

Regional Court Cologne, 25 O 179/07

Date: February 6, 2008

Court: Regional Court Cologne

Panel of judges: 25<sup>th</sup> Civil Division

Form of adjudication: judgment on the basis of the cause of action

Case Number: 25 O 179/07

Operative Provisions: The case is warrantable according to its merits

The decision on costs is subject to the final judgment

1

Facts of the case:

2

The plaintiff, born on April 17, 1959, is making a claim against the defendant who, as a surgeon, removed sexual organs from said plaintiff, including the uterus, fallopian tubes and ovaries. The plaintiff accuses the defendant of providing a preoperative consultation that was lacking in information on the nature and extent of the operation, and therefore is requesting a monetary compensation for pain and suffering.

3

The plaintiff, who exhibited a distinct hypospadias, grew up as a male. During puberty, masculine hair growth including a beard, appeared. On February 25, 1976, he underwent an appendectomy. During this operation, clues to the presence of female, intra-abdominal sexual organs presented themselves. In order to substantiate the suspected diagnosis of a double cryptorchidism, the plaintiff was admitted on April 8, 1976 to Antonius-Hospital L. Upon the opening of the groin and the abdominal area to the bladder and exposure of the right inguinal canal, neither testicles nor a spermatic cord were detectable. Hereupon, the right side of the abdominal cavity was opened. Thereupon, an ovarian-shaped formation with Fimbriae (microscopic, however with no sign of testicles) was found. A tissue sample was taken, whose histological examination led to the diagnosis of the existence of fallopian tubes, ovaries and epididymis. Testicle tissue could not be detected. The histological findings reported on April 10, 1976 further specified that seminiferous tubules existed next to the ovaries, which equates to an epididymis. This was, however, not considered substantial enough evidence to diagnose a hermaphrodite. Nevertheless, the plaintiff was informed that ovaries were found.

4

The plaintiff's sister, Ms T2, wrote a letter to Professor X, senior physician of the medical clinic at hospital N, informing him that because of the news that he is 60% female, the plaintiff was having concrete thoughts of suicide. Ms T2 asked Professor X for his help.

5

On December 1, 1976, the medical clinic obtained a urological consultation regarding the treatment of a hypospadias. During this it was recorded, that the plaintiff personally feels neither male nor female. It was also recommended from a urological perspective, that in the case the plaintiff feels a tendency to either/or sex, a corresponding operation should be considered.

6

On December 12, 1976 a chromosome analysis was performed that yielded a normal, female chromosome constitution 46,XX, which was never shared with the plaintiff. On March 28, 1977, the plaintiff's sister wrote a letter to Professor X, informing him that the plaintiff was very unsettled. Further, she inquired if it would be possible "to make" either a man or a woman out of the plaintiff. On July 21, 1977, the plaintiff's general practitioner transferred the plaintiff to Hospital L3-N with the diagnosis "hermaphrodite" to undergo "a hormonal examination and surgical removal."

7

The Plaintiff was admitted and given the diagnosis "suspicion of female pseudo-hermaphroditism with an over-functioning cortex of the suprarenal gland" and a "Grade III hypospadias. With a letter on August 2, 1977, Professor X turned to Dr. W/Psychosomatic Department of the University Hospital L3. In this letter it was written that a normal female chromosomal configuration of 46,XX was found and that "the patient was only partially informed of the said dysfunction in 1976." It still needed to be clarified whether or not the Plaintiff had fully identified himself with his male role. Furthermore, it was also conveyed, that the sister's statements suggested doubt of subjective gender identification that had developed in the meantime. Dr. W disclosed the result of the exploration with a letter on August 2, 1977, that the Plaintiff was once again psychologically stable, which was a result of the previous, subjective medical consultation and the prospect of a corrective operation. There was no substantial evidence of self-doubt regarding the Plaintiff's male sexual consciousness, his male gender role and his male sexual orientation. No discussion was held with the Plaintiff about his normal female chromosomal constitution, which was disclosed in the letter from August 2, 1977, as [it was assumed] this only limitedly interpretable result could have possibly confused him.

8

The operation in dispute was performed on August 12, 1977. Of this there is only an anesthesia report that reports a "testovarectomy" as the purpose of the operation, and from which can be concluded that the Defendant had been involved. According to the medical clinic's senior physician, Dr. I's, entry on August 14, 1977, "a normal female anatomy with pre-puberal uterus, normal sized ovaries, blindly ending vagina..." were found upon the opening of the abdomen. All intra-abdominal genital organs were removed. The entry concludes with the diagnosis that there is no hermaphroditism. The reason for the virilization could either be an Androgenital Syndrome (AGS) or a tumor of the cortex of the adrenal gland (adrenal gland tumor).

