p. 71

KEY WORDS:

psychiatric nurse - short film - third-party information - existence - name - patient - psychic disorders - trial release - contact - revelations - professional secrecy - infringement

LEGAL PROBLEM:

Can a psychiatric nurse be held liable for breach of professional secrecy on the ground that he put a film crew in contact with a female patient on a trial release?

FACTS:

A psychiatric nurse took part in a short film shot by some upper secondary-school students. He gave them information which enabled them to contact a female patient with psychic disorders on a trial release. The nurse was sued for breach of professional secrecy.

DECISION:

The hospital nurse failed in his duty of professional secrecy by revealing the female patient's mere existence and thus allowing amateur film-makers outside the department to approach her and learn from her some facts referred to in the film; even though the patient was on trial release, she was still in the care of the hospital.

SUBJECT 2

MINORS

REFERENCE:

Court of Cassation, 1st Civ., 5.11.1996. "Département" of Lot and Garonne and A versus Miss D

REFERENCE WORK:

JCP 1997, II, p. 1, note by Isabelle ARDEEFF

KEY WORDS:

female minor - anonymous confinement - child handed over to the child welfare service - suit for restitution of the child - absence of consent - absence of recognition of the child - absence of relationship by descent - consent not necessary - Article 61 of the Family and Social Assistance Code

LEGAL PROBLEM:

What is the force of a minor's consent to the handing over of her new-born child to the child welfare service?

FACTS:

On 19.5.1993 Miss D, a minor aged 17, gave birth anonymously to a baby and handed it over to the child welfare service. The child was provisionally declared a ward of the State by a decree of the "Département" Council on 8.9.1993 and was placed with a view to adoption. On 16.11.1993 Miss D's mother, acting as her statutory representative, sued the "Département" of Lot and Garonne for the restitution of the baby. Her suit was dismissed. Miss D, now an adult, appealed. On 14.12.1995 the Agen Court of Appeal upheld her appeal on the ground that she had been a minor when the baby was handed over and that she could not have consented thereto without the assistance of the holder of parental authority, ie her mother.

DECISION:

The Court of Cassation quashed and set aside the Court of Appeal's judgment on the ground that in the absence of recognition, as a relationship by descent had not been established, it had not been necessary for the minor's consent to be formally recorded when the baby was handed over to the child welfare service pursuant to Article 61.1 of the Family and Social Assistance Code.

ITALY

PLAN

I. PERSONS OF FULL AGE WITH LEGAL CAPACITY

Theme 1: The basis for the lawfulness of surgical acts

Theme 2: Consent to medical treatment

A. The requirement of consent
B. The doctor's duty to inform
C. Refusal of treatment
D. Excessive medical zeal

Theme 3: Medical malpractice

A. Criteria for assessment
B. Surgical acts performed by a team

Theme 4: Medically assisted procreation

A. Status of the person conceived by heterologous artificial insemination
B. An action to disclaim paternity after consenting to heterologous artificial insemination
C. Surrogate motherhood

Theme 5: Voluntary sterilisation

Theme 6: Sex change operations

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II.PERSONS OF FULL AGE LACKING LEGAL CAPACITY

Theme 1: Persons of full age lacking legal capacity

Theme 2: Minors

I. PERSONS OF FULL AGE WITH LEGAL CAPACITY

THEME 1

THE BASIS FOR THE LAWFULNESS OF SURGICAL ACTS

REFERENCES:

Investigating Judge of the Florence District Court, 23 May 1989.

LITERATURE:

unpublished

FACTS:

see theme 2, No. 3.

DECISION:

The decision, concerning a case which will be examined below, merits interest insofar as it lays down, also on the basis of the latest developments in expert opinion, some fundamental principles as to the practice of surgery. These can be summarised as follows:

1) The political basis for the lawfulness of therapeutic activity lies in its human usefulness, as it relates to the individual's health (guaranteed by Article 32 of the Constitution).

2) Moreover, the formal technical basis for its lawfulness lies neither in the consent given by the person entitled to do so, nor in the fulfilment of a duty, nor in the existence of a state of necessity, but in the justified nature of the exercise of the right under Article 51 of the Criminal Code, since it is a legally permitted practice.

3) The patient's prior consent is in any case the necessary condition for the lawfulness of medical treatment. As a result, if the patient has been intentionally ill-informed at the outset, intentional offences may arise, including offences against the person. By contrast, the failure to explain the particular characteristics of the treatment fully enough due to negligence or carelessness is not at variance with the prior conditions for the lawfulness of surgical acts: it therefore falls into the category of unintentional offences because proper limits were unintentionally exceeded or erroneous assumptions were made with regard to the grounds of justification.

THEME 2

CONSENT TO MEDICAL TREATMENT

A. THE REQUIREMENT OF CONSENT

REFERENCES:

Constitutional Court, Judgment No. 161/1985

DECISION:

This judgment affirms that in cases where therapeutic treatment involves or might involve a permanent reduction of physical integrity, the patient's consent is only valid if there is a danger, albeit a possible one, of considerable damage to health.

REFERENCES:

Constitutional Court No. 218/1994

DECISION:

This decision affirms that the patient's express refusal to consent to medical treatment, even in the event of serious danger to his or her health, cannot be ignored except in those cases prescribed by law and having regard to the requirement of human dignity (Art. 32 Const.).

REFERENCES:

(1) Florence Assize Court 218/10/1990; (2) Florence Assize Court of Appeal, 26 June 1991; (3) Court of Cassation, Vth Criminal Division, 21 April 1992

LITERATURE:

(1) Il Foro Italiano, 1991, II 236; Giurisprudenza di merito 1991, II, 1119; (3) Cassazione penale 1993, 63; Rivista Italiana di Medicina Legale 1993, 460; Giustizia penale 1992, II, 550; Diritto di famiglia 1993, 441; CED Cass, 92/190113

FACTS:

Without her consent and without there being any necessity and medical emergency, an elderly patient was subjected to mutilating surgery involving total abdomino-perineal amputation of the rectum instead of the less serious and less traumatic transanal removal of a benign tumour which had previously been scheduled and consented to by the patient. The operation resulted in serious lesions from which the patient died two months later after continuous hospitalisation.

DECISION:

Confirming the earlier judgments, the Court of Cassation found the surgeon guilty of manslaughter. This is a landmark case with regard to the issue of arbitrary medical intervention, to which approaches previously varied. Since then, the principle that consent is a necessary prerequisite for the lawfulness of surgical treatment has gradually become established in judicial practice. More specifically, it was held that only the patient's freely given consent as an expression of his or her will to dispose of his or her body can, in the absence of other codified grounds of justification, concretely negate the unlawfulness of lesions caused by the surgical treatment. Consequently, the surgeon who, without there being any necessity and medical emergency, subjects the patient to a more serious operation compared with the less traumatic - and in any event - less serious one which was scheduled and consented to by the patient, commits the offence of intentional injury because, from the psychological angle, the constant aim of healing the patient becomes insignificant, with the result that the surgeon is responsible for the crime of manslaughter should the injury lead to death.

B. THE DOCTOR'S DUTY TO INFORM

REFERENCES:

Court of First Instance of Padua, 11 October 1994

LITERATURE:

Rivista Italiana di Medicina Legale 1995, 608

FACTS:

A patient underwent cosmetic surgery involving the laser removal of a large tattoo from her left shoulder without being previously informed by the surgeon of the possible risks of bad scarring. After the operation, there was a large, visible and hypertrophic scar in the deltoid region.

DECISION:

The judge held that the surgeon had committed the offence of involuntary injury, of which however he could not be convicted as there had been no complaint. The decision is based on three fundamental theoretical affirmations: (a) a doctor is prohibited from performing any operation without the patient's informed consent; (b) consequently, the doctor is obliged to inform the patient in advance of the possible risks of the operation; (c) consequently, the consent of an uninformed or ill-informed patient is of no legal significance. On this basis, the patient's consent in the instant case was held to be invalid. The surgeon's possible criminal responsibility was ruled out, however, as doubts inevitably remained that the failure to provide information was not intentional but rather caused by professional incompetence on the part of the doctor, who had not foreseen the harm which might be, and was, caused. Consequently, through an error due to a fault on his part, the doctor considered the patient's consent valid and thus committed only unintentional injury.

REFERENCES:

Court of First Instance of Arezzo, Montevarchi division, 24 March 1997.

LITERATURE:

Rivista Italiana di Medicina Legale 1997, 1103

FACTS:

A patient consented to and underwent an operation for the removal of a lateral cervical lymph node for a biopsy. The patient had not been informed of the possible consequences of the operation which subsequently occurred: ie injury to the accessory nerve resulting in the irreversible loss of the use of the left arm and persistent muscle pain.

DECISION:

The first-instance judge found the surgeon guilty of the offence of unintentional injury for unintentionally exceeding proper limits with regard to the grounds justifying the patient's consent. The decision is based on the principle that the patient's consent, even if given freely and consciously, must also be informed. Consequently, it was held that in this case the patient's consent could be considered defective because the surgeon gave insufficient information as to the risks involved in the diagnostic operation.

REFERENCES:

Court of Cassation, 8 August 1985

LITERATURE:

Il Foro it 1986, I, 121; Giustizia Civile 1986, I, 1432; Giurisprudenza italiana 1987, I, 1, 1135

FACTS:

A patient underwent cosmetic surgery without obtaining the expected results.

DECISION:

The judgment re-affirmed the position already adopted in other court decisions that a cosmetic surgeon's duty to inform is greater than that of a therapeutic surgeon to the extent that it must encompass the possibility of obtaining a real improvement of physical appearance which has favourable effects on the patient's professional life and relationships with other people.

C. REFUSAL OF TREATMENT

REFERENCES:

Court of First Instance of Modica, Order of 13 August 1990

LITERATURE:

Foro Italiano 1991, I, 286; Giurisprudenza di merito 1993, I. 1314

FACTS:

A girl of 19 was hospitalised after a traffic accident and underwent a number of surgical osteosyntheses for her multiple fractures as well as four blood transfusions. At the time that another transfusion was to be carried out, in view of the protests of her Jehovah's Witness parents, who opposed the transfusion, the girl, despite having expressed her willingness to receive the transfusion that same morning, began to refuse treatment on religious grounds. Given the seriousness of the patient's state, which would have probably led to death, the doctor in charge applied to the first-instance judge and was granted authorisation under Art. 700 of the Code of Civil Procedure to perform the necessary transfusions and all other appropriate medical acts.

DECISION:

The decision concerns a person of full age (for the issue of parents who refuse transfusions on religious grounds on behalf of their minor children in danger of dying, see below 2, I). The court upheld the judge's decision and declared lawful the coercive intervention of a doctor in a position of responsibility in a public institution with regard to a patient in a life-threatening condition who refuses a transfusion on religious grounds. The decision is based on two essential arguments: (a) the doubts

existing in the instant case as to the patient's capacity to decide freely and autonomously when her logical and critical capacities were diminished by her worsening state, preventing her from giving conscious and informed consent; (b) the affirmation that, aside from the patient's specific condition, it should in any case be held as a principle that freedom of religious belief, though guaranteed by the Constitution, is limited by the essential constitutional value of respect for the person and by the inalienability of the right to health.

D. EXCESSIVE MEDICAL ZEAL

REFERENCES:

Messina District Court, 23 May 1989

LITERATURE:

Rivista Italiana di Medicina Legale 1996, 302

FACTS:

A haemophiliac was admitted to an intensive care unit in a very serious state of haemoperitoneal shock, coma and respiratory failure. The family was informed of the need for emergency surgery, the outcome of which would almost certainly be death given the patient's very poor general state. The family objected on the ground that the patient was a member of the Jehovah's Witnesses, which precluded blood transfusions (which would have been inevitable during the operation). The doctors did not perform the operation and the patient died some hours later.

DECISION:

The investigating judge ruled out responsibility for manslaughter: both on the doctors' part for not having operated and on the family's part for not having consented. The reason given for the decision was that there was no causal link in this case between the failure to perform the operation, although it was necessary in abstracto, and the death of the patient as the patient's general state made the operation infeasible, an operation whose outcome was practically certain to be death. Finding, therefore, that the operation would have been a case of excessive medical zeal, the judge held that neither the doctors' failure to operate nor the family's refusal to consent could be considered to be offences of any kind.

THEME 3

MEDICAL MALPRACTICE

A. CRITERIA FOR ASSESSMENT
REFERENCES:

Court of Cassation for civil matters, 3 November 1994

LITERATURE:

Rivista Italiana di Medicina Legale 1994, 474

FACTS:

As the patient was haemorrhaging as a result of laceration to the uterus after childbirth, a highly experienced surgeon immediately applied a compressed utero-vaginal pack which made the haemorrhage irreversible and led to the death of the patient.

DECISION:

The Court of Cassation held the doctor responsible for the patient's death. The decision was based on two theoretical statements by which the Court defined the special contents of medical malpractice.

1) Medical malpractice falls into the category of the so-called special or professional fault concerning acts which are legally permitted because they are socially useful even if they by nature involve a risk.

2) This kind of fault has the following characteristics: (a) a failure to observe the special rules of conduct, the leges artis, aimed at averting risks which are not permitted by law; (b) the foreseeability of the fact arising from the non-permitted risk.

It was held on the basis of the stated principles that the doctor in the instant case should have first, in accordance with the leges artis of the medical profession, performed a laparotomy to check the size and site of the lesion; without the laparotomy, the fatal outcome of the treatment immediately administered by the doctor was all the more foreseeable as the doctor was highly experienced.

REFERENCES:

Court of Cassation, IVth Criminal Division, 18 December 1989, Olivi, 89/184881

LITERATURE:

Cassazione penale, 1992, p. 312

DECISION:

This judgment incorporates the principle, which is currently being established in the latest case-law, that the criminal significance of medical malpractice must be assessed exclusively on the basis of criminal law criteria (for the opposite approach, see below No. 3). More specifically, the Court of Cassation affirmed that the rule in Article 2236 of the Civil Code (according to which a person administering medical treatment is immune from liability for damages when the treatment involves the resolution of especially difficult technical problems, unless the act was committed voluntarily or by gross negligence) is only applicable to liability for damages in the aforementioned contractual relationship, as well as in the case of non-contractual liability, but can by no means be extended to the rules of criminal law to the point where acts committed with a slight degree of negligence would be unpunishable.

REFERENCES:

Court of Cassation, IVth Criminal Division, 2 October 1990

LITERATURE:

Cassazione penale 1992, p. 313

DECISION:

Although relatively recent, the judgment presented is the legacy of an approach to medical malpractice which for a long time dominated Italian case-law but is currently in decline. This especially indulgent approach held that a doctor's error should receive special legal treatment so that criminal consequences would only arise in the event of gross negligence, as set out in Article 2236 of the Civil Code. This gross negligence is found in an inexcusable error arising either from the failure to use the profession's general and basic knowledge or from the lack of a minimal competence or technical experience in the use of the manual or instrumental methods which are used in the operation and which the doctor must be sure of being able to use correctly, or finally from a lack of the care or diligence which those who practise medicine should never lack.

REFERENCES:

(1) Court of Cassation, Ivth Criminal Division, 22 February 1991; (2) Court of First Instance of Rome, 22 January 1993

LITERATURE:

(1) Cassazione penale, 1992, 2756; (2) Cassazione penale 1993, 2635

DECISION:

The two judgments, based on the same statements of principle, which are to be found in all the latest case-law, represent the final acceptance of criminal law criteria for the assessment of medical malpractice. The two judgments specify that a doctor's professional malpractice must be assessed with a broad mind, taking account of the special nature of the medical profession and the difficulties of particular cases, but always within the framework of the established criteria for identifying fault under Article 43 of the Criminal Code. This assessment may thus not be made on the basis of the elements of Article 2236 of the Civil Code, under which the person responsible for medical treatment is exempted from liability for damages when the treatment involves the resolution of particularly difficult technical problems, unless he acts with intent or gross negligence. The application of this rule of civil law is out of the question insofar as: (a) its application by analogy runs foul of the exceptional nature of the provision in relation to the general principles (expressed in Articles 1176, 1218, 2043 of the Civil Code); (b) it is moreover out of the question for the systematic regulation of justification and fault in the system of criminal law, according to which the degree of fault is laid down as a criterion only for sentencing (Art. 133 of the Criminal Code) or as an aggravating circumstance (Art. 611 No. 3 of the Criminal Code), but by no means to establish the very existence of the mens rea for the offence. As a consequence, the lesser degree of fault can under no circumstances have any justificatory value.

B. SURGICAL ACTS PERFORMED BY A TEAM

REFERENCES:

Court of Cassation, IVth Criminal Division, 1990

LITERATURE:

CED Cass. 90/187989

FACTS:

The instant case deals with the issue of the liability for negligence of an anaesthetist who used a colleague as an assistant during a blood transfusion.

DECISION:

The judgment holds that an anaesthetist who uses a colleague during a blood transfusion as an assistant (in such a way that the latter effectively replaces the first empty bottle of blood by a full

bottle of blood for transfusion) is under a duty to ensure, before the transfusion, that the blood type of the new bottle corresponds exactly to the one intended for the patient.

The decision is based on the so-called principle of reasonable confidence in the proper conduct of others, laid down with respect to liability for negligence in situations of risk involving acts of several persons who have "shared obligations" (as is precisely the case of surgery performed by a team). On the basis of this principle, each person:

1) is bound to observe the rules pertaining to his own area of competence and is therefore liable, in the first place, only for non-compliance with his own shared obligation;

2) he is consequently bound, in the second place (and has a corresponding responsibility), to act prudently to mitigate the risks of the other person's error. This secondary obligation arises in two distinct cases which are: (a) the prediction or predictability, and therefore the possibility of avoiding, in the given circumstances, the dangerousness of the other person's improper conduct; (b) a special obligation on the person, because of his or her special position in the hierarchy, to avoid or correct the other person's improper actions.

Consequently, the affirmation of the anaesthetist's liability in the instant case is based on his dual obligation, on the one hand, to fulfil with great care the duties arising from his specialisation, among them the patient's blood transfusion, and on the other hand, to supervise the work of any colleague on the basis of his position in the hierarchy.

REFERENCES:

Court of First Instance of Genoa, 13 November 1991

LITERATURE:

Il Foro Italiano, 1992, II, 586

FACTS:

Death of a nine-year old of cardiac arrest during an appendectomy performed by a hospital medical team.

DECISION:

The judge held all members of the medical team responsible for manslaughter by applying the rules stated above on the principle of reasonable confidence (see above, No. 1). In particular, the anaesthetist was held responsible for not having respected the rules of care pertaining to his own field by omitting in the preparatory phase of the operation to perform an intubation and connect the patient to the electro cardiogram monitor. The judge found the following to be responsible for not having intervened effectively to correct the improper conduct of another person: the Chief Anaesthetist, who later acted as an auxiliary when he prematurely had the heart massage interrupted, when the signs of death were still doubtful, as well as the three surgeons who upon observing this interruption to be hasty and unusual, failed to take over: every doctor's - even a general practitioner's - indispensable professional experience would have told him or her that heart massage when used to revive a patient must be kept up for at least half an hour and be accompanied by the appropriate heart stimulating medication.

REFERENCES:

Court of Cassation, IVth Criminal Division, 28 June 1996

LITERATURE:

Cassazione penale 1997, p. 3034

FACTS:

Examples of professional malpractice of an assistant hospital doctor performing surgery in a team.

DECISION:

Still using the rules of the principle of reasonable confidence as a basis, this judgment lays down the rights and duties of a hospital assistant. More specifically, referring to the principle that each member of a medical team is bound to follow the standards of care set out for his area of competence, the judgment affirmed that the hospital assistant has:

a. the duty to collaborate with the Chief Surgeon and his assistants;
b. the duty to execute his superior's organisational directives;
c. responsibility to the patients entrusted to him;
d. an obligation to act immediately in emergencies. In keeping with the principle that each member of a team is bound to intervene in the event of another member's incorrect action, the judgment established that the hospital assistant, in his capacity as collaborator of the Chief Surgeon and his assistants, is not bound to follow the other doctors blindly and uncritically in caring for patients. If he identifies obvious or other elements of doubt which are perceptible with the necessary diligence and experience, he has the duty to point them out and voice his disagreement: only if he does so, may he be exempted from responsibility when his superior does not share his point of view.

THEME 4

MEDICALLY ASSISTED PROCREATION

A. THE STATUS OF THE PERSON CONCEIVED BY HETEROLOGOUS ARTIFICIAL INSEMINATION

REFERENCES:

Rimini District Court, Judgment 24 March 1995

LITERATURE:

Rivista Italiana di Medicina Legale, 1996, 1502

FACTS:

Following a declaration of birth by a married couple, a child conceived by heterologous artificial insemination of the woman was given the status of a legitimate child in the Registry of Births, Deaths and Marriages.

DECISION:

The judgment deals with two distinct issues. The first is the general problem of the lawfulness of the practices of homologous and heterologous artificial insemination, which, in the absence of a specific legal prohibition, were declared lawful. The second issue concerns the status of a child conceived and born in wedlock after heterologous artificial insemination of the woman. In this connection, it was found that the spouses have a dual obligation: (a) the woman, being the biological mother, must recognise the newborn as her natural child; (b) the husband must take on the role of actual adoptive father by applying to the Juvenile Court to adopt the child in accordance with Article 44 (b) of Law No. 184 of 1983. As a consequence it was found that the spouses violated these obligations in the instant case by making a false declaration on the birth certificate; given that they did not have the right to freely dispose of the newborn's status, they violated the prohibition on altering reality as to procreation under Article 567, para. 2 of the Criminal Code (crime of alteration of status).

B. AN ACTION TO DISCLAIM PATERNITY AFTER CONSENTING TO ARTIFICIAL INSEMINATION

REFERENCES:

(1) Cremona District Court, 24 January 1994; (2) Brescia Court of Appeal, 14 June 1995

LITERATURE:

(1) Rivista Italiana di Medicina Legale 1994, p. 772; (2) Rivista Italiana di Medicina Legale 1996,

p. 1516

FACTS:

After having consented to heterologous artificial insemination of his wife with the sperm of a third person, the husband applied to disclaim paternity of the child born in wedlock after the assisted procreation and declared in the Registry of Births, Deaths and Marriages as a legitimate child.

DECISION:

Upholding the District Court's judgment, the Court of Appeal found the action to disclaim paternity under Article 235, para. 1 of the Civil Code to be well-founded, given the husband's certain impotentia generandi, whereas no legal significance could be attached to the prior consent to the heterologous artificial insemination of his wife. The insignificance of this consent was affirmed on the basis of three arguments: (a) the lack of, in the rules currently in force, a specific rule establishing a link between this consent and the unavailability of an action to disclaim paternity; (b) recognition of the biological blood relationship as the sole and indispensable condition of any legal relationship of descent outside marriage; (c) the invalidity, in any case, of this consent, since it concerns a personal and inalienable status.

Moreover, the wife's application for damages was rejected on the ground that the right to disclaim paternity must not be subject to limitations or conditions, as it would be if its exercise involved the payment of compensation.

C. SURROGATE MOTHERHOOD

REFERENCES:

Monza District Court, judgment 27 October 1989

LITERATURE:

Giustizia civile 1990, I, p. 478; Giurisprudenza di merito 1990, I, 240

FACTS:

An Italian married couple without children entered into an agreement with a young Algerian immigrant under which the young woman would undertake, in exchange for remuneration, to undergo artificial insemination with the husband's sperm, take the pregnancy to term and, after giving birth, immediately surrender the newborn to the contracting couple; this couple would then assume all rights and duties inherent in the parental relationship without any interference or participation by the surrogate mother. But when the little girl was born, the woman refused to honour the agreement and the couple applied to the court to have the agreement enforced.

DECISION:

The court dismissed the contracting couple's action to enforce the undertaking given by the surrogate mother as well as their request for reimbursement of any payments made by way of

remuneration. The decision was based on the contract being null and void for its unlawful subject matter, ie so-called rental of the womb, a contract under which a woman, in exchange for remuneration, agrees to be artificially inseminated by a married man whose wife is sterile, or be implanted with an embryo that is not hers and takes this pregnancy to term, and agrees to surrender the newborn to the contracting couple and loses any rights to her natural child. Such a contract amounts to an act of disposal of the woman's own body, which even though it does not involve a permanent loss of physical integrity on her part and is consequently not prohibited under the first part of Article 5 of the Civil Code, must however, in the absence of any express legal prohibition, be considered contrary to public order and morals under the second part of the aforementioned Article 5.

The judgment also recognised the possibility of the biological father to recognise the newborn as his natural child under Article 250 of the Civil Code.

REFERENCES:

Salerno Court of Appeal, Juvenile Division, Decree of 25 February 1992

LITERATURE:

La nuova giurisprudenza civile commentata, I, p. 177

FACTS:

Under a surrogate motherhood agreement, the biological mother, remaining anonymous, voluntarily gave up all rights to her child to a married couple. The child was recognised by the husband as a natural child and integrated into the family. The man's wife applied to adopt the child.

DECISION:

While reaffirming the principle of the unlawfulness of surrogate motherhood agreements, the court in this case allowed the wife to adopt the natural child of the husband in the best interests of the child under Article 44, para. 1 (b) of Law No. 184 of 4 May 1983.

THEME 5

VOLUNTARY STERILISATION

REFERENCES:

Court of Cassation, Vth Criminal Division, 18 March 1987

LITERATURE:

Cassazione penale 1988, p. 609; Rivista Italiana di Medicina Legale 1988, p. 593; Diritto di famiglia 1988, p. 1612

FACTS:

A patient voluntarily underwent sterilisation by vasectomy.

DECISION:

The judgment affirms the lawfulness of voluntary sterilisation. In the opinion of the Supreme Court, Article 552 of the Criminal Code previously in force (induced procreative impotence), repealed by Law No. 194 of 22 May 1984, was not a special rule with respect to Article 583, para. 2, No. 3 of the Criminal Code (grave personal injury resulting in loss of fertility). Consequently, the repeal of this article involved a straightforward abolitio criminis: voluntary sterilisation is therefore no longer an offence. This is true to the extent that the general prohibition on acts of disposing of one's body involving a permanent reduction of physical integrity under Article 5 of the Civil Code does not rule out the justificatory validity of consent to specific acts which the legislature has declared to be lawful on a case by case basis.

