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**STRICT LIABILITY FOR NEGLIGENT USE OF ANESTHESIA  
(RESPONSABILIDAD OBJETIVA POR EL USO NEGLIGENTE DE LA ANESTESIA)**

**CASE:** *Contradicción de Tesis 93/2011*

**REPORTING JUSTICE:** Arturo Zaldívar Lelo de Larrea

**DECISION ISSUED BY:** First Chamber of Mexico's Supreme Court of Justice

**DATE OF THE DECISION:** October 26, 2011

**KEY WORDS:** civil liability, strict and fault liability, anesthesia, contractual liability, informed consent, medical-health professionals, burden of proof.

**CITATION OF THE DECISION:** Supreme Court of Justice of the Nation, *Contradicción de Tesis 93/2011*, First Chamber, Arturo Zaldívar Lelo de Larrea, J., decision of October 26, 2011, Mexico.

The full text of the decision may be consulted at the following link:

<https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emplematicas/sentencia/2022-01/CT93-2011.pdf>

**CITATION SUGGESTED FOR THIS DOCUMENT:** Center for Constitutional Studies of Mexico's Supreme Court of Justice, Excerpt from of the *Contradicción de Tesis 93/2011*, Mexico.

## SUMMARY OF THE *CONTRADICCION DE TESIS* 93/2011

**BACKGROUND:** A Tabasco Collegiate Circuit Court reported the possible *contradicción de tesis* (conflicting decisions) between its decision and the decision of a Collegiate Circuit Court in Mexico City. The Tabasco Collegiate Circuit Court held that, regardless of whether anesthesia represents a risk, the application of the assumption of risk doctrine is not justified, since the use of anesthesia is the result of a patient-doctor agreement where the patient knows and accepts the risks of its use, so the harm generated by its use gives rise to contractual liability. The Collegiate Circuit Court in Mexico City considered that anesthesia, due to the effects it produces (intense depressant of the central nervous system), is inherently dangerous, so the harm resulting from its application generates strict liability.

**ISSUE PRESENTED TO THE COURT:** Determine what type of civil liability is generated by the harm caused by the negligent use of anesthesia.

**HOLDING:** The conflicting decisions were resolved as follows: Even when the patient has given his informed consent for the administration of anesthesia, the harm generated by the negligent administration of such substance falls under non-contractual liability, since values not waivable by the patient such as the right to health and the right to life are at stake. That said, such non-contractual liability is fault-based, so in order to claim a remedy for the damages generated by the use of anesthesia, negligence in the conduct must be proved. the result of a cause unrelated to the pregnancy and that the resignation was free and spontaneous. Therefore, it was determined that the criterion issued with the following title must govern as court precedent: HARM CAUSED BY THE NEGLIGENT APPLICATION OF ANESTHESIA GENERATES CIVIL FAULT LIABILITY (CIVIL LEGISLATION OF MEXICO CITY AND THE STATE OF TABASCO).

**VOTE:** The First Chamber of the Supreme Court decided the core of this case by the unanimous vote of its five justices Olga Sánchez Cordero de García Villegas, Arturo Zaldívar Lelo de Larrea, Jorge Mario Pardo Rebolledo, Guillermo I. Ortiz Mayagoitia and José Ramón Cossío Díaz.

The votes may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=125593>

## EXTRACT OF THE *CONTRADICCION DE TESIS* 93/2011

p.1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (this Court), in session of October 26, 2011, issues the following decision.

### BACKGROUND

p.1 and 12 On March 3, 2011, the possible *contradiccion de tesis* (conflicting decisions) between the decision issued by a Collegiate Circuit Court of Tabasco and the holding of a Collegiate Circuit Court in Mexico City was reported. Both courts analyzed the type of civil liability generated by the harms caused by the negligent use of anesthesia.

p.13 The Tabasco Collegiate Circuit Court, in deciding an *amparo directo*, considered that, regardless of whether anesthesia represents a risk, the application of the assumption of risk doctrine is not justified, since the use of anesthesia is the result of a patient-doctor agreement where the patient knows and accepts the risks of its use. Therefore, the harm generated by its use gives rise to contractual liability.

For its part, the Mexico City Collegiate Circuit Court, in deciding an *amparo directo*, considered that anesthesia, due to the effects it produces (intense depressant of the central nervous system), is inherently dangerous, and therefore the harm resulting from its application generates strict liability.