9

The histological diagnostic finding of the extirpated material from August 16, 1977 concludes with the evaluation: “Rudimentary atrophic uterus with flat regular myometrium and sparse portions of epithelium of the vaginal portion of the cervix. Ovarian tissue with cystic follicles, primary and secondary vesicular follicles as well as scattered Corpora albicantia. Male germ plasm in the form of a testovar cannot be detected.”

10

On August 24, 1978, a surgery for penile erection was performed at the Municipal Hospital M on the Rheine due to massive pressure on the part of the Plaintiff. In May 1979 the Plaintiff took the A-Levels. He reached the occupational level of male nurse.

11

The plaintiff accuses the Defendant of removing his female sex organs without due cause. He states that the organs were normally developed and fully functional and that this fact was apparent during the surgery. Furthermore, the Plaintiff states that with appropriate therapeutic treatment for Androgenital Syndrom he could have led the life of a woman, including experiencing a fulfilled female sexuality, as well as procreated. He believes that the Defendant should take the responsibility as surgeon of the operation. The Plaintiff claims to never have been informed about the true results of the surgery, but rather, was left to believe that degenerative, genital tissue or some sort of tumor was removed.

12

To this effect, the Plaintiff states – in addition to a life with the “wrong gender” –, that as a consequence of the urethra reconstruction he has suffered from a chronic, almost antibiotic-resistant urinary tract infection that spread to the kidneys as well as a spasmodic urinary dysfunction with residual urine remaining in the bladder. Furthermore, “castratee’s fat” has supposedly developed on his body, as testosterone medication has masculinized the body.

13

The Plaintiff petitions,

14

to convict the Defendant, that he must pay a sum of money as the court deems appropriate (however at least €100,000 along with a per annum interest of 5 percent points above the relative base rate since May, 8 2007) for the pain and suffering caused by the injuries afflicted on him on August 12, 1977.

15

The Defendant petitions,

16

to repudiate the charges.

17

He denies the levied accusations. He invokes the fact that he, as a surgeon, has relied on the diagnosis of the pretreatment medical specialists of the medical clinic. This applies especially to the question of the operation's indication, which resides exclusively within the scope of the pretreatment medical specialists. The operation was performed in the presence of the senior physician of the Internal Medicine Department, Dr. I, who was also witness to the intra-operative findings. According to his concrete instructions, the organs were removed. The Defendant's function was limited to the carrying-out of these instructions.

18

In addition, the Defendant claims that a "naturally female body" was not evident, which followed from the already documented hair-growth. Also, the organs within the Plaintiff were found to be "profoundly atrophied." Thus, the assumed findings from the pretreatment hospital in L were confirmed intra-operative. The operation simply fulfilled the urgent and thoroughly reviewed wishes of the Plaintiff. Assimilation to the female sex did not come into consideration as the Plaintiff clearly identified himself as a male. Notifying the Plaintiff of genotypic appearances was omitted in a non-objectionable way out of therapeutic reasons in light of the suicidal thoughts and psychological concernment of the Plaintiff. Thus, this aspect was to be neglected in the post-operation disclosure of information.

19

It can be assumed however, that because of the fragmentary nature of the patient's files – after the expiration of the compulsory period of record-keeping – it is no longer provable that the medical understanding of the Plaintiff was sufficient regarding female pseudo-hermaphroditism with congenital, adrenogenital syndrome, as well as the existence of treatment possibilities. Alternatively, the Defendant refers to a hypothetical consent from the Plaintiff after an adequate explanation of his chromosomal constitution was given.

20

Finally, the Defendant raises the point of the amount of time that has elapsed between the operation and the court case. He asserts that the Plaintiff had already known about his disposition as the female sex as he had received knowledge of his female sex organs in 1976.

21

Concerning the progressing stage of proceedings, the alternating pleadings and the other documents concerning the Plaintiff's treatment, which were added to the courts file, will be referred to.

22

Reasons for the decision:

23

The lawsuit is thus accordingly well-founded.

24

Under the terms of “§§ 823 Abs. 1, 847 Abs. 1 BGB” in accordance with “Art. 229 § 8 Abs. 1 EGBGB” of the resolution that lasts until July 31, 2002, the Plaintiff may require compensation for the immaterial injury that was caused to him from the surgery on August 12, 1977, because the Defendant illegally, in a deliberate and culpable manner, injured the Plaintiff’s health by removing his female sex organs.

