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Frankenthal Regional Court on the liability of ritual "circumcisers"

In the lawsuit

4 O 11/02

regarding compensation for pain and suffering

the 4th Civil Chamber of the Regional Court Frankenthal (Palatinate) by XXX, XXX and XXX on the oral hearing of 15.06.2004

rules:

The defendant is ordered to pay the plaintiff damages for pain and suffering in the amount of 500,-- euros plus interest in the amount of 5 percentage points above the prime rate since 24 January 2002.

The defendant is ordered to pay to the plaintiff 255,65 euros plus interest thereon in the amount of 5 percentage points above the base interest rate since 24 January 2002.

It is determined that the defendant is obligated to pay the plaintiff the material and immaterial damage due to the circumcision carried out by the defendant on the plaintiff on 01 October 2000, insofar as the claims are not transferred to social insurance carriers or other third parties.

In all other respects the action is dismissed.

Of the costs of the proceedings, the plaintiff shall bear 58% and the defendant 42%.

The judgment is provisionally enforceable for both parties against security in the amount of 110% of the respective amount to be enforced.

Facts of the case:

The plaintiff asserts claim against the defendant arising from a faulty ritual circumcision. He demands compensation for pain and suffering from the defendant, whereby he considers an amount of at least 15.338,75 euros (30.000,-- DM) to be appropriate, and the repayment of the remuneration paid in the amount of 25.565,-- euros (500 DM).

On 01.10.2000, the defendant performed a ritual circumcision on the plaintiff, who was born in 1991, after being instructed to do so by the plaintiff's parents. The circumcision took place in the parental dwelling of the plaintiff. The defendant received for it a remuneration at a value of 500,-- DM.

The defendant himself has no medical training. On his business cards he describes himself as a scientific circumciser, who circumcises without pain and without bleeding.

The defendant performed the circumcision without anesthesia, but with only use of an ice spray. In the process, he removed not only the foreskin but also part of the plaintiff's penile shaft skin.

After the circumcision, there was heavy bleeding. The plaintiff was then taken by his parents to the Municipal Hospital in Ludwigshafen, where he was operated on 02 October 2000, and the missing skin was replaced through plastic surgery by removing scrotal skin. The hospital stay lasted until 06.10.2000.

On 11.04.2001 the plaintiff required surgery again. Plastic surgery to cover the ventral penile shaft was performed because of a high scrotal line caused by the previous surgery.

The plaintiff claims that the defendant circumcised him completely improperly. Specifically, he completely cut off the penile shaft skin. Further, prior to the circumcision, the defendant had untruthfully told the parents that he had thirty years of experience and had medical training. It was only for this reason that the defendant had been commissioned to perform the circumcision. Due to the faulty circumcision, plaintiff had suffered from severe pain, which had also lasted for more than 1-1/2 years. It is to be assumed that he will suffer from further considerable pain due to his growth, especially during puberty, and that renewed surgical interventions will be necessary.

The plaintiff requests:

to order the defendant to pay him an appropriate compensation for pain and suffering plus 9.26%interest thereon from the date of *lis pendens*,

to order the defendant to pay him 255,65 Euro plus 9,26% interest since 02.10.2001,

to declare that the defendant is obliged to pay him the material and immaterial damage due to the circumcision carried out on him by the defendant on 01.10.2000, insofar as the claims are not transferred