ATTACHMENT VI

Sagardía de Jesús v. Hosp. Auxilio Mutuo

177 D.P.R. 484 (2009)

[English Translation]

(Official Translation)

IN THE SUPREME COURT OF PUERTO RICO

Miguel Sagardía de Jesús *et al.*,

Petitioners

v. No. CC-2005-1263 Certiorari

Hospital Auxilio Mutuo *et al.*,

Respondents

JUSTICE KOLTHOFF CARABALLO delivered the opinion of the Court.

San Juan, Puerto Rico, November 12, 2009

Here we must determine whether a sum settled by compromise between plaintiffs and some codefendants may be deducted from the total damages awarded when the codefendants released by the compromise agreement are not held liable for the tortious act. We must also determine whether a hospital is vicariously liable for the acts of medical malpractice committed by a physician working as an independent contractor in an exclusive franchise that provided anesthesiology services to patients in that institution. Moreover, we must determine whether it is proper to reduce the compensation awarded to plaintiffs for the physical damage sustained by their son because the latter remained unconscious for several days.

I

The essential findings of fact are the following.

In mid-1992, Rita M. Deliz Cordero became pregnant and received prenatal treatment from a group of obstetrician-gynecologists constituted by Dr. Arsenio Comas Urrutia, Dr. Ubaldo Catasús, and Dr. Juan Figueroa Longo, under the main care of Dr. Comas. The pregnancy was normal and there was no evidence of problems with the fetus during the gestation period. In the morning of April 2, 1993, Mrs. Deliz arrived at Hospital Auxilio Mutuo (Hospital) by order of Dr. Comas because she was in active labor. While she was being examined in the Hospital, Dr. Comas ruptured the membranes (a procedure known as "breaking water") and the amniotic fluid was noted to be meconium stained.[1] Since no progress in the labor process was being observed at that time, the physician determined that probably Mrs. Deliz would have to undergo a caesarian section.

At 11:30 a.m., in view of the fact that labor was not progressing and there was cephalopelvic disproportion, in addition to the previously detected presence of meconium, Dr. Comas decided to perform the cesarian section. No steps were taken prior to the surgical procedure to require the presence of a pediatrician or other trained medical staff

[1] Meconium is "a material that collects in the intestines of a fetus and forms the first stools of a newborn . . . . The presence of meconium in the amniotic fluid during labor may indicate fetal distress . . . ." *Mosby's Medical Dictionary* (8th ed. 2009).

during delivery despite the fact that meconium had been detected. No pediatrician was available during delivery, even though the Hospital's medical staff at the time included pediatricians and neonatologists. The following medical staff was present during delivery: Dr. Comas, Dr. Miguel A. Eliza García (anesthesiologist), a female anesthetist, and two nurses (a circulating nurse and a scrub nurse).

Miguel Alfonso, a baby boy weighing 9 pounds and 6 ounces, was born at 12:16 p.m., with his body covered in meconium. At that time, Dr. Comas, as prescribed by the standard procedure, suctioned the baby's mouth and then his nose. Immediately after that procedure, the baby started to cry and Dr. Comas gave him to Dr. Eliza, who assumed the responsibility of taking care of the baby, inasmuch as no other person in the operating room had the necessary training and experience in caring for a newborn baby.

Dr. Eliza suctioned 4cc of meconium out of Miguel Alfonso, gave him oxygen, intubated him endotracheally, and used a laryngoscope.[2] The baby was given an Apgar score[3] of 7 at birth and 9 five minutes later. However, the record does not show who assigned the Apgar score or the criteria employed to assign that score. In view of the fact that the medical record is not very clear—but rather has countless deficiencies and gross omissions—Dr. Eliza testified at the trial that it was he who had assigned the Apgar score.[4]

When the attending physician (Dr. Sánchez) examined the newborn Miguel Alfonso in the Nursery, he suctioned the baby once more. In addition to the 4cc of meconium suctioned by Dr. Eliza in the Operating Room, an additional 7cc of meconium was suctioned from the baby's stomach and almost 1cc from the trachea. To prevent an infection, Dr. Sánchez ordered the administration of antibiotics. However, the antibiotics were ordered at 1:00 p.m., and the hospital's nurses administered them at 3:15 p.m. It was not until 3:30 p.m. that all medical orders were fulfilled.

At 4:55 p.m., it was confirmed that Miguel Alfonso had pneumonia. In view of this situation and of the continuous deterioration in the newborn's condition, Dr. Sánchez

---

[2] However, although the record does not clearly show from where those 4cc of meconium were suctioned, Dr. Eliza testified in court that he suctioned the meconium from the baby's stomach. Neither is it clear what method was employed to administer oxygen to the baby, why was a laryngoscope used and what was the result of that procedure, how was the baby intubated, and how the procedure developed. All resuscitation measures are checked, but there is no explanation or details about when, how, how many times, and why were those measures taken.

[3] The Apgar score is an evaluation of a newborn infant's physical condition at one and five minutes after birth. A value of 0 to 2 is assigned to each of five criteria: heartbeat, respiratory (breathing) effort, muscle tone, response to stimulation, and skin color. The maximum score is 10. The Apgar score is used to assess the condition of a newborn infant. See 1 Jacob E. Schmidt, *Attorney's Dictionary of Medicine and Word Finder* A-475 (2003).

[4] The medical record lacks data that would explain what type of medical treatment was given by Dr. Eliza to the baby in the Operating Room. No detailed information was entered to clearly document the circumstances surrounding the care and treatment administered to the baby at birth. Neither does the record show who ordered the baby transferred from the Operating Room to the Nursery. Despite the fact that Dr. Eliza administered all resuscitation procedures to the baby—which reveals his delicate condition—he was transferred to the Nursery with an escort in an ordinary incubator without medical staff. It was also established that before being transferred to the Nursery, the baby was left unattended in the Operating Room for at least 17 minutes, without further follow-up monitoring or special measures, despite the special resuscitation procedures carried out by Dr. Eliza.

contacted Dr. Jaunarena (the family's pediatrician) and decided to transfer the baby to a Neonatal Intensive Care Unit at Hospital Damas in Ponce, since Hospital Auxilio Mutuo did not have one at the time.

At 5:30 p.m., Dr. Ochoa (neonatologist at Hospital Damas in Ponce) accepted the transfer of the baby to that institution. Since Hospital Auxilio Mutuo had not established a protocol for situations of this type, it was not until 7:15 p.m. that Miguel Alfonso was transported by ambulance to Hospital Damas. In this trip, the newborn was accompanied by Dr. Sánchez, a female respiratory therapy technician, an intensive care nurse, and two paramedics.

The baby was admitted to the Intensive Care Unit of Hospital Damas on the night of April 2, 1993, and continued to receive medical treatment. Despite the care provided, his respiratory condition worsened. In these circumstances, the physicians at Hospital Damas advised plaintiffs to transfer the newborn to a hospital in the United States that had a specialized Extracorporeal Membrane Oxygenation (ECMO) machine.