THEME 6

SEX CHANGE OPERATIONS

REFERENCES:

Constitutional Court, 24 May 1985, No. 161

LITERATURE:

Il Foro Italiano 1985, I, 2162

DECISION:

In this judgment, the Constitutional Court declared unfounded under Articles 22 and 32 of the Constitution the issue of the constitutional lawfulness of the part of Art. 1 of Law No. 164 of 14 April 1982 permitting the lawful rectification of sexual characteristics not only in the case of the natural development of situations ill-defined at the outset, though aided by surgical operations aimed at displaying already existing organs, but also in cases where for reasons of a psychosexual orientation clearly opposed to the presence of organs of the other sex, removal and reconstruction operations are performed to give the subject the appearance of the opposite sex.

REFERENCES:

Benevento District Court, 10 January 1986

LITERATURE:

Rivista Italiana di Medicina Legale 1988, 263

FACTS:

A subject who was born female and voluntarily underwent a mastectomy operation filed an application to be recognised as a male person on the grounds of her affirmed male psychosexual identity, resulting from a natural inclination dating back to the pre-pubescent stage to adopt masculine behaviour and from the presence of well above average male hormones and other marked signs of masculinity and of sexual behaviour directed towards female partners.

DECISION:

The court declared the application for recognition as a male person admissible, and found that it did not matter that the subject could not obtain the definitive anatomical characteristics of the opposite sex. The decision was based on the affirmation that the right to one's real sexual identity is a special case of the more general right to health under Article 32 of the Constitution.

THEME 7

EUTHANASIA

REFERENCES:

Trieste Assize Court, 2 May 1988

LITERATURE:

Foro Italiano, 1989, II, 184

FACTS:

Example of a case of homicide of a consenting person (Art. 579 of the Criminal Code)

DECISION:

The Court of Appeal expressly affirmed that the will of a patient does not under any circumstances make it lawful for a doctor to perform therapeutic euthanasia, active (consisting of administering medication to relieve suffering and induce death) or passive (refraining from any therapy that could prolong life).

REFERENCES:

Court of Cassation, Vth Criminal Division, 7 April 1989

LITERATURE:

Rivista Italiana di Medicina Legale 1992, p. 719

FACTS:

Example of a case of homicide of a consenting person (Art. 579 of the Criminal Code)

DECISION:

Ruling on the issue of the homicide of a consenting person which had the characteristics of euthanasia, the Court of Cassation refused to recognise extenuating circumstances of a special moral or social value. According to the court, these could only be recognised if the act was inspired exclusively by altruistic reasons and not by personal ones, nor even by the two together, and they must correspond to objectives and principles which society unconditionally approves at the time the act is performed. It was consequently found that these extenuating circumstances could not be recognised in the case of euthanasia in that on-going discussions show that there is no general consensus on the subject today and that, on the contrary, a large part of Italian society opposes it.

II.PERSONS LACKING LEGAL CAPACITY

THEME 1

PERSONS OF FULL AGE LACKING LEGAL CAPACITY

REFERENCES:

Brindisi District Court, 5 October 1989

LITERATURE:

Foro Italiano 1990, II, 273

FACTS:

The doctors, the nurses, the director of the departmental service of mental health, the director of health and the co-ordinator of health were charged with manslaughter for having omitted to take, each as part of his or her own duties, appropriate steps to prevent repeated suicides of hospitalised psychiatric patients.

DECISION:

The court did not find the accused guilty of manslaughter as their omissions could not be considered significant at the criminal level. The decision rests on the affirmation that since the enactment of Law No. 180 of 1978, the perception of mental illness as giving rise to assistance to mentally sick persons consisting essentially in close supervision to prevent them from harming themselves and others has to be considered outdated, and that since then assistance has essentially taken a therapeutic form.

THEME 2

MINORS

REFERENCES:

Court of First Instance of Catanzaro, 13 January 1981

LITERATURE:

Giustizia civile 1981, I, 3098

FACTS:

The Public Prosecutor's Office applied to the court to order an emergency procedure concerning a blood transfusion for a minor in danger of imminent death as the parents had withheld their consent on religious grounds.

DECISION:

The judge granted the application of the Public Prosecutor's Office and ordered the emergency procedure. The decision falls into the well-established case-law on the relationship between medical treatment and freedom of religious belief according to which it is unlawful for parents exercising parental authority to refuse or omit, on religious grounds, to have their children undergo medical treatment which is indispensable to protect their health: the parents' attitude justifies the state's coercive intervention. The problem has arisen in Italy in particular with Jehovah's Witnesses refusing blood transfusions.

REFERENCES:

(1) Cagliari Assize Court, 10 March 1982; (2) Court of Cassation, Ist Criminal Division, 13 December 1983; (3) Rome Assize Court of Appeal, 13 June 1986

LITERATURE:

(1) Il Foro Italiano 1983, II, 27; (2) Il Foro Italiano 1984, II, 361; (3) Il Foro Italiano 1986, II, 616

FACTS:

In order not to infringe a religious prohibition of the Jehovah's Witness faith which they followed, parents refused to let their youngest daughter who suffered from homozygote thalassanaemia undergo periodic blood transfusions which were necessary for her survival. The girl died as a result of severe anaemia.

DECISION:

The judgment at first instance, upheld on appeal, found the parents guilty of participation in an intentional homicide, finding this intention in the act of having accepted the risk of not preventing the death of their minor child. The Court of Cassation set aside the judgment of the Court of Appeal and referred it back to the Court of Appeal for a flaw in the judgment's reasoning as to the recognised existence of a homicidal intent. The Court moreover held that the existence of any possible intent in the form of accepting the outcome of death should have been verified in light of the fact that the Juvenile Court had ordered steps aimed at definitively resolving the issue of therapeutic assistance to the minor. In this decision, the Court of Cassation also declared manifestly unfounded the issue of the constitutional lawfulness of Article 147 of the Civil Code and 570 of the Criminal Code (from which the legal duty arises to avoid an event with criminal consequences within the meaning of Article 40, para. 2 of the Criminal Code), in the parts where they do not provide for exemption from the duty of assistance owed to family members in cases where this would conflict with religious beliefs, or if they do not provide for the possibility of this conflict giving rise to situations of incapacity, which represents the precondition for the state's substitutive intervention, under Articles 2, 3, 19, 21, and 30 (2) of the Constitution. Finally, after having had the case referred back to it by the Court of Cassation, the Rome Court of Appeal held the parents responsible for participation in the crime of manslaughter as an unintended consequence of the offence of violation of the duty of assistance owed to family members. Despite the contrasts between the different judgments cited regarding the responsibility of the accused, the case as a whole is symbolic of the courts' consistent tendency to affirm the unlawfulness of refusing on religious grounds to allow minor children to receive medical treatment which is necessary for the protection of their health.

REFERENCES:

Rome Juvenile Court, 27 July 1994

LITERATURE:

Gius 1995, p. 61

DECISION:

This recent decision also reaffirms the well-established position of the courts that a refusal by the person with authority over a person lacking legal capacity to consent to therapeutic treatment needed to avoid damage to the health of the person lacking legal capacity is unlawful and can be overcome under Articles 333 and 336 of the Civil Code (which allow the court to order the appropriate measures in the event of parental behaviour which is damaging to minor children), or of Article 424 and 384 of the Civil Code (which provides for the guardian's dismissal or suspension and, consequently, the adoption of measures by the guardianship judge).

REFERENCES:

Turin Court of Appeal, Decree 3 October 1992

LITERATURE:

Rivista Italiana di Medicina Legale 1994, 802

FACTS:

A father and mother refused to let their minor son receive the compulsory vaccinations against tetanus, diphtheria and polio. In the interest of the minor, the Juvenile Court issued an immediately effective emergency order that the minor must be given, even against the wishes of the parents, the compulsory vaccinations which he had not yet received. The parents appealed against the order, claiming a violation of Articles 3 and 32 of the Constitution by Law No. 180 of 1978 in so far as it does not prescribe compulsory preliminary examinations before vaccination to avoid accidents due to the vaccination or any other health risks.

DECISION:

The Court of Appeal dismissed the complaint and affirmed the legitimate powers of the court to issue the order in question to protect the minor's health and his right to education which would have been jeopardised as the laws currently in force would have prohibited him from attending elementary school as he had not been vaccinated. The issue of constitutional lawfulness was declared to be completely devoid of any foundation because under Article 32 of the Constitution anyone can be lawfully required to undergo medical treatment even if it implies a specific risk; moreover, it is possible under the law to show the usual medical certificate for temporary exemption from treatment and make use of specific kinds of treatment as is done for example for persons suffering from immune deficiencies.

REFERENCES:

Potenza Juvenile Court, 29 July 1993

LITERATURE:

Rivista Italiana di Medicina Legale 1996, 299

FACTS:

A minor, declared at birth to be male, was affected by a case of clear female pseudohermaphroditism. In light of the parents' failure to act, the Public Prosecutor's Office requested the appointment of a special guardian for the minor to deal with the matter of the minor undergoing the necessary and urgent surgical, pharmacological and psychological treatment which would enable him to grow up in harmony with his real sex and with his social integration.

DECISION:

The Juvenile Court allowed the application of the Public Prosecutor's Office, recognising the necessity and urgency of the surgical and therapeutic treatment for the minor's physical and psychological well-being. At the same time, given the foreseeability of serious prejudice to the minor, the court ordered the suspension of parental authority for the duration of the guardian's action and the minor to be taken in charge by the Local Health Unit.

NETHERLANDS

HEALTH, HEALTH CARE AND THE PATIENT,
Selected jurisprudence, Netherlands.

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I. INTRODUCTION

Before presenting some of the major court decisions involving health care professionals in their relation towards patients, it is indicated to present an overview of the possibilities for legal action regarding health care delivery, medical treatment or any other act by a health care professional as part of his professional performance.

In the Netherlands, the law offers several possibilities to enforce the position of patients and rights of the patient through proceedings.[1]

According to the Medical Contract Bill (1995), the medical treatment contract between the health care professional and the patient imposes obligations on the professional. They include the requisite of compliance with the right of the patient to information, the requirement ofinformed consent by the patient, right of the patient to medical secrecy as well as the obligation of the physician to act in accordance with his professional standard. The physician can be sued for breach of contract if the rights of the patient under the contract are violated by negligence or tort.

Civil law is applied to situations in which the violation of rights has caused material or non-material damage to the patient. The patient must, as a general rule, prove that an error causing harm has been committed. At present an alternative method of dealing with patients complaints on the health care performance in hospital is tried out. It concentrates on complaints not exceeding a claim of FL 7.500, which may be put before a special arbitration board in case the patient and the hospital have not come to an agreement on the case. In principle the opinion of the Board will be binding on parties. The Board may come to adjudication of compenstation of damages, which mostly is followed by the insurance company of the hospital.

Medical treatment without consent and breaking professional secrecy are not only subjected to civil law. They are in fact regarded as a criminal act. However, they are mostly dealt with under civil law or medical disciplinary law. Criminal law is rarely used, with the exception of cases of euthanasia and abortion. The latter acts are not considered to be a part of the regular medical contract between the health care professional and the patient, they are not part of the medical professi-

[1] Scource: H. Leenen, S. Gevers, G. Pinet, The rights of patients in Europe, Kluwer, Deventer/Boston, 1993.

onal standard, though they have to be performed by a medical doctor as one of the conditions for legitimately performing those acts.

The Medical Disciplinary Law (the scope of which has been extended from 1998 onwards and now includes medical doctors, dentists, pharmacists, clinical psychologists, psychotherapists, physiotherapists, midwives and nurses) is considered to have a great influence on the development and recognition of the rights of the patient. The patient has a limited part in the proceedings of the disciplinary courts. The primary objective of the disciplinary law is to ensure that the health care povided by a health professional is compatable with good medical practice and of an adequate standard, as derived from science and experience.

Because of the different objectives of penal, civil and disciplinary law, it occurs that a disciplinary procedure coincides with, or follows after a civil or penal procedure against a health care professional.

The objective of the Bill on Complaints Procedures in health care (1995) is to provide the patient with a procedure which is easy accessable in case of complaints about the attitude of a health care provider. (For patients who stay in a psychiatric hospital on a compulsory basis, a seperate procedure is provided for in the Law on Compulsory Admittance to Psychiatric Hospitals.)[2] Following a decision by the competent complaint commission, the health care institution may take measures, but cannot impose sanctions. Sometimes the outcome of a complaint procedure is used in a civil procedure.

A complaint about any behaviour by a public authority in relation to health care can be addressed to the National Ombudsman. This includes for instance complaints on behaviour by the Minister of Health and the health inspectorate. The Ombudsman judges whether the behaviour has been correct or not. A sanction can not be imposed, but responsible public authorities have to take measures whenever indicated.

II. BEGINNING AND END OF LIFE

II.1. Assisted suicide and euthanasia on a patient's request

a. The present state of the art

Assisted suicide and euthanasia are subject to the Dutch criminal law. Like any other person, a doctor who assists a person in his/her death is formally open to criminal prosecution. Not all doctors who have performed euthanasia or assisted suicide are actually prosecuted. In particular the last decade, through court decisions criteria have been developed which have to be taken into account by the physician before euthanasia or assitance in suicide can be acceptable. Since 1991, a notification procedure for physician assisted suicide is in use. This procedure was legaly enacted in 1994, through procedural rules under the Burial Act.

Presently, a new procdure is discussed in Parliament. In entrusting the first examination of a case to a special commission, whose conclusions will be ponderous for the public prosecutor, the suggested change of the existing procedure aims at alleviating the burden a treatening process re-

[2] J. Legemaate, The pateints' right of complaint: Options and developments in the Netherlands, European Journal of Health law, 1996, nr. 3, 255-271.

presents for the medical doctor.

b. Procedural rules

In case of euthanasia or assisted suicide, the physician may not issue a declaration of a natural death, but instead has to report each case to the coroner by way of an extensive questionnaire. The latter in turn notifies the public prosecutor, who decides whether or not to pursue the case (in practice it is the meeting of general prosecutors who take the decision). In general, there will not follow a prosecution if the physician has complied with the requirements which have been formulated over the years by various courts. These requirements are as follows:

- the patient must be a mentally competent adult,
- the patient must consider his/her suffering unbearable and hopeless, with no prospect of relief (no alternative solution), although the disease does not need to be terminal,
- the wish to die must be voluntarily, well considered and persistent (= free and explicit request),
- the act must be performed by a physician,
- the physician must consult at least one other physician not involved in the case,
- the physician is obliged to keep records.[3]

If the procedural requirements are insufficiently met, a prosecution follows and the court will as a general rule impose a punishment.

The first condition excludes physician asisted death on requeast of the family. The second condition aims for instance at providing guarantees that the doctor does not give in because of pressure from the part of the patient, to which a doctor should resist in any case.

This latter problem has been the subject of a court case on assistance with suicide, in which case the doctor provided instructions to the patient on how to place a bag around the head. These instructions were seen as compatable with the expression in the Penal Code "being of help with". The doctor declared to have given assistance because the patient threatened to make an end to his life in a horrable manner. The case ended in a conviction with punishment, which was supported by the Supreme Court (December 1995).

c. Situation of necessity, not of a medical exception.

An appeal on "necessity" (in case of conflicting duties, "force majeure") is the legal basis for all decisions on euthanasia and assistance to suicide in the Netherlands.

If the above conditions are met, an appeal on "necessity" (in case of conflicting duties, "force majeure") usually results either in not prosecuting the case or in acquitting the physician. A failure to appropriately document a case makes control of a plea to a situation of "force majeure" impossible and therefore automatically leads to a punishment (April 1997, District Court of Leeuwarden).

[3] P. v.d. Maas, G. v.d. Wal, I. Haverkate e.a., Euthanasia, physician-assisted suicide, and other medical practices involving the end of life in the Netherlands, 1990-1995. The New England Journal of Medicine, vol. 335, nr. 22, 1699-1705.

Courts have repeatedly rejected the socalled "medical exception" as a legal basis for physician assisted death. A medical exception is seen as a situation where the relevant articles of the penal code do not apply to a doctor who in performing his medical profession, complies with the medical professional norms and standards: the doctor has acted in accordance with the medical-professional standard, with the prevailing scientific medical views and the medical ethical norms. An Act which brings about death of a patient intentionally cannot considered to be a medical act which should not be punishable for the sole reason that the doctor has acted within the boundaries of the medical-professional standard. Against this appeal the courts always hold that there is no proof nor argument for the suggestion that because the penal code does not apply when a practising doctor is performing as a doctor in accordance with the prevailing norms and standards, that code would apply only in case a doctor takes the life of a person while disrespecting the medical professional standard.

d. "Nemo tenetur principle", death certificate, reporting to the coroner.

In case the doctor issues a certificate of a natural death after he assisted a patient in her/his death, a punishment (mostly a fine) is ordered by the court irrespective of the circumstances.

The physician cannot evoke succesfully the "nemo tenetur principle" (no one is obliged to testify against himself) in this respect, according to two recent judgements (January 1997, District Court of Almelo, April 1997, District Court of Leeuwarden). An appeal on this principle in relation to the doctor's obligation of reporting to the coroner is equally unsuccesfull (Court of Appeal of Leeuwarden, April 1996).

Exceptionally however, though considered liable under criminal law, an assistant doctor who issued a certificate of a death[4] was not punished. Despite the fact that she had followed the information provided by the neurologist while the medical file which was consulted by her contained objective medical facts contradicting natural death, the Court took into consideration that the assitant-doctor had been on duty during the day, evening and night and at the same time was in a dependent position viz à viz the treating doctor, a neurologist. The latter had told her (by telephone) that she could issue a death certificate, that the (extremely high) morfine dosage which was prescribed and which was the direct cause of death, was administrated as a painkiller and that there had been "natural death" because of the intention of the prescription (pain killing) of which the death was a side-effect. (District Court of the Hague, October 1994.)

e. Psychiatric patients, mental suffering

For somatic patients, the Supreme Court has exceptionally accepted necessity also in a case where the doctor did not follow precisely the consultation rules.

For psychiatric patients the Supreme Court holds more stringent rules than in case of a somatic patient, but it does not preclude assistance to death, though according to the Supreme Court, extreme cautiousness is required. This applies in particular to the free and deliberate request of the patient, as well as to the fact that there is no alternative to end the severe suffering. In the case of a mentally suffering patient who is not a psychiatric patient, the Supreme Court requires the same rules to be followed as in the case of a psychiatric patient.

[4] According to the dutch law, a certificate of death may only be issued in case of natural death.

In 1994, in a case of assistance by a doctor in the suicide by a lady with severe mental suffering, the Supreme Court has accepted that when the general criteria for euthanasia and the additional requirements for psychiatric patients are met, a psychiatric patient is not excluded per se from euthanasia or assistance to suicide. The patient in question was severely depressed, one of her two sons had killed himself, the other died of cancer and she became divorced. Because of this, she extremely suffered mentally, but she was not mentally ill. She refused treatment which was offered to her. In 1993, the District Court acquitted the psychiatrist, the Court of Appeal followed that decision. The Supreme Court, however, convicted the psyhiatrist, but did not punish him. In this case, the Supreme Court had to consider an appeal to necessity on basis of mental suffering without a somatic or psychiatric origin. In fact, the Dutch Penal Code allows for all circumstances to be put forward in a plea for application of necessity. In the present case, which is rare because of the absense of a somatic or psychiatric disease, the Supreme Court decided to set the same criteria as those which apply in case of psychiatric patients. Unlike in the case of somatic patients, for psychiatric patients and persons with other forms of severe mental suffering, the doctor who is called for a second opinion has to examine in person the patient or suffering person. In the present case, the lady had not been examined by the colleagues who were consulted by the psychiatrist. Moreover, the Supreme Court is of the opinion that in principle an appeal on necessity cannot be invoked in cases where the psychiatric patient or mentally suffering person has refused to undergo treatment.

For somatic patients, the refusal to be treated can under certain circumstances result in the alternative of palliative care not being (sufficiently) available, the only remaining solution then being euthanasia or assisted suicide (provided the conditions are met).

For psychiatric patients, according to the Supreme Court, refusal prohibits an appeal to necessity. The psychiatrist was convicted (but not punished) because he had not followed these two rules (examiniation by the doctor called for a second opinion and no refusal of treatment) set by the Supreme Court.[5]

Another important conclusion can be drawn from this particular judgement. Through its judgement in the present case, the Supreme Court has put beyond doubt that the imminent death of a patient is not one of the conditions to be fulfilled in case of euthanasia or assistance to suicide.

The Medical Disciplinary Court of Amsterdam which dealt with the same case in 1995, agreed basically with the Supreme Courts' decision. However, in judging the professional aspects of the case, it came to the conslusion that the psychiatrist did not meet the requirements as to providing the necessary mental help before assisting in suicide. When the lady consistently refused help, he should have sent her to a colleague for adequate psychiatric help, or he should have considered compulsory admission to a psychiatric hospital. Also, the woman's capacity to take an autonomous decision regarding her death was questioned.[6]

f. Only a doctor

Another important signal which has been given in the jurisprudence concerns the person

[5] H.J.J. Leenen, Dutch Supreme Court about assistance to suicide in the care of severe mental suffering, European Joumal of Health Law, 1994, p. 377-379.

[6] M.C. Ploem, Selected legislation and Jurisprudence, the Netherlands, European Journal iof helath Law, 1995, 365-366.

who may under certain conditions legitimately evoke "necessity" as the basis for assisting a patient with his/her death. The "verification procedure" has only been laid down for doctors and not for other health personnel, such as a nurse. The situation is the same in case the nurse has acted upon order of a doctor. Unlike many other medical acts, which may legitimately be delegated (explicitely or implicitely) to for instance nurses, euthanasia is an act to be performed by doctors only. Such an act cannot be delegated to someone else. A nurse ought to be aware of this. (District Court of Groningen, March 1995). This applies also in case the patient explicitely requests the nurse to perform the act, in full agreement with the treating physician. Euthanasia upon request in a medical context may under circumstances make it possible that a doctor calls with success upon necessity. However, it does not imply that in the same situation if the act is performed by another health professional (in casu a nurse), the performance of the act is legitimate. The decisionmaking-procudure takes place under the responsibility of a medical doctor and the performance of the act is reserved to a doctor, as appears also from a case of a HIV-positif patient. In that particular case the nurse administered the deadly morfine-injection to a close friend and colleague, upon his request, after having discussed the matter thoroughly with the treating physician. Both the physician and the nurse considered the performance of the act primarily as an act of friendship carried out by an experienced nurse. The District Court had pronounced a punishment, the Court of Appeal, however, though convicting the nurse, did not give a punishment. (Appeal Court Leeuwarden, September 1995).

Another question which has risen before the courts is whether euthanasia or assistance in suicide is only legitimate in case the performing person is the treating doctor. The (disciplinary) courts have not accepted such a condition, though the Central Disciplinary Court in highest instance has indicated a preference in that direction. This because the treating physician is best placed to judge the patient, as well as the insistence and consistence of his request.

A complication arises in case the treating physician is not (yet) prepared to comply with the request of the patient and that physician calls upon another medical doctor (mostly one who is a member of the Dutch Association of euthanasia on request). It is the opinion of the District Court that in that case yet another independent medical doctor should be consulted by the latter one. This requirement is made in order to avoid that the medical doctor upon whom the first physician has called for assistance, focuses unilateraly upon his duty to assist in dying, rather than upon his (other) duty to protect life. (District Court of Rotterdam, April 1994.)

An intriguing question was raised before the medical disciplinary board in Amsterdam, through a complaint by a regional inspector for health concerning the presence of the treating physician of the patient during the assistance with suicide by a psychiatrist. The conclusion of the Medical Disciplinary Board (March 1995) was that in this particular case the physician did not bear co-responsibility nor was he in any advisory position. However, according to the Board, its opinion could have been different in case it should have been evident to the physician from the documentation by the psychiatrist that he had not (fully) been in compliance with the (professional) rules.

II.2. Physician assisted death without explicit patients' request

The reporting-procedure which was discussed under II.1. applies also in case of physician assisted death without explicit request of the patient.

Whereas in case of assisted death on request, the physician who has complied with all the conditions developed in the jurisprudence, taking into account all relevant requirements and

conditions, the public prosecutor or the court will usually dismiss the case on basis of force majeur, the situation is entirely different in the absence of a request. Because of the absence of self-determination, ending a patient's life without his/her explicit request raises more difficult questions of legitimacy. Such situations may arise in particular at the beginning of life, when a severely handicapped baby is born. At the other end of the lifeline, withholding treatment because it would be medically senseless may be confonded with assistance in dying without request.

The matter is anyhow closely associated with the medical judgement of "medically senseless treatment", which ought to result in abstaining from (further) treatment. The latter can, however, bring about a situation of extreme suffering, in which situation exceptionally death is brought about. This question was addressed recently in two court cases on handicapped born children.

In April 1995, the District Court of Alkmaar dealt with the first case about termination of the life of a severely handicapped baby. The Court did not convict the gynaecologist who was prosecuted for killing a brain damaged spina bifida baby described as "a sleeping plant". To its opinion, medical treatment was considered futile, there were no alternatives for alievating the suffe-ring, considering the scientific state of the art, the decision was carefully taken and carried out, taking into account the prevailing norms of medical ethics, the parents had repeatedly and consistently asked for termination of life. Under these conditions, the Court held that the decision could be reasonably justified and therefore excepted the plea for "necessity". The Court of Appeal (November 1995, Amsterdam) is of the opinion that when called upon to judge whether or not a doctor who has choosen against life, has made a justified choice in a case of conflicting duties, the utmost diligence is required. This the more so when an incapacitated person is involved. According to the Court, in such situations there is no room for a judgement on basis of subjective personal values about quality of the future life of the patient who cannot pronounce him/herself about that quality of life. The decision for ending the life of the baby was closely linked to the medical decision to abstain from any further treatment. Objectively, the life of the baby was dominated by acute, severe suffering without prospect of improvement, there were no useful alternative medical possibilities, like pain-killing. Therefore, under these circumstances the choice to stop treatment and to actively end life in respecting all conditions, was considered jusitifed. The doctor was acquitted.

In another case, the baby was affected by Trisomie 3, with a very poor life-expectancy. The baby was brought home from hospital on the parents' request. The parents had refused any further treatment. Further treatment would have been disproportional because it would only lengthen the dying process. According to the Court of Appeal all the conditions laid down by the Court of Appeal of Amsterdam in the before mentioned case had been met: there was no doubt about the diagnosis and the prognosis, there was no doubt about the parents consistent agreement with the life-ending act, other physicians had been consulted, the act was performed with all carefulness, the doctor had reported about his act. Therefore, the Court of Appeal (Leeuwarden, April 1996) supported the plea of necessity. The doctor was acquitted.

Assisted death of a patient by a physician further to a request of the children of the patient is considered a serious act, because of the absence of a request by the patient himself. The fact that the patient is in a hopeless, incurable situation does not justify another approach. (District Court of Groningen, October 1995.)