25

The Plaintiff had not fully consented to having such an operation to the Defendant. Even after the pleading of the Defendant, it was not evident that the Plaintiff was appropriately informed about the nature, content and extent of the surgical removal that was performed on August 12, 1977.

26

In his defense, the Defendant made it clear that he believed the Plaintiff to be well enough informed about the medical situation. As was evidenced by a letter from the Plaintiff to his sister, the Plaintiff was aware that he was, medically speaking, 60% female and therefore had an organic disposition for the female sex. Furthermore, the Defendant evoked the fact that the intra-operative findings had confirmed what the pretreatment Hospital L had suspected, namely, that the patient’s intra-abdominal area contained only profoundly atrophied sex organs. For this reason, there was no need for further information for or from the Plaintiff after the opening of the abdominal area on August 12, 1977.

27

From both positions of the lawsuit it is impossible to conclude, whether or not the Plaintiff was well enough informed. According to the medical procedure report concerning the intra-operative findings, which was prepared by senior physician, Dr. I, and contained in the treatment documentation, and according to the pathologic findings on August 16, 1977, not only was an organic “disposition” for the female sex found, but also female sex organs. Thus, the findings from August 12, 1977 were not consistent with the suspicions of pretreatment Hospital L, which were based on the histological examination of tissue samples and which purported evidence of fallopian tubes, ovaries and epididymis, not only for female but also for male sex organs.

28

Subsequently, there is no indication that the Plaintiff had the knowledge before the surgery that – as is stated in the medical procedure report – a “normal female anatomy with a prepubertal uterus, normal-sized ovaries” and vagina would be removed.

29

Since this is not the case, the documentation of the doctors who treated the Plaintiff speaks much more to the proceedings. In the anesthesiology report, the surgery in question was described as a testovarectomy, that is, as a removal of a [testicular] ovary or the gonad of a hermaphrodite, which was comprised of both male and female gonad tissue. This implies that the doctors involved with the actual operation themselves

believed that the surgery was a matter of removing mixed sex organs and not purely female sex organs. The medical procedure report from August 12, 1977 suggests that the faultiness of this presumption became clear to the surgeons (including also the Defendant) during the operation. Here the conclusion was drawn as a result of the intra-operative findings, that this is “not a case of hermaphroditism,” but rather the virilization of the Plaintiff as a result of an Adrenogenital Syndrome or a tumor of the adrenal glands. One could extract from this, that the pre-operative, diagnostic starting point of the surgery – namely that of a case of mixed sex organs – was only first revised as a result of the intra-operative findings. This change of facts was, however, not shared with the Plaintiff and the surgery resumed. There is no evidence that suggests that such a protocol [that is, continuing with the surgery despite such findings] was agreed upon by some sort of consensual agreement before the surgery. The Defendant himself did not state that such a possible contingency was taken into account before the surgery and discussed with the Plaintiff.

30

Thereby, there is no provocation to assume that a “normal female anatomy” presented itself during the operation as it was reported in the medical procedure report, even if the individual sex organs might not have been fully developed. For the description of the intra-operative findings in the procedure report was written on August 14, 1977 because of the impression made by surgery on August 12, 1977 and not because of the report on diagnostic findings from the pathology. The latter, which also exclusively described female sex organs, dates from August 16, 1977 and can, therefore, not have been available during the formulation of the description in the medical procedure report.

31

As stated in the Defendant’s pleading, according to which the intra-operative findings were demonstrated to Dr. I, as well as according to the above cited medical procedure report from August 14, 1977, the said findings were concretely observed by the Defendant intra-operative. Because of this, the Defendant should not have proceeded with the surgery, but rather have cancelled it. From both the Defendant’s statements and the presented diagnostic starting point of an operation considered to be a “Testovarectomy,” there is no evidence that the Defendant guiltlessly assumed that the removal of a “normal female anatomy” would be covered by a possible pre-operative agreement.

32

The circumstance that the surgery henceforth was dealing with female and not mixed sex organs and in light of the Plaintiff’s undisputed psychological irritation from the prospect of having “female organ parts” was of great significance and should have been properly explained. As such, the surgery took on a different quality, one that no longer represented a correction in order to adapt and maintain one of two present sexes, but rather one that represented a complete removal of organs from the only present and organic sex.