The baby was transferred by air ambulance to Miami Children's Hospital, where he was placed in an ECMO machine. He was treated at Miami Children's Hospital since April 4, 1993, and his small body was pierced by countless needles and tubes. He was also kept in the Intensive Care Unit inside a machine that had some openings through which the hands could be introduced in order to provide the medical treatment he needed. The father, Miguel Sagardía de Jesús, was with the baby at all times until the mother, Mrs. Deliz Cordero, was allowed to travel and could also be with him. During the baby's stay in that hospital, both parents watched helplessly how their firstborn deteriorated until Miguel Alfonso, among other complications, suffered a cardiac arrest that kept him in a coma from April 23 to April 27, 1993, when he died.

Miguel E. Sagardía de Jesús, Rita M. Deliz Cordero, and the conjugal partnership constituted by them filed an action for damages against the Hospital, obstetrician-gynecologists Comas Urrutia, Catasús, and Figueroa Longo, and anesthesiologist Eliza García. Plaintiffs alleged that Miguel Alfonso had died 25 days after his birth as a result of defendants' negligent acts and omissions.

Before the trial began, plaintiffs voluntarily dismissed with prejudice their action against Drs. Comas, Catasús, and Figueroa Longo by way of a private compromise agreement under which plaintiffs released those codefendants from their liability to them and to the remaining codefendants. The released codefendants, in turn, bound themselves to pay $200,000 to plaintiffs. The Court of First Instance accepted the compromise by way of a partial judgment, and the Hospital and Dr. Eliza remained in the action.

During the discussion on the compromise agreement held on the first day of trial, the codefendants, according to the transcript of the hearing, stated in open court that they had no interest in claiming any sum from the released codefendants.[5] Furthermore, the judge who conducted the proceedings clearly allowed the Hospital and Dr. Eliza, with the

[5] See Addendum I to the petition for certiorari at 28.

consent of all the parties, to present evidence on the liability of the released codefendants should they deem it pertinent.[6]

After conducting the trial, examining the extensive evidence presented, and hearing the testimony, the court found for plaintiffs, ordered codefendants (Hospital Auxilio Mutuo and Dr. Eliza) to solidarily compensate plaintiffs for the damage sustained, and found that it was more likely than not that the baby would have survived if he had received earlier, continuous, and more adequate medical care from Dr. Eliza, the Hospital's nursing staff, and the Hospital itself as an institution.

The court concluded that Dr. Eliza assumed responsibility for the baby when the latter was born and negligently failed to request the presence of a pediatrician, a neonatologist or any other professional. Regarding the medical record, the court concluded that Dr. Eliza's failure to enter annotations was alarming and inexcusable. The court also found that even though the presence and inhalation of meconium is not unusual, when such situation is noticed, fast and adequate action must be taken to suction as much as it is possible in order to prevent or reduce the damage that may be caused to the baby. The court further concluded that if the attending pediatrician extracted 7cc of meconium from the baby's stomach and 1cc from his trachea when the baby arrived at the nursery, it was because Dr. Eliza had been negligent in extracting the meconium.

Consequently, the court concluded that Dr. Eliza was negligent in failing to suction all the meconium inhaled by the baby, and this failure caused the damage that resulted in the baby's subsequent death. The court specifically stated that Dr. Eliza's handling of the baby was brief, inadequate, discontinuous, and not entered in the medical record. The court further concluded that the Hospital was solidarily liable to plaintiffs[7] and ordered them to solidarily pay $809,778.52.[8] Moreover, defendants were ordered to

---

[6] See Addendum I to the petition for certiorari.

[7] The court found that among the Hospital's main deviations from the best standards of medical practice were the following:

1. Failing to have sufficient trained staff in the Operating Room to care for a baby who was known to be meconium stained.

2. Keeping and allowing its employees to fill an insufficient record riddled with major contradictions and omissions that invalidate its use to precisely describe the treatment given.

3. Keeping and maintaining an exclusivity contract with the anesthesiology firm of which Dr. Eliza was a member, thereby delegating to that group unsupervised decisions on what staff and equipment are needed in the operating rooms.

4. Failure of the nursing staff at the Operating Room and the Neonatal Unit to recognize the baby's delicate condition and to urgently notify the attending pediatrician in order to have the baby promptly treated.

5. Failure of the nursing staff to follow medical orders in a timely and reasonable manner.

6. Failure of the Hospital to have an established protocol for the transfer of newborns to an intensive neonatal care unit when necessary.

[8] Said amount is divided as follows: $6,867 in air ambulance expenses; $828.52 in lodging expenses at the Miami Children's Hospital; $684 in funeral expenses in Miami; $650 in funeral expenses in Puerto Rico; $759.00 in airfare expenses; $50,000 to both plaintiffs for their

pay $4,000 in costs, expenses, and attorney's fees for obstinacy, plus interest at the prevailing rate of 5.25%.

Therefore, according to the evidence presented, the trial court held that codefendants Dr. Eliza and the Hospital were solely liable for the tortious event. Thus, even though they filed a motion for additional findings of fact and conclusions of law and sought a finding of liability against the released codefendants, the judge denied the motion.

The Hospital and Dr. Eliza filed separate appeals, which were consolidated. In a lengthy judgment, the Court of Appeals thoroughly discussed the issues raised by defendants, modified the judgment rendered by the Court of First Instance, and held that the Hospital was not negligent in keeping and maintaining an exclusivity contract with the anesthesiology firm of which Dr. Eliza was a member, thereby delegating to that group unsupervised decisions on what staff and equipment were needed in its operating rooms. Likewise, the court held that no causal relation was established between the damage caused and the fact that the Hospital did not have a protocol for the transfer of infants in critical condition to a tertiary care hospital. The court, however, upheld the finding of solidary liability made by the Court of First Instance against the Hospital and Dr. Eliza.

The Court of Appeals likewise modified the $50,000 award to plaintiffs for the physical pain suffered by their son at the rate of $2,000 for a period of 25 days and reduced it to a period of 17 days, for a total of $34,000. The intermediate court deemed that since the award was based on the physical pain suffered by the baby, the amount resulting from the number of days in which, according to the record and the evidence presented, he was sedated and/or comatose had to be deducted from the total award; therefore, since the baby felt no pain for eight days, no compensation could be awarded for physical pain not suffered on those days.

The Court of Appeals also deducted from the total award the $200,000 already paid to plaintiffs under the compromise agreement between them and the released codefendants. Thus modified, the judgment appealed was affirmed.

Since none of the parties was satisfied by this judgment, they resorted to this Court through their respective petitions. The Court did not accept those filed by Hospital Auxilio Mutuo and by Dr. Eliza. Plaintiffs, in turn, assigned the following errors in their petition for certiorari:

> i. The Court of Appeals erred in modifying the Judgment rendered by the Court of First Instance and thus deducting from the amount awarded in damages to plaintiffs-petitioners the total amount settled by compromise between plaintiffs-petitioners and Drs. Comas, Catasús, and Figueroa Longo, invoking reasons of equity.

---

son's cause of action resulting from the physical pain suffered by the baby, at the rate of $2,000 [daily] for 25 days; $350,000 for Mrs. Deliz's mental anguish and suffering in her direct action; and $400,000 for Mr. Sagardía's mental anguish and suffering.

ii. The Court of Appeals erred in modifying the Judgment rendered by the Court of First Instance and in holding that Hospital Auxilio Mutuo is not liable for not having, back in 1993, a protocol for the transfer of infants in critical condition to a tertiary care unit.

iii. The Court of Appeals erred in modifying the Judgment rendered by the Court of First Instance and reducing the amount awarded to plaintiffs for the physical damage suffered by the newborn.

iv. The Court of Appeals erred in modifying the Judgment rendered by the Court of First Instance and not imposing vicarious liability on Hospital Auxilio Mutuo for Dr. Eliza's acts even when it was shown that the group of anesthesiologists for which Dr. Eliza worked was contractually responsible for having the necessary trained staff available at all times in the delivery room.[9]

We are ready to decide this case.

