

SPAIN

Albert Ruda

**Decision (*Auto*) Supreme Court, Civil Chamber,
11 January 2017 [JUR 2017\15077]**

Sabina v. Instituto Canario de Fertilidad

‘Wrong fatherhood’

Facts (I)

- Mrs. Sabina (claimant, 31), had sought fertilization treatment (2007).
- Instituto Canario de Fertilidad (ICI) – a commercial company (*sociedad limitada*) (defendant)
- Mr. Jesús (husband, 41) had undergone a vasectomy.
- Fertilization took place through testicle biopsy.
- Marriage split in 2009.
- DNA test reveals the twins are not his children.
- Claimant sues ICI in her name (in contract under Art. 1101 Spanish CC) and in the name of her children.

Lower court decision

*Court of Appeal of Las Palmas de Gran Canaria, Section 5th,
16 May 2016*

- ICI negligently failed to keep the reproductive material.
- Contractual breach: sperm from an anonymous donor was used instead of the husband's.
- Defendant's hypothesis (who claimed that natural fertilization had taken place) is 'highly improbable'.
- Causation was established (*csqn* test).
- Claimants suffered both pecuniary and non-pecuniary damage.
- Defendant sentenced to pay € 315,000 compensation.

Supreme Court decision

- Contract breach was established as the cause of damage both to claimant and her children
- Damage suffered by claimant's children:
 - deprivation of information about their biological origin (non-pecuniary damage), and
 - lost maintenance (pecuniary damage)
- Damage suffered by the claimant:
 - Facing parental responsibilities alone
 - Social rejection

Comments

- Contract-tort divide remains unclear ('unity of civil fault')
- Uncertain causes within the victim's sphere? (Art. 3:106 PETL)
- The defendant's negligence is never explained
 - It is deduced from the fact that the claimant got pregnant from another man's sperm
 - Confusion between the samples is impossible under the circumstances from a technical point of view
 - Sexual relationships with a third man during the fertilization treatment cannot be actually excluded