### STUDY OF THE MERITS

p.14 To resolve this contradiction, some general concepts of civil liability are explained, based on which it is argued that the harm caused by the negligent use of anesthesia generates non-contractual liability. It is then determined that such liability is fault-based. Finally, it is specified that it is the anesthesiologist who must prove that he acted with due diligence.

#### I. Civil liability

p.14-15 According to the theory of civil liability, one who causes harm to another must remedy it. This harm may be caused by a breach of contract or by a violation of the generic duty of every person not to harm others. In contractual liability, the parties are connected prior to the act that causes the liability and, in non-contractual liability, the connection arises from the occurrence of the harmful acts. Therefore, contractual liability arises from an

agreement that has been transgressed by either of the parties, while fault liability results from the breach of the generic duty not to harm others.

- p.15 For contractual liability to exist, failure to comply with the agreed obligation is enough, while non-contractual liability may be either strict or fault-based. Fault liability is based on a psychological element, either because there is an intention to harm or because there is carelessness or negligence. On the other hand, the subjective element (fault or negligence) is absent from strict liability.

## II. Medical-health civil liability

- p.16-17 Medical-health liability may have an explicit or tacit contractual origin: (a) the providing of the doctor's services or, (b) the providing by the State of a social right, such as public health services. In the first case, the activities included in contractual medical liability are those that were specifically acquiesced to by the doctor and the patient; those duties that by virtue of the services contract had to be fulfilled by the doctor and the patient (payment for the services, date of the procedure, place of the medical intervention, among others). In contrast, in the providing of social security services there is no contract between individuals, but an administrative liability arises, since the State is liable for damages caused by the "irregular actions" of its agents (doctors and public institutions).
- p. 18 Regardless of the origin of the relationship between the doctor and the patient, such liability should not be governed solely by the rules of a contractual breach since contractual liabilities and non-contractual liabilities may coexist. The liability of medical-health professionals goes beyond the duties contained in or derived from the contractual relationship, since they are bound to the standards of their profession. Thus, to determine the type of liability arising from harm generated by medical-health professionals, their compliance or non-compliance with the specifications of medical science when performing their activities must be analyzed.
- p.19 Harm caused to the patient by the negligence of doctors cannot be included in contractual liability because undue impact on physical integrity, or life, which are unwaivable values, cannot be subject to a contract.

### III. Non-contractual liability in the case of negligent application of anesthesia

- p.20-21 Point 16.1.1 of NOM-170-SSA1-1998, for the Practice of Anesthesiology (NOM), requires the patient's signature attesting to know the risk of the administration of anesthesia. The duty imposed by the NOM fulfills the function of authorizing the physician to participate in the rights to health and physical integrity of the patient. Thus, patients have the right to decide freely on the application of the diagnostic and therapeutic procedures offered, since otherwise their fundamental rights of personal freedom and bodily autonomy would be violated.
- p.22 The General Health Law also requires that consent, stating that patients have a right to grant or not grant their informed consent for medical treatments or procedures. In emergency situations there may be exceptions to the informed consent requirement, such as when the patient is in a state of temporary or permanent incapacity.
- p.23 Through consent, generically, it is possible to authorize or consent to situations in which the legal system makes the harmed interests or rights freely waivable by the holder. However, consent cannot be used for intrusion into rights that are not waivable by the holder. Through informed consent the patient assumes the risks and consequences inherent in or associated with the authorized intervention; but it does not exclude medical liability when the doctors or health institutions involved act negligently.
- p.23-24 In medical science there are accepted risks that can arise even when the interventions in the patient are performed under the highest standards required by the profession. In some cases, the type of harm that can be generated and the probability of its occurrence can be estimated. However, there are other types of harms that are generated by the negligence of medical professionals, which are not accepted by patients when they decide to undergo surgery, since they are beyond the scope of the contract. Thus, even if the patient accepts the use of anesthesia, if it is determined that there was a negligent application or inadequate post-surgery care, then non-contractual liability exists. That type of harm cannot be accepted through a contract for services between the doctor and the

patient, since they are unwaivable legal interests, such as health, physical integrity, or life itself.