On the other hand, the Central Medical Disciplinary Board was of the opinion that a neurologist had acted responsibly in stopping medical treatment of an elderly man who suffered

severely after a brain-heamorraghe, the medical treatment being considered futile in this particular situation. Also the artificial feeding through an infusion was stopped as part of the medical treatment. The neurologist had moreover discussed the situation thoroughly with the wife of the patient. The Central Medical Disciplinary Board furthermore considered that the greatest diligence is required regarding quality of life judgements and that they should in any case not reflect personal views of the doctor. It was also of the opinion that in the present case the guard of, and care for the infusion has to be considered as a medical act. Provision of fluid substances and food through an infusion to the patient is artificial, it is a process which is guided and controled by a medical doctor and therefore predominantly falls under the medical responsibility.

II.3. Penal code and undeliberate deprivation of life

Another problem concerns the scope of the application of article 307 of the Penal Code on deliberate deprivation of life. A gynaecologist was prosecuted for not having taken the necessary medical action when it was urgently needed in 1992, as a consequence of which two unborn children had died. The gynaecologist who had taken over duty at 18.00 o'clock, had examined the cardiotogramms (ctg's) of the unborn children which were made earlier the same day. He was of the opinion that childbirth through an operative procedure was medically necessary. However, he respected the decision taken by his colleague earlier that day, to repeat the ctg's the same evening. When repeated, the ctg's showed decline. The gynaecologist was informed accordingly by the medical-assistant, but did not take appropriate action. In 1995, the District Court of 's-Hertogenbosch came to the conclusion that the gynaecologist had not caused the death of one of the unborn children by omitting any medical action. The foetus had died already. The other one was still showing signs of life and died just before birth/at birth. The District Court came to the conclusion that the facts as presented were such that it was considered unlikely that death of the second unborn child would have occured had the necessary medical action been taken. Therefore the Court was convinced of the penal causality. The Court considered also that the doctor in question was a skilful and responsible doctor. The bad relations between the gynaecologists in the hospital were the very reason for not coming into action in the particular case. Hence, according to the Court, the gynaecologist had given precedence to the conflictual relationship among the doctors, rather than to the duty to give care to the unborn children. The Court therefore was convinced of proof of penal liability.

The question which was then raised was whether the fact amounted to death caused by a criminal offence as ment in article 307 of the Penal Code: in other words it was questioned by the Court whether or not the article on "death as a consequence of a criminal offence" applies to the unborn. The Court was of the opinion that article 82a of the Penal Code, which determines the scope of the terms "deprivation of life" as including killing of a foetus who may reasonably be expected to stay alive outside the mothers womb, refers only to deliberately killing a viable foetus.

It held also that there was no basis in the drafting history of the penal code for the assumption that the protection of the unborn viable foetus which the Penal Code offers also applies to the death of an unborn viable foetus in case of an offence which is criminal (culpability) but not deliberate. In referring to a report of the Dutch Health Council on the foetus as a patient (1990), as well as to the Preamble of the UN Treaty on the rights of the child, the Court recognised that there are certain ongoing developments in the legal and medical doctrine, which might suggest a further protection of the unborn viable foetus. The Court considered, however, that there is not the least consensus on the scope of the protection of the unborn viable foetus. To assume application of the

article penalising death of an unborn viable foetus in case of an deliberate act also in case of culpability without deliberation, would be opposed to the requirement of the Penal Code that no one can be held guilty without specifiation in the law.

Also, the Court was of the opinion there was an alternative to base the charges on. In fact, the charge could have consisted of disgrading treatment/torture of the mother. The gynaecologist was acquitted.

III. ESTABLISHMENT OF PARENTHOOD

The establishemnt of parenthood by way of testing a blood-sample may have as a basis the wish of the child to know his/her father, the wish of a man to establish his biological fatherhood or the wish of a woman to establish the biological fatherhood.

a. fatherhood claimed by the man

In July 1994, the Higher Court of -'s Hertogenbosch had to examine the legitimacy of the opposition by a woman to cooperate in testing of her blood for the purpose of establishing fatherhood. The man claimed the cooperation in order to establish whether or not he is the biological father of the mothers' child. In case of a positive answer, he would be legally permitted to make visiting-arrangements. The woman based her refusal on articles 10 and 11 of the Dutch Constitution (right to physical and mental integrity, right to protection of privacy) as well as on article 8 of the European Convention on Human rights and Fundamental Freedoms (right to privacy and familylife). The Court was of the opinion that the man had an interest to establish fatherhood which was such that the cooperation of the woman in the blood-testing could be required. The procedure was sufficiently reliable (though not 100% watertight) and not considered intrusive. Moreover, the law on civil procedures (article 221) permits the Court to ask for expert-reports. The Court was of the opinion that a test of a blood-sample for establishment of parenthood can be considered as such. Therefore, the law provides a basis for the restriction of the womans' rights to physical integrity and privacy. The public interference with her rights was also compatible with article 8, para. 2 of the European Human Rights Convention, in particular where the interference with her rights were necessary to protect the rights of the man under article 8, para. 1 of the convention and based on the law.

b. fatherhood claimed by the woman

In 1995, the claim of a woman for establishment of fatherhood of her child by a DNA test to be performed on the partner of her mother, was not adjudicated by the President of the District Court of -s-Gravenhage (summary proceedings).

The woman did not only want the DNA-test to be performed in order to establish parenthood, but also an examination of the blood for sexual trasmittable diseases out of fear that she and her daughter were infected. The request for establishment of parenthood was not a request for establishing biological fatherhood in order to get alimony.

The man had been judged guilty of sexual relationship with the woman when she was still a minor and was placed in his custody. During that period she had given birth to a child.

The President considered the request for establishment of parenthood as such, without demonstrated interest for the woman, unsufficient ground for an infraction upon the man's bodily integrity. Even in case the request been made for establishment of biological fatherhood in order to get alimony, the DNA-test would not have been allowed for, because the duty of payment of alimony can also be estabiiahed without having recourse on the said examination. Because the request for an examination of blood to verify the presence of a sexual transmittable disease was made out of fear, which as such is unsufficient justification, and also because the examination was not the only method to establish infection (the woman could have undergone a medical examination herself, unless there were justifiable hindrances, which was not the case), also this request was rejected.

IV. INFORMATION AND CONSENT

IV. 1. Information failure and inadequate consent

a. The present state of the art

Information and consent to treatment are closely linked. Unsufficient information may result in inadequate consent. As a result of an information failure the patient may for instance not have had the opportunity to choose for an alternative method of treatment, or for the decision not to be treated because of the risks involved with a medical procedure. If so, possible damage because of the lack of appropriate information can result in civil liability. Even when the medical act has been performed technically correct, a shortcoming in the information provided beforehand may lead to compensation of damages because of the impact on the "informed consent" requirement.

Prerequisites are that the liability in meeting the standard of care required (appropriate information, adapted to the individual patient and the particular circumstances of the case) can be established and that there is (material or immaterial) damage which is particularly caused thereby (fault-liability). The patient has to prove that he would have taken another decision, had the information provided by the medical doctor been adequate. However, if for instance there is no (sufficient) documentation on the information given to, and the consent by the patient in the patient's file, the burden of proof of having provided adequate information often is put on the medical doctor.

b. sterilisation procedures

The majority of the cases brought before the courts because of information failures are related to artificial methods of birth control (sterilisation). The courts have held as a general rule that in case of sterilisation the requirements of information are particular stringent because sterilisation is not in general a necessary treatment method, because there are alternative methods of birth control and because if sterilisation fails, the consequences are in general far-reaching.

In cases before courts on childbirth following sterilisation, parental duties toward a child play a role.

The claims always involve a request for compensation of material and immaterial damages for expenses incurred with the care and education of a child (rearing-costs), lately also for (im)material losses by parents (like loss of income and carier perspective).

Parents may base a claim of "wrongful birth" on medical liability because of breach of contract based on negligence or tort and claim damage for at least expenses incurred with care and education.

IV.2. Information failure

The right to information is broader than the "informed consent" requirement. It covers also for instance rules to be observed after treatment, as well as information on the outcome of diagnostic testing. The latter issue was raised in a case concerning results of a screening test, which had taken place in the context of a cervix carcinome population screening programme. A primary physician who had been informed of the results by the laboratory was held liable because of failure to inform the woman of the deviating result of the test. In this particular case, the physician argued that it was up to the patient to inform about the test results. According to the Medical Disciplinary Court, the physician should have controlled whether the patient had taken contact by telephone to be informed of the results, as is usually done in the frame of these screening programmes. (Central Medical Disciplinary Court, 1994.)

V. DIAGNOSIS AND TREATMENT

V.1. preventive diagnostic tests

Preventive screening in particular may give rise to questions like, when should a test be offered in the doctor-patient relationship, when and under what circumstances can a doctor of a population screening programme be held liable if later on an affection develops which was undiscovered in the screening programme?

a. population screening

Unlike in the framework of the individual patient-doctor relationship, the documentation of the result of a diagnostic test in for instance a population-screeening programme for breast-cancer is generally confined to suspicion of malignity. No entries are made on findings which are not considered as malignent, because this would result in unnecessery further diagnostic acts. The mamma screening by radios does not result in a definitive diagnosis. Afterwards, when looking at the radios with the knowledge that a malignity has developed since, the diagnostic judgement on basis of the radio is undoubtly influenced by the later diagnosis.

In a case which was brought before the Medical Disciplinary Board, the radios of a woman who died of breast cancer had as unsual in a breast screening rpogramme, been examined by two specialists. The Medical Disciplinary Board consulted another radiologist. The three doctors were unanimous in their opinion that the findings were not suspect. Though there was a family case of breast-cancer and despite the fact that the laboratory assistant had suspected (uncertain) malignity, the Medical Disciplinary Board did not consider that the doctor had been negligent (July 1997).

b. prenatal testing

Wrongful birth/wrongful life in relation to omitting a prenatal diagnostic test is at the basis of a complaint which was filed in 1996 by the parents on behalf of their daughter (wrongful life) and on their own behalf (wrongful birth). They claim compensation for damage caused by the failure to perform a diagnostic test prenataly. They substantiate their claim by the fact that they would have

chosen abortion if such a test had shown a seldom genetic anomally. The case is still pending.

One of the interesting aspects to this case is that a decision has to be taken on the question whether a child has an autonomous claim for "wrongful life" and therefore a possibility to claim compensation for immaterial damages as a consequence of negligently failing to diagnose prenatally and this neglicence leads to the birth of a child who suffers from diabilities. In general, defects having been caused to the child by negligence in diagnostic procedures are easier to prove than the circumstance whereby the child is born because the parents were not well informed of, for instance, the medical situation of the still unborn child. In such a case, moreover, the child has not been harmed by any medical act during the pregnancy of the mother, but rather its very existence is due to a medical omission to proceed with diagnosis, whereby there was an information-failure viz a viz the parents.

V. 2. Treatment failure

a. wrongful birth

In February 1997, the Supreme Court came to the conclusion that the expenses involved with education and care of a child is a material damage for which the doctor who has made a medical failure is liable. Next to these damages, the doctor ought to recompense also the loss of income of the mother during pregnancy and birth of the child. The complaint was filed with the Court because the parents had chosen sterilisation of the woman as a method of bith-control. The woman became pregnant as a consequence of a professional medical failure, and gave birth to a healthy child. The Supreme Court insisted that the adjudication of compensation for expenses incurred with care and education of the child, which were unexpected and unaccounted for did not imply a (negative) judgement on the very existence of the child, nor was there any indication that the compensation would be against the dignity of the child. The Court rejects the view that the child could possibly suffer psychologically because the parents did not intend to have another child. According to the Supreme Court, the discussion is not on the question whether or not the parents wanted to have the child, but rather on the expenses incurred by the acceptance of the child by the parents. Not the child itself is the damaging factor, the damage rather being caused by a medical failure and the ensuing expenses for the care-taking and education of the child as a very consequence of the acceptance of the child by the parents. The explanations given by the Supreme Court take away any possible misunderstanding that liability and imputation of compensation for damages would be unthinkable without invading other basic values.

b. parental duties

In another case, which is still pending appeal, pertaining to a child which was severely handicapped (mentally and physicillay) because of failures which were made during his stay in the hospital, compensation was adjudicated to the parents. the compensation not only covered the expenses incurred by the care of the child, it included also conpensation for damage they had themselves suffered by a default by the medical doctors in the context of the medical treatment contract. The verdict of July 1995 by the District Court of Amsterdam was considered a change in the jurisprudence on compensation for damages incurred in health care. In this particular case the court reasoned that in accordance with the Civil Code, parents are under the obligation to take care of, as well as raise their children. This care also includes medical treatment. For the latter purpose, whenever necessasy parents conclude a medical treatment contract (as enacted in the Civil Code) with a

medical doctor or hospital for the health and wellbeing of the cihild. It follows from their duty towards the child, that they have themselves interest in appropriate treatment of the child and therefore they are autonomously entitled to a just fulfilment of the treatment agreement. Next to this, the district court concluded that parents not only conclude such an agreement for the interest of the child, on the basis of the parental duty to take care of the child, but also for their own interest, precisely because they have to comply with their duty to take care of the child. They in fact conclude a medical treatment agreement not only for providing appropriate medical care to the child, but also for preventing harm to the health of the child which may result from not securing appropriate treatment on basis of their own interest to act in compliance with their parental duty to take care. The court reasoned that parents with a healthy child have more freedom to accomodate their life than in case of a child which because of mental or physical handicap requires permanent care and attention by the parents. Therefore both the claim for compensation of loss of income by the mother as well as the claim for compensation of immaterial damage were adjudicated. Also noteworthy in this case is the fact that the court action was initiated by the Organisation of Consumers on behalf of the parents.

VI. RESPONSIBILITY OF PUBLIC AUTHORITIES FOR APPROPRIATE QUALITY OF CARE

a. HIV-infection

In the Netherlands the organisation of blood-donation and blood tranfusion is primary the responsibility of the services themselves. This includes also the safety measures to be taken, like screening of donors and testing blood. This does not however discharge the government of its final responsibility.

The National Ombudsman has dealt with a complaint put forward by the Dutch Association of heamophiliacs against the minister of health. The complaint pertained to HIV infection by blood-products which had taken place in the period between 1982 and 1989. The Association was of the opinion that the minister of health had not taken sufficient action to prevent transmission of the virus. In 1983 information had become available indicating transmission of the virus through blood(products), followed by warnings from the medical field that the haemophiliacs were particularly vulnerable to the risk of contamination.

It is estimated that during the period from 1979-1985 around 170 out of 1.300 haemophiliacs were infected with the virus. on 31 December 1994, 554 of them had developed AIDS.

The ministry had been timely and correctly informed, the developments were followed closely, as were the activities of the blood services.

End 1984/early 1985 it was sufficiently demonstrated that heating of bloodproducts was an effective method to prevent HIV infection. There were at that time indications that the plasma from Dutch donors was not free from infection. However, neither the blood services nor the government had been active in providing information on the risks involved with bloodproducts which had not been treated with the heating-procedure.

According to the Ombudsman, the government ought to have taken measures to prevent the

use of Dutch products and in stead to import products which had been handled properly.

In June 1986, among the health services involved consensus was reached on the methods of preparing Factor VIII-products on which the treatment of haemophiliacs is based, in such a manner that infection could be avoided (heating-procedure). It was agreed that the consensus would be implemented from 18 June 1987 onwards. However, implementation was realised only as from 1 january 1988.

The Ombudsman found that the government had been negligent in securing timely application of the consensus. The Ombudsman also concluded that there had not been negligence from the part of the government in providing information to the health care sector.

In its report of 1995, the Ombudsman is of the opinion that in principle, the public authorities have a complementary role. However, the government also has responsibility for appropriagte action at the appropriate moment in order to prevent serious health risks. It is the responsibility of the government to make use of its possibilities in this repsect in case there are signs that the health services themselves do not act adequately and promptly. An active governmental policy is the more indicated in case the thread to the public health is serious.

The situation was complicated because of certain exceptional circumstances, like the unsufficient national supply of bloodplasma, dissatisfaction with the organisation of the blood transfusion services, discriminatory elements of a policy which would exclude certain groups of the population (homo-sexuals) of being a donor.

The Ombudsman was of the opnion that in some respect the minister had not taken speedily enough action, was not always sufficently informed or had been too passif. At the same time, he recongised that the period of time he was asked to judge the activities of the government about, was one of uncertainty. Early 1982 there was not yet sufficient knowledge about AIDS, its causes and modes of transmission. The Ombudsman did not have the competence to look into the causual relationship between the ineffectiveness of the government until 1 January 1988 and the cases of HIV-infection. His only competence is to judge whether a public authority has acted properly or improperly in judging the seriousnes of a health risk and subsequent action.

b. health care in prison

In 1995, the National Ombudsman investigated a complaint about the functioning of the health care services in prison. The investigation was made after a complaint by the comittee of prisoners of the prison in Veenhuizen against the minister of Justice, who is the reponsible authority for prisons, including the (medical) care in prisons. The complaint followed the tragic death of a prisoner, which was due to unsuficient and inapproriate medical care and medical treatment as well as general (hygienic) care. The medical complaints by the prisoner were suggested to be a consequence of use of drugs.

Once the medical problem had been recognised, medical and overall care remained inadequate.In fact the prisoner had been seriously neglected.

The prisoner in question apparently suffered from tuberculosis, which was not recognised as such. The serious shortcomings in the care for the prisoner, who even did not receive the most basic hygienic care, were due to a combination of circumstances, including a failing relationship between

the prison personnel and the nurses of the medical service, resulting in pointing to each other for responsiblity, in stead of taking care of the prisoner. Also, no urine control had taken place to verify the presumption of drug-use, up until six days before the death of the prisoner. This was the more serious because of the situation of illhealth of the prisoner. The conclusion that there use of drugs was not the cause underlying the health complaints, was not followed by sufficient appropriate action by the prison doctor to guarantee an appropriate level of care to the prisoner. He also neglected to consult the Directory Board on the lack of care given to the patient.

The Ombudsman found the shortcomings in the functioning of the Directory Board, the doctor of the prison, the nurses and the prison personnel most serious. The Directory Board has a supervisory responsibility for approriate functioning of the medical service, the medical doctor like the nurse have repsonsibilities under their professional standard, prison personnel has also responsibilities including those for general care and hygiene. None of those involved had taken their responsibilities. In this respect he comes to recommendations on availiblity of health care for prisoners, on the description of functions of the personnel and on the supervision by the Directory Board.

c. health inspectorate: inspection and control

The activities of the health inspectorate on the manner in which it had dealt with a complaint pertaining to the quality of care given to a patient by two gynaecologists in a hospital were the subject of a report by the Ombudsman in 1997.

The inspectorate had been informed of difficulties in the functioning of the partnership of gynaecologists. Various complaints by patients were received by the health inspectorate since 1994, also medical professionals had hinted at doubts about quality of care, and patient organisations had filed complaints since June 1995. The health inspection also had recieved the decisions of the Medical Disciplinary Court of Amsterdam of Oktober 1995, which concerned the same gynaecologists and which showed indications of dysfuntioning of the partnership of gynaecologists. As the Dutch Association of Gynaecology and Obstetrics were to perform an audit, the health inspectorate did not give suit to its earlier decision to carry out an extensive inspection of the situation. As a result of the report by the professional organisation[7], improvements of the situation were promised on basis of the recommendations which were made.

The health inspectorate paid an inspection-visit to the partnership in September 1996 only, and another one in July 1997. The Ombudsman's concludes that the health inspectorate has not been active until March 1996, confining itself to some meetings with the director responsible for the care of the patients in the hospital, a first visit to the partnership was made in March 1996, followed in September 1996 and July 1997 by inspection-visits. Because of the seriousnes of the information received by the inspectorate on the circumstances in the hospital concerning the quality of gynaecological care, the Ombudsman is of the opinion that the health inspectorate ought to have taken action at a much earlier moment of time, that the health inspectorate when it came to action was not active enough in gathering information from all parties concerned.

The patient-organisations who had send a report to the inspectorate in August 1995 should have been contacted by the inspectorate in the course of its inspection, one year later.

[7] A particularity in the case is that the judge has ordered publication of the report of the professional organisation unbder the act which deals with public information.

The Ombudsman came to the conclusion that there had been shortcomings in the performance of the supervising duties by the health inspectorate in actively supervising the quality of care, in acting timely and adequately on signals about evident deficiencies in health care delivery.

SPAIN

SPANISH CASE-LAW ANALYSIS ON BIOMEDICAL MATTERS (1993-1997)

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I. JURIDICAL STATUS OF THE NASCITURUS

1.1. Voluntary interruption of Pregnancy

Sentence

Provincial Court of Oviedo, 1 February 1997 (Criminal Chamber).

Source

Actualidad del Derecho Sanitario, No. 27, April 1997.

Ruling

The Court of Oviedo has condemned a psychiatrist and a gynaecologist as responsible of an abortion offence for "making fun of the spirit" of the art. 417 bis of the Spanish Penal Code. The psychiatrist invented the therapeutic indication of the abortion by physical damage for the person who was pregnant, as quotes the sentence, and the gynaecologist practised the abortion without testing if the report of the specialist corresponded to the reality: "The gynaecologist, limiting to trust the final conclusion of the psychiatrist report without valorising its content, not as a physician, but as a responsible person of University level, ended up with the gestation in the wrong idea not excusable (overcome error) that the cause of the justification of the abortion concurred". Article 417 bis of the Penal Code refers that it is not punishable the abortion practised by a physician, with the consent of the woman, when it is necessary to avoid a great damage for the physical health or psychological illnesses of the pregnant, and it must be on record in a previously emitted report by other specialist psychiatrist.

Juridical Basis

The most significant of the sentence is question are mainly two:

1. The possible concurrence of overcome or not overcome error about the illicitly of the interruption of pregnancy.

The overcome error has been admitted by the case-law when in the supposed cases of interruption of the pregnancy the person accused of the offence had acted without valorising the content of the report, trusting improperly the final conclusion. On the other hand, the invincible error of prohibition is admitted when the accused, with no medical and juridical knowledges, thinks that is proceeding in a licit way when giving his/her consent for ending up with the gestation.

2. Matters that refer to the possible exclusion of the antijuridical by concurrence of the cause of justification gathered in the art. 417 bis 1.1 of the Penal Code.

Keywords
Criminal Responsibility by abortion offence; sanction to psychiatrist; sanction to gynaecologist; overcome error of the gynaecologist.

Sentence

Supreme Court, of 19 January 1995 (Criminal Chamber).

Source

Repertorio de Jurisprudencia Aranzadi, Vol. I, 1995, Marginal No. 154.

Ruling

The High Court states that there is no place for the causation recourse by infraction of the constitutional precept, interposed by the accused, against the sentence that condemned him as author of the abortion offence in ideal audience with an offence of temerity imprudence with result of foetal injuries with deformity.

Juridical Basis

It is alleged that there exist a violation of the art. 24.2 Spanish Code, as it is not appreciated in the cause, the minimum evidential activity of charge, obtained with guarantee that allows to affirm, as the sentence makes, that the recurrent will be author of an abortion offence. Nevertheless, it is understood as safeguarded, the principle, when the Court makes an appreciation in conscience and determines that there exist enough proofs, supported at the same time with expert and testify proofs.

Keywords
Abortion; foetal injuries.

Sentence

Supreme Court, 7 February 1996 (Criminal Chamber).

Source

Repertorio de Jurisprudencia Aranzadi, Vol. I, 1996, Marginal No. 804.

Ruling

The Supreme Court states to be place to the appeal and pronounces second sentence in which maintaining the other pronouncing of the person who appeals, absolved the accused -the pregnant woman-, of the offence of abortion, subject of the accusation.

Juridical Basis

Of the different Juridical Basis that were exposed to ask for the absolution of the woman, -spontaneous abortion, presumption of innocence, invincible error-, only the last argument was esteemed by the Court. It was considered that she acted with invincible error as the report of the specialist was enough to have an abortion without valorising the medical indication prescribed as a requirement to legally have an abortion. It was provided that the woman had the invincible believe to be licitally proceeding and that it is why she gave her consent to the interruption of the pregnancy.

Keywords
Abortion and no criminalising supposed cases; invincible prohibition error in the pregnant woman.

Sentence

Supreme Court, 3 April 1997 (Criminal Chamber).

Source

Actualidad Penal, No. 25/16-22 June, 1997.

Ruling

The Supreme Court condemns a professional for prescribing a pregnant woman -that wanted to have an abortion- to take one medicament to provoke the interruption of pregnancy.

Juridical Basis

The recurrent combats that his actuation had produced the abortion, but the Court do not estimate it considering that there was an abortion *strictu sensu* and not only a general information about the medicament. Besides, art. 145.1, of the Penal Code sanctions to who produces the abortion in a woman with her consent, out of the cases that the law allows.

Keywords
Abortion and no criminalising supposed cases; invincible prohibition error in the pregnant woman.

1.2 Foetal injuries

Sentence

Supreme Court, 13 October 1992 (Civil Chamber).

Source

Repertorio de Jurisprudencia Aranzadi, Vol. IV, 1992, Marginal No. 7.547.

Ruling

The physicians are condemned as through fault or negligence derived of a failure to give assistance behaviour, some foetal injuries are produced during the birth. That it is to say, there was not the adequate handling that, as the medical technique, it would have obtained a birth where the foetus will not have had the injuries that he had at the end.

Juridical Basis

The demanded physicians alleged that it was a vaginal birth with difficulties, due to the size of the foetus and that was why, they could not act in other way.

Keywords
Extracontractual fault; foetal injuries.

Sentence

Supreme Court, 5 April 1995 (Criminal Chamber).

Source

Actualidad del Derecho Sanitario, No. 6, June 1995.

Ruling

The Supreme Court condemns a matron for temerity imprudence, as she omitted to inform the gynaecologist on call the situation of a woman who was going to give birth with patent signs of foetal suffering. As in the sentence, the matron infringed the due norms noticing the magistrates that the elements of the information that facilitate the process, allow to notice a serious negligence to be together in the fact, improvidence and meridians throughtlessness and the infraction of the more elemental norms of care.

The Court absolved the physician in call as he adopted all the adequate measures when he went to visit the patient.

Juridical Basis

It was alleged that there were an error in the facts in the appreciation of the proof, as well as problems at the time of criminal calification of the facts. Without being both arguments estimated by the Judge.

Keywords
Foetal injuries; temerity imprudence by the sanitary professional; diligent actuation by the side of the gynaecologist; civil responsibility.

1.3 Failure in the prenatal diagnosis

Sentence

Supreme Court, 6 June 1997 (Civil Chamber).

Source

La Ley, 25 June 1997.