II

In their first assignment of error, petitioners allege that the Court of Appeals erred in subtracting the amount settled by way of a compromise agreement between them and some codefendants from the total amount awarded in damages. We agree.

[1] A. The main elements of a compromise are: (1) the existence of an uncertain and litigious controversy or legal relationship; (2) the parties' intent to replace, by way of the compromise, the uncertainty over the objective elements of the legal relationship with another relationship that is "certain and incontestable"; and (3) the mutual concessions.[10] In most cases, the cited uncertainty is the cause of the compromise. Prior to compromising, the parties may find themselves in a state of uncertainly about the legal grounds on which they may rest and the lack of objective knowledge about the outcome of the lawsuit or future lawsuit. That uncertainty is what ordinarily leads the parties to compromise.[11]

As a result, under a compromise agreement, the parties replace uncertainty with the certainty of a contract. Furthermore, when both parties reach a compromise, they assume the risk (of paying more or receiving less) in order to avoid or put an end to a lawsuit.

[2] B. In damages cases, the victim may waive his or her claim against any of the joint tortfeasors by way of a compromise agreement. Moreover, this situation may also occur in situations involving a plurality of subjects. In the last few years we have explained the effects produced by this type of agreement in damages cases in which a plurality of subjects is solidarily liable for the damage caused. We have held that the effects of the agreement on the joint tortfeasor or codefendant with whom the compromise is reached and on those who remain in the action depend on the terms of the

---

[9] Petition for certiorari at 14-15.

[10] Civil Code sec. 1709 (31 L.P.R.A. § 4821); *US Fire Insurance v. A.E.E.*, 174 D.P.R. 846 [74 P.R. Offic. Trans. ___] (2008); *Mun. de San Juan v. Prof. Research*, 171 D.P.R. 219 [71 P.R. Offic. Trans. ___] (2007).

[11] Luis Rafael Rivera Rivera, *El contrato de transacción: sus efectos en situaciones de solidaridad* 37 (citing Alfonso Cossío y Corral), San Juan, Jurídica Editores (1998).

compromise.[12] Therefore, it is vitally important to know what was agreed upon in order to accurately determine the scope of the compromise.[13]

[3] In a recent case, *US Fire Insurance v. A.E.E.*, 174 D.P.R. 846 [74 P.R. Offic. Trans. ___] (2008), we clarified the standards that govern the effects of a compromise in terms of both the internal relationship between solidarily liable codefendants and the external relationship between codefendants and plaintiffs. There, we stated that the release of one of the codefendants from liability by a victim does not entail the release of the other codefendants if such intention is not clearly stated in the compromise agreement.[14] Consequently, the victim may continue with his or her claim against the remaining codefendants.

[4] In turn, the effects of a compromise on the non-compromising codefendants will depend on the agreement reached between the plaintiff and the released codefendant. It may happen that by way of the compromise agreement, the victim releases a codefendant from *all* liability that may arise with respect to the tortious event. This act is considered a release from liability to the victim (external relationship) as well as to the relationship existing between the codefendants (internal relationship). As a result, when this situation occurs, if the released codefendant accepted his or her liability for the tortious event, or if the court finds him or her liable, the main effect is that *the victim assumes the share of liability attributed to the released joint tortfeasor.*[15] Consequently, the remaining joint tortfeasors cannot recover anything from the released joint tortfeasor.[16] The action for contribution is not available to them because the compromise agreement exempted the released joint tortfeasor from internal liability. Therefore, the share of liability attributed to the released joint tortfeasor is deducted so that they may not pay more than their share.[17]

In these circumstances, the remaining joint tortfeasors will be liable only for the amount that remains after deducting the sum corresponding to the *share of liability* of the released joint tortfeasor, not for the totality of the damages.[18] The plaintiff, in turn, will

---

[12] *US Fire Insurance v. A.E.E.*, 174 D.P.R. 846 [74 P.R. Offic. Trans. ___] (2008); *S.L.G. Szendrey v. Hospicare, Inc.*, 158 D.P.R. 648, 656 [58 P.R. Offic. Trans. ___, ___] (2003); *Blás v. Hospital Guadalupe*, 167 D.P.R. 439 [67 P.R. Offic. Trans. ___] (2006).

[13] Puerto Rico Civil Code sec. 1714 (31 L.P.R.A. § 4826).

[14] *Id.; Merle v. West Bend Co.*, 97 P.R.R. 392, 398 (1969); *S.L.G. Szendrey v. Hospicare, Inc.*, 158 D.P.R. at 655 [58 P.R. Offic. Trans. at ___]; *Blás v. Hospital Guadalupe*.

[15] *US Fire Insurance v. A.E.E.*; *S.L.G. Szendrey v. Hospicare, Inc.*, 158 D.P.R. at 656-659 [58 P.R. Offic. Trans. at ___].

[16] *US Fire Insurance v. A.E.E.*

[17] This position is based on the interest in preventing the unjust enrichment of a party; that is the purpose of the action for contribution. *US Fire Insurance v. A.E.E.*; *S.L.G. Szendrey v. Hospicare, Inc.*, 158 D.P.R. at 654 [58 P.R. Offic. Trans. at ___]; *P.R. Fuels, Inc. v. Empire Gas Co., Inc.*, 149 D.P.R. 691, 712-713 [49 P.R. Offic. Trans. ___, ___] (1999); *Ramos v. Caparra Dairy, Inc.*, 116 D.P.R. 60, 63-64 [16 P.R. Offic. Trans. 78, 82-83] (1985).

[18] *US Fire Insurance v. A.E.E.*; *S.L.G. Szendrey v. Hospicare, Inc.*, 158 D.P.R. at 658 [58 P.R. Offic. Trans. at ___].

receive the amount established in the compromise agreement in payment of the amount corresponding to the share of liability—if any—that may be determined in due time for that joint tortfeasor.[19]

For this reason, in accordance with the risk assumed, if, when judgment is rendered, the amount corresponding to the share of liability of the released joint tortfeasor is greater than the amount received in exchange for the release from liability, the plaintiff assumes said reduction. Contrariwise, if that amount is lower than the amount received in exchange for the release from liability, the plaintiff receives the additional amount.[20]

Under this type of settlement, if the joint tortfeasor, after being released, is not held liable, he or she is not entitled to recover the amount paid; neither are the other joint tortfeasors entitled to file an action for contribution. In this case, the plaintiff receives the additional amount.

