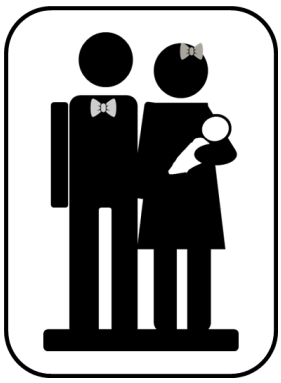

Pain & Suffering, and Time Barring due to exchange of newly born babies, discovered 24 years after this took place.

BY: JORGE PAREDES I ATTORNEY AT LAW I AUGUST 2021

Courts of Justice accept a complaint for damages against a Health Service due to the pain and suffering that was claimed as a consequence of the exchange of newly-born babies.

In January 1993, an unusual number of births took place at the maternity unit of the Aysén Health Service. Up to that date the average had been three births per month, but in January 1993, 12 births took place, causing the collapse of the maternity unit. The above, in addition to the fathers not being allowed to be present during labour, lack of a policy for promoting maternal attachment, and the non-existence of security protocols regarding the procedure for identifying newly-born babies, led to these babies being exchanged and delivered to the wrong set of parents. Thus, newly-born baby called Carlos (fictitious name) was delivered to family group ONE, even though he was the biological son of family group TWO. On the other hand, Andrés (fictitious name), born to family group ONE was mistakenly delivered to family group TWO.

As from February 2017, that is to say, 24 years later, and as a result of taunts and jibes received by the father of family group ONE, said father decided to take a paternity test (DNA). The results showed that he was not the biological father of his son Carlos. Subsequently, the mother of this same family group also took the same test, which showed that she was not the biological mother of the son raised by this family group.

In December, 2017 family group TWO learned of the situation affecting family group ONE, and the mother decided to take a maternity test based on her DNA. The result was negative. Subsequently the boys raised by both family groups took DNA tests, which confirmed that Carlos was not the biological son of family group ONE, but of family group TWO. On the other hand, Andrés also took a DNA test which confirmed that he was the biological son of family group ONE.

LEGAL SCENARIO

After parentage was clarified by means of DNA tests, and it was established that the newly-born boys had been exchanged in January 1993, both family groups jointly filed a complaint for compensation for damages against the Health Service involved, as well as the Regional Hospital

in whose maternity unit the newly-born babies had been exchanged. The complaint was notified in March 2019. The following people participated in this complaint for compensation for pain and suffering:

Family Group ONE, both the mother and the father sued, each of them for $300,000,000; one biological son, for $100,000,000, and the son *"raised"* by the family group, who was actually the biological son of family group TWO, for $300,000,000, thus making a total sum of $1,000,000,000 for pain and suffering.

Family Group TWO, the mother sued for pain and suffering in the amount of $300,000,000; two biological offspring, for $100,000,000 each of them, and the son *"raised"* by this family group, for $300,000,000, thus making a total of $800,000,000. The biological father of this family group did not sue.

The complaint was based on the violation of the plaintiffs' right to personal identity and human dignity, as this implies that every human being can be his or her own self and nobody else, which constitutes an extremely personal right inherent to all persons. Likewise, the lack of service incurred by the Health Service and the Regional Hospital was also claimed.

The defendants first of all claimed that the action had prescribed, as for this case in particular, the applicable rule was a 4-year period taken as from when the act was *"perpetrated"*, for which reason judicial proceedings filed 26 years after the events had taken place, could not be successful. Also, the need for proving the supposed lack of service, was claimed. Finally, the legal nature of the supposed damage and the sum being claimed were disputed.

In May 2020, civil courts accepted the complaint, joint and severally sentencing the Health Service and the Regional Hospital to pay an indemnity in the amount of $180,000,000 to the claimant mothers of both family groups and the father of family group ONE; $70,000,000 for each of the claimant siblings of both family groups, i.e., three in total; and for each son that had been exchanged at birth, the sum of $200,000,000. The above led to a sentence for the total amount of $1,150,000,000.

As was to be expected, both the plaintiffs and the defendants filed appeals against the sentence in first instance; however, this sentence was confirmed by both the Santiago Court of Appeals in January 2021, and by the Supreme Court in July 2021.

RELEVANT ASPECTS FOR THE AREA OF MEDICAL MALPRACTICE CRAWFORD - GRAHAM MILLER

Time Bar for Actions

This case clearly shows the difference that arises between the principle of legal security versus the right to effectively file compensatory actions as soon as events and generated damage are known.

In fact, the complaint for compensation for damages was notified 26 years after the newly-born babies were exchanged. Due to this, the defendants filed a motion to dismiss based on time barring, taken from the date on which the babies were actually exchanged.

Notwithstanding the defendants' claims in this regard, the court accepted the plaintiffs' claims in the sense that time barring corresponded to a penalty that should be applied to the litigant that did not act as a *"reasonable man"* should, as this was a person that did not take necessary and normal action to preserve his equity.

In this regard, the Court stated that *"…defendants' claim that the 4-year period for filing the complaint for compensation in these proceedings was taken as from the 7th of January, 1993, is not admitted, as although it is true that on this date the events occurred that gave rise to this complaint, these circumstances were not known at the time by the parties involved; that is to say that this refers to events which they became aware of and decided to exercise their rights to, as per what is relevant to the case, as did in fact occur; therefore the exception to time barring is not admitted".*

In line with this, the sentence from the Court of Appeals says that *"…the Judge shall establish when the time bar shall begin, taking into account the facts regarding the dates that have a bearing on this, estimating by virtue of the aspects summarised in the reasons mentioned above, that this starting point must coincide with the date on which the holder of the rights is effectively able to take action. Otherwise, a litigant could be penalized for having been negligent in exercising rights the legal entitlement of which he was not aware of, and whose factual grounds he did not know. Also, this interpretation is in line with a model for establishing the beginning of the extinguishing time bar, that is more in agreement with the evolution of the times that contrast with the coding, which placed it as coinciding with the enforceability of the obligation, because as has been mentioned by doctrine:* ***"jurists' time, like physics' time, cannot not escape from the great principle of relativity".***

In short, what is relevant in this particular case, is related to the fact that the time bar for actions shall be taken as from when action is available to the victim, which necessarily implies that the damage shall always be the element that shall determine the moment when the civil offense is perpetrated and the obligation for compensation arises; the maximum extraordinary time bar of 10 years as from the perpetration of the unlawful civil act, cannot be used as a limitation.

Claimed Pain and Suffering

In this case, plaintiffs claimed pain and suffering based on the violation of their right to personal identity and human dignity, as this implies that every human being can be his or her own self and nobody else, which in turn constitutes an extremely personal right inherent to all persons. They also maintained that the events attributed to the defendants, deprived them from the *opportunity* or possibility of enjoying a full life next to whom legitimately should have been their father, mother and brother.

In short, there is a duality of the claimed pain and suffering, covering both *pretium doloris* as well as a lack of opportunity. In this regard, the Court of Appeals maintained that "*…in order to clarify the admissibility of this claim for compensation we must first of all indicate that it was set out in generic terms, using expressions such as* ***"loss of life opportunities"*** *or "the evident and total impossibility of enjoying or being able to enjoy a full life with those who should have been their parents, siblings or sons".* And, secondly, because this concept or category refers to a *"loss of opportunity",* which is a dogmatic creation, and its application is not unanimously accepted.

Notwithstanding the foregoing, the Court goes on to say that "… *it has gradually been considered by our highest Court, particularly in rulings on trials for compensation as a result of the earthquake and subsequent tsunami that occurred in February 2010, against the Chilean National Treasury for the possible lack of service that would have had a bearing on the death of the victims; however, its nature, limits and applications continue to be a matter for discussion".*

Thus, the Court of Appeals establishes that although the loss of opportunities can be considered as a type of autonomous damage, in this particular case there is no evidentiary data presented by the plaintiffs that would enable it to be understood this way. On the contrary, all evidence provided by the plaintiffs focussed on interpreting this type of damage as "*included*" or "*contained*" within the pain and suffering claimed by the plaintiffs and conceded by the relevant court.

For this case, therefore, the Courts do acknowledge the existence of a specific type of damage, aside from the traditional notion of pain and suffering that is similar to the price of pain *("pretium doloris"),* but it must be proved by the plaintiffs.