Ruling

The Court condemns jointly a sanitary professional and the Health Service of Valencia to indemnify to the demanding in compensation for injuries and prejudices. The matter has place when some proofs to detect possible foetal anomalies are done to a pregnant woman. Nevertheless, one of the proofs, by several not confirmed causes, failed without the communication of the situation from the physician to the woman a month later. Therefore, when the pregnant woman known the failure in the proof, it was not possible to interrupt voluntarily the pregnancy as the legal date for it was expired.

Juridical Basis

It was considered the infraction of some norms of the legal legislation, nevertheless the Supreme Court did not estimate them in its majority for considering such norms *per se* had a nature decidedly focused to the administrative order, that it is why according to case-law of this Civil Court, the referred precepts could not be fundamented in norms of other character.

Keywords
Jointly civil responsibility; not possibility of legally interrupt the pregnancy in the legal stabilised date; medical negligence.

Other related decisions

First Instance Court No. 11 of Bilbao, Sentence of 26 September 1994 (original document).

1.4. Donation and utilisation of the embryo and human foetus or his cells, tissues or organs.

Sentence

Constitutional Court, 19 December 1996.

Source

Original document.

Ruling

The sentence of the Constitutional Court does not estimate the recourse but with two particularities, from the formal point of view.

1. That the interjection of art. 5.1 "according the applicable normative dispositions" will be interpreted as art. 417 bis of the Penal Code.

2. That the interjection "with the adaptations that the matter requires" of art. 9.1, it is unconstitutional and null therefore.

Juridical Basis

This sentence is the result of a unconstitutional recourse interposed against the Law 42/88 about donation and utilisation of embryos and human foetus or his cells, tissues or organs. It is considered unconstitutional the totally of the Law and concretely articles 1, 2, 3.2, 3.3, 5.1, 5.3, 5.7, 5.8, 5.9 and the First Additional Disposition, sections d) and e) ast they contradict arts. 9, 10, 25, 53 and 81 of the Spanish Constitution. Definitely, the most relevant themes that are questioned are: the determination of the titular person of the right to the life; the consideration if an embryo or a foetus are or not viable; the human dignity in relation with the foetus and embryos donation; the infringement of art. 81 of the Spanish Constitution, that requires organic law for regulating fundamental rights and public freedom.

II. INFORMED CONSENT

2.1. General criteria

Sentence

Constitutional Court, 3 October 1997 (Criminal Chamber).

Source

La Ley, November, 1997.

Ruling

States that there is not place for the appealing against the sentence of the Provincial Court of Albacete, of 25 July 1996, that absolved to three physicians (surgeon, anaesthetist, and physician on call) the offence of professional imprudence.

Juridical Basis

It has been proved that there existed consent for the operation of a patient that was 79 years old and that suffered a prostate hypertrophy with irregularity in the right side, as well as a right litiasis in the urethra. It was pretended to practise one operation through endoscopy, but half an hour before of it, he was communicated that there was the possibility of being practised open surgery, that will extend the time of the operation. The patient died after the surgery after being recognised by the physician on call, as he was suffering hypertension and he had tachycardia. It is possible that accused surgeon did not practise an exhaustive description of all the risks, but the minimum common sense does not allow to assume that a surgery act of medium complexity in an 79 aged person, could be something complete out of risks. The plaintiff, son of the person who died, was conscious that there existed some risk, as he proposed the surgeon that the operation will take place in the Provincial Hospital, as he knew that himself, facing any emergency, will have at his disposition more human and material media, The consent existed, the authorisation was signed for the intervention. The fact that the document is was not incorporated to the clinical file of the patient, does not mean that this would have not taken place. There existed adequate information, express consent of the patient and of his close family, previous exposition of the surgery incidences and acceptance of those, as well as, absence of damage of trust, together with a correct surgical technique and adequate facultative attention in the post surgical period immediate to the operation by the side of the main surgeon with charge of negligence, it is cancelled any possibility that this prospers, when through it, so it is exaggerated, to the point of given formal requisites inalienable and that desneutralizes the relation of trust that should exist between the facultative and the patient, the exigency of an adequate information as support of the given consent.

Keywords
Informed consent; adequate information

Sentence

Supreme Court, 24 May 1995 (Civil Chamber).

Source

Repertorio de Jurisprudencia Aranzadi, 1995, Marginal No. 4.262.

Ruling

Reject of the appeal interpose against the sentence of the Provincial Court of Zaragoza (1992), that appreciates jointly responsibility and condemns the National Institute for Health (INSALUD) and the physician for the ligature of tubes realised during the birth with the consent of the husband of the patient but not with hers.

Juridical Basis

By the circumstances of the patient, it was convenient to make the ligature of tubes, but with independence of the correction of the treatment, as it did not concurred the urgency that did not allow delays as there could be irreversible injuries or death of the patient, it was compulsory to inform the patient about the possible effects and consequences of the intervention and obtaining her consent to this effect.

Keywords
Informed consent; urgency.

Sentence

Supreme Court, 31 July 1997 (Civil Chamber).

Source

Repertorio de Jurisprudencia Aranzadi, 1997, Marginal No. 3.346.

Ruling

It revokes the Sentence of the Provincial Court of Badajoz, 15 July 1993 (see this sentence) and absolves the National Institute for Health and the physician that assisted the minor.

Juridical Basis

The Doctor assisted the patient with absolute dedication. He fulfilled with this obligation of informing about the convenience of practising, to the patient an annoying and painful biopsy of the mucous membrane of the intestine, that the parents did not allowed.

Keywords
Duty of information; minor.

Sentence

Supreme Court, 2 October 1997 (Civil Chamber).

Source

Repertorio de Jurisprudencia Aranzadi, 1997, Marginal No. 7.405.

Ruling

Absolving of the physicians that fulfil with the obligation of informing to the family of the patient (minor) about the treatment.

Juridical Basis

The appellants were informed that, facing the seriousness of the illness, the treatment will consist in given high doses of chemotherapy, as well as regenerating cell transplantation of osseous medulla, and besides, they were informed about the technique of the transplantation. Such treatment was admitted by the plaintiff. Although instead of the 20 or 25 days that the duration was predicted, the treatment took place during 80 days, until the patient died, it is considered that there was enough information.

Keywords
Information regarding treatment; minor.

Sentence

Supreme Court, 10 November 1997 (Civil Chamber).

Source

Repertorio de Jurisprudencia Aranzadi, 1997, Marginal No. 7.868.

Ruling

It revokes the condemn that the Provincial Court of Santa Cruz de Tenerife imposed to a physician and to the National Institute for Health by total injury of the skin muscle nerve and the trapped of the left bone of the wrist that a patient suffered during an operation.

Juridical Basis

It is not proved that the physicians will actuate without diligence and that the damage will be consequence of its faulty intervention. The omission of information about the risk, that supposes negligence, only generates responsibility if between this and the injury there exist causal connection.

Keywords
Omission of information; causal connection.

Sentence

Supreme Court, 26 October 1995 (Criminal Chamber).

Source

Actualidad del Derecho Sanitario, No. 15, 1996.

Ruling

It does not estimate the recourse of causation and condemns a gynaecologist for making a tube ligature, after an urgency caesarean, without the consent of the patient.

Juridical Basis

The hysterectomy would have been compulsory if the haemorrhage would not be controlled. As it was controlled, the ligature required the consent of the patient, although the medical criteria advise to avoid future high risk pregnancies. The correct actuation does not legitimise the physician to do it without the consent, unless it is necessary to take urgently some decision to the respect, as it exists imminent risk for the life or the integrity of the person.

Keywords
Informed consent; urgency.

Sentence

High Justice Court of Navarra, 22 May 1995, (Social Chamber).

Source

Actualidad del Derecho Sanitario, No. 9, 1995.

Ruling

It is confirmed the sentence of instance that condemns a medical team for physical, psychical and moral injuries, derived from the numerous operations that did not reach to stop an adenoma of prostate of the patient (with several injuries). Absence of the written authorisation of the patient for the operation .

Juridical Basis

In those surgery operations where exists a percentage of possibilities to produce a harmful determined result, the physician has the obligation of informing of such eventualities to the patient which, in contrary case, generates the right of him to be indemnified by the harmful results produced and this with independence that the actuation of the professional with be technically correct, as the fulfil information of such risks, integrates one of the assumed obligations by the facultative or medical team that is acting. This informed consent is only the cause of the acquit of the inherent injuries to the operation, of which the patient has been adequately informed before giving his consent for the operation, and always that such damages had not been caused by the negligent actuation or omission of the facultative, as with no doubt it will be his actuation according the *lex artis ad hoc* the one that has to serve as a base to judge about the existence or absence of the responsibility by his actuation in each case.

Keywords
Informed consent; requeriment for *lex artis*.

Sentence

Superior Court of Justice of Castilla y Leon, 20 May 1997 (Social Chamber).

Source

Actualidad Jurídica Aranzadi de Tribunales Superiores de Justicia, 1997, Marginal No. 1.457.

Ruling

It does estimate the recourse against the sentence that absolves the National Institute for Health for given faulty medical service, as the consent for the operation was not given. It condemns to the payment of the indemnification.

Juridical Basis

It does not appear that information would be given to the patient of their family and nor will give their consent to go under surgery and as the consent is included in the *lex artis*, it is considered that the operation was contrary to this. The facial paralysis that he suffered from is a risk of the otological surgery, of which he was not warned.

Keywords
Informed consent; requeriment for *lex artis*.

Sentence

Provincial Court of Barcelona, 25 June 1993 (Criminal Chamber).

Source

Repertorio de Jurisprudencia Aranzadi de Sentencies dels Tribunals Superiors de Justicia, Balears i Audiènces Provincials, 1993, Marginal No. 1.125.

Ruling

Does not estimate the recourse against the sentence of the Criminal Court, No. 16 of Barcelona of 4 March 1993, that absolves the physicians the took out the molar 37, in an operation where it was previewed only the extraction of molar 38, since when the patient has suffered several consequences.

Juridical Basis

There was not infraction of the *lex artis* by the accused specialist, non direct or indirectly by the absence of the consent of the patient. The extraction of the molar 37 was necessary when the intervention due to the problems that had the patient, practically impossible to predict previously. To not practise it, would have given place to mechanical and nervousness infection complications.

Keywords
Consent as a requirement for *lex artis*; moment to give the consent.

Sentence

Provincial Court of Badajoz, 15 July 1993, (Civil Chamber).

Source

Original document.

Ruling

It establishes that the responsibility derived from the moral injuries suffered during the time of the treatment, by not knowing the diagnosis and for the expenses occasioned in the Clinic Navarra, of the physician and of the National Institute for Health for not informing to the parents of the minor of the importance of a diagnosis proof.

Juridical Basis

Although the physician made a correct treatment in function of the diagnosis, as it was taken out of the made proofs, that the patient had fibrosis in the lungs, it incurs in the responsibility as due to the deficient information, the parents decided to deny the duodenal biopsy to avoid non necessary suffering to the daughter. Later on, in the Clinic Navarra and through this proof, a important illness was diagnosed.

Keywords
Information concerning diagnosis.

Sentence

Provincial Court of Pontevedra, 2 June 1995 (Civil Chamber).

Source

Actualidad Civil, Vol. 4, 1995.

Ruling

Solving of a physician by the failure of an aesthetic surgical operation that consisted in the collocation of two titanium implants, to which the patient was not tolerant, risk to which she had not been warned.

Juridical Basis

The reach of the information should be referred to the essential or transcendental aspects, as it does not constitute an own content of itself any imponderable or extreme of accidental or secondary character. The responsibility by lack of information should cover a certain causal connection importance or, in other terms, that if the patient would have known what has been occulted or defective manifested, she would not have had the treatment or conditioned itself in other terms. When the rate of failures is of the 5%, it is considered that is for a circumstance of accessory order and casually with no transcendence, even in the aesthetic surgery, where the major guarantee between the physician and the patient is similar to a contract where it is required major guarantee for the obtaining of the result than in supposed cases of curative medicine. In the concrete case it is not accredited that the facultative would have guaranteed a result.

Keywords
Content of the information.

Sentence

First Instance Court No. 14 of Valencia, 20 May 1996, (Criminal Affairs).

Source

Original Document.

Ruling

Absolving of the physician that prescribed a medicament that produced serious secondary effects. Condemns to pay a indemnification by the laboratory that made it, because of not informing about this possibility in the prospectus.

Juridical Basis

The physician acted correctly prescribing the medicament. The problem appears in the information of the prospectus, that is directed to the people and has be understood by these, This prospectus did not content any information about the possibility of appearing of the "Sindrome Neuroleptico Maligno". As a general rule, the patient or his familiars, depending of the characteristics of the patient, have to be warned about the risks of medication and the conduct to follow in each case.

Keywords
Information about medicaments.

Sentence

Court No. 13 of Barcelona, 14 July 1997.

Source

Original Document.

Ruling

Absolving of the physicians and the Dexeus Clinic of Barcelona. They did not act with temerity professional imprudence. The treatment was correct and consented by the patient.

Juridical Basis

The doctor informed to the patient, that had neurosis obsessive chronic, of the possibility of operating with “radiofrecuencia” or “radiocirujia” and the risks of both of them, minors in the second case. The patient signed a consent document. When his suffering did not stop, he had a second operation in other hospital and he died by in complications caused by posterior medication. The first intervention, that is the one that the accused practised, was the correct one although it did not had the results that they were waiting for. The patient consented with capacity for it, as he affirmed the psychiatrist that treated him.

Keywords
Informed consent; results of an intervention

2.2. Minimum risk. Does it exist a duty to inform about?

Sentence

Supreme Court, 31 July 1996 (Civil Chamber).

Source

Actualidad del Derecho Sanitario, No.19, 1996.

Ruling

It does not estimate the recourse against the sentence of the Provincial Court of Barcelona (1992), that condemned a traumatologist because he did not informed of a risk that is produced in the 2% of the cases (therapies after an operation to eliminate the cervical discal protusion).

Juridical Basis

The fact that the risks will be minimum does not exempt the obligation of communicating them. It is obligatory to explain which are the risks and obtain the authorisation, in a explicit, clear and decisive way, as the facultative does not answer of the happening of the event that can injure, even in the supposed case that exist an absence of culpability. Besides, the physician did not fulfil the *lex artis* when he did not use all the ways for the implant to be located in the correct place or not to be displaced afterwards.

Keywords
Informed consent; minimum risk; *lex artis*.

Sentence

Supreme Court, 23 September 1996 (Civil Chamber).

Source

Repertorio de Jurisprudencia Aranzadi, 1996, Marginal No. 6.720.

Ruling

It does not estimate the appeal against the sentence of the Provincial Court of Barcelona, that absolves the physician and the "Institut Catalá de Salut", of the responsibility for injuries after the intervention.

Juridical Basis

Besides of the correction in the operation to remedy the advance of the illness (espondiolistesis), the proved facts accredit that the physician informed the patient about the results of the operation, as in the case that it would not be satisfactory and efficacy. The afterwards injuries (anquilosis of several articulations) were due to a congenital multitraumatism process)

Keywords
Adequate information; injuries.

Sentence

High Court of Justice of Galicia, 8 June 1995 (Administrative Litigious Chamber).

Source

Actualidad del Derecho Sanitario, No. 7 and 8, 1995.

Ruling

It absolves the Administration in a process in which there was a debate between an operation by hypertension, in which there existed at least 1% of paraplegia risk, and where was not proved that this extreme was informed.

Juridical Basis

The medical actuation in accordance to the *lex artis*, exempt from responsibility. It is not necessary to inform about minimum or remote risks. The lack of this information is not consider necessary, as the decision of the physicians seems to be the one expected by any person in the conflict of risking a minimum percentage of risk in front of a such problematic future concerning health.

Keywords
Information about minimum risk; requeriment for *lex artis*.

Sentence

Provincial Court of Barcelona, 22 April 1994 (Civil Chamber).

Source

Actualidad del Derecho Sanitario, No. 2, 1995.

Ruling

It is absolved the civil responsibility to five physicians and the Catalan Institute is condemned to indemnify to a patient that had serious consequences afterwards, after considering that she was not enough informed about the risk of the intervention to give her consent.

Juridical Basis

To which refers to the medical praxis from the technical point of view, it is not demonstrated the existence of the contrary action or omission to the *lex artis*. She was warned that she would have to be in the hospital for 48 hours after an exploration though cauterisation of the femoral artery under local anaesthesia, for which it existed a risk "but little" of complications. Different question is the responsibility by lack of information to the patient. The patient suffers consequences, that are practically not avoidable even with the correction in the proof. The responsibility by lack of information is imputable to the sanitary centre in the treatment and identification of illnesses in which, by the difficulty in its diagnosis and the complexity in the technical to employ, intervene several pluripersonal equipments. In this case, it can not be required to all and each of the ones the integrate it, the reiteration of information. It is revealed so, not the existence of the individually imputable omission to the members of the medical team, that in one or another phase attended the demanding, but to he functioning of the firm where they give their services.

Keywords
Information about risks.

Sentence

Provincial Court of Soria, 12 December 1994 (Criminal Chamber).

Source

Actualidad del Derecho Sanitario, No. 29, 1997.

Ruling

It absolves a physician for not fulfilling the consent in the realisation of a "cologio-pancreatografia endoscopica retrograda (CPER)" proof , although the patient was not warned of the risk of pancreatitis (between the 0.2 and 2%).

Juridical Basis

In this case such complication was produced and had lethal effects, but it is considered that there was not any infraction of *lex artis* by the accused specialist, neither directly nor indirectly by lack of informed consent in a operation that was told to be necessary and unavoidable, for this reason do not concur the necessary presupposed cases for the existence of imprudence. This, although the risk of pancreatitis was not told to the patient, which the tribunal considers that is justified, as the information have to limit only the typical risks; on the other hand, the deontological Spanish Code is inclined by the thesis that such obligation of information will be given if the patient ask for this information, question that is not planted in this case.

Keywords
Information to the patient; minimum risk.

Sentence

Provincial Court of Valladolid, 19 April 1997 (Civil Chamber).

Source

Actualidad del Derecho Sanitario, No. 29, 1997.

Ruling

It condemns a physician as there was no consent when making a "coligo-pancreatografia endoscopica retrograda (CPER)" proof, as the patient was not informed of the pancreatitis risk (between the 0,2 and 2%).

Juridical Basis

Although the proof was correctly made, there was not written consent, and there is not constancy that it were given in an oral way. There was not information about the risk of the pancreatitis that has place in some cases. The responsible of informing about the practice of the intervention, the consequences if itself is not carried forward or if it is done, and the risks in general that all of this generates, is the person that is going to operate.

Keywords
Information to the patient; minimum risk.

2.3. Information about pregnacy risk in sterilization operations

Sentence

Supreme Court, 25 April 1994 (Civil Chamber).

Source

Actualidad del Derecho Sanitario, No. 1, 1994.

Ruling

It rejects the appeal against the sentence of the Provincial Court of Barcelona (1991), that condemns the physician for not informing of a risk of pregnancy ulterior to the vasectomy.

Juridical Basis

In the cases where the medicine has a merely voluntary character, that is to say, in the cases where the interested comes to the physician, not for the treatment of a pathological complaint, but for the improvement of a physical or aesthetically appearance, or for the transformation of a biological activity, as it is the sexual one, the contract that links the physician with the client (not patient) is the one of hiring services but approximate in a notorious way to the hiring of work, that propitiate the existence of a higher guarantee in the obtaining of a result that is searched, as, if this would not be like that, it is obvious that the interested one will not go to the facultative to obtain the finality that he is searching for. From this point, that this obligation, that is still of ways, is intensified, making to fall on the facultative, not only, as the supposed cases of curative medicine, the utilisation of suitable ways for that purpose, as well as the obligations of informing, but also, and with more strength, the ones of informing the client, both of the possible risk that the intervention carries out, especially if it is a surgical one, as the possibilities that itself will not involve the obtaining of the result that is searched for, and of the cares, activities and analysis that result precise for the main assurance of the success of the operation. That it is why, although the risk of failed vasectomy by recanalization will be minimum (between 0,4 and 1 % of the cases), the physician must communicate it.

Other related decisions

Sentence of the Provincial Court of Palma de Mallorca, of 21 January 1997, Civil Chamber (*Actualidad del Derecho Sanitario*, No. 27, 1997).

Keywords
Adequate information; vasectomy; pregnancy risks.

Sentence

Supreme Court, 31 January 1996 (Civil Chamber).

Source

Actualidad del Derecho Sanitario, No. 19, 1996.

Ruling

Reject of the appeal interpose against the sentence of the Provincial Court of Madrid that absolves the urologists because they informed about the risk of pregnancy after a vasectomy.

Juridical Basis

The patient´s wife was pregnant few months after the operation. It is inferred from the clinical history that they were informed about the sexual abstinence to keep after the intervention. The pregnancy occurred because the appellant didn´t follow the medical indications.

Other related decisions

Provincial Court of Alicante, 27 February, 1997, Civil Chamber, *Actualidad del Derecho Sanitario*, No. 28, 1997)

Provincial Court of Cáceres, 23 February, 1996, Civil Chamber, *Actualidad del Derecho Sanitario*, No. 19, 1996.

Keywords
Information about the risk; vasectomy; pregnancy.

Sentence

Supreme Court, 27 June 1997, (Civil Chamber).

Source

Repertorio de Jurisprudencia Aranzadi, 1997, Marginal No. 5.758.

Ruling

Absolving of the physician and the Health Service of Valencia. The patient was informed about the risk of pregnancy after a tube ligature operation.

Juridical basis

Before the operation the demanding, assisted to a preparation and information process by the services of Gynaecology Department of the University Clinical Hospital about the possible birth-control options, and she was warned that the tube ligature was not an sterilisation or birth-control way with absolute efficacy. She was not informed after the operation, as the patient did not go to have the confirmatory proof, in spite of the medical indication.

Other related decisions

First Instance Court No. 19 of Valencia, 1 December 1994 (Civil Chamber), Original Document.

High Justice Court of Cantabria, 11 July 1997, (Social Chamber), *Repertorio Aranzadi de Jurisprudencia de Tribunales Superiores de Justicia*, 1997, Marginal No. 2.424.

Keywords
Adequate information; risk of pregnancy; tube ligature

Sentence

Provincial Court of Valladolid, 19 May 1993.

Source

Original Document.

Failure

Absolving of the accusation of pregnancy after vasectomy, by considering that the operation was correctly done, including the requisite of the information about the circumstances of the operation.

Juridical Basis

Given to the patient, in paper, it is standed out, with the warning of "VERY IMPORTANT", the necessity of making a control of the efficacy of the operation. It has not been detected a negligent behaviour by the side of the demanded, it does not exist a causal connection between the professional actuation of the demanded surgeon practised in relation with the actor and the pregnancy of his wife, that is attributed to the no adoption of the couple to the precaution measures that were done to avoid the conception.

Keywords
Adequate information; pregnancy risk; vasectomy.

Sentence

Provincial Court of Palma de Mallorca, 16 June 1994 (Civil Chamber).

Source

Actualidad del Derecho Sanitario, No. 3, 1995.

Ruling

It condemns a physician by lack of information about the risk of recanalization after a tube ligature.

Juridical Basis

In the supposed cases where the patient goes to the physician to obtain a major commodity in the sexual relations, the obligation to inform the client (not patient), of the possible risks that it carries out, as well as the possibilities of failure, has a major force than when the patient follows an exclusively therapeutic purpose.

Keywords
Adequate information; pregnancy risks; tube ligature.

Sentence

Provincial Court of Zaragoza, 27 May 1995 (Civil Chamber).

Source

La Ley, October, 1995.

Ruling

It revokes the sentence of the judge of First Instance of Zaragoza (January 1995) and absolves by not fulfilling the obligation of information about the risk of pregnancy after a tube ligature operation (between the 0,4 and 0,4 %).

Juridical Basis

The injured result for which it is asked the indemnification (pregnancy or abortion) is not truly proved, but it is that the demanding will be informed in some interviews of the risk of failure of the operation: it does not concur the requisite of injured result and the one of negligence. The negligence concurs not only if a medical operation is done according the *lex artis ad hoc*, that this is not the case, but also if the consent has not been obtained of the patient or in its case client, in the contrary way the risks are assumed only by the facultative.

Keywords
Lex artis; risk of pregnancy; adequate information; tube ligature.

Sentence

Provincial Court of Valencia, 20 February 1996 (Civil Chamber).

Source

Actualidad del Derecho Sanitario, No. 20, 1996.

Ruling

Absolving of the surgeon and condemns the Health Service of Valencia by lack of information about the risk of pregnancy after a tube ligature operation.

Juridical Basis

The information about the risk of pregnancy after the intervention of tube ligature does not involve to the surgeon but other professionals to whom correspond the previous labours of preparing and informing of the patient.

Keywords
Risk of pregnancy; tube ligature; adequate information.

2.4. Other interventions

Sentence

Constitutional Court, 14 July 1994.

Source

Código de Leyes sobre Genética, C. M. Romeo-Casabona (Ed.), Bilbao, 1997.

Ruling

The Court stated that art. 428 of the Penal Code (that allows the sterilisation of the psychical handicapped with no capacity to consent) was constitutional. In the sentence five particular votes were pronounced.

Juridical Basis

The problem of the remplacement of the consent in the cases of non suitability of the person to emit it, once attended his situation of serious psychical handicap, it is converted in the one of justification and proportionality of the action about the corporal integrity, a justification that only can have place, always in the interest of the non capable, in the concurrence of facts and values constitutionality recognised which protection legitimates the limitation of the fundamental right to the psychical integrity that the operation involves. The particular votes pronounced, object the previous arguments that the substitution of the voluntary of the handicapped by the one of third persons does not have in the case not even proportionality: the good being of the handicapped, a part from the relativity of this concept, it is not a fundamental right and can not collide with the right to the physical integrity. The authorisation to intervene in the corporal integrity of the non-capable supposes a total substitution of the voluntary of the person that in some way converts it in an object.

Other related decisions

Sentence of the Provincial Court of Asturias, 1 February 1996, Civil Chamber (*Actualidad Civil*, No. 10/16, 1996).

See below the section corresponding to Sterilisation of Mentally Handicapped.

Keywords
Consent; sterilisation; psychical handicapped.

Sentence

Supreme Court, 18 February 1997 (Civil Chamber).

Source

Actualidad del Derecho Sanitario, No. 26, 1997.

Ruling

The lack of information about the risk of contagious of AIDS by transfusion makes that the Court condemns the Hospital Centre.