[5] On the other hand, the compromise agreement may be limited to the release of a joint tortfeasor only in terms of the external relationship. In other words, the plaintiff may waive an action for damages against one of the joint tortfeasors without releasing him or her from the effect this may have on the remaining joint tortfeasors. This type of compromise does not preclude the victim from continuing with the action against the other joint tortfeasors in order to recover the totality of the damages.[21] If, in order to satisfy a judgment, the other joint tortfeasors have to assume the share of the released joint tortfeasors and pay a sum that exceeds their share of liability, they may file the corresponding action for contribution.[22]

In this context, it is proper to deduct the *amount* settled in the compromise agreement. Otherwise, the plaintiffs, without assuming any risk, may recover the totality of the money judgment plus the amount obtained through the compromise agreement.[23] This would constitute unjust enrichment, inasmuch as the joint tortfeasors would sustain an impoverishment by paying more than their share, while plaintiff would experience an enrichment without assuming—as we have pointed out—any risk. Consequently, that type of compromise agreement that exempts the released tortfeasors only from the external relationship has the effect of making available to the non-released joint tortfeasors the action for contribution against the released joint tortfeasors.

C. With respect to the facts of this case, in the Private Compromise Agreement (Agreement) signed by plaintiffs and Drs. Comas, Figueroa Longo, and Catasús, the physicians agreed to pay $200,000 as total compensation for all the facts alleged by plaintiffs against them. The released codefendants, however, stated that the payment of that

---

[19] *US Fire Insurance v. A.E.E.*

[20] *Id.*

[21] *US Fire Insurance v. A.E.E.* See *Blás v. Hospital Guadalupe.*

[22] *Id.*

[23] *US Fire Insurance v. A.E.E.*

sum did not constitute an admission of liability. As a result of the Agreement, plaintiffs released Drs. Comas, Figueroa Longo, and Catasús from all claims made in the complaint, thereby releasing them from the external relationship between them and plaintiffs.

On the other hand, the Agreement shows that plaintiffs' intent was to also release codefendants from the internal relationship. The compromise agreement shows that plaintiffs totally released the compromising codefendants from any claim made by the other codefendants should a cross-claim be filed.[24] Consequently, the Agreement released the compromising codefendants from external liability as well as from internal liability.

When plaintiffs released codefendants Dr. Comas, Dr. Figueroa Longo, and Dr. Catasús from both the internal relationship and the external relationship, plaintiffs subrogated themselves in place of those codefendants. The main consequence of this action was that if any of the released codefendants was held liable, *the portion of liability imposed would be deducted from the sum awarded.* Here, the released codefendants were not held liable or found to be joint tortfeasors; therefore, nothing could be deducted from the sum awarded to plaintiffs as a result of the compromise agreement they had signed.

[6] In *US Fire Insurance v. A.E.E.*, 174 D.P.R. at 858 [74 P.R. Offic. Trans. at ___], we held "that a plaintiff who signs a compromise agreement with one of the codefendants and ends up receiving, in total, an amount greater than the amount to which he or she would be entitled under the judgment rendered in his or her favor, may keep said additional sum if this was set forth in the compromise agreement." The compromise agreement reached in this case shows that plaintiffs assumed the portion of liability that would be imposed on the released codefendants and, therefore, assumed the risk of recovering less or more. Compromises in cases of this type entail the assumption of risks by the plaintiffs and the released codefendants. As we have already pointed out, the compromise agreement is based on the uncertainty that surrounds the litigation. It could happen that the released codefendant is held liable and, depending on his or her share of liability, the outcome could turn out to be (or not to be) beneficial for one party or for the other. That is the risk involved in a compromise agreement.

In this case, Drs. Comas, Figueroa Longo, and Catasús reached a compromise agreement with plaintiffs and thus, avoided a lengthy litigation. They assumed the risk of paying more—which eventually occurred. In its judgment, the Court of Appeals deducted

---

[24] Insofar as it is pertinent here, page 5 of said agreement states:

> "In the event that the court allows any cross-claim or third-party complaint against any or all of the appearing codefendants, and should the court grant in due time the relief demanded in such cross-claim or third-party complaint, and this decision entails the obligation to pay any sum in favor of the cross-claim, third-party claimants, or plaintiffs, plaintiffs will release the appearing codefendants from payment of the corresponding sum regardless of the amount involved . . . .
>
> "This means that the appearing codefendants will not have to pay plaintiffs any sum additional to that already paid under this agreement. Plaintiffs, in turn, waive any right they may have, on solidary liability grounds, to recover from the appearing defendants any sum in excess of the amount agreed here."

$200,000 from the total damages awarded on equity grounds, stating that the "[f]ailure to deduct said sum from the total amount awarded by the trial court would constitute double compensation to plaintiffs with respect to the stipulated sum."[25]

However, we believe that under these standards, we may dispose of the controversy without resorting to equity. Furthermore, the possible effect of recovering a larger sum for the risk assumed in a compromise agreement does not constitute double compensation for the damage sustained.

On the other hand, affirming the appellate court's decision would be tantamount to benefiting those codefendants who took no part in the compromise agreement. They would be paying less than what they have to thanks to a compromise agreement to which they were not parties and for which they assumed no risk whatsoever. Moreover, allowing plaintiffs to receive a gain does neither harm nor concern the codefendants because they did not contribute to that gain and, on the other hand, they would have to pay their respective percentage of liability anyway.

Consequently, we reverse the Court of Appeals' decision in this respect and hold that the sum of $200,000 resulting from the compromise agreement should not have been deducted from the total award of damages.

III

In the second assignment of error, plaintiffs allege that the Court of Appeals erred in holding that the Hospital is not liable for not having, back in 1993, a protocol for the transfer of infants in critical condition to a tertiary care unit. We do not agree.

[7] Among the elements required by Civil Code sec. 1802[26] is that of causality or a causal relation, which is not established on the basis of mere speculation or conjecture. In medical malpractice cases, this causal relation is established by showing that the damage sustained was most likely caused by the physician's acts.[27]

In the facts of this case, there is no controversy over the Hospital's liability for the negligence of its employees (which, along with Dr. Eliza's liability and the lack of trained staff in the Delivery Room, was what most likely caused the harm). However, according to the evidence presented, it was established that although Miguel Alfonso was in a delicate condition, he remained stable in Ponce, and even that he was not intubated until the following day. Moreover, there is no evidence on record to show that the transfer was negligent or that the absence of a protocol affected Miguel Alfonso. Therefore, as the appellate court correctly concluded, plaintiffs failed to establish the existence of a causal relation between the lack of a protocol for the transfer of infants in critical condition to a tertiary care unit and the damage sustained.

---

[25] Appendix to the petition for certiorari at 70E.

[26] 31 L.P.R.A. § 5141.

[27] *Rodríguez Crespo v. Hernández*, 121 D.P.R. 639, 649-650 [21 P.R. Offic. Trans. 637, 646] (1988).

IV

Plaintiffs allege that the Court of Appeals erred in reducing the compensation awarded to them for the physical damage suffered by their son. We agree.