[Please note that the following italicized portion contained typographical errors and was translated to the best of the translator’s ability]

33

*The obligation to inform the patient could also not be dropped due to therapeutic reasons. Regarding the disclosure of information about the nature and the extent of the surgery, the Defendant on the one hand does not claim this [i.e does not claim that he did not need to inform the patient due to therapeutic reasons], but only with regard to the fact that he concealed the clearly female chromosome constitution of the plaintiff. On the other hand, without substantiating, the Defendant already described a serious and not remediable damage to the Plaintiff's health, which in the case of full disclosure about the genetic disposition of the plaintiff would have needed to be provided. Regarding the disclosure of information about the removal of a purely female anatomy, this applies all the more. This [meaning the non-applicability of the obligation to disclose the information] would however be necessary if the defendant now wants to claim that a medical contra-indication for the disclosure of information existed and the giving of information thus was dispensable. (BGH, NJW 1959, 814, Rdn. 20; 811, Rdn. 26; BGHZ 90, 103 ff. Rdn. 24; Rdn. each cited according to JURIS). It was therefore, the responsibility of the defendant to provide good reason for the omission of this information to the Plaintiff. He did not even manage to do this regarding the chromosomal constitution. The assertion that the Defendant did not want to risk further confusing the Plaintiff with such information is not a reasonable defence. This is even more the case with respect to the disclosure of information of the female genital anatomy. Similarly, there is no evidence in the records of treatment that there existed a health risk that was so grave and acute that it overweighed the necessity for the Plaintiff self-determination in deciding to have such an extensive, and more than anything, irreversible surgery.*

34

The Defendant may also not claim to have simply been the surgeon that carried out instructions. The circumstance that needed to be clarified and/or disclosed (i.e. the extent of the surgery and the type of removal to be performed) pertained precisely to his function as surgeon. The fact that the surgery's point of origin considerably changed during the surgery was self-explanatory and could have been understood and assessed by the Defendant, even without the treatment report or the official recommendation.

35

In the same way, the plea that there existed a hypothetical consent from the Plaintiff regarding the disclosure of said surgery's particulars, may not work in the favour of the Defendant. Simply because of the external circumstances the court can safely assume that had the Plaintiff had sufficient information regarding the presence of normal and exclusively female intra-abdominal anatomy, he would have found himself in the conflict of making a decision. This is obvious in light of the fact that the surgery's nature fundamentally changed inter-operatively. Moreover, the consultation report from the Psychosomatic Clinic of the University Hospital L3 reported that the Plaintiff admitted to being relieved upon hearing that he does not have "proper" ovaries. This suggests that the Plaintiff's understanding of not exhibiting at least an unambiguously female organic disposition strengthened his desire to have the female "parts" removed. From this it can

be concurrently inferred that the intra-operative contrarian findings would have also strongly influenced his formation of opinion.

36

In addition to this, after the discovery of female genital anatomy, there was even more reason to disclose the information about the female chromosomal constitution because it was then known that the Plaintiff was not only genetically, but also organically female.

37

After what was said above it is no longer relevant whether or not the surgery can also be seen as a treatment performed by the Defendant lacking permission, because the Plaintiff was undisputedly not elucidated about his chromosomal constitution. As explained earlier, the dispensability of disclosure about this fact because of therapeutic reasons has not even rudimentarily been stated. Also in that respect, the consequences and irreversibility of the surgery prevail. It is only questionable to what extent the Defendant, as surgeon, can be blamed, for the concealment of the chromosomal constitution occurred undisputable out of therapeutic considerations, whereas the determination of the indication and therapy planning were the responsibility of the Medical Clinic. The fact that the Defendant, as surgeon, had to at least understand and fundamentally review the disclosure of information from the surgery says a lot. This does not need further final clarifications.

38

The plea that too much time has elapsed is unfounded. The Plaintiff finally found out about the facts of the Defendant's involvement in the surgery, the removal of exclusively female sexual organs in opposition to the diagnostic initial situation as well as the intentional concealment about his chromosomal constitution after his [un]confutative pleading by inspection of the medical reports in the year of 2006. To the assertions made regarding the currently disputed claims: the fact of the „predominantly female anatomy of the sexual organs” is just as deficient as the wish to live as a women, which was fostered for many years.

39

The law suit is not yet far enough for a decision concerning the amount to be paid.

40

For this a broad gathering of evidence will still be needed about the consequences of the surgery. Therefore, it seems reasonable, according to §304 para.1 ZPO to make a decision in advance about the reason for the claim for pain and suffering compensation.