Juridical Basis

If then, there were not compulsory the proofs of HIV detection and either scientifically viable, the risk existed anyway. Once Known the existence of the illness and that this was transmitted through blood or blood derived, the Health Authorities was conscious also of the potential risk to which it exposed to the receivers of these products. The Administration assumed the risks instead of the patient that was not informed, in a way that he could assume it. The Administration would have adopted a restrictive criteria in the employment of the blood transfusions when it would not exist vital risk, in particular if there were place for other alternative therapeutic ways.

Other Sentences

See below, Section devoted to AIDS.

Keywords
Adequate information; AIDS; transfusion.

Sentence

Provincial Court of Oviedo, 28 November 1995 (Civil Chamber).

Source

Actualidad del Derecho Sanitario, No. 15, 1996.

Ruling

It confirms the sentence to a dermatologist centre by aesthetic prejudices and moral injuries (infectious reaction, with destruction of synthetic hair and scarves) derived from the reject to a synthetic hair implant.

Juridical Basis

All information in order to the real percentage that the treatment does not produce the result is hidden; it is also hidden any reference about the possibility of a deterioration of the implant, of the massive reject of this due to non endogenous factors, or at least not detected though the simple realised analysis, and does not figure a dotted description of the indispensable clarity concerning the possible risks: secondary complications and infections of the implantation of artificial hair, that are frequent, as it is given in the given report.

Keywords
Aesthetic surgery; information to the patient.

III STERILISATION OF MENTALLY HANDICAPPED

Sentence

Constitutional Court 215/1994 of 14 July 1994. Question of unconstitutionality. Art. 428, 2nd paragraph of the -former- Penal Code.

Source

Código de Leyes sobre Genética, C.M. Romeo-Casabona (Ed.) Bilbao, 1997.

Ruling

The Constitutional Court has estimated that the second paragraph, last interjection of art. 428 of the former Penal Code, that authorises the sterilisation of handicapped persons with serious psychical deficiencies, carried forward by the initiative of his/her parents or legal representative and with judicial authorisation, is not contrary to the Constitution.

Juridical Basis

From the juridical-constitutional viewpoint, the problem is reduced to the question if the coercive sterilisation, ordered by the judge, as initiative of the legal representative of the handicapped, does it injury the essential content of the right to the physical integrity recognised by art. 15 of Spanish Constitution?

The essential content of the right to the physical integrity appears delimited by the Sentence of the Constitutional Tribunal 120/1990 27 July, the Court quoted that through the right to the physical and moral integrity guaranteed by art. 15 of the Spanish Code "the inviolability of the person in protected, not only against the attacks directed to injure his body and soul, but also against all class of intervention in these goods that do not have the consent of its titular" (Juridical basis 8). "This consent, however, is the one that, by definition, can not be given by the person that will have a serious psychical handicap, and from this point of view, the legal prevision of the authorisation that, at the request of the legal representatives of the handicapped person, has to be given or not by the Judge. The organ that propose it, questionates about the constitutional legality of substituting by this judicial authorisation that consent of non possible lending in a suppose of "decreasing of integrity" of the persons as it is the sterilisation. This, therefore, will be never admissible each time that it is not admitted by the person to whom it might affect" (Juridical basis of the Sentence of the Constitutional Court of 14 July 1994).

The Constitutional Court affirms the invulnerability of the essential content of the right to the physical integrity based on juridical goods of inferior range to the physical integrity, basically "the obligations and faculties that the Civil Code (art. 154) quotes to the ones that conduct the paternal authority" (Juridical basis 4 of the Sentence of the Constitutional Court of 14 July 1994)

The constitutionality of the precept is also justified by the Constitutional Court based to the wellbeing of the handicapped (Juridical basis 2), being this interest the only one that can fundament the sterilisation.

Keywords

Sterilisation of psychical handicapped; coercive sterilisation; right to the physical integrity; well being of the handicapped; medical prescription; right to sexuality; judicial authorisation; request of the ones that conduct the legal representation of the handicapped; serious psychical handicap.

Other related Case-Laws

Provincial Court of Oviedo in the Sentence of 1 February 1996 (*La Ley*, Vol. 1996 - 3).

IV CONSCIENTIOUS OBJECTION

4.1. The reject to blood transfusion by religious motives

Sentence

Provincial Court of Huesca, of 20 November 1996.

Source

Original Document.

Ruling

The Sentence of the Provincial Court of Huesca, absolves the parents of the minor, Jehovah's witnesses, who did not allow to authorise a transfusion to be practised, of the presumed offence of parricide.

Juridical basis

We are in a supposed case in which the life of the son, who is 13 years old, as a consequence of a serious accident needs to be transfused, with the consciousness of the parents, to the respect, the Provincial Court of Huesca, establishes that "there not exist in the parents the directed action to cause the death of the minor son, as their actuation was not a omission, but they did all the possible to find an adequate treatment for their son (going to several hospitals looking for an alternative treatment for the blood transfusion)".

This sentence of petition, understands that the parents have lost the condition of responsible once that they have asked for medical assistance by the conventional ways, giving to society the effective chance of replacement them and given entrance to the substitution mechanisms that our society have to act for the protection of the minors.

Keywords
Right to life; right to the religious freedom; right of the patient to his/her autodetermination; judicial authorisation; condition of responsible of the parents.

Sentence

Supreme Court (Criminal Chamber) of 27 June 1997.

Source

Actualidad Penal, No. 38, October 1997.

Ruling

Against the sentence of the Provincial Court of Huesca [see above], appears the Sentence of the Supreme Court that cancel the previous one, condemning the parents as responsible authors of an offence of murder in commission by omission, with the concurrence of the extenuating, higher

qualified of mentally blinded or passionate state.

Juridical Basis

The most important Juridical basis of the Sentence of the Supreme Court establishes that the "vulnerability of the right to the life can not be juridically justified by the invoke of the also right to religious freedom that could only have a modified-attenuated value of the contracted criminal responsibility", at the same time the sentence of the Supreme Court continues that "the conscientious and religion freedom is not guarantee in an absolute and unconditional way and in case of conflict or collision, can be legitimised by other constitutional protected rights, especially when the ones that result affected are the rights of other persons".

The negative attitude to the treatment of the minor son by reason of religious believes will constitute an abusive practice of the parental authority by the parents, in this sense, the only Juridical basis of the analysed sentence, sets out that "in this case it is perfectly legitimised and compulsory to order that the treatment to the minor will be practised although the parents will have expressed their opposition. The right to the life and to the health of the minor can not give up against the affirmation of the freedom of consciousness or objection of the parents. If they let die their minor soon as their religious believes forbids the hospital treatment of blood transfusion, a criminal responsibility is created"; "it is evident that the parents, that where in the exercise of a parental authority, where in responsible position of the health of their son, to whom the moral and legal obligation corresponded to do all that were precise to make effective this obligation, in order to avoid any situation that could damage his health of his life, being obliged to provide to their son the medical assistance that he may needed.

Other related Case-Laws

Decision of the Provincial Court of Palma de Mallorca of 29 June 1993.
Sentence of the Supreme Court (Social Chamber) of 3 May 1994.
Decision of the Provincial Court of Ciudad Real of 27 January 1995.
Decision of the Tribunal of Ceuta of 29 June 1995.
Sentence of the Constitutional Court of 28 October 1996.

Keywords
Right to life, right to religious freedom; right of the patient to his/her autodetermination; judicial authority; position of responsible of the parents.

4.2 Euthanasia

Decision

Provincial Court of La Coruña, 19 November 1996.

Source

Actualidad del Derecho Sanitario, No. 28, 1997.

Ruling

The Court of La Coruña has unauthorised the request of euthanasia of a patient with serious illnesses, insisting on art. 15 of the Spanish Constitution that specific the right to life and moral and physical integrity. The Court rejects therefore the allegations of the patient directed to show that this art. 15 guarantees the right to the dead.

Juridical Basis

The controversial question is the recognising to the right of a dignified death and besides, the disposability on the own life. The article invoked by the patient to demonstrate that the Spanish Constitution guarantees the right to the own death is art. 15 of the Spanish Constitution that refers to life freely chosen by its titular, which, for him means that only de conducts that attempt against this juridical matter, could be considered typical ones. On the other hand, the conducts that does not attempt in any way against the life freely chosen, will be non typical ones, for lack of harmfullness against the juridical matter, that is to say, that they will not be objectively attributed as they do not affect to the purpose of protection of the norm.

The Decision refers to the established positions by the Constitutional Court in the latest years in the interpretation of art. 15 of the Spanish Constitution that quote that the general thesis maintained by the High Court has been the proclamation of the absolute character of the fundamental rights, that find their limit in the rights of the others and other protected matters and constitutional rights. In this way, in Sentence of the Constitutional Court 91/1983 the Constitutional Court is pronounced on the non absolute protection of the life, as "it happens in relation with all the matters and rights, constitutionally recognised, in determined supposes may be, and can yet, be a subject of limitations".

The Decision of the Provincial Court appeals against the Sentence of the Constitutional Court 120/1990 of 27 June on the right to the life and in which it is stabilised that". It has by consequent the right to the life a content of positive protection that does not prevent to shape it as a right to freedom that includes the right to the own death. This does not prevent, nevertheless, to recognise, that being the life a matter of the person that is integrated in the ambit of his/her freedom, may he/she dispose of his/her own life, by this disposition constitutes a demonstration of the *agere licere*, regarding the privacy of the own life of the realisation of the own death is an act that law does not forbid and not in any way a subjective right that implies the possibility of mobilising the support of the public power to win to the resistance that opposes to the voluntary of dyeing; and non the less, a subjective right of fundamental character in which its possibility extends even facing the resistance of the legislator that can not reduce the essential content of the right, by virtue of it, it is not possible to admit the Spanish Legislation guarantees in its art. 15 the right to the own death" (Juridical basis 7º).

At the same time, in the Decision that is being analysed, it is reminded that the euthanasia is criminal typified, and the Magistrates of the Provincial Court refers to the distinction that the Penal Code makes of the criminalities in its art. 143, according if it deals with deceitful homicide or consent homicide. It indicates that the previous Penal Code, already punishes euthanasia, and the new one, attenuates -in its art. 143.4- the cooperation to the death of other by express petition, will be unequivocal of the affected, in the case that the victim, will suffer a serious illness.

Keywords
Euthanasia; serious illness; right to life; right to an appropriate death; right to disposability upon the own life.

V. AIDS

5.1 Transmission by transfusion

Sentence

Supreme Court, 18 February 1997 (Civil Chamber).

Source

Actualidad del Derecho Sanitario, No. 26, 1997.

Ruling

The lack of information about the risk of contagious of AIDS by transfusion after a blood haemorrhage in an articulation, carries to the Court to condemn the Hospital Centre.

Juridical Basis

Although then (1983) there were not compulsory the proofs of detention of AIDS, nor scientifically viable, the risk existed anyway. Known the existence of the illness and that this would be transmitted through the blood or blood derived, the Health Authorities was conscious also of the potential risk to which it was exposed to the receptors of those products. The administration assumed the risks in the place of the patient that was not informed in a way that he could assume it. The Administration, could have adopted a restrictive criteria in the employment of the blood transfusions where there will not exist any vital risk, in particular if there was the employment of other alternative therapeutic media.

Other related Case-Laws

Sentence of the High Justice Court of Castilla y León, Social Chamber, 22 July 1997, Repertorio de Jurisprudencia Aranzadi de Tribunales Superiores de Justicia, 1997, Marginal No. 2.493.

Keywords
AIDS; transfusion; informed consent; responsibility of the Health Authorities.

Sentence

Supreme Court, 24 June 1997 (Civil Chamber).

Source

Repertorio de Jurisprudencia Aranzadi, 1997, Marginal No. 5.208.

Ruling

It maintains the condemn to the "Generalidad of Cataluña" and absolves the physicians that, by a blood transfusion inoculated the patient HIV antibodies, that caused AIDS and therefore his death.

Juridical Basis

The physicians used the adequate ways to the circumstances and paid attention and demanding diligences, as the state of the science and the means of the centre. In this, were distributed the functions and therefore the service of haematology was the one that provided to the patient the blood that precised during his operation and ulterior treatment. But, although in this moment the proof of detection of the virus was not compulsory, the direction of the hospital known the possible contamination of the blood neither did adopted measures to avoid the contagious, nor informed about this circumstance.

Keywords
AIDS; transfusion; informed consent; responsibility of the hospital.

Sentence

Supreme Court, 13 February 1997 (Criminal Chamber).

Source

Original document.

Ruling

It confirms the sentence of the Provincial Court of Madrid, of 5 June 1995, that absolves the physicians that transfused a patient after one hysterectomy with infected blood of HIV. The patient dies as consequence of the illness.

Juridical Basis

The accusation impute an offence or temerity imprudence to the physicians (not to the services that prepared the blood for the transfusion); but there not exist any causal connection between the conduct of the accused and the result of the death, not even there exist determination or concretion of the harmful element, described as suffering, pains, going under surgery and not extension of life. It is proclaimed a mortal result produced by a totally foreign actuation of the accused, as it is not proved that the cares that are considered omitted would have extended the life and how long.

Keywords
AIDS; transfusion; temerity imprudence; responsibility of the physicians; causal connection.

Sentence

Supreme Court, 6 February 1996 (Litigious- Administrative Chamber).

Source

Repertorio de Jurisprudencia Aranzadi, 1996, Marginal No. 989.

Ruling

It determines the patrimonial responsibility of the Public Administration by the not normal functioning of the public sanitary services, in the case of transmission of the virus of the human inmunodeficiency trough transfusion.

Juridical Basis

The Public Administration is obliged to indemnify, by patrimonial responsibility derived of the not normal functioning of the public services, when it concurs the requisite of causal connection between the transmission of haemofactor that transmits the virus of the human inmunodeficiency and the death, without foreigner interferences that come from third persons or from the own interested. In the determination of the causal connection, it is taken into account the non existence of other risk factors. It has been appreciated the existence of this nexus without giving relevance to the identification of the concrete haemoderived that provoked the transmission, facing the certainty that the contagious was produced by the supplying of these products by the National Institute for Health. The juridical fundament of the exigency of the objective responsibility in that it is indemnified all lesion that a particular may suffer in his/her rights, except in the cases of major force, and that will have as a consequence the functioning of the public services.

Other related Case-Laws

High Court of Justice of Baleares, 13 May 1993 (Social Chamber), *Repertorio de Jurisprudencia Aranzadi de Tribunales Superiores de Justicia,* 1993, Marginal No. 2.558.

High Court of Justice of Castilla la Mancha, 5 November 1993 (Social Chamber), *Repertorio de Jurisprudencia Aranzadi de Tribunales Superiores de Justicia*, 1993, Marginal No. 4.950.

High Court of Justice of Castilla la Mancha, 9 June 1997 (Social Chamber), *Repertorio de Jurisprudencia Aranzadi de Tribunales Superiores de Justicia,* 1997, Marginal No. 2.788.

High Court of Justice of Madrid, 14 December 1994 (Social Chamber), *Repertorio de Jurisprudencia Aranzadi de Tribunales Superiores de Justicia,* 1994, Marginal No. 5.034.

High Court of Justice of Extremadura, 6 February 1997 (Social Chamber), *Repertorio de Jurisprudencia Aranzadi de Tribunales Superiores de Justicia,* 1997, Marginal No. 495.

Keywords
AIDS; transfusion; responsibility of the Health Authorities.

Sentence

Provincial Court of Palma de Mallorca, 4 April 1995.

Source

La Ley, No. 4, 1995.

Ruling

It absolves a physician that supplied a preparation for a transfusion that caused AIDS to a patient, to be this the only pharmaceutical alternative to his disposal. But there exist responsibility of the Public Administrations for supplying to their patients medical preparations without the compulsolry requisite of the registration.

Juridical Basis

The Court does not estimate that the physician would have to ask the consent of the affected or applying other alternative medication, given the risks that imply the haemoderivated, as the obligation of the physician is the one of diagnosing and providing the adequate medication, being, in the case, the Social Security, the responsible of the medicaments. The physician facing the extreme seriousness of the patient took the decision that although implying a risk (implicit in all medical activity, surgery or therapeutic one) was necessary to avoid a major damage (the dying of the patient) without being demonstrated that the scientific knowledge about AIDS in those moments would reasonably allow to suspect that the virus will be hidden in a product acquired by the own hospital. The determinant fact of the culpability of the National Institute for Health is the acquiring and distribution of medical-pharmaceutical products that had not fulfil the legal or obligatory demanded requisites for its public commercialisation.

Keywords
AIDS; transfusion; responsibility of the physician.

5.2. AIDS and discrimination

A. Determination of the duty of payment regarding the quantity agreed in the insurance policy of the life insurance when death is caused by AIDS.

Sentence

Supreme Court, 8 July 1996 (Civil Chamber).

Source

Actualidad del Derecho Sanitario, No. 22, 1996.

Ruling

It exempts the Insurance Company from indemnify a VIH sick person, who was diagnosticated of this illness and did not communicate it to the Insurance Policy when fulfilling the adhesion bulletin. What it is more, he falsified the data when confirming that he did not suffered from any illness in the last five years.

Juridical Basis

The omission of falsification of the data about the health of the patient to the Insurance Companies, exempt these of indemnifying by the contingencies of illnesses or death. The affected did not fulfil the obligation to state to the insurer, the agreement with the questionnaire that this submit, all the circumstances that may influence in the valorisation of the risk. He did it knowing that the data were not exact and had influence in the valorisation of the risk, and known the illness that he had and its seriousness in order to life expectancy, that is to say, deceitfully. The criteria used by the Courts to determine the obligatorily of the payment of the quantity agreed in the policy by the Insurance Company that contracted a life Insurance with a person that had AIDS is the existence of fraud or hide in the moment of the contract. The bad faith in the owe to declare about his state of health exempt from the payment to the Insurance Policy.

Keywords
AIDS; insurance contract; duty to declare.

Sentence

High Court of Justice of Castilla y Leon, 14 November 1995, (Social Chamber).

Source

Repertorio de Jurisprudencia Aranzadi de Tribunales Superiores de Justicia, 1995, Marginal No. 4.104.

Ruling

Condemns to the Insurance Company to the payment of the indemnization by death of the insured caused by HIV, illness that he did not declared to the company.

Juridical Basis

The situation of having HIV, by itself, does not constitute serious illness and does not affect to the health state, which carries to consider as healthy the contracting party in the moment of the contracting, and when affirmed such circumstance, he did it therefore acting in good faith. This circumstance have influence in the valorisation of the risk, but not when existing any question to the respect, it could not be demanded to him the declaration. The omission of data in the Policy by the beneficiary does not exempt to the Insurance Company of indemnify, unless deceit will shown in the attitude of the insured.

Other related Case-Laws

Provincial Court of San Sebastian, 25 September 1996 (Civil Chamber) *Actualidad del Derecho Sanitario*, No. 23. 1996.

Keywords
AIDS; insurance contract; duty to declare.

B. Valorisation of the social consequences of the illness in the judicial decisions

Sentence

Provincial Court of Madrid, 11 July 1996.

Source

La Ley, No. 6, 1996.

Ruling

It exempt the mother, that have AIDS, to pay the subsistence allowance to her son, and the system of visits to the son is extended.

Juridical Basis

The suffering of this illness does not suppose a physical or psychical risk for a son, that makes necessary to restrict the right of visits of the mother. It makes difficult the integration in the labour world of the ill person and that it is why it is not possible the demand of subsistence allowance, even recognising the right in favour of the descendant.

Keywords
AIDS; discrimination; risk to transmit an illness.

UNITED KINGDOM

I - MENTALLY COMPETENT ADULTS

Theme 1 : Consent to Medical Treatment

A - Refusal of Treatment

CA, Re T (Adult: Refusal of Treatment) [1992] 3 WLR 782
FD, Re S (Adult: Refusal of Treatment) [1992] 3 WLR 806
FD, Home Secretary v Robb [1995] 1 FLR 412

Theme 2 : Medical Negligence

CA, De Freitas v O'Brien [1995] 25 BMLR 112
HL, Bolitho v City Hackney Health Authority [1997] 3 WLR 1151

Theme 3 : IVF

FD, Re B (Parentage) [1996] 2 FLR 15
FD, Re Q (Parental Order) [1996] 1 FLR 369
R v HFEA *ex parte* Blood [1997] 2 FLR 742
FD, U v W (Attorney-General Intervening) [1997] 3 WLR 739

Theme 4 : Abortion

Kelly v Kelly (1997) Times, 5 June

Theme 5 : Access to Medical Records

CA, R v Mid Glamorgan FHS Authority, *ex parte* Martin [1995] 1 WLR 110

Theme 6 : Euthanasia

CC, R v Cox [1992] 12 BMLR 38

II - MENTALLY DISORDERED PATIENTS

Theme 1 : Refusal of Artificial Nutrition

CA, F v Riverside Health Trust [1994] 1 FLR 614
FD, Re KB (An Adult) (Mental Patient: Medical Treatment) (1994) 19 BMLR 144
CA, B v Croydon District Health Authority [1995] 1 WLR 294

Theme 2 : Refusal of Caesarean Section

FD,Tameside and Glossop Acute Services Trust v CH (A patient) [1996] 1 FLR 762

III - MENTALLY INCOMPETENT ADULTS

Theme1 : General Principles

HL, Re F (Sterilisation: Mental Patient [1990] 2 AC 1
FD, Re H (Mental Patient) [1992] 1 BMLR 71

Theme 2 : Test of Mental Competence/Refusal of Treatment

CA, Re C (Adult: Refusal of Treatment) [1994] 1 WLR 290
FD, Re JT (Adult: Refusal of Medical treatment) [1998] 2 FLR 49

Theme 3 : Organ/Tissue Donation

FD, Re Y (Mental Incapacity: Bone Marrow Transplant) [1997] 2 WLR 556

Theme 4 : Sterilisation

HL, Re F (Sterilisation: Mental Patient [1990] 2 AC 1
FD, F v F [1991] 7 BMLR 135
Practice Note (Sterilisation: Minors and Mental Health Patients) [1993] 3 All ER 222
FD, Re W (An Adult: Mental Patient) (Sterilisation) [1993] 1 FLR 381
OH, Lawrence, Petitioner [1996] 32 BMLR 87

Theme 5 : Abortion

FD, Re SG (Adult Mental Patient: Abortion) [1991] 2 FLR 239

Theme 6 : Caesarean Cases

FD, Norfolk and Norwich Healthcare NHS Trust v W [1996] 2 FLR 613
FD, Rochdale Healthcare NHS Trust v C [1997] 1 FCR 274
FD, Re L (Patient : Non Consensual Treatment) [1997] 2 FLR 837
CA, Re MB (Medical Treatment) [1997] 2 FLR 427

Theme 7 : Unconscious Patients - Life-Saving Treatment

HL, Airedale NHS Trust v Bland [1993] 2 WLR 316
CA, Frenchay Health Care NHS Trust v S [1994] 1 WLR 601
Practice Note (PVS State: Withdrawal of Treatment) [1996] 4 All ER 766
Ct of Sess (IH) & (OH), Law Hospital Trust v Lord Advocate and Another [1996] 2 FLR 407
FD, Re R (Adult: Medical Treatment) [1996] 2 FLR 99
FD, Re D (Medical Treatment) [1998] 1 FLR 411

IV - CHILDREN

Theme 1 : Withdrawal or Withholding of Life-Saving Treatment

CA, Re J (A Minor) (Wardship: Medical Treatment) [1991] 2 WLR 140
CA, Re J (A Minor) (Child in Care: Medical Treatment) [1992] 3 WLR 507
FD, Re A [1992] 3 Med LR 303
FD, Re C (A Baby) [1996] 2 FLR 43
CA, Re T (A Minor) (Wardship: Medical Treatment) [1997] 1 FLR 502
FD, Re C (Medical treatment) [1998] 1 FLR 385

Theme 2 : Parents Right to Enforce Treatment

CA, R v Cambridge District Health Authority, *ex parte* B, [1995] 1 FLR 1055

Theme 3 : Refusal of Life-Saving Treatment

A - Child under 16

CA, Re R (A Minor) (Wardship: Medical Treatment) [1991] 4 All ER 177
FD, Re E (A Minor) (Wardship: Medical Treatment) [1993] 1 FLR 386
FD, Re S (A Minor) (Consent to Medical Treatment) [1993] 1 FLR 377

B - Child 16 or over

CA, Re W (A Minor) (Medical Treatment: Courts Jurisdiction) [1992] 4 All ER 627
FD, A Metropolitan Borough Council v DB [1997] 1 FLR 767
FD, Re C(Detention: Medical Treatment) [1997] 2 FLR 180

LIST OF ABBREVIATIONS

LAW REPORTS

All ER: All England Law Reports
BMLR: Butterworths Medico-Legal Reports
FLR: Family Law Reports
FCR: Family Court Reports
Med LR: Medical Law Reports
Weekly Law Reports: Weekly Law Reports

COURTS

ENGLISH

HL: House of Lords
CA: Court of Appeal
CC: Crown Court
FD: Family Division

SCOTTISH

Ct of Sess (IH) &(OH): Court of Session (Inner House) & (Outer House)

I. MENTALLY COMPETENT ADULTS

THEME 1

CONSENT TO MEDICAL TREATMENT

A * REFUSAL OF TREATMENT

***1 CASE*:**

Court of Appeal, Re T (Adult: Refusal of Treatment) [1992]

***2 LAW REPORT*:**

Weekly Law Reports, vol. 3, p. 782.

***3 KEY WORDS*:**

Patient refusing blood transfusion - mental capacity - validity of consent and refusal - scope of refusal - effect of undue influence - guidance on consent forms.

***4 LEGAL QUESTION*:**

Whether blood transfusion can lawfully be given to an adult who has signed a form refusing consent.

***5 FACTS*:**

Miss T was 34 weeks pregnant when she was admitted into hospital following a road traffic accident. She was diagnosed as suffering from pneumonia and prescribed powerful analgesics. Her condition deteriorated and became critical. Miss T was then left alone with her mother who was a fervent Jehovah's Witness. Following this, Miss T told the staff nurse and consultant that she did not want a blood transfusion and signed a form to that effect. Miss T's father and partner applied to the court for a declaration to the effect that the doctors could lawfully administer a blood transfusion in spite of T's refusal.

***6 HELD*:**

Miss T's refusal of consent was not valid. Treatment involving the administration of a blood transfusion could be administered on the principle of necessity (*Re F (Sterilisation: Mental Patient* [1990] 2 AC 1, HL). The common law presumption is that the individual has a right to self determination and that a mentally competent adult has an absolute right to choose whether to consent to medical treatment or to refuse it. This right of choice is not limited to decisions which others might regard as sensible. It exists notwithstanding that the reasons for making the choice are rational, irrational, unknown or even non-existent. A consent or a refusal will not be valid if the patient lacks the capacity to decide or if the patient has been misinformed by the doctor or if the patient's will has been overborne by undue pressure or influence from others. Neither will a refusal be effective if the patient did not intend it to apply to the circumstances which have arisen. Forms of refusal should be re-designed to bring the consequences of a refusal forcibly to the attention of patients. An adult patient may be deprived of his capacity to decide either by long term mental incapacity or retarded development or by temporary such as unconsciousness or confusion or the effects of fatigue, shock, pain or drugs.