[8-9] A. Civil Code sec. 1802, which is the threshold of noncontractual (tort) civil liability, provides: "A person who by an act or omission causes damage to another through fault or negligence shall be obliged to repair the damage so done." Caselaw has defined damage as "any material or moral loss resulting from the violation of a legal provision, suffered by a person and for which another person is liable."[28]

[10-11] Patrimonial damages and non-patrimonial damages are intrinsic to the concept of damage. *Patrimonial damage* is the loss—measurable in terms of money—in the wealth or patrimony of the person suffering the damage.[29] *Non-patrimonial damage*, in turn, is "in principle, [that] whose value in terms of money is not based on parity like patrimonial damage, because [it involves] elements or interests whose monetary value is difficult to assess."[30]

[12] Moral damage is essentially non-patrimonial damage. However, caselaw has made a distinction between genuine moral or pure damage and oblique moral damage or indirect patrimonial damage. The consequences produced by the first type of damage are non-patrimonial in nature, while the second type of damage is that which, "by harming immaterial interests, transcend[s] to patrimonial values."[31]

[13] We have previously stated that moral damage is that inflicted on beliefs, feelings, dignity, social esteem, or physical or psychic health of the person aggrieved.[32] Therefore, such damage mainly affects personal rights—either from a physical or a moral standpoint—of human beings.[33] Likewise, the harm caused to the integrity of physical faculties, the act of *depriving a person of a limb or faculty*, as well as all forms of physical or moral pain, have been recognized as moral damage.[34]

[14] Now, moral damage is a broad concept that includes different aspects of human nature and results from multiple causes.[35] As we have already pointed out, such

---

[28] 3 Jaime Santos Briz, *Tratado de derecho civil: teoría y práctica* 457, Barcelona, Ed. Bosch (2003). See: *Ramírez Ferrer v. Conagra Foods PR*, 175 D.P.R. 799 [75 P.R. Offic. Trans. ___] (2009); *García Pagán v. Shiley Caribbean, etc.*, 122 D.P.R. 193, 205-206 [22 P.R. Offic. Trans. 183, 196] (1988).

[29] 1 Herminio M. Brau del Toro, *Los daños y perjuicios extracontractuales en Puerto Rico* 428, San Juan, Pubs. JTS Inc. (rev. 2d ed. 1986); Santos Briz, *supra*, at 461.

[30] Santos Briz, *supra*, at 460.

[31] Santos Briz, *supra*, at 461; 4 José Castán Tobeñas, *Derecho Civil español, común y foral* 950-951, Madrid, Ed. Reus (15th ed. 1993).

[32] *Rivera v. S.L.G. Díaz*, 165 D.P.R. 408, 428 [65 P.R. Offic. Trans. ___, ___] (2005).

[33] Brau del Toro, *supra*, at 427.

[34] Antonio Borrell Macía, *Responsabilidades derivadas de culpa extracontractual civil* 211, Barcelona, Ed. Bosch (2d ed. 1958).

[35] "[S]uch as, for instance, moral anguish produced by the loss of a family heirloom . . . moral damage derived from physical pains or physical or mental illness, and . . . moral damage

broadness covers from physical or body pain and mental anguish to bodily harm and injuries. Although the terms *suffering* and *physical damage* have been used as concepts independent from the concept of *moral damage*, we must recognize that these are part of the latter concept, even if they constitute different aspects of it.

[15] A tortious act may result in bodily injury or damage, which may range from light blows to a serious injury that leads to death.[36] This type of bodily damage may be compensated and is recognized as an independent type included in the concept of moral damage.[37] *Consequently, an injury inflicted on a person's physical integrity or faculties as a result of a tortious act may be compensated.*

On the other hand, one of the main manifestations of bodily injury can be pain, which may occur in the person's body or mind. Physical pain "[i]s the local or general manifestation of the injury as a result of the nerve receptors specialized in the reception of different stimuli."[38] It is an afflictive sensation caused by a physical condition that becomes manifest in different forms, most of which are perceptible. For that reason, in order to feel pain, a person must have the capacity to feel it. Therefore, aside from the difficult process of quantifying pain, evidently it is easier to establish the existence of physical pain (because of its intrinsical relationship with bodily injury) than the existence of psychic pain or mental anguish.[39]

Mental anguish, in turn, is the reaction of the mind and the conscience to an event or to a bodily injury or damage suffered and its subjective impact on personal well-being.[40] Consequently, mental anguish is not always related to bodily damage because it mainly affects the emotional and mental ambit of human beings. It may arise as a direct consequence of the tortious event or as a collateral effect of the damage suffered by another person.

[16] B. This Court held a long time ago that the victim of a tortious act may be compensated for his or her physical and mental sufferings from the time of occurrence to his or her death; therefore, upon death, the victim transmits the cause of action to his or her heirs.[41] However, with respect to newborns, this Court has stated that a child cannot

---

concomitant with patrimonial damage, or vice versa. Their common trait is that they all produce emotional distress (grief, desperation, loss of joy of living, etcetera), but derive from different motives." Santos Briz, *supra*, at 461.

[36] "Physical or bodily damage can be serious in nature and lead to death. It ranges from light blows, bruises or abrasions to fractures, dismemberment, mutilations, and damage to bone structure and internal organs." 1 Antonio J. Amadeo-Murga, *El valor de los daños en la responsabilidad civil* 223, San Juan, Ed. Esmaco (1997).

[37] *Font v. Viking Construction Corporation*, 58 P.R.R. 691, 713 (1941).

[38] Blanca Pérez Pineda and Manuel García Blázquez, *Manual de valoración y baremación del daño corporal* 36, Granada, Ed. Comares (4th ed. 1995).

[39] "Man, unlike the rest of all living beings, has the capacity to feel present pain (the current manifestation of the injury), past pain (recollection of the pain and the injury suffered), and future pain (fear that the painful situation will be repeated)." *Id.* at 3-4.

[40] Amadeo-Murga, *supra*, at 224.

[41] See *Vda. de Delgado v. Boston Ins. Co.*, 101 D.P.R. 598 [1 P.R. Offic. Trans. 823] (1973). This Court has pronounced itself on this matter on several occasions. In *Vda. de Delgado*, we

sustain mental damage, in the legal-compensatory sense, during the first months of his or her life.[42] Thus, in cases involving children who are a few months old and who die as a result of a tortious act, they transmit their cause of action—though limited—for moral damages in its aspect of mental damages.

[17] C. It is incumbent upon the judge, in his or her sound judgment, experience, and discretion, to make a fair and necessary assessment of the damage suffered in order to award adequate compensation therefor.[43] However, reasonableness must be the compass guiding the judge in the circuitous task of assessing and appraising damages. Thus, in *S.L.G. Rodríguez v. Nationwide*, 156 D.P.R. 614, 622 [56 P.R. Offic. Trans. ___, ___] (2002), we stated:

> The assessment and appraisal of damages is a difficult and distressing task and endeavor because there is a certain degree of speculation involved in it and because it involves, in turn, subjective elements such as the discretion, sense of justice, and human conscience of the trier.[44]

The judicial task becomes even more complicated in cases involving moral damages, since the assessment of and eventual compensation for moral damage is not a mechanical or easy task. For this reason, it takes great effort to assign monetary value to personal interests that are not part of the framework of patrimonial damages.

