GREECE

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AP 1408/2015: Non-pecuniary Damages for Moral Harm in case of the Intra-uterine Death of a Foetus

a) Brief Summary of the Facts

P, pregnant with her third child, had to undergo a Caesarian section in order to remove the foetus which had died due to Rh isoimmunisation, a type of hemolytic disease.

It was proven that P had a negative Rh (rhezus) blood group system, while her second child has a positive Rh factor. During P's second pregnancy, this Rh incompatibility led to the production of maternal antibodies which, in P's third pregnancy, attacked the unborn child's red blood cells through the placenta resulting in its death.

The Court of Appeal found that the death of the foetus could have been prevented if the obstetricians who had attended P, and especially the defendant, doctor D, had performed their duties properly.

Accordingly, the Court decided that D was liable for the foetus' death and awarded P the amount of € 10,000 as compensation for her moral harm and € 25,000 to her as well as to her husband as compensation for pain and suffering for the death of the foetus.

b) Judgment of the Court of Cassation

The Court of Cassation held that, according to the law, life starts from the date of birth (arts 35 and 36 GCC); the foetus is assimilated to a living person only under the condition that he was born alive and survived even for a while after birth. Accordingly, in case of the intra-uterine death of a foetus because of tortious behaviour of a third person, the family of the foetus and more particularly the parents cannot be awarded compensation for pain and suffering, as there was no death caused according to art 932 sent 3 GCC. Compensation for moral harm can only be awarded to the pregnant mother because of the impairment to her health.

c) Commentary

Whether, in case of death of a foetus due to the tortious behaviour of a third person: a) the pregnant woman is entitled to an amount as moral harm for the impairment of her health or b) only she or both she and her husband are entitled to an amount as pain and suffering for the loss of the foetus has been a controversial issue for a long time in Greek jurisprudence and literature.

Contrary to part of the jurisprudence of the courts of substance and of Greek authors who support the view that both spouses are entitled to an amount as pain and suffering for the loss of the foetus on the ground that human life starts with conception, the Court of Cassation follows the view that the provisions of the GCC dictate that a person starts existing from the moment she is born alive.

I am not convinced that this approach is the correct one. The sadness both spouses feel for the loss of the foetus, ie for the loss of their child-to-be, is, at least for them, sadness for the loss of a human being, and justifies their compensation for pain and suffering.

In relation to the above, an interesting subject for discussion arises in the case of medically assisted reproduction and relates to which point of the related *in vitro* process there exists a *nasciturus* in the meaning of art 36 GCC. According to one view, the time of the implantation of the fertilised ovum in the uterus of the woman is the time from which a *nasciturus* starts to exist; before the implantation, the fertilised ovum cannot be a *nasciturus* in the meaning of art 36 GCC. According to another view, art 36 GCC can also apply by analogy to the fertilised ovum even before its implantation, as, even then, it also constitutes a potential living organism.