1 CASE **:**

Family Division, Re S (Adult: Refusal of Treatment) [1992]

2 LAW REPORT **:**

Weekly Law Reports [1992] vol. 3, p. 806.

3 KEY WORDS **:**

Patient in labour - life of patient and foetus in danger - doctors advising caesarean section - patient refusing consent on religious grounds.

4 LEGAL QUESTION **:**

Whether doctors can lawfully perform a caesarean section on an adult woman in labour who refuses consent on religious grounds.

5 FACTS **:**

Mrs S was admitted to hospital with ruptured membranes and in spontaneous labour. The foetus was lying in a transverse position with its elbow projecting through the cervix. In the view of the consultant, both the woman and the foetus were likely to die unless a caesarean section was carried out. Mrs S was a born again Christian. She refused consent to the operation on religious grounds. The hospital applied to the court for a declaration that the operation could be lawfully performed in spite of her refusal.

6 HELD **:**

The operation could be lawfully performed despite the fact that there is no English authority directly in point as there is some American authority which suggests that American courts would be likely to be in favour of granting a declaration in this circumstances: see *Re AC* [1990] 573 A2d 1235 at 1240, 1246-8, 1252.

N.B. The correctness of this decision has since been doubted *obiter* in *ReMB* (*infra)*

1 CASE **:**

Family Division, Home Secretary v Robb [1995]

2 LAW REPORT **:**

Family Law Reports, vol. 1, p. 412.

3 KEY WORDS **:**

Prisoner on hunger strike - prisoner refusing nutrition and hydration - duty of Home Secretary.

4 LEGAL QUESTION **:**

Whether prison authorities bound to abide by the refusal of a prisoner on hunger strike to receive nutrition and hydration.

5 FACTS **:**

The defendant was a 27 year old prisoner on hunger strike. He had a long-standing medical history of personality disorder but psychiatric experts agreed that D was of sound mind and understanding. The Home Secretary sought a declaration from the court that he might lawfully observe and abide by the refusal of the defendant to receive nutrition; and, secondly that the plaintiff might lawfully abstain from providing hydration and nutrition, whether by artificial means or otherwise, for as long as the defendant retained the capacity to refuse the same.

6 HELD **:**

Declaration granted, overturning *Leigh v Gladstone and others* (1909) 26 FLR 139 in which it was held that the duty of prison officials to preserve the health of prisoners extended to force feeding prisoners on hunger strike. According to modern authority, the principle of the sanctity of life does not authorise forcible feeding of prisoners on hunger strike or compel the temporary keeping alive of patients who are terminally ill contrary to their express wishes: *Re T* (consent to medical treatment: adult patient) [1992] 3 Weekly Law Reports 782 (*supra)* and *Airedale NHS Trust v Bland* [1993] 2 Weekly Law Reports 316 (*infra*)

THEME 2

MEDICAL NEGLIGENCE

1 CASE **:**

Court of Appeal, De Freitas v O'Brien [1995]

2 LAW REPORT **:**

Butterworths Medico-Legal Report, vol. 25, p. 112.

3 KEY WORDS **:**

Medical practitioner - negligence - Bolam test - size of responsible body of medical opinion.

4 LEGAL QUESTION **:**

Whether a responsible body of medical opinion has to be substantial in order for a medical practitioner, who has acted in accordance with their views, not to be found negligent.

5 FACTS **:**

The plaintiff started to suffer back pain when she was 37 years old. She was referred to a spinal surgeon who performed surgery to alleviate the pain caused by what he suspected was nerve root compression. The surgery was not successful and she was left with permanent disability and crippling pain. Subsequent investigations revealed deep wound infection and leakage of cerebro-spinal fluid. The plaintiff alleged that the consultant had been negligent in performing the operation and that no responsible body of medical men, specialising in the defendant's speciality, would have decided to operate.

6 HELD **:**

The defendant had not been negligent, even though the body of medical opinion relied upon by the defendant was very small and its views were not in accordance with the majority of normal medical opinion. The test for negligence laid in *Bolam v Friern Hospital Management Committee* [1957] 1 Weekly Law Reports 582 at 586 is "the standard of the ordinary skilled man exercising and professing to have that skill". To establish negligence "It is not enough to show that there is a body of competent professional opinion which considers that there was a wrong decision, if there also exists a body of professional opinion, equally competent, which supports the decision as reasonable in the circumstances" (at 638). A responsible body does not have to be a substantial body. It was open to the judge to find as a fact that a small number of specialists constituted a responsible body of medical opinion.

1 CASE **:**

House of Lords, Bolitho v City of Hackney Health Authority [1997]

2 LAW REPORT **:**

Weekly Law Reports, vol. 3, p.115.

3 KEY WORDS **:**

Medical practitioner - causation - negligence - Bolam test - court's sanctioning of professional opinion.

4 LEGAL QUESTION **:**

Was the patient's death caused by the doctor's negligence? Would the doctor, who admitted breach of duty in failing to attend a child, had been negligent in not intubating if contrary to the facts she had attended and not intubated?

5 FACTS **:**

The plaintiff was the mother of a two year old child who had died in hospital as a result of cardiac arrest induced by respiratory failure. The judge had found that Dr Horn, the doctor in charge, had been negligent in not attending the child when called by the nurse. By the end of the trial it was common ground that intubation would have prevented cardiac arrest. But the plaintiff's and defendant's medical experts offered diametrically opposed opinions on whether intubation would have been appropriate if, contrary to the facts, Dr. Horn had attended. There were two questions facing the judge: 1) What would Dr. Horn have done if she had attended the boy? 2) If she would not have intubated, would that have been negligent.? Dr. Horn's evidence was that, if she had attended, she would not have intubated. The judge accepted her evidence and held that the *Bolam* test has no relevance to the first question but is central to the second. The judge found the views of the medical experts to be those of a responsible body of medical opinion, notwithstanding the fact that they were diametrically opposed on whether or not intubation would have been appropriate. On this basis, the judge held that Dr Horn would have come to a proper standard of skill and competence if, contrary to the facts, she had attended and not intubated. Accordingly, it had not been proved that the admitted breach of duty by the defendants had caused the catastrophe which occurred to the child. On appeal, a majority of the Court of Appeal held that the judge had directed himself correctly in accordance with that approach. The plaintiff appealed to the House of Lords.

6 HELD **:**

Dismissing the appeal - The judge asked himself the right questions and answered them on the right basis. The *Bolam* test has no application in determining what would have happened if Dr. Horn had attended. However, the answer to the question of what would have happened is not determinative of the issue of causation. Dr. Horn could not escape liability by proving that she would have failed to take the course of faction which any competent doctor would have adopted. Thus, a plaintiff can discharge the burden of proof on causation by satisfying the court *either* that the relevant person would in fact have taken the requisite action (although she would not have been at fault if she had not) *or* that the proper discharge of the relevant person's duty towards the plaintiff required that she take that action (*Joyce v Merton, Sutton and Wandsworth Health Authority*

[1996] 7 Med.L.R. applied). But the court is not bound to hold that a defendant doctor escapes liability for negligent treatment or diagnosis (as against disclosure of risks which was expressly distinguished) just because he leads evidence from a number of medical experts who are genuinely of the opinion that the defendant's treatment or diagnosis accorded with sound medical practice. The court has to be satisfied that the exponents of the body of opinion relied upon can demonstrate that such opinion has a logical basis. In particular in cases involving the weighing of risks against benefits the judge, before accepting a body of opinion as being responsible, reasonable or respectable, will need to be satisfied that, in forming their views, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter. In the vast majority of cases it will not be right for a judge to hold the views of a responsible body of medical opinion are unreasonable. This case is not one of those rare cases.

THEME 3

IVF

1 CASE **:**

Family Division, Re B (Parentage) [1996]

2 LAW REPORT **:**

Family Law Reports, vol. 2, p. 15.

3 KEY WORDS **:**

HFE Act 1990 - artificial insemination - parentage.

4 LEGAL QUESTION **:**

Whether a couple had received "treatment services together" for the purpose of Sch 3, par 5(3) of the Human Fertilisation and Embryology Act 1990.

5 FACTS **:**

The mother of twins who had been born as the result of artificial insemination, had applied for financial provision in respect of the children. The father raised as a preliminary issue the question of whether he was the parent of the twins within the meaning of sch 1 of the Children Act 1989. The father accepted that he was the donor of the sperm and that he was the biological father of the twins. But he contended that whilst he willingly donated the sperm, by the time the insemination took place he had parted from the mother and was at that stage not asked to consent to the actual insemination.

6 HELD **:**

The father had been a willing consenting party to the treatment which they had commenced together when the sample was taken. Accordingly, the couple had received "treatment services together" under Sch 3, para 5(3) of the HFE Act 1990 and the requirement for written consent did not apply.

1 CASE **:**

Family Division, Re Q (Parental Order) [1996]

2 LAW REPORT **:**

Family Law Reports, vol. 1, p. 369.

3 KEY WORDS **:**

HFE Act 1990, s 30 - surrogacy - parentage.

4 LEGAL QUESTION **:**

Who is to be treated as the father of a child born to a surrogate mother, for the purpose of giving consent to the making of a parental order under s 30 of the HFE Act 1990?

5 FACTS **:**

Miss A had agreed to act as a surrogate mother for Mr. & Mrs. B. Miss A was artificially inseminated with an egg from Mrs. B. The egg had been fertilised by the sperm of a donor who was not Mrs. B's husband. After the birth, Miss A handed over the baby to Mr. & Mrs. B who applied to the court to make a parental order. Under s 30, such an order may be made in favour only of parties to a marriage and, if made, provides for a child to be treated as their child. Section 30(5) further provides that the court must be satisfied that both the father of the child (including a person who is the father by virtue of section 28 of the Act), where he is not the husband, and the woman who carried the child have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order. The question for the court was who was the father in the circumstances of the case.

6 HELD **:**

Granting the order - On application of the Act to the circumstances of the case, there was no man who was to be `treated as the father' and whose consent was necessary to the making of the order.

1 CASE **:**

Court of Appeal, R v Human Fertilisation and Embryology Authority, *ex parte* Blood [1997]

2 LAW REPORT **:**

Family Law Reports, vol. 2, p. 742.

3 KEY WORDS **:**

Patient unconscious - sperm removed without consent - wife seeking artificial insemination with husband's sperm - export of sperm for treatment in the European Union - HFE Act 1990, sch 3 - Treaty of Rome, arts. 59 and 60.

4 LEGAL QUESTION **:**

Whether HFEA had acted legally in refusing to use its discretion to enable Mrs. Blood to export her late husband's sperm for treatment in another EU country.

5 FACTS **:**

Mrs. Blood's husband unexpectedly fell ill with meningitis. He was admitted into hospital where his condition rapidly deteriorated. Mrs. Blood asked doctors to take a sperm sample from her husband. On 1 March 1995 a sample was taken whilst Mr. Blood was unconscious in a coma. The sample was entrusted to the Infertility Research Trust (`IRT') for storage. On 2 March 1995, Mr. Blood was certified brain dead and another sperm sample was taken following the advice of Professor Cooke from the IRT, who had advised his colleagues that the request could be met and the sperm stored for later use once the woman had had the opportunity for suitable counselling. But on 2 March, Professor Cooke had second thoughts about whether his advice had been correct. He rang the HFEA for advice about storing sperm from a man who was on a life support system. He was advised that the man's written consent for storage was a legal requirement and that it needed to be established whether he had given relevant consent in any form at any time. The Authority recognised that Mrs. Blood might wish to take her own legal advice and that it would be uncaring and unnecessarily bureaucratic to insist on the provision of proper legal consent at this time. Nevertheless, it needed to be brought to her attention that storage was going ahead to allow her time to clarify the situation. Mrs. Blood subsequently requested to be artificially inseminated with her late husband's sperm and the HFEA refused to accede to Mrs. Blood's request to sanction the storage and use of sperm for treatment. The HFEA further refused to accede to her request that the Authority exercise its discretion to permit the export of gametes from the UK to enable her to receive treatment in the EU, on the ground that the provisions of the HFE Act 1990 had been breached as there had been no written consent and no opportunity for the husband to receive counselling. Mrs. Blood applied for judicial review and the judge dismissed the application but gave leave to appeal. Mrs. Blood appealed.

6 HELD **:**

Allowing the appeal and remitting the matter to the authority for reconsideration:

- Both the authority and the judge's decision that in the absence of the necessary written consent both the treatment of Mrs. Blood and storage of Mr. Blood's sperm in the UK would be prohibited

by Sch 3 of the HFE Act 1990 were correct. In future, and in order to give effect to the clear language of the Act, those who are responsible for treating a man and woman together should take the precaution of having the necessary consent not only for storage but also to enable that treatment to continue if the man should die before the sperm is used.

- As far as the export of gametes for treatment in the EU is concerned, Parliament acted well within its powers in passing the 1990 Act and the restrictions imposed on the export of sperm did not constitute an infringement of a citizen's right to receive medical treatment in another Member State under Arts. 59 and 60 of the EC Treaty. But the Authority's decision to refuse to use its discretion to allow Mrs. Blood to export the sperm was contrary to Art 59 because it did not pay sufficient regard to the exceptional circumstances of the case and the fact that in future it will not be possible for this problem to arise since sperm could not lawfully be preserved without written consent.

1 CASE **:**

Family Division, U v W (Attorney General Intervening) [1997]

2 LAW REPORT **:**

Weekly Law Report, vol. 3, p. 739

3 KEY WORDS **:**

HFE Act 1990, s 28(3) - artificial insemination treatment provided outside the UK - unmarried couple - donor sperm - parentage - art 59 of EC Treaty.

4 LEGAL QUESTION **:**

Whether couple received treatment services together for the purpose of s 28(3) of the HFE Act 1990.

Whether requirement that doctor providing treatment should be licensed constitutes a restriction on the freedom to provide services under art. 59 of EC Treaty.

5 FACTS **:**

The applicant, Miss U, was the mother of twins born as a result of artificial insemination at a clinic in Rome. She sought a declaration from the court under section 27 of the Child Support Act 1991 that Mr. W, the respondent, was their father by virtue of s 28(3) of the HFE Act 1990 The judge found that Miss U and Mr. W had had a very close relationship and for three and a half years they were virtually living together. From an early stage Miss U had wanted to have a child by the respondent. He was content that she should do so, but notwithstanding their efforts she failed to become pregnant. The couple was referred to a specialist clinic in the UK which offered artificial insemination through SUZI. The treatment failed and the couple were referred to Dr. A's clinic in Rome. The couple travelled to Rome. In the event, after an unsuccessful attempt to fertilize Miss U's eggs with Mr. W's sperm, Miss U was artificially inseminated with her own eggs fertilized with donor sperm. Following this, the affair between the couple came to a sudden end and the twins were born. The respondent now contended that the services provided in Rome fell outside s 28(3) of the HFE Act as they had not been provided for them together but for her alone. He further contended that Dr. A was not "a person to whom a license applies" under that section. The applicant agreed but submitted that the requirement of a license in s 28(3) of the HFE Act 1990 constitutes a restriction on the freedom to provide services within the Community which infringes art 59 of the E.C. Treaty.

6 HELD **:**

Dismissing the application - the applicant and the respondent had received services together for the purposes of s 28(3) of the HFE Act 1990 but since the treatment had not been provided by a license holder, the section could not confer paternity on the applicant's partner. The statutory requirement that the doctor providing the treatment be licensed did constitute a restriction on the freedom to provide services under art 59 of the EC Treaty. But the restriction was valid and proportionate.

THEME 4

Abortion

1 CASE **:**

Court of Session, Kelly v Kelly (1997)

2 LAW REPORT **:**

Family Law Reports, vol. 2, p. 828.

3 KEY WORDS **:**

Abortion - Scotland - Husband seeking to restrain estranged wife form terminating pregnancy - Abortion Act 1967.

4 LEGAL QUESTION **:**

Whether rights of child actionable at birth could be invoked before birth to prevent an abortion.

Whether father of child has enforceable right to prevent an abortion.

5 FACTS **:**

The pursuer sought an order preventing his estranged wife from having a lawful abortion. The pursuer submitted that, since an action for damages lay at the instance of a child's guardian in respect of wrongful injury sustained by that child whilst *in utero*, the wrong must be capable of prevention by interdict in advance. The pursuer further submitted that he had a right to represent the interests of the foetus in order to prevent an apprehended wrong being done to it. An *ex parte* order was granted at first instance but recalled after hearing the parties. The pursuer reclaimed against the recall.

6 HELD **:**

Refusing the reclaiming motion - (1) Injury to the foetus is not actionable before birth as an unborn foetus has no legal persona which is separate from that of the mother. Foetal rights only crystallise at birth. (2) Whether it is an actionable wrong to the unborn foetus for an abortion to be terminated depends essentially on whether Scots law confers on the foetus a right to continue to exist in the mother's womb. Scots law recognises no such right on the foetus. Such a right would conflict with the policy of the Abortion Act 1967 to enable women to exercise their right to terminate the pregnancy in accordance with its terms. It follows that no person can invoke the power of the court to vindicate such a right.

THEME 5

ACCESS TO MEDICAL RECORDS

1 CASE **:**

Court of Appeal, R v Mid Glamorgan Family Health Services Authority, Ex Parte Martin [1995].

2 LAW REPORT **:**

Weekly Law Reports, Vol. 1, p. 110.

3 KEY WORDS **:**

Patient previously detained under Mental Health Act 1959 - applicant seeking access to medical records - right of access at common law - art 8 of the European Convention for the Protection Human Rights & Freedoms.

4 LEGAL QUESTION **:**

Whether patient, who had previously been detained under Mental Health Act 1959, has an absolute right of access to his medical records.

5 FACTS **:**

The plaintiff sought access to medical records kept by the defendants in relation to his previous detention and treatment under the Mental Health Act 1959. It was over 20 years since he had been a patient of any doctor whose records were held by the health authority. The health authority offered to disclose the records to a medical expert nominated by him, who would be in the position to decide whether and to what extent disclosure could be made without causing harm to the plaintiff or to third parties. The plaintiff rejected the offer, contending that he had an absolute right of access to his medical records which he based on his fundamental right to self-determination protected by Art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

6 HELD **:**

Dismissing the appeal, that the patient's right of access to medical records, whether at common law or under the Access to Health Records Acts 1990, was not absolute but qualified. Access may lawfully be denied if, in the opinion of the holder of the record, disclosure of the information is likely to cause serious harm to the physical or mental health of the patient or to any other individual.

THEME 6

EUTHANASIA

1 CASE **:**

Crown Court, R v Cox [1992]

2 LAW REPORT **:**

BMLR vol. 12 p. 38.

3 KEY WORDS **:**

Patient with terminal illness - patient requesting doctor to kill her - doctor injecting patient with potassium chloride - mercy-killing - attempted murder - euthanasia.

4 LEGAL QUESTION **:**

Whether a doctor who administers a lethal injection of potassium chloride at the patient's request is guilty of attempted murder.

5 FACTS **:**

The patient was a 70 year old woman, terminally ill with rheumatic arthritis, complicated by gastric ulcers, gangrene and body sores. She suffered excruciating pain which could not be controlled by drugs. She repeatedly asked her consultant, Dr. Cox to help her die. Dr. Cox injected her with a lethal dose of potassium chloride. She died almost immediately. Dr. Cox was prosecuted for attempted murder. Ognall J. directed the jury to convict if they found that Dr. Cox's intention or primary purpose was to hasten death and not merely to alleviate suffering.

6 HELD **:**

Dr. Cox was found guilty of attempted murder. He was sentenced to one year's imprisonment, suspended for 12 months.

II. MENTALLY DISORDERED PATIENTS

THEME 1

REFUSAL OF ARTIFICIAL NUTRITION

1 CASE **:**

Court of Appeal, F v Riverside Health Trust [1994]

2 LAW REPORT **:**

Family Law Reports, vol. 1, p. 614.

3 KEY WORDS **:**

Patient suffering from anorexia - refusal of food - force feeding - court's jurisdiction to issue interim ex parte declarations.

4 LEGAL QUESTION **:**

Whether court has jurisdiction to issue interim declarations.

5 FACTS **:**

The appellant was detained under s 3 of the Mental Health Act 1983. She suffered from anorexia nervosa. She reached a stage of extreme weight loss. The doctor in charge of her treatment became concerned that her life could be at risk if she lost more weight. The hospital made an *ex parte* application for a declaration that compulsory feeding would be lawful in the circumstances. The judge granted the declaration together with an order requiring both parties to attend the court on a later date so that the matter could be heard *inter- partes*.

6 HELD **:**

Setting aside the order, that the order amounted to an interim declaration and the court has no jurisdiction to issue interim declarations. In cases of emergency, where matters of life and death are concerned, the court has jurisdiction to issue *ex parte* declarations (*Re S* [1992] 3 Weekly Law Reports 806, FD but such declarations are final.

1 CASE **:**

Family Division, Re KB (An Adult) (Mental Patient: Medical Treatment) (1994)

2 LAW REPORT **:**

19 BMLR 144.

3 KEY WORDS **:**

Patient sectioned under the Mental Health Act 1983 - Patient suffering from anorexia nervosa - refusal of food - s 63 of Mental Health Act 1983.

4 LEGAL QUESTION **:**

Whether naso-gastric feeding can be construed as treatment for mental disorder under s 63 of the Mental Health Act 1983.

5 FACTS **:**

The patient was detained under the Mental Health Act 1983. She suffered from anorexia nervosa. The health authority applied for a declaration that naso-gastric feeding without her consent would be lawful.

6 HELD **:**

"Medical treatment" under s 63 includes relief of the symptoms of the mental disorder as well as treatment for the disorder itself. Tube-feeding is an integral part of the treatment for anorexia nervosa and therefore amounts to treatment for mental disorder which can lawfully be administered without the patient's consent by a responsible medical officer under s 63 of the Mental Health Act.

1 CASE **:**

Court of Appeal, B v Croydon District Health Authority [1995]

2 LAW REPORT **:**

Weekly Law Reports, vol. 1, p. 294.

3 KEY WORDS **:**

Patient detained under Mental Health Act 1983 - patient refusing food - patient refusing consent to tube-feeding.

4 LEGAL QUESTION **:**

Whether tube-feeding is treatment for mental disorder under s 63 of Mental Health Act 1983.

5 FACTS **:**

The patient was a woman of 24 who suffered from a psychopathic disorder. The symptoms included depression and a compulsion to self-harm. The only known treatment was psychoanalytic psychotherapy. She stopped eating and her weight fell to dangerous levels. The patient applied to the court for an injunction to restrain the health authority from feeding her by tube without her consent.

6 HELD **:**

The patient could lawfully be fed under s 63 of the Mental Health Act 1983,which authorises medical treatment of a patient for a mental disorder from which he is suffering without his consent. Medical treatment could be construed as including all ancillary acts which are necessary to alleviate or prevent a deterioration of the mental disorder or to alleviate the consequences of the disorder. (*Re KB* (*An Adult) (Mental Patient: Medical Treatment)* (1994) 19 BMLR 144, applied).

THEME 2

REFUSAL OF CAESAREAN SECTION

1 CASE **:**

Family Division, Tameside and Glossop Acute Services Trust v CH (A patient) [1996]

2 LAW REPORT **:**

Family Law Reports, vol. 1, p. 762.

3 KEY WORDS **:**

Pregnant woman detained under Mental Health Act 1983 - doctors advising caesarean section patient refusing to co-operate with doctors - s 63 of Mental Health Act - use of force.

4 LEGAL QUESTION **:**

Whether caesarean section is treatment for mental disorder under s 63 of Mental Health Act. Whether force can be used.

5 FACTS **:**

The patient was a pregnant woman of 41 who was 38 weeks pregnant. She had been suffering from schizophrenia since the age of 14 . She was detained in a hospital under s 3 of the Mental Health Act 1983. The consultant psychiatrist in charge of her treatment had no doubt that she wanted the baby, but she was unable to accept medical advice which she perceived as malicious and harmful to her child as a result of her psychotic and delusional condition. The consultant obstetrician became concerned that she might resist an early induction or a caesarean section at the time of the birth, should the need arise. The hospital sought a declaration from the court that the operation could be performed, including any ancillary treatment and any restraint to the extent to which it may reasonably be required.

6 HELD **:**

Declaration granted. The performance of a caesarean section, and the reasonable use of restraint, fall within a broad interpretation of s 63 of the Mental Health Act 1983, which provides that the consent of a patient is not required for any medical treatment given to him for the mental disorder from which he is suffering. In this case, the patient lacked the mental capacity to consent or refuse medical treatment in relation to the management of her pregnancy as she failed all three of the tests laid down in *Re C* (*Refusal of Treatment* [1994]. The medical evidence was that it would be in her best interests to deliver a healthy child. The achievement of a successful outcome of her pregnancy was a necessary part of the overall treatment for her mental disorder.

III. MENTALLY INCOMPETENT ADULTS

THEME 1

GENERAL PRINCIPLES

1 CASE **:**

House of Lords, Re F (Sterilisation: Mental Patient [1990].

2 LAW REPORT **:**

Appeal Cases, vol. 2, p. 1.

3 KEY WORDS **:**

Mentally handicapped adult - sterilisation - medical treatment of person unable to consent - jurisdiction of court -procedures.

4 LEGAL QUESTION **:**

Whether sterilisation of a mentally handicapped woman lawful. Whether court has jurisdiction to consent to operation.

5 FACTS **:**

The patient was 36. She became mentally disabled as a result of an acute infection when she was 9 months old. She had the verbal capacity of a child of 2 and the mental capacity of a child of 4 to 5. She had been a voluntary in-patient in a mental hospital since the age of 14 . She formed a sexual relationship with a male patient at the same hospital. Her mother and doctors thought it would be disastrous for her to conceive a child. Ordinary methods of contraception were considered to be unsuitable. The mother, acting as her next friend, sought a declaration that she could be lawfully sterilised without her consent or for the consent of the court under its *parens patriae* or its inherent jurisdiction to her sterilisation. The judge granted the declaration. The Official Solicitor appealed to the Court of Appeal, which affirmed the decision. The Official Solicitor appealed to the House of Lords, contending that, in the absence of its *parens-patriae* jurisdiction, the court had no power to declare the operation lawful.