[18] Thus, on countless occasions this Court has held that it will abstain from disturbing the weighing of the evidence and assessment of damages made by a trial court.[45] It is a well-settled rule that out of deference and respect for trial courts, and for the sake of stability, appellate courts have the power to modify the amounts awarded only in cases in which those amounts "are absurdly low or exaggeratedly high."[46]

D. The Court of First Instance awarded Miguel Alfonso's parents $50,000 for the baby's physical damage and sufferings. That court specifically stated:

> Instead of being received by the warm and tender arms of his parents, baby Sagardía-Delíz was placed in a crib with a respirator, and his

---

awarded $15,000 to the heirs of a deceased for the physical and moral sufferings he endured for three days before his death as a result of the extensive burns he suffered. In turn, in *Publio Díaz v. E.L.A.*, 106 D.P.R. 854 [6 P.R. Offic. Trans. 1173] (1978), we awarded $5,000 for the suffering endured by a married couple for a short period of time prior to their death when they drowned in the currents of a river. In *Colón v. Municipio de Guayama*, 114 D.P.R. 193 [14 P.R. Offic. Trans. 249] (1983), this Court raised from $15,000 to $25,000 the compensation awarded to the heirs of young man who suffered severe and painful injuries that kept him paraplegic for ten days before his death. In sum, it is well settled in our jurisdiction that the cause of action for moral damages is transmissible.

[42] *Riley v. Rodríguez de Pacheco*, 119 D.P.R. 762, 804 [19 P.R. Offic. Trans. 806, 848] (1987).

[43] *S.L.G. Rodríguez v. Nationwide*, 156 D.P.R. 614, 623 [56 P.R. Offic. Trans. ___, ___] (2002); *Concepción Guzmán v. Water Resources Authority*, 92 P.R.R. 473, 486-487 (1965).

[44] See *Nieves Cruz v. U.P.R.*, 151 D.P.R. 150 [51 P.R. Offic. Trans. ___] (2000); *Rodríguez Cancel v. A.E.E.*, 116 D.P.R. 443, 451 [16 P.R. Offic. Trans. 542, 551-552] (1985).

[45] *Albino v. Ángel Martínez, Inc.*, 171 D.P.R. 457 [71 P.R. Offic. Trans. ___] (2007); *S.L.G. Rodríguez v. Nationwide*.

[46] *Id.*

> small body was entirely pierced by tubes and needles used to medicate and feed him during the 25 days he lived. That physical suffering is compensable, and for that reason we award a reasonable amount to the parents in the action inherited from their son on those grounds.[47]

However, at the end of the judgment, the trial judge stated that the $50,000 awarded to both petitioners for the cause inherited from their son was on account of the physical pain suffered by the baby, at the rate of $2,000 per day, for a period of 25 days. Thus, the Court of Appeals used this expression to deduct from the award the number of days in which the baby "felt no pain." The court subtracted eight days from the sum awarded on the ground that the child was not intubated for one day, was sedated and irresponsive to stimuli for two days, and was five days in a coma.[48]

Although it is true that the trial court stated at the end of the judgment that the sum awarded was at the rate of $2,000 per day, the truth, as may be inferred from the judgment, is that the $50,000 award was for the physical *damage* and sufferings endured by Miguel Alfonso; not only for his physical pain, but also for the broader concept of moral damage, which includes *bodily injuries*.[49] It is evident that baby Miguel Alfonso remained sedated and comatose for some days because his physical integrity was affected by an act of medical malpractice. *This bodily injury, as well as the harm caused to his capacity to feel, is compensable. The condition of a person who is comatose or sedated as a result of a tortious act constitutes a bodily injury compensable as moral damage. Said compensation is not based solely on the perception of pain, but also, among other things, on the injury that keeps the person in a coma or unable to feel pain.*[50]

Therefore, the sum awarded to plaintiffs for the damage sustained by their son covers all the moral damages he suffered as consequence of the tortious act. Since we deem that sum reasonable, we abstain from disturbing the trial court's weighing of the

---

[47] Appendix to the petition for certiorari at 461.

[48] The Court of Appeals specifically stated:

> "The days in which Miguel Alfonso was not intubated and with tubes and needles attached to his entire body—that is, day 2—shall be deducted from the sum awarded by the Court of First Instance. Likewise, the days on which, according to the medical record of Hospital Damas, the baby was sedated and unresponsive to stimuli—that is, days 3 and 4—must also be deducted. Moreover, the days on which the child remained comatose and unresponsive to pain—that is, days 23, 24, 25, 26, and 27—must be deducted too. All these days total eight (8) days; therefore, the proper award would be $2,000 daily for seventeen (17) days, for a total of $34,000.00."

[49] We must point out that we do not deem it wise to assess damages—as the trial court did—based on the number of days on which a person was or was not unconscious or in a coma. Rather, we believe that the best practice would be to use said process to calculate a single and separate sum that would compensate the objective damage of losing contact with reality, for a given time, or as part of the process of assessing the general amount to be awarded in damages.

[50] On the other hand, there is absolutely no expert or scientific evidence on record to uphold the conclusion that the child felt no pain during the days on which he was not intubated or pierced by needles attached to his entire body, or during the days on which he was sedated, as the appellate court stated in its judgment.

evidence and assessment of damages. In view of the above, we reverse the Court of Appeals' decision to reduce the amount awarded to Miguel Alfonso's parents for the damage suffered by the child.

V

Lastly, in the fourth assignment of error, plaintiffs contend that it was established that the group of anesthesiologists for which Dr. Eliza worked had the contractual responsibility to have all necessary skilled and trained staff available in the delivery room at all times and that, therefore, the Hospital should be held vicariously liable for Dr. Eliza's acts. However, when we examine the judgment rendered by the Court of Appeals, it becomes clear that said court modified the judgment of the Court of First Instance by stating that the liability fell on the Hospital, not on the group of anesthesiologists.[51] Consequently, as the intermediate court correctly stated, the Hospital's liability was direct, not vicarious. We must, therefore, determine whether the Hospital is vicariously liable for Dr. Eliza's acts.

[19] A. There is no doubt that a hospital is liable for the negligence of its employees when they commit acts of malpractice against patients treated in its facilities. The hospital's liability in these cases is framed within the concept of vicarious liability established under Civil Code sec. 1803.[52] However, this Court has established a clear distinction in cases involving acts of medical malpractice committed by physicians not employed by a hospital, but to whom that institution granted the privilege of using its facilities to treat their private patients.

When the acts are committed by the physician against his or her private patients at a hospital chosen by the physician, ordinarily the hospital is not held liable.[53] However, the hospital could be held liable for the acts of these physicians if it fails to fulfill any of the following obligations: (a) to carefully select the physicians who are granted that privilege; (b) to require that said physicians keep up-to-date through professional advancement studies; (c) to monitor the work of those physicians and take action, when possible, in the face of an obvious act of malpractice; (d) to discontinue the privilege

---

[51] The Court of Appeals specifically stated the following in its judgment:

> "When we examine the contract, we notice that it *only* refers to the anesthesiology service and *not* to the *total services* of the HOSPITAL's [operating] rooms. At no time did the exclusive nature of the contract release the HOSPITAL from the responsibility to provide trained staff and the necessary equipment to operate its rooms. The Court of First Instance erred in concluding that by virtue of the exclusivity contract, Dr. Eliza was responsible for providing the necessary staff and equipment in the Operating Rooms. Our analysis of the contract shows that it was the HOSPITAL that had the obligation to provide the necessary staff and equipment to offer anesthesiology services (except for the anesthetists)." Appendix to the petition for certiorari at 49. (Footnote omitted.)

[52] 31 L.P.R.A. § 5142.