#### IV. Medical-health fault liability

- p.26-27 Fault and strict liabilities are regulated in articles 1910 and 1913 of Mexico City's Civil Code, and in articles 2024 and 2070 of the Civil Code for the State of Tabasco. Both regulations characterize fault liability as the duty to remedy the damages caused to a third party when they have been caused by the fault or negligence of the defendant, while strict liability is derived from the damages generated by the use of dangerous mechanisms, instruments, devices, or substances even if it is not an illegal use, unless it is proven that such damages were caused by the fault or inexcusable negligence of the victim.
- p.27-28 Doctrine and foreign courts have determined that medical-health liability is fault liability, so it is necessary to prove the element of guilt or the negligence of the professional for there to be a duty of compensation, since the exercise of medical science entails certain risks that cannot always be avoided. In this regard, the elements of fault liability are the harm, the fault, and the causal link between the harm and the fault.
- p.28-29 The social benefit generated by the use of anesthesia is clear. It is no exaggeration to say that it directly protects values such as health and physical integrity and its use represents a great contribution to medical science. The administration of anesthesia is essential in the treatment of various medical conditions, so it is undeniable that its use has a social purpose. Consequently, in order to hold medical professionals or institutions involved in the anesthetic process liable, it must be established that the anesthesia was administered incorrectly or without adherence to the medical or scientific techniques required—*lex artis ad hoc*. Thus, to determine the doctor's duty of compensation it must be analyzed whether the anesthesia was applied according to the care required by the NOM and the duty of diligence required by the profession.
- p.29-30 According to the NOM, the responsibility of the physician specializing in anesthesiology includes the study and assessment of the patient prior to the application of anesthesia to select the lower-risk procedure most appropriate to each situation; the correct and timely

application of anesthesia, constantly monitoring the conditions of the patient during surgery; and the post-anesthetic recovery up to the complete stability of the patient's functions. Thus, anesthetic care is a process that encompasses three stages: pre-, during and post-anesthesia. Although anesthesia must be used under the highest standards of the medical profession since its use involves various risks, this cannot mean that any damage caused by its administration must be compensated by the anesthesiologist who administers it, since the actions of the medical personnel must also be weighed.

#### **V. Presumption of negligence in the application of anesthesia resulting in harm**

p.30-31 In the case of application of anesthesia, the subjective element of the conduct must be proven – the negligence of the doctors – and the burden of proof of diligence falls on the doctors and/or medical institutions in view of the victim's right to compensation. Due to the difficulty for the victim to prove the fault of the anesthesiologist, the burden of proof may be shifted so the doctor is the one who must prove that the anesthesia was applied in accordance with the care established in the applicable regulations and the duty of diligence required by the profession. Thus, the medical staff must demonstrate that they took due care at each stage of the anesthetic procedure.

p.31-32 According to the principles of probatory ease and proximity, the burden of proof must be met by the party who has the means of proof or can produce it or render it to the process at a lower cost so that it can be assessed by the judge. Medical professionals and/or health institutions can more easily access testing to demonstrate their diligent action. They have the necessary knowledge to determine what information may be relevant in the process and they can access such evidence more freely than the person concerned.

p.32 Even in the case of the application of anesthesia, the NOM requires hospital institutions to document the anesthetic procedure. These institutions must also have the patient's medical record. Therefore, the relevant evidence is often in the possession of the doctors themselves or of the hospitals, or these professionals can access it more easily.

p.32 This reversal of the burden of proof does not imply that the doctor has to prove that his or her action (i.e., the application of anesthesia) was not the cause of the harm produced. The reversal of the burden of proof does not cover other elements of liability such as the existence of a causal link between conduct and harm; it is exclusively limited to the subjective element of liability.

p.34 The elements of fault liability are the harm, the fault, and the causal link between such harm and fault. Consequently, reversing the burden of proof of fault means that it will be the medical professional who must prove that he or she did not act negligently, which does not mean that the medical professional has to prove the absence of the other elements of liability. Thus, the medical staff or the hospital institution must only prove that the anesthesia was applied under the legal and professional standards of diligence that are required of them.

If it were accepted that strict liability applied to medical-health matters, the doctor would be liable when it is proven that an injury was caused, regardless of whether his or her conduct was in accordance with the standards of action required by the regulations and *lex artis* of the profession. In this regard, strict liability must be distinguished from fault liability where it is the defendant who must prove that he or she acted diligently.

p.34-35 In summary, in the case of liability arising from harm caused by the application of anesthesia, the defendant doctor will bear the burden of proof of diligence. Therefore, if it cannot be proven that the care established in the applicable regulations or in the *lex artis* of the profession was complied with, the defendant doctor will be liable for the harm caused by the application of that substance.

## DECISION

p. 64-65 In accordance with the foregoing, the criteria established by this Court in the following terms must prevail as case law: "Harm caused by the negligent application of anesthesia generates civil fault liability (civil legislation of Mexico City and the state of Tabasco)."