6 HELD **:**

F could lawfully be sterilised.

(1) The *parens patriae* jurisdiction for persons of unsound mind was abolished by the Mental Health Act 1959 and, as a result of a legislative oversight, the court no longer has jurisdiction to authorise treatment or make decisions on behalf of adults of unsound mind.

(2) The court has jurisdiction to issue declarations that a proposed course of treatment would be lawful or unlawful.

(3) Medical treatment of an adult patient who is not mentally competent to give consent is lawful if it necessary in order to save his life or to insure improvement or prevent deterioration in his physical or mental health. The treatment must be in the patient's best interests.

(4) The standard to be applied to determine what is in the best interest of the patient is the

standard laid down in *Bolam v Friern Hospital Management Committee* [1957] 1 Weekly Law Reports 582 which requires a doctor to act in accordance with a responsible and competent body of professional medical opinion.

(5) In the case of a sterilisation operation an application to the court for a declaration concerning the lawfulness of the proposed operation was not strictly necessary as a matter of law although it was highly desirable.

1 CASE **:**

Family Division, Re H (Mental Patient) [1992]

2 LAW REPORT **:**

BMLR vol. 1, p. 71.

3 KEY WORDS **:**

Patient suffering from mental disorder - doctors advising diagnostic brain scan - application to court for a declaration.

4 LEGAL QUESTION **:**

Whether court declaration required for diagnostic scanning of a patient who lacked the capacity to consent.

5 FACTS **:**

The patient was 25 years old. She was diagnosed as suffering from schizophrenia. She had been a voluntary patient in a mental hospital since she was 21. The schizophrenia did not respond to drug treatment. Her doctors wished her to undergo a CT brain scan to investigate the possibility of a brain tumour. Attempts had been made to discuss procedures with the patient but she was unable to address them in any reasoned way, although she made it clear that she hated needles and indicated her total opposition to the procedures. It was accepted by the Official Solicitor, as guardian ad litem, and the health authority that she did not have the capacity to consent to or refuse treatment. The health authority sought a declaration that the proposed procedures could be lawfully undertaken.

6 HELD **:**

Dismissing the application and applying *Re F* [1990] - this was not one of those special cases where it was necessary or desirable to grant a declaration. There was no reason to distinguish between proposed diagnostic procedures and proposed therapeutic procedures. The same criterion governs their lawfulness. As to whether the procedure is in the best interests of the patient, there is always a balance to be struck, in relation to treatment just as much as to diagnosis, between possible risks and possible benefits.

THEME 2

TEST OF MENTAL COMPETENCE / REFUSAL OF TREATMENT

1 CASE **:**

Court of Appeal, Re C (Adult: Refusal of Treatment) [1994].

2 LAW REPORT **:**

Weekly Law Reports, vol. 1, p. 290.

3 KEY WORDS **:**

Test of mental competence - refusal of amputation - advance treatment directive.

4 LEGAL QUESTION **:**

Whether mentally disordered patient has mental capacity required to give valid refusal for treatment. Whether court has jurisdiction to grant injunction restraining hospital from carrying out treatment contrary to a valid advance directive.

5 FACTS **:**

The patient was 68. He had been diagnosed as suffering from chronic paranoid schizophrenia whilst serving a 7 year prison sentence for a crime committed in 1962. He had been transferred to a mental hospital. In 1993 he developed gangrene in the foot. He was advised by the consultant vascular surgeon that he would die imminently if the leg was not amputated below the knee and that his chances of survival with more conservative treatment were no better than 15%. Mr C refused to consider amputation. Mr C's solicitor sought an undertaking that the hospital would not amputate. This was refused on the basis of the consultant psychiatrist's report that Mr C's mental illness reduced his capacity to consent to treatment. C sought an injunction restraining the hospital from amputating his leg now or in the future, without his consent.

6 HELD **:**

Granting the injunction - The presumption that C has a right to self-determination had not been displaced as it had not been established that C's mental illness prevented him from understanding the nature, purpose and effects of the treatment and making a clear choice. When considering whether an individual has the capacity to refuse treatment, the question to be decided is whether it has been established that the patient's capacity is so reduced by his mental illness that he does not sufficiently understand the nature, purpose and effects of the proposed treatment.

The test to be applied is threefold. The patient must be able to:

iii) comprehend and retain treatment information.
iv) believe it.
v) weight it in the balance to arrive at a choice.

1 CASE **:**

Family Division, Re JT (Adult:Refusal of Medical Treatment) [1998]

2 LAW REPORT **:**

Family Law Reports, vol. 2, p. 49.

3 KEY WORDS **:**

Patient detained under Mental Health Act 1983 - patient refusing haemodialysis - mental capacity - duty of doctors.

4 LEGAL QUESTION **:**

Whether mentally disorder patient detained under Mental Health Act 1983 had requisite mental capacity to refuse haemodialysis. Whether lawful for doctors to abide by refusal.

5 FACTS **:**

The patient was a woman of 25 who had been detained under s 3 of the Mental Health Act 1983 by reason of mental disability which had been associated with extremely severe behavioural disturbance. She developed renal failure and underwent dialysis for a short period of time. But she subsequently refused to undergo any further treatment and to cooperate with doctors. The consequences of her refusal were explained to her but she persisted in her refusal and consistently said that she wanted to die. All the doctors attending her, including her psychiatrist and another psychiatrist who examined her, were of the view that she understood the purpose and nature of the treatment and the consequences of a refusal to continue with it. Furthermore, the renal consultant Dr. S, thought that it would be unethical and unsafe to attempt to compel her to undergo haemodialysis. Accordingly the hospital sought first, a declaration from the court that the patient had the mental capacity to refuse treatment and second a declaration that it would be lawful for doctors to abide by her refusal to undergo treatment.

6 HELD **:**

Dismissing the summons- the patient had the required mental capacity to make a decision about whether to consent to or refuse treatment as she satisfied the threefold test in *Re C(Refusal of Medical Treatment)* [1994] *supra*. Consequently, doctors were under a duty to abide by her refusal and a declaration was not necessary as the purpose of the declaration was not to render lawful that which would have otherwise been unlawful.

THEME 3

ORGAN / TISSUE DONATION

1 CASE **:**

Family Division, Re Y (Mental Incapacity: Bone Marrow Transplant) [1997]

2 LAW REPORT **:**

Weekly Law Reports, vol. 2, p. 556.

3 KEY WORDS **:**

Mentally incompetent patient - Bone marrow donation.

4 LEGAL QUESTION **:**

Whether diagnostic tests can be performed on a mentally handicapped woman in order to establish whether she might be a suitable bone marrow donor.

5 FACTS **:**

The defendant Y, was an adult who had been severely physically mentally handicapped from birth. She had lived in a community home from the age of 10. Her sister, the plaintiff, was the eldest of four. She had been diagnosed as suffering from non-Hodgkin's lymphoma. Her only realistic prospect of recovery was for her to receive a bone marrow transplant from a healthy, compatible donor. Preliminary investigations showed that of all the three sisters only Y would be a suitable donor. A search for other donors had been carried out and one possible donor had been found but, from the point of view of the plaintiff, her prospects of significant prolongation of life were higher with transplantation from a sibling. The plaintiff sought a declaration that preliminary blood tests under general anaesthetic could be lawfully performed on the defendant, notwithstanding that she could not consent to the operation.

6 HELD **:**

Granting the declaration, the donation of bone marrow to the plaintiff would be in the best interests of the defendant (*Re F* [1990] HL applied). The donation would materially increase the chances of survival of the defendant's sister, and the psychological emotional and social benefits to the family as a whole would be benefits to the defendant herself too. It was therefore in the defendant's best interests to undergo diagnostic tests to establish her suitability as a donor.

THEME 4

STERILISATION

1 CASE **:**

House of Lords, Re F (Sterilisation: Mental Patient) [1990] *Supra* p. 35.

2 LAW REPORT **:**

See supra p. 35

3 KEY WORDS **:**

4 LEGAL QUESTION **:**

5 FACTS **:**

6 HELD **:**

1 CASE **:**

Family Division, F v F [1991]

2 LAW REPORT **:**

Butterworths Medico-Legal Reports, vol. 7, p. 135.

3 KEY WORDS **:**

Mentally handicapped woman - sterilisation.

4 LEGAL QUESTION **:**

Whether declaration from court necessary when sterilisation is an incidental effect of a treatment.

5 FACTS **:**

The patient was a 29 year old woman with severe physical and mental handicap. She suffered from excessive menstruation. In the opinion of the doctors the only suitable treatment for her was a hysterectomy which would have the incidental effect of sterilising her. The mother sought a declaration that the operation may be lawfully be carried out.

6 HELD **:**

The application was not necessary because the operation did not require the approval of the court. Where two medical practitioners are of the view that the operation is necessary for therapeutic purposes, in the best interests of the patient and there is no practicable less intrusive means of treating the condition, no application to the court is necessary as a matter of good medical practice.

1 CASE **:**

Practice Note (Sterilisation: Minors and Mental Health Patients) [1993]

2 LAW REPORT **:**

All England Law Reports , vol. 3, p. 222.

3 KEY WORDS **:**

Practice Note - Sterilisation of minors or incompetent adults - Procedure for applications to the court.

4 PRACTICE NOTE **:**

The Official Solicitor has issued the following Practice Note relating to the procedure in applications to be followed in cases where the sterilisation of a minor or mentally incompetent adult is sought. The Practice Note states *inter alia* that:

1. The prior sanction of a High Court judge will be required in virtually all cases involving the sterilisation of a minor or a mentally incompetent adult.

2. The patient must always be a party.

3. The Official Solicitor will act as an independent and disinterested guardian representing the interests of the patient and will require to meet and interview the patient in all cases where he or she is able to express any views.

4. The Official Solicitor anticipates that the judge will expect to receive comprehensive medical and psychological evaluations of a patient from qualified experts.

5. There is no practicable less intrusive alternative.

1 CASE **:**

Family Division, Re W (An Adult: Mental Patient) (Sterilisation) [1993]

2 LAW REPORT **:**

Family Law Reports, vol. 1, p. 381.

3 KEY WORDS **:**

Mentally handicapped woman - sterilisation.

4 LEGAL QUESTION **:**

Whether sterilisation of mentally handicapped woman lawful when the risk of the patient becoming pregnant is small.

5 FACTS **:**

W was mentally handicapped. She was now aged 20 but had a mental age of about 7. She lived at home. Her mother wished to encourage her daughter to live in the community as much as possible in the future. She worried about the possibility of W becoming pregnant. The consultant psychiatrist thought there was only a small chance of W having sexual intercourse in the future. The mother sought a declaration that her daughter could lawfully be sterilised. The sterilisation was supported by W's doctor and a number of medical experts including obstetricians and gynaecologists, and a social worker.

6 HELD **:**

Granting the declaration - the proposed sterilisation was in the best interests of W, notwithstanding the fact that there was only a small chance of her becoming pregnant at the present time (*Re F* [1990] applied).

1 CASE **:**

Outer House, Lawrence, Petitioner [1996]

2 LAW REPORT **:**

BMLR vol. 32 p. 87

3 KEY WORDS **:**

Mentally handicapped woman - sterilisation.

4 LEGAL QUESTION **:**

Whether a mentally handicapped woman should be sterilized in the absence of evidence of her having ever had sexual intercourse or be likely to in the future.

5 FACTS **:**

Ingrid was a 32 year old autistic mentally handicapped woman who was being looked after by her mother at home. Her behaviour was ritualistic and obsessive. Her mother thought that she would never get her out of the bathroom if she bled. Her mother and medical adviser also considered that if she were to become pregnant, this would have a devastating effect on her. She was prescribed the contraceptive pill at the age of 13 to prevent her menstruating. After 20 years, her medical advisor took the view that she could not continue using the oral contraceptive over the age of 35 without risks to her health. He advised sterilisation. Ingrid's mother sought the power to consent to sterilisation on behalf of her daughter. The curator opposed the petition, arguing that sterilisation was unjustified in the circumstances, as there was no evidence that Ingrid had ever had sexual intercourse or that she was likely to in the future.

6 HELD **:**

Granting the petition, the test to be applied was whether the surgical sterilisation proposed was necessary and in the best interests of Ingrid (following *Re F* [1990]). The test was satisfied in this case as, balancing all the considerations including the desirability of avoiding a major invasive surgical procedure, the only way of fulfilling the need to prevent menstruation and a pregnancy, was by means of sub-total or partial hysterectomy.

THEME 5

ABORTION

1 CASE **:**

Re SG (Adult Mental Patient: Abortion) [1991]

2 LAW REPORT **:**

Family Law Reports, vol. 2, p. 239.

3 KEY WORDS **:**

Mentally handicapped woman - abortion.

4 LEGAL QUESTION **:**

Whether termination of pregnancy, in the case of a mentally handicapped woman who lacks the capacity to consent, is lawful.

5 FACTS **:**

SG was a 27 year old mentally disabled woman unable to consent to treatment by reason of her mental incapacity. Her father applied to the court for a declaration that a termination of pregnancy would be lawful.

6 HELD **:**

Dismissing the application, no formal declaration by the court that such treatment is lawful was required. Abortion is regulated by the Abortion Act 1967, which provides adequate safeguards to protect patients undergoing terminations of pregnancy. Providing those conditions are met, no formal application to the court is required.

THEME 6

CAESAREAN CASES

***1 CASE* :**

Family Division, Norfolk and Norwich Healthcare NHS Trust v W [1996]

***2 LAW REPORT* :**

Family Law Reports, vol. 2, p. 613.

***3 KEY WORDS* :**

Woman in labour - refusal of consent to caesarean section - mental competence - use of force at common law.

***4 LEGAL QUESTION* :**

Whether caesarean section can lawfully be performed on woman in labour who refuses to give consent. Whether court has power at common law to authorize use of force.

***5 FACTS* :**

The patient was an adult woman who had arrived at the hospital in labour denying that she was pregnant. She was in a state of arrested labour. The obstetrician considered that a forceps delivery or caesarean section should be performed. A psychiatrist examined her and found that she was not suffering from a mental disorder although she had previously had a history of psychiatric treatment. He was not certain whether she was capable of comprehending and retaining information about the proposed treatment but he was of the opinion that she was not able to balance the information given to her. The hospital applied for a declaration that the proposed operation would be lawful and that doctors could use force if necessary to exact compliance.

***6 HELD* :**

Declaration granted. The patient was not mentally competent as she was incapable of weighing up the considerations involved. The operation was in her best interests. The court had power at common law to authorize the use of reasonable force (*ReF* [1990] applied).

1 CASE **:**

Family Division, Rochdale Healthcare NHS Trust v C [1997]

2 LAW REPORT **:**

Family Court Reports vol. 1 p. 274.

3 KEY WORDS **:**

Woman in labour - caesarean section - refusal of consent - mental competence.

4 LEGAL QUESTION **:**

Whether a caesarean section can be lawfully performed on a woman in labour who refuses consent.

5 FACTS **:**

The patient was an adult woman in labour. The consultant obstetrician in charge considered that unless a caesarean section was carried out within an hour, the life of the foetus and health of the mother were at risk. The mother had previously had a caesarean section and said she would rather die than have it again. It was not possible to obtain psychiatric evidence in the time available. The obstetrician considered that the patient was fully competent. The hospital applied for a declaration that the proposed operation would be lawful.

6 HELD **:**

Declaration granted. The patient was not mentally competent as the pain and emotional stress involved in labour prevented her from weighing up the information she was given. She failed the third element of the *Re C* test (*supra*).

1 CASE **:**

Family Division, Re L(Patient : Non Consensual Treatment) [1997].

2 LAW REPORT **:**

Family Law Reports, vol. 2, p. 837.

3 KEY WORDS **:**

Patient in labour - doctors advising caesarean section - patient refusing to give consent - fear of needles - mental competence.

4 LEGAL QUESTION **:**

Whether caesarean section could lawfully be performed on woman in labour who objected because of her extreme fear of needles. Whether patient competent to give consent.

5 FACTS **:**

L was a young woman who had been in labour for several hours when the labour became obstructed. The obstetrician in charge was of the view that the child was presenting in good condition but would not remain so indefinitely. In the absence of intervention, deterioration was inevitable and death would follow. L was advised that a caesarean section might be required but she was unable to consent to the operation because of her acute fear of needles. The hospital applied for a declaration as to the lawfulness of a) inserting needles for the purpose of anaesthesia and intravenous infusion and b) the performance of an emergency caesarean section on L. The official solicitor attended as amicus curiae. He did not oppose the application. Such was the urgency of the case that there had been no time to prepare any documents for the court. The court had to proceed on the basis of oral information given by phone by doctors attending the patient.

6 HELD **:**

Declaration granted. L's extreme needle phobia amounted to an involuntary compulsion that disabled L from weighing treatment information in the balance to make a choice. Accordingly L lacked the relevant mental competence to make the treatment decision. The proposed anaesthesia and caesarean section were in L's best interests, as she would be spared the inevitable profound distress of loosing her child and the risk to her own health and well being would be reduced to a minimal risk. The declaration contained a direction to medical staff to "generally furnish such treatment and nursing care as may be appropriate to ensure that she suffers the least distress and retains the greatest dignity".

1 CASE **:**

Court of Appeal, Re MB (Medical Treatment) [1997]

2 LAW REPORT **:**

Family Law Reports, vol. 2, p. 427.

3 KEY WORDS **:**

Patient in labour - doctors advising caesarean section - patient refusing to give consent - fear of needles - mental competence - use of force - court guidance on procedures.

4 LEGAL QUESTION **:**

Whether a caesarean section can lawfully be performed, with the use of reasonable force if necessary, on an adult woman in labour who refuses to undergo the operation because of her fear of needles.

5 FACTS **:**

Miss MB first attended an antenatal clinic when she was 33 weeks pregnant. She refused to allow blood samples to be taken since she was frightened of needle pricks. At 40 weeks, the foetus was found to be in the breech position. Miss MB was advised by Mr. N to have a caesarean section because of the serious risks to the baby of brain damage or death. She agreed and was admitted into hospital where she signed a consent form, but she refused twice to provide blood samples and later refused to undergo anaesthesia by means of an injection. Several attempts were made to perform the operation, which she still wanted, but consent was withdrawn at the last moment because of needle phobia. The hospital applied to the court for a declaration that the operation would be lawful. Dr. F, a consultant psychiatrist, was asked to assess MB in connection with the legal proceedings. He described MB as someone who was able to clearly understand and consent to the need for a caesarean section, providing she was away from the need to undergo the procedure. But when it came to the actual point, he thought she was not capable of making a decision at all because she panicked and the needle dominated her thinking and made her quite unable to consider anything else. The hospital applied for a declaration that the operation would be lawful. The judged agreed to the declaration, including the use of reasonable force if necessary. MB appealed.

6 HELD **:**

Appeal dismissed. A mentally competent patient has an absolute right to refuse to consent to medical treatment for any reason, rational or irrational, or for no reason at all, even where that decision may lead to his or her own death. Irrationality is here used to connote a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Irrationality in itself does not amount to incompetence, but may be symptom or evidence of incompetence. A person lacks capacity if some impairment or disturbance of mental functioning renders the person unable to make a decision whether to consent to or to refuse

treatment (*Re C*, supra). Capacity has to be commensurate to the gravity of the decision (*Re T*, supra) and may be impaired by temporary factors such confusion, shock, fatigue, pain, drugs or panic induced by fear. The extent to which force or compulsion may become necessary can only be judged in each individual case and by the health professionals. It may become for them a balance between continuing treatment which is forcibly opposed and deciding not to continue with it. It is a difficult issue which may have to be considered in greater depth in another occasion. On the facts of the case, Miss MB was temporarily incompetent and doctors could lawfully administer the anaesthetic if that was in her best interests.

Procedure:

The C.A. offered some guidance to doctors who feel it necessary to seek declarations from the court. *Inter* alia, and as a matter of good practice, doctors ought for the time being seek a ruling from the High Court on the issue of competence. The hearing should be inter partes, the mother should be represented in all cases. If she is unconscious, she should have a guardian *ad litem*. The Official Solicitor should be notified and it would be helpful if he was prepared to continue to act as *amicus curiae* where needed. There should be some evidence, preferably but not necessarily from a psychiatrist as to the competence of the patient.

THEME 7

UNCONSCIOUS PATIENTS
LIFE-SAVING TREATMENT

1 CASE **:**

House of Lords, Airedale NHS Trust v Bland [1993]

2 LAW REPORT **:**

Weekly Law Reports, vol. 2, p. 316.

3 KEY WORDS **:**

Patient in PVS state - withdrawal of life-sustaining treatment, food and hydration - civil and criminal liability of doctors - euthanasia.

4 LEGAL QUESTION **:**

Whether artificial nutrition and hydration amount to medical treatment. Whether life-sustaining treatment and artificial feeding and hydration can lawfully be withdrawn from a patient in a PVS state with no hope of recovery.

5 FACTS **:**

Bland was a 21 year old patient who three years previously had suffered severe brain damage as a result of an accident at the Hillsborough football stadium. He was left in a persistent vegetative state. The medical consensus was that there was no hope whatsoever of recovery or improvement of any kind. He had been looked after at the Airedale General Hospital where he was being fed and hydrated artificially. His condition required continual nursing and medical attention. His doctor, in agreement with the parents, reached the conclusion that medical treatment should be discontinued. The hospital sought a declaration that it might (i) lawfully discontinue all life prolonging treatment and medical support measures designed to keep the patient alive in his existing PVS state, including the termination of ventilation, nutrition and hydration by artificial means; and (ii) lawfully discontinue and thereafter need not furnish medical treatment to the patient except for the sole purpose of enabling the patient to end his life and die peacefully with the greatest dignity and the least of pain, suffering and distress. The judge granted the declaration sought. The Official Solicitor appealed to the Court of Appeal which upheld the judge's decision. The Official Solicitor appealed to the House of Lords contending that the withdrawal of feeding would inevitably cause and be intended to cause death, and as such, it would be an unlawful and criminal act. Secondly, he submitted that discontinuance of the artificial feeding would be a breach of the doctor's duty to care for and feed him, and since it would cause death it would necessarily be unlawful or criminal.

6 HELD **:**

Dismissing the Appeal and granting the declaration. The cessation of artificial nutrition and hydration constituted an omission which was only criminally culpable in law if doctors were under a duty to feed and hydrate the patient. The doctor is under a duty to preserve life. But the principle of the sanctity of life is not absolute. In the case of a mentally incapacitated adult who has expressed no prior wishes, the doctors duty is to act in the best interests of the patient

(*Re F* [1990] applied.) A majority of law lords considered that the standard to be applied by the doctor who is proposing to discontinue life-saving treatment, is the Bolam standard. In determining what is in the best interests of the patient the doctor must act in accordance with a responsible body of medical opinion. In this case, life-prolonging treatment or other life-sustaining measures was not in the best interests of the patient as it served no medical or therapeutic purpose. All life-prolonging medical treatment and nutrition and hydration could therefore lawfully be withdrawn. Lord Browne-Wilkinson and Lord Mustill thought that it was imperative that the moral, social and legal issues raised by the case should be considered by Parliament. For the time being, doctors should as a matter of practice seek the guidance of the court in all cases similar to the present.

1 CASE **:**

Court of Appeal, Frenchay Health Care NHS Trust v S [1994]

2 LAW REPORT **:**

Weekly Law Reports, vol. 1, p. 601.

3 KEY WORDS **:**

Patient in deep state of unconsciousness - artificial feeding accidentally stopped - emergency - euthanasia.

4 LEGAL QUESTION **:**

Whether court should make a declaration in an emergency, on the question of whether a nasogastric tube, which had accidentally become dislodged, should be reinserted when the patient had been in a state of deep unconsciousness for two years.

5 FACTS **:**

The patient was aged 24. He had suffered catastrophic brain damage as a result of taking a large overdose of drugs. For two years he had been in a state of deep unconsciousness and had not responded to intensive rehabilitation and nursing treatment. He was fed artificially through a nasogastric tube which had been inserted into his stomach by surgical means. The tube became accidentally dislodged. A further surgical procedure was required to reinsert it. If the tube was not reinserted the patient would die within a limited period. The consultant in charge took the view that feeding should not be resumed, as there was no chance whatsoever of this being to the patient's benefit. The mother agreed and the father was ambivalent. Reports from other experts as to whether the patient was in a persistent vegetative state were not unanimous. The hospital sought a declaration authorising the hospital not to replace the tube and this was opposed by the Official Solicitor who contended, inter alia, that it was not practicable for the court to explore fairly and fully the issues involved in view of the emergency of the situation. The judge granted the declaration and the Official Solicitor appealed.

6 HELD **:**

Granting the declaration and dismissing the appeal - it was unsatisfactory to deprive doctors of the benefit of the court's opinion in an emergency. The court has the ultimate power and duty to review the doctors decision in the light of all the facts. The judge has to make a final decision as to what constitutes the patients best interests after hearing all the evidence. In this case the opinions of all of the consultants were to the same effect. Hence, there was no reason for the court to interfere with the hospital's decision.

1 CASE **:**

Practice Note (Official Solicitor to the Supreme Court: Vegetative State) [1996]

2 LAW REPORT **:**

Family Law Reports, vol. 2, p. 375

3 PRACTICE NOTE **:**

The guidelines issued by the High Court include *inter alia*, the following:

(1) The termination of artificial feeding and hydration for patients in a PVS state will in virtually all cases require the prior sanction of a High Court judge.
(2) The diagnosis should be made in accordance with the most up to date generally accepted guidelines for the medical profession.
(3) There should be at least two independent reports on the patient from neurologists or other doctors experienced in accessing disturbances of conciseness.
(4) The applicant may be either the next of kin or other individual closely connected with the patient or the relevant health authority/hospital. The views of the next of kin or of others close to the patient cannot act as a veto, but they must be taken fully into account by the court (*Re G (persistent vegetative state)* [1995] 2 FCR 46).
(5) The Official Solicitor should normally be invited to act as a guardian *ad-litem* of the patient.

1 CASE **:**

Outer House & Inner House, Law Hospital Trust v Lord Advocate and Another [1996]

2 LAW REPORT **:**

Family Law Report, vol. 2, p. 407

3 KEY WORDS **:**

PVS patient - discontinuance of life-sustaining treatment - civil and criminal liability of doctors -jurisdiction of court - euthanasia.

4 LEGAL QUESTION **:**

1) Whether court has jurisdiction to sanction discontinuance of life-sustaining treatment by means of a declarator (Inner House). 2) Whether discontinuance of treatment in best interests of patient (Outer House).

