Medical Malpractice Liability in Spain: Cases, Trends and Developments*

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Introduction

In the last 20 years health care liability has developed to become a central issue of Spanish tort law. The number of claims has increased dramatically and so has the number of judicial decisions. After reforms passed in 1998 and 1999 in procedural and substantive rules, now the largest part of the cases are tried by administrative courts applying the general norms that govern public bodies and that provide for a vicarious liability system in which liability is channelled through the public body that operates the health care service. However, services provided by health care professionals or private institutions belong to private law and therefore the claims against professionals and institutions remain a matter of civil courts. Rules related to breach of contract (Arts. 1101 et seq. Civil Code, CC), liability in tort (Arts. 1902 et seq. CC) or Art. 28.2 of the General Consumers Protection Act (Ley General para la Defensa de Consumidores y Usuarios, LGDCU) are to be applied. The first two sets of rules mentioned above refer to a fault liability system, while the second rule places upon the health care provider a strict liability regime and rules based on the principle of fault liability. The following selection of decisions of the Civil Chamber of the Supreme Court (Tribunal Supremo) shows to what extent the civil courts have followed the path of their administrative counterparts in order to ease the victim to get compensation of his or her harm. The first decision offers a good example of the main questions that arise with regard to the errors or defects of information and reflects the prevailing doctrine about informed consent. The second decision deals with causation issues and the third one with the proof of fault. Whereas Spanish courts seem willing to give an increasing role to arguments that serve the goal of facilitating the proof of physician’s fault, the general rules of causation are still applied to medical malpractice cases in very strict way. The last decision illustrates the manner in which general
criteria of recoverable damages and compensation are usually employed in Spanish tort law and in health care liability.

1 Information errors

Case: STS 2.7.2002 (RJ 2002\5514 = LA LEY 2002, 6492)

The defendant underwent an operation for vasectomy on 30 November 1990 at the public hospital “Virgen de la Concha” in Zamora. Prior to the operation the psychologist at the Centre of Family Guidance informed the patient, in general terms, on the characteristics of this sort of operation and gave him an information brochure where it was stated that vasectomy was an easy operation, with no side-effects and which could cause some discomfort for a couple of days only. It is not recorded anywhere that the physician who performed surgery or the hospital provided the patient with any additional information referring to the specific characteristics of the operation of vasectomy, its risks and its eventual complications. There is no document either in which the plaintiff authorises the performance of the operation in writing after having received the necessary and suitable information in the terms provided by the law.

The operation was performed satisfactorily. However, during its performance a haemorrhage occurred which caused a haematoma and subsequently an infection called orquiepididimitis, which resulted in the atrophy of one of the testicles. The records do not state which sort of postoperative treatment the plaintiff received, but it is clear that due to complications arising during the performance of the operation the plaintiff had to be on sick leave for three months and suffered severe pain and serious discomfort. After the plaintiff was discharged the long-term effect from the operation was the permanent atrophy of one testicle.

The claim against the surgeon who performed the vasectomy and against the hospital brought by the patient was dismissed by the Court of First Instance num. 1 in Zamora on 8 February 1996, and this decision was confirmed by the Appellate Court of Zamora on 27 June 1996. However, the Supreme Court pronounced its judgement in favour of the plaintiff. Although it has not been proven that the surgeon had acted negligently during the operation or the postoperative treatment, the surgeon and the health care centre were ordered to pay the compensation of 7 million PTA (approx. €42,000) that the plaintiff had claimed for, arguing that, prior to the operation, the plaintiff was not given adequate and sufficient information on the risk of suffering the sort of com-