[53] *Márquez Vega v. Martínez Rosado*, 116 D.P.R. 397, 408-409 [16 P.R. Offic. Trans. 487, 499] (1985).

granted in the face of repeated or crass acts of malpractice committed by those physicians; and (e) to keep reasonably abreast of available technological breakthroughs.[54]

[20] In turn, when a patient goes to the hospital and the hospital provides the physicians, we have held that the hospital will be solidarily liable with the non-employee physician who committed malpractice.[55] This is because, in the first place, it is the hospital that provides the services of that particular physician, and the patient ordinarily has no option and takes no part in that choice.[56] For that reason, "[t]o a certain point one can affirm that in this type of situation the hospital is 'guaranteeing' to the patient that said physician, or any other who treats him under those circumstances, is a competent physician who is fit to render medical assistance."[57] In second place, what the patient sees and deals with is the hospital, not physicians acting independently.[58] Therefore, a physician who works at that hospital is, to the patient, an apparent employee or assistant [agent] of the hospital. In third place, evidently when a patient goes to the hospital to receive services, the main relationship established in that case is between the patient and the hospital,[59] since in this context, the hospital is not a place that houses many independent physicians, but an entity bound to provide good services to patients who visit it. Lastly, this Court has held that even in cases involving an independent contractor bound by a relationship in which "the hospital is the main beneficiary of the work done by the physician, the hospital must be held liable for the negligent acts committed by the physician.[60]

Regarding the above-cited standards, we have also recognized "that it makes no difference whether the attending physician is a hospital employee or not, or a physician granted a 'franchise' to offer his specialized medical services to the hospital patients, or a physician belonging to the hospital staff and called in for consultation to treat the patient, etc."[61]

[21] In cases involving exclusive franchises—such as contracts for radiology, anesthesiology, and emergency room services, among others—it is clear that the above-cited doctrine applies. In this type of scenario, the patient usually has no option and takes no part in the selection of a given physician or service. The hospital provides the service to the patients who resort to it. Therefore, in situations of this type, the hospital and the

---

[54] *Id.* at 409-410 [16 P.R. Offic. Trans. at 500].

[55] *Id.* at 407 [16 P.R. Offic. Trans. at 497-498].

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.* at 408 [16 P.R. Offic. Trans. at 498].

[60] *Id.* [16 P.R. Offic. Trans. at 498-499].

[61] *Id.* at 407 [16 P.R. Offic. Trans. at 497].

physician are jointly liable to the patient. An implicit guarantee is created to assure that the hospital will provide the service competently. However, in situations in which the hospital grants an exclusive franchise to a physician or a group of physicians to render specialized medical services to hospital patients, the institution must be liable for the negligent acts of said physicians.

[22] This Court has held that physicians granted an exclusive franchise to render anesthesiology services at a hospital are jointly liable with the hospital if the hospital lacks the basic equipment to adequately operate the franchise.[62] However, we must add that although many of these cases involve an independent contractor, since the hospital benefits from the work done by the physician, the hospital and the physician must answer jointly for the negligent acts of the physician.[63]

However, the hospital's liability is not vicarious, but direct, primary, and separate with respect to the patient. This liability cannot be shirked by hiring independent contractors, since the hospital itself is the one providing the service and the physicians to the patients. Therefore, both must answer solidarily for the negligent act committed.

[23] We have previously acknowledged that in certain circumstances, hospitals could be held liable for those physicians who only enjoy the privilege of working at the hospital without being employees.[64] On that occasion, we stated that in those cases, liability would be solidary, without prejudice to a finding of the exact degrees of liability and to the right of contribution within the internal relationship.[65] Thus, if the patient went to the hospital—either on his or her own or by order of his or her private physician—and he or she suffers a compensable damage caused by an independent contractor physician, both the physician and the hospital will be solidarily liable.

B. Regarding the Hospital's liability for Dr. Eliza's acts, clause number 30 of the exclusivity contract expressly shows that the latter is an independent contractor of the former. However, as we previously stated, the Hospital is solidarily liable for Dr. Eliza's acts. In this case, Mrs. Deliz went to the Hospital by order of her physician, but the medical malpractice act was not caused by that physician, but by anesthesiologist Eliza, who is an independent contractor of the Hospital. Nevertheless, evidently Mrs. Deliz neither decided nor took part in the selection of the physician who would anesthetize her; much less did she decide that it had to be that anesthesiologist (Dr. Eliza) who would have to take care of her baby because there was no pediatrician in the Operating Room. In turn, when she was operated on, the anesthesiologist became an assistant of the Hospital; consequently, the institution is solidarily liable with the physician for the latter's acts. Therefore, the fourth error was not committed.

---

[62] *Blás v. Hosp. Guadalupe*, 146 D.P.R. 267, 323, 350 [46 P.R. Offic. Trans. at ___, ___] (1998).

[63] *Márquez Vega v. Martínez Rosado*, 116 D.P.R. at 408 [16 P.R. Offic. Trans. at 498-499].

[64] *Núñez v. Cintrón*, 115 D.P.R. 598, 606 [15 P.R. Offic. Trans. 797] (1984).

[65] *Id.*

VI

For the foregoing reasons, *the judgment rendered by the Court of Appeals is modified as stated above and, thus modified, it is affirmed.*

Judgment will be rendered accordingly.

Justices Fiol Matta and Rodríguez Rodríguez concurred in the result without a written opinion. Chief Justice Hernández Denton issued a partly concurring and partly dissenting opinion.

PGI/mal

(Official Translation)

IN THE SUPREME COURT OF PUERTO RICO

Miguel Sagardía de Jesús *et al.*,

Petitioners

v. No. CC-2005-1263 Certiorari

Hospital Auxilio Mutuo *et al.*,

Respondents

CHIEF JUSTICE HERNÁNDEZ DENTON, concurring in part and dissenting in part.

San Juan, Puerto Rico, November 12, 2009

I concur with Part IV of the Opinion of the Court because the court below erred in reducing the compensation awarded to the spouses Sagardía-Deliz for the damage suffered by their son Miguel Alfonso. However, I dissent from the rest of the Court's Opinion because I believe that in light of the compromise agreement signed in this case, we must apply the rule laid down in *S.L.G. Szendrey v. Hospicare, Inc.*, 158 D.P.R. 648, 658-659 [58 P.R. Offic. Trans. ___, ___ (2003) (*Szendrey*).

As a result, plaintiffs would absorb the share of fault that would have been attributed to the defendants they released from both the external relationship and the internal relationship and, consequently, the amount corresponding to the degree of negligence of those codefendants would be deducted from the sum awarded by the judgment. Absent a specific determination on the distribution of fault within the internal relationship, it is proper to remand the case to the Court of First Instance for it to make such a determination or to divide the fault equally among all the joint tortfeasors. See Puerto Rico Civil Code sec. 1091 (31 L.P.R.A. § 3102). See also: *US Fire Insurance v. A.E.E.*, 174 D.P.R. 846 [74 P.R. Offic. Trans. ___] (2008); *Sánchez Rodríguez v. López Jiménez*, 118 D.P.R. 701, 705 n.2, and 710 [18 P.R. Offic. Trans. 808, 814 n.2, and 819-820] (1987).

The Court's Opinion, however, holds that the effects of the rule laid down in *Szendrey* are not applicable to this case because no claim was filed against the released physicians. It further states that the remaining codefendants—Dr. Miguel A. Eliza García (anesthesiologist) and Hospital Auxilio Mutuo—presented no evidence on the liability of these codefendants or on the distribution of fault among the joint tortfeasors who caused Miguel Alfonso's death. As a result, the Court decided that the amount corresponding to the degree of fault of the released defendants cannot be deducted from the judgment.