5 FACTS **:**

The patient had been in a PVS state since January 1992. She remained alive only because feeding and hydration were provided artificially. The medical consensus was that there was no prospect of any improvement in her condition. Both the hospital and the relatives agreed that treatment should be discontinued. The hospital applied for the sanction of the court, in the form of a declarator, to terminate the treatment. The Lord Ordinary referred the case to the Inner House for guidance on the competency of the action.

6 HELD **:**

The Inner House held that a declarator would be inappropriate in all future cases where the *parens patriae* jurisdiction, which had not been abolished in Scotland, was available. But to assert whether a proposed course of conduct was or was not criminal by means of a bare declarator was not open to the court and lay outside its jurisdiction (*Airedale NHS Trust v Bland* not followed). The question to be answered by the Lord Ordinary concerned the civil consequences of the proposed course of conduct and the issue to be addressed was whether it was in the patient's best interests that the life-sustaining treatment which she is receiving should be discontinued.

The Outer House held that, notwithstanding the uncertainties acknowledged by medical experts in the present case, the opinions expressed had carefully followed the authoritative guidance of the BMA on the diagnosis of PVS cases. In the court's opinion, continuance of the treatment was no longer of any benefit to the patient. That being so, the patient no longer had any best interests to be served by continuing such treatment.

1 CASE **:**

Family Division, Re R (Adult: Medical Treatment) [1996]

2 LAW REPORT **:**

Family Law Reports, vol. 2, p. 99.

3 KEY WORDS **:**

Mentally incompetent patient - cardiac arrest - DNR orders - quality of life.

4 LEGAL QUESTION **:**

Whether lawful for mentally incompetent patient not to be given CPR in the event of him suffering a life threatening condition involving a cardiac arrest.

5 FACTS **:**

R was a 23 year old patient who had suffered since birth from a serious malformation of the brain and from cerebral palsy. R was not in a PVS state but in the scale of gravity of the low awareness state he would rate between 1 and 2 on a scale of 10. R suffered from recurrent infections and dehydration which had required repeated hospitalisation. Doctor S, the consultant responsible for his medical care, discussed R's position with his parents. They agreed that, if in future R should suffer a life threatening condition involving a cardiac arrest, he should not be subjected to cardio-pulmonary resuscitation. Accordingly Doctor S signed a DNR order stating that "It is agreed that cardio-pulmonary resuscitation is not to be given to the above-named person". Following concern from the day care centre staff, an application for leave to apply for judicial review was issued by R's next friend. The application sought to squash the trust's 'do not resuscitate' policy and 'no treatment' policy. The trust sought a declaration that it was lawful to withhold CPR and the administration of antibiotics in the event of R developing a potentially life-threatening infection.

6 HELD **:**

Granting the declaration - the principle of law to be applied in this case is that in "In *Re J (A Minor) (Wardship: Medical Treatment)* [1991] 2 Weekly Law Reports 140, CA". Although there is a strong presumption in favour in the preservation of life, it is for the court to judge whether the quality of life that the patient would have to endure if given the treatment would be "so afflicted as to be intolerable". The unanimous evidence was that CPR would not be in the best interests of R in the event of his suffering a cardiac arrest. Furthermore, antibiotics could be lawfully withheld, but only when a potentially life-threatening condition arose immediately prior to the condition which would otherwise call for the administration of antibiotics.

1 CASE **:**

Family Division, Re D (Medical Treatment) [1998]

2 LAW REPORT **:**

Family Law Reports, vol. 2, p. 427.

3 KEY WORDS **:**

Patient in coma for two years - withdrawal of artificial nutrition and hydration - Royal college of Physicians' guidelines on PVS patients.

4 LEGAL QUESTION **:**

Whether withdrawal of artificial nutrition and hydration lawful in the case of a patient who has been in a deep coma for two years but does not comply with some of the guidelines issued by the Royal College of Physicians to determine the existence of a PVS state.

5 FACTS **:**

M suffered serious head injuries in a road traffic accident when she was 22. She was left seriously disabled and depressed. She was looked after by her mother until six years later when there was an episode of unknown cause which resulted in further brain damage. She was left in a vegetative state and was looked after in hospital. There was a difference of opinion between medical experts as to whether or not M was in a PVS state although they all agreed that M had no awareness whatsoever. M did not fulfil all the guidelines on *The Permanent Vegetative State* produced by the Royal College of Physicians in 1996 as she still exhibited a `menace' response and some primitive following responses, a nystagmoid response to caloric testing to the right ear with cold water and the fact that she seemed to be exhibiting some features of epileptic seizures similar to those that occurred prior to the second cerebral episode. Notwithstanding this, all medical experts were sympathetic to the mother's request that artificial nutrition and hydration should be withdrawn. The hospital applied for a declaration to that effect.

6 HELD **:**

Declaration granted. Although M did not fulfil all the clinical guidelines issued by the Royal College of Physicians on *PVS*, the effect of the declaration was not to extend the range of cases in which a declaration might properly be considered. In this case all the evidence establishes that there is no real possibility of meaningful life continuing to exist. The patient is suffering a `living death'. Accordingly, it is not in the patient's best interests artificially to keep her body alive.

IV. CHILDREN

THEME 1

WITHDRAWAL OR WITHHOLDING OF LIFE-SAVING TREATMENT

1 CASE **:**

Court of Appeal, Re J (A Minor) (Wardship: Medical Treatment*)* [1991]

2 LAW REPORT **:**

Weekly Law Reports, vol. 2, p. 140.

3 KEY WORDS **:**

Severely brain-damaged baby - quality of life - withholding of life-saving treatment.

4 LEGAL QUESTION **:**

Whether court should consent to withholding of life-saving treatment.

5 FACTS **:**

Baby J was 5 months old. He was born prematurely suffering from severe brain damage due to shortage of oxygen and impaired blood supply. Brain scans conducted later showed a large area of fluid-filled cavities where there ought to have been brain tissue. His condition had required repeated hospitalisation and ventilation. Baby J was made a ward of court. The question facing the court was whether to consent to treatment being withheld if baby J suffered another collapse.

6 HELD **:**

Treatment could be withheld. The principle on which the court's decision is to be based is the best interests of the child: the interests of the ward are paramount. Respect for the sanctity of human life imposes a strong presumption in favour of taking all steps capable of preserving it. But there is no absolute rule requiring life to be preserved at all costs, whatever the quality of the life to be preserved, and however distressing may be the nature of the treatment necessary to preserve life. The court has to perform a balancing exercise and decide whether the pain and suffering and quality of life which the child will experience if life is prolonged would be so "demonstrably awful" or "intolerable", that it is not in the best interests of the child to receive the treatment.

1 CASE **:**

Court of Appeal, Re J (A Minor) (Child in Care: Medical Treatment) [1992]

2 LAW REPORT **:**

Weekly Law Reports, vol. 3, p. 507.

3 KEY WORDS **:**

Mentally handicapped child - withholding of life-saving treatment - court's jurisdiction to order doctors to treat.

4 LEGAL QUESTION **:**

Whether court has jurisdiction to order treatment against the clinical judgement of doctors in charge.

5 FACTS **:**

J was aged 16 months. He had suffered severe head injuries which had left him profoundly handicapped in an accidental fall when he was one month old. J's condition required constant attention. The medical opinion was that it would be medically inappropriate to intervene with intensive therapeutic measures such as artificial ventilation if J were to suffer a life-threatening event. A declaration from the court was sought to determine whether artificial ventilation and/or other life saving measures should be given to J if he suffered a life-threatening event.

6 HELD **:**

The fundamental issue was whether the court, in the exercise of its inherent power to protect the interests of minors, should ever require a medical practitioner to adopt a course of treatment which, in the *bona-fide* clinical judgement of the practitioner concerned is contraindicated as not being in the best interests of the patient. The court could not conceive of any circumstances in which this would be other than an abuse of power. The court could not *dictate* the treatment to be given to the child.

1 CASE **:**

Family Division, Re A [1992]

2 LAW REPORT **:**

Med LR, vol. 3, p. 303.

3 KEY WORDS **:**

Child brain dead - disconnection of life-support machine - jurisdiction of court - parental responsibility.

4 LEGAL QUESTION **:**

Whether consent of all those with parental responsibility required to disconnect a brain-stem dead child from a life-support machine.

5 FACTS **:**

Baby A was brought to the emergency unit of the hospital on January 17. The mother claimed that he had fallen from a table and struck his head. The doctors who examined him could detect no heartbeat.

The clinical symptoms were not consistent with accidental injury. A was put on a ventilator but showed no signs of recovery. Several days later tests were conducted in accordance with the guidelines of the Royal College of Surgeons. They showed that A was brain-stem dead. The hospital sought to disconnect A from the ventilator and discontinue attempts to resuscitate him. The parents refused consent and sought a court order to the effect that no one with parental responsibility could give consent to the switching off of a life support machine in respect of A without the consent of others with parental responsibility.

6 HELD **:**

The court had jurisdiction to make a declaration that A was now dead for all legal as well as medical purposes and also to make a declaration that the consultants would be acting lawfully in disconnecting A from the ventilator. As A was now dead it was not possible for the court to exercise its inherent jurisdiction over him as a child.

1 CASE **:**

Re C (A Baby) [1996]

2 LAW REPORT **:**

Family Law Reports, vol. 2, p. 43.

3 KEY WORDS **:**

Baby suffering from serious brain damage - not able to survive without artificial ventilation - disconnection of ventilator.

4 LEGAL QUESTION **:**

Whether court should grant leave to discontinue artificial ventilation of a baby with serious brain damage.

5 FACTS **:**

Shortly after birth baby C developed a form of meningitis which left her with serious brain damage. She could not survive without artificial ventilation. She was suffering increasing pain and distress. There were no prospects of recovery. Her life expectancy was judged to be no more than one or two years. All the medical staff agreed that it was not in the best interests of the child to be artificially ventilated. C was made a ward of court and doctors sought leave from the court to discontinue ventilation.

6 HELD **:**

Leave granted. It was not appropriate for the court to make general observations as to when doctors should seek the leave of the court. Each case must be considered on its merits, although when the patient is a child and a ward of court, then it is quite clear that any important step in the life of the ward requires the leave of the court.

1 CASE **:**

Court of Appeal, Re T (A Minor) (Wardship: Medical Treatment) [1997]

2 LAW REPORT **:**

Family Law Reports, vol. 1, p. 502.

3 KEY WORDS **:**

Baby suffering from life-threatening liver disease - doctors advising liver-transplant - parents refusing consent to the operation.

4 LEGAL QUESTION **:**

Whether baby, who will otherwise die, should undergo liver-transplant surgery when the parents refuse consent to the operation.

5 FACTS **:**

The patient was a baby boy born with a life-threatening liver defect. The unanimous medical prognosis was that he would not live beyond the age of two and a half without a liver transplant and that it would be in his best interests to undergo the operation as soon as a donor liver became available When three weeks old, the baby had undergone surgery which had caused much pain and distress and proved unsuccessful. The parents, who were both healthcare professionals, sought medical advice and decided that they did not wish their baby to undergo major transplant surgery. The father went to work abroad and the mother and baby, against medical advice, went out on a visit. A suitable liver became available while the mother was abroad with the baby, but the hospital was unable to get in touch with the mother and the opportunity was lost. The paediatrician took the view that the mother was not acting in the best interests of the baby and referred the matter to the local authority. The local authority sought the court's ruling on the following issues:

(1) whether it was in the best interests of the baby to undergo surgery for liver transplant;
(2) for permission to perform the operation notwithstanding the refusal of the mother to consent;
and
(3) for the child to be returned to the jurisdiction for the purpose of surgery.

The judge held that the chances of success were good if the transplant was performed and that it was in the child's best interests for the operation to go ahead. The mother appealed.

6 HELD **:**

Overturning the ruling of the judge - the principle to be followed by the court in decisions concerning a child is that the paramount consideration must be the welfare of the child. The consent or refusal of consent of the parents is an important consideration to weigh in the balancing exercise to be carried out by the judge. But the court decides and in so doing may

overrule the decision of a reasonable parent. There is a strong presumption in favour of a course of action which would prolong life. But to prolong life, is not the sole objective of the court and to require it at the expense of other considerations may not be in a child's best interests. In the present case, taking into account all factors and not just medical considerations, it was not in the interests of the baby for the court to force the devoted mother to take on the commitment of caring for the child after major invasive surgery with which she did not agree.

1 CASE **:**

Re C (Medical Treatment) [1998]

2 LAW REPORT **:**

Family Law Reports, vol. 1, p. 385.

3 KEY WORDS **:**

Baby suffering from fatal disease - doctors advising withdrawal of ventilation - parents objecting - jurisdiction of court.

4 LEGAL QUESTION **:**

Whether court would sanction the proposed withdrawal of ventilation and non-resuscitation.

5 FACTS **:**

Baby C was 16 months. She suffered from the fatal disease spinal muscular atrophy type

1. She had been on ventilation to support her breathing. Her condition was described by medical experts as a `no chance' situation, an expression used by the Royal College of Paediatrics and Child Health to denote a situation `where the child has such severe disease that life-sustaining treatment simply delays death without significant alleviation of suffering'. The consultant in charge of her care advised that it was no longer in her best interests to be kept on ventilation and if and when ventilation is withdrawn it should not be reinstituted in the event of a further respiratory arrest. The parents were orthodox Jews. They were prepared to agree that C be taken off the ventilator but they were unwilling to agree that ventilation should not be reimposed if C suffered respiratory failure. The hospital sought leave from the court to disconnect the child from the ventilator and in the event of respiratory failure not to resuscitate.

6 HELD **:**

Leave granted. On the medical evidence available, there was no doubt that it was in C's best interests to be taken off the ventilator and that it should not be reinstated or resuscitation attempted. The paramount consideration is not to preserve life but the best interests of C. Medical treatment should be as advised by her doctor, to include palliative care to ease her suffering and permit her life to end peacefully and with dignity. The court could not agree to the parents' request that C be put back on a ventilator in the event of respiratory failure, as this was not in C's best interests and it would be tantamount to requiring the doctors to undertake a course of treatment which they are unwilling to do. The court could not consider making an order which would require them to do so.

THEME 2

PARENTS RIGHT TO ENFORCE TREATMENT

1 CASE **:**

Court of Appeal, R v Cambridge District Health Authority, *ex parte* B, [1995]

2 LAW REPORT **:**

Family Law Reports, vol. 1, p. 1055.

3 KEY WORDS **:**

Child suffering from leukaemia - health authority refusing to fund treatment.

4 LEGAL QUESTION **:**

Whether Cambridge Health Authority had acted illegally in refusing to fund treatment for child.

5 FACTS **:**

B was a ten year old child who was first diagnosed as suffering from non-Hodgkins lymphoma with common acute lymphoblastic leukaemia when she was five. Over the following five years she underwent two course of chemotherapy, including a course of total body irradiation and a bone marrow transplant. Unhappily in January 1995 she suffered a further relapse of acute myeloid leukaemia. The doctor in charge of her case thought that she had a very short period of some 6-8 weeks to live and that no further treatment could usefully be administered. Other doctors who had the care of B at earlier stages agreed. B's father was unwilling to accept these views. He approached a notable expert in the field, Professor Goldman, who advised that it would be reasonable to give B further chemotherapy in the hope of achieving complete remission, whereupon a second transplant could be contemplated. Professor Goldman rated the chances of success with this approach at less than 20% but still considered it as the best palliative approach to a patient with acute myeloid leukaemia in relapse after bone marrow transplantation. The proposed chemotherapy treatment would have cost £15.000 followed by a further £60.000 for the transplant if successful. The Authority was not prepared to fund the treatment on the grounds that it was not in the child's best interests and that the substantial expenditure on treatment of an experimental nature with such a small chance of success was not an effective use of limited resources. The judge made an order of certiorari quashing the decision of the Cambridge Health Authority on the grounds that the Authority had acted unreasonably and exceeded its powers in refusing to fund the treatment. Justice Laws further held that when an individual's right to life is at stake, a public body which enjoyed a discretion whose exercise might infringe such a right could not perpetrate such an infringement unless it could show a substantial objective justification on public interest grounds, and Cambridge had failed to do so in the present case. The Authority appealed.

6 HELD **:**

Allowing the appeal - the criticism made by Justice Laws could not be upheld as the Authority had been aware of the child's family's concerns and the proposed treatment was, on any showing, at the frontier of medical science. Health authorities have limited budgets and have to make difficult and agonizing decisions as to how such budgets are best allocated to the

maximum advantage of the maximum numer of patients. Such judgments are not for the court to make, nor can a health authority be fairly criticised for not advancing details of their budget allocations before the court. Since the Authority had not exceeded its powers or acted unreasonably, its decision should not be quashed by the court.

THEME 3

REFUSAL OF
LIFE-SAVING TREATMENT

A * CHILD UNDER 16

1 CASE **:**

Court of Appeal, Re R (A Minor) (Wardship: Medical Treatment) [1991]

2 LAW REPORT :

All England Law Reports, vol.4, p.177.

3 KEY WORDS :

Child under 16 - refusal of treatment - mental competence - validity of consent - jurisdiction of court.

4 LEGAL QUESTION **:**

Whether medical treatment may be given to a child under 16 who refuses to give consent.

5 FACTS **:**

R was a 15 year old girl who had been in local authority care for several years. She was suffering from mental illness which had required the administration of anti-psychotic medication. Her doctor thought that if in the absence of medication she was likely to lapse into a fully psychotic state and become a serious suicidal risk. R rejected further medication and the local authority applied to the court to override her consent.

6 HELD **:**

Granting the application - a child under 16 who has sufficient maturity and understanding may give valid consent to treatment (*Gillick v West Norfolk and Wisbeck Health Authority* [1985] 2 BMLR 11). What is involved in assessing competence is not merely an ability to understand the nature of the proposed treatment but a full understanding of the consequences of the treatment and the anticipated consequences of the treatment. A "*Gillick* competent" child has the power to consent to treatment but this power is concurrent with that of a parent or guardian. The court has the power to override the decisions of both a "*Gillick* competent" child and those of parents or guardians. In this case R was not "*Gillick* competent".

1 CASE **:**

Family Division, Re E (A Minor) (Wardship: Medical Treatment) [1993]

2 LAW REPORT **:**

Family Law Reports, vol. 1, p. 386.

3 KEY WORDS **:**

Fifteen-year-old child - child and parents Jehovah's Witnesses - child and parents refusing blood transfusion - mental capacity of child.

4 LEGAL QUESTION **:**

Whether blood transfusion could lawfully be given to a fifteen-year-old boy who refused consent on religious grounds.

5 FACTS **:**

A 15 year old boy suffering from leukaemia urgently required a blood transfusion. Both he and his parents were devout Jehovah's Witnesses. They refused consent to the life-saving blood transfusion. The hospital made an application to the court to authorise the blood transfusion.

6 HELD **:**

Granting the application - the boy lacked sufficient understanding to give full and informed consent. Neither was the court satisfied that his will was fully free. The first and paramount consideration was the welfare of the child. The court had to balance the wishes and religious convictions of the parents and those of the child against the well-being of the child. In this case the court would not allow the child to make a martyr of himself.

1 CASE **:**

Family Division, Re S (A Minor) (Consent to Medical Treatment) [1993].

2 LAW REPORT **:**

Family Law Reports, vol. 1, p. 377.

3 KEY WORDS **:**

Fifteen-year-old child - child requiring blood transfusion - child and mother Jehovah's witnesses - patient and mother refusing blood transfusion - mental capacity of child.

4 LEGAL QUESTION **:**

Whether blood transfusion could lawfully be administered to fifteen-year-old child who refused consent on religious grounds.

5 FACTS **:**

The patient was a fifteen and a half year old girl who had suffered from thalassaemia since birth. She and her mother began attending the Jehovah's Witnesses meetings when she was about 10. Blood transfusion treatment continued until 1994 when the girl failed to attend hospital for a blood transfusion. The local authority applied to the court to authorise treatment against the mother and daughter's consent.

6 HELD **:**

Granting the application - the girl in this case lacked the emotional maturity that one would have expected of a girl of her age. She only had a very general understanding of matters relating to her treatment and appeared to be subject to considerable pressure from her mother. She didn't understand fully the implications of her refusal and was therefore not "*Gillick* - competent". In the circumstances it was clear that the court could use its discretion to override the girl's wishes.

B * CHILD 16 OR OVER

1 CASE **:**

Court of Appeal, Re W (A Minor) (Medical Treatment: Courts Jurisdiction) [1992]

2 LAW REPORT **:**

All England Law Reports, vol. 4, p. 627.

3 KEY WORDS **:**

Sixteen-year-old child - child refusing life-saving treatment - s 8 of Family Law Reform Act 1969 - power of court to override refusal.

4 LEGAL QUESTION **:**

Whether court has jurisdiction to override the refusal of treatment of a 16-years-old child.

5 FACTS **:**

W was 16 and suffering from anorexia nervosa. She was being looked after by the local authority as an in-patient in a specialist residential unit for children and adolescents. Whilst at the unit her condition deteriorated to the point where she had to be fed by naso-gastric tube and have her arms encased in plaster to stop her injuring herself. The authority sought to move her to a hospital specialising in the treatment of eating disorders but W refused. The authority applied to the court to override W's refusal to undergo the proposed treatment. The primary question was whether in the light of section 8 of the Family Law Reform Act 1969, the court had any jurisdiction to make orders concerning W's medical treatment which conflicted with her expressed wishes.

6 HELD **:**

Granting the order - the court has the power under its inherent jurisdiction to override W's refusal to undergo the proposed treatment. Section 8 of the Family Law Reform Act 1969 gives minors who have attained the age of 16 a right to consent to surgical, medical or dental treatment. Such a consent cannot be overridden by those with parental responsibility for the minor. But it can be overridden by the court. The right does not extend to consent to the donation of blood or organs. Section 8 of the Family Reform Act does not confer on a minor the power to refuse medical treatment irrespective of the views of the parents or the court. No minor of whatever age has power by refusing consent to treatment to override the consent of someone who has parental responsibility for the minor and a- fortiori a consent by the court. Nevertheless such a refusal is a very important consideration in making clinical judgements and for parents and the court in deciding whether to give consent themselves.

1 CASE **:**

Family Division, Re C (Detention: Medical Treatment) [1997]

2 LAW REPORT **:**

Family Law Report, vol. 2, p. 180.

3 KEY WORDS **:**

Sixteen years old child - mental capacity of child - detention for treatment - secure accommodation - jurisdiction of the court - Children Act 1989 s 25.

4 LEGAL QUESTION **:**

Does the court, when exercising its inherent jurisdiction in relation to a child who has attained 16 years of age, have power to authorise and direct the detention of the child in a specified institution for the purposes of medical treatment? Is the inherent jurisdiction being used solely for the purposes of deprivation of liberty?

5 FACTS **:**

C was aged 16. She had been diagnosed with anorexia nervosa two years previously and admitted to a private clinic for treatment. Her condition deteriorated and she was detained in hospital under the Mental Health Act 1983 and subsequently readmitted to the clinic. Her behaviour was aggressive and suicidal and she absconded several times. The local authority applied for the court to exercise its inherent jurisdiction with respect to C and was granted an order so that a) C be detained at the clinic or at a clinic specified by her doctor for the purpose of receiving appropriate medical treatment and that b) the doctor be granted leave to give medical treatment without consent. A further order was granted that doctors may use reasonable force if necessary either to transfer C to hospital and/or to provide treatment and generally to furnish such treatment and nursing care as may be appropriate to ensure that C suffers the least distress and retains the greatest dignity. C appealed and the Official solicitor acted as *amicus curiae*. C contended that she was prepared to stay in the clinic voluntarily and receive treatment so there was no need for an order.

6 HELD

The court has the power in the exercise of its parens patriae jurisdiction to authorise detention in a clinic for the purposes of treatment and the power to authorise the use of force if necessary for that purpose. The court's powers were not ousted by s 25 of the Children Act since all the evidence was that the restriction of liberty was not the primary purpose of the clinic. Consequently, the clinic was not "secure accommodation" within the meaning of the Act. Nevertheless, in making an order the court should have regard to the need to build in equivalent safequards to those which Parliament has provided for children who are subjects of applications under s 25. Further, the court had to be satisfied that s 1 of the Children Act 1989 was satisfied and that the order sought was in the best interests of the child. In this case, the

medical evidence was that C lacked the capacity to give consent to or refuse treatment. There was no doubt that detention at the clinic was an essential part of the treatment. Accordingly, the order was extended to 18 April when the court would consider whether it should be extended further or discharged.

1 CASE **:**

Family Division, A Metropolitan Borough Council v DB [1996]

2 LAW REPORT **:**

Family Law Report, vol. 1, p. 767.

3 KEY WORDS **:**

Seventeen-year-old child - mental capacity - detention for treatment - secure accommodation - Children Act 1989, s 25.

4 LEGAL QUESTION **:**

Whether court may under its inherent jurisdiction make an order directing that reasonable force may be used to require a child over 16 to submit to medical treatment - Whether maternity ward was secure accommodation within the provisions of the Children Act 1989, s 25.

5 FACTS **:**

D was a seventeen year old crack-cocaine addict who had lived in squalor and received no antenatal care shortly before the birth of her child. Her blood pressure was dangerously high causing eclamptic fits which put at risk both her life and that of the child. She was advised to remain in hospital but discharged herself twice. Eventually the hospital obtained a High Court order authorizing the performance of a caesarean section including the use of reasonable force if necessary. Following the birth, the newly born child was made the subject of an emergency protection order. Medical advice was that D should remain in hospital so that both her and the child could continue to be monitored and receive appropriate medical treatment. The local authority applied for a court order that D be placed in secure accommodation pursuant to s 25 of The Children Act 1989. D maintained that the hospital was not secure accommodation and that the order regarding medical treatment should be amended to delete the provision that reasonable force could be used to administer treatment.

6 HELD **:**

Allowing the application - D was not mentally competent to consent or refuse medical treatment as she failed all of the three stages of the *Re C* test (*supra* [1994] 1 FLR 31). The essential factor in determining what is secure accommodation within the meaning of s 25 of the Children Act 1989 is the restriction of liberty. In the circumstances of this case, the maternity ward was secure accommodation as it imposed restrictions of D's liberty, readily enforceable by the existence of a key and pass system. Further, the court was satisfied that the provisions of s 25(1)(b) were met since unless D was kept in the ward she was likely to injure herself or others. As to the use of force, the local authority, which also has parental authority under the care order, is empowered like the mother, to take such steps as may be appropriate to protect the best interests of the child, including the use of reasonable force for the purpose of imposing intrusive necessary medical treatment on her where a life-threatening situation arises or where a serious deterioration to health may occur if appropriate treatment is not administered.

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