The main problem with this decision is precisely that *Szendrey* bars the filing of any claim—whether a cross-claim, a third-party complaint, or a separate action for

contribution—against the released codefendants when the intention stated in the compromise agreement is to release them from liability in terms of the internal relationship and the external relationship. It would not be necessary to bring suit against the released codefendants because under the terms of the compromise agreement, they would not be liable to the plaintiffs or to the defendants who remain in the action.

However, in exchange for that total release, the plaintiffs subrogate themselves in place of the released codefendants and thus assume the risk that in the final determination of liability against *all* the joint tortfeasors, the Court will find the released codefendants liable for a higher degree of fault than that foreseen when the compromise agreement was signed. Only thus would it make sense to sign a compromise agreement because, as is well known, part of the consideration in this type of agreement is mutual renunciation. In this respect, it has been stated:

> [It is not] fair to state that the cause should center on putting an end to a controversy; this must be necessarily complemented by mutual concessions . . . . It is always necessary that both parties sacrifice and concede something at the same time in order to end a litigation over the matter at issue.
>
> . . . .
>
> *Overall, the litigation and the mutual concessions constitute the elements of the cause.*

Silvia Tamayo Haya, *El contrato de transacción* 210, Madrid, Ed. Thomson-Civitas (2003) (cited in *López Tristani v. Maldonado*, 168 D.P.R. 838, 857 [68 P.R. Offic. Trans. ____, ____] (2006)). (Emphasis added.)

According to this principle, we must inevitably ask what is the true cause [consideration] of the compromise agreement signed by plaintiffs in this case. If despite signing said compromise agreement, they would not be facing any risk (since, according to the Opinion of the Court, they may recover damages from *all* the tortfeasors), the agreement would lack a cause. More importantly, it would be improper to allow plaintiffs to recover both the amount obtained through the compromise agreement and the amount awarded by judgment, inasmuch as the defendants who were not part of the compromise agreement would be paying the totality of the judgment and would not be entitled, under the terms of said agreement, to file an action for contribution against the released defendants.

In view of this fact, in *Szendrey,* at 658 [58 P.R. Offic. Trans. at __], we held, in clear and imperative terms, that the trial court "will have to assess the total cash value of the damage caused to plaintiffs by *all* the joint tortfeasors and will deduct from said total amount a sum equivalent to [the] degree of liability." Likewise, for purposes of contribution among the codefendants who remain in the case, "the court must determine the degree of each codefendant's contribution to the damage suffered by plaintiffs, even when they remain solidarily liable to plaintiffs for the totality of the remaining damages,"

that is, for the amount that may result after subtracting the sum corresponding to the degree of fault of the released codefendant. *Id.* at 658-659 [58 P.R. Offic. Trans. at ___].

In the alternative, of course, the defendants who were not part of the compromise agreement—Dr. Eliza García and the Hospital—could file a separate action for contribution to claim from plaintiffs the amount that the former paid in excess and that the latter should have assumed under the compromise agreement. See *Soc. de Gananciales v. Soc. de Gananciales*, 109 D.P.R. 279 [9 P.R. Offic. Trans. 365] (1979); *Torres v. A.F.F.*, 94 P.R.R. 297 (1967).

However, since the litigants in that future action for contribution are already part of the case under our consideration, it is unnecessary to wait for that action to be filed. There is no doubt that in this case, the trial court erred in failing to apply the *Szendrey* rule when rendering judgment. During the first day of trial, an extensive debate arose on the scope of the compromise agreement, its effects on the released codefendants, and its consequences with respect to the standards that govern solidarity. The trial court examined the issue and approved the compromise agreement (despite having initially refused to approve it) after plaintiffs' attorneys told the court that they would present evidence on the liability of all codefendants—even those who were released under the compromise agreement. See Addendum to the petition for certiorari at 61-62. Thus, the trial court would be able to assess the degrees of fault of each of the joint tortfeasors and, consequently, to correctly apply the *Szendrey* rule.

A reading of the compromise agreement reveals that the parties in this case had the intention to release Dr. Arsenio Comas Urrutia and his obstetrics group from both the external relationship and the internal relationship:

> [P]laintiffs release, acquit, and forever discharge codefendants Dr. Arsenio Comas Urrutia, Seguros Triple-S Inc., and the professional Partnership for the practice of Gynecology Obstetrics Gynecology & Perinatal Medicine Associates, constituted by Dr. Arsenio Comas, Dr. Juan Figueroa Longo, and Dr. Ubaldo Catasús, from all claims or causes of action that may arise for any reason or as a result of any damage or loss . . . suffered by plaintiffs or that may be suffered as a consequence of the facts set forth in the action filed in this case or in any of the amendments made thereto.
>
> . . . .
>
> At the time of signing this Agreement, there are no cross-claims filed among the codefendants. Should any of the codefendants remaining in the action file a cross-claim or a third-party complaint against all or some of the appearing codefendants after this agreement is signed and executed, even if any of said actions would be belated and legally untenable, plaintiffs agree, upon payment of the compromised sum of $200,000, to the following:
>
> a. To totally release the appearing codefendants with regard to any claim made by the codefendants in said cross-claim.

> b. [Should any cross-claim or third-party complaint be allowed,] plaintiffs will release the appearing [codefendants] from payment of the corresponding sum regardless of the amount involved.

In view of the wording of the cited contract, the trial court, as part of its assessment, stated at the beginning of the hearing on the merits that "plaintiffs' counsel . . . will prove all their allegations . . . against parties that will not even be here." Addendum to the petition for certiorari at 61-62. This remark was made in clear reference to Dr. Comas and the other released defendants. Thus, it was not proper for the codefendants who remained in the action to present evidence against those who were released because under the terms of a compromise agreement such as the one signed in this case, any cross-claim or third-party complaint would have been untenable. Neither it is pertinent that Dr. Eliza had "waived" the filing of a claim for any sum against the released codefendants, since he could not do so under the terms of the compromise agreement.

Although some evidence on Dr. Comas's acts was presented on the first few days of the trial, plaintiffs reevaluated their previous determination to present evidence against him and informed their decision to withdraw the expert obstetrician they had hired because they believed that this was not necessary in light of the compromise agreement signed by the parties. Appendix to the petition for certiorari at 1164-1165. However, at that time, we had already decided *Szendrey* by way of an Opinion dated February 14, 2003.

Consequently, I believ e that before rendering judgment—in December 2003—the trial court should have required evidence on the degree of fault of the released defendants as prescribed in *Szendrey*. Defendants informed this to the court on several occasions and even filed a motion for additional findings of fact and conclusions of law. Still, the Court of First Instance denied the motion on grounds that the compromise agreement was confidential. Appendix 5 to the petition for certiorari at 164-168. In so doing, it erred.

Therefore, I concur with Part IV of the Opinion of the Court, which reversed the decision to reduce the sum awarded to the spouses Sagardía-Deliz for the damage suffered by their son Miguel Alfonso. However, I dissent from the Court's refusal to apply to this case the rule laid down by this Court in *Szendrey*.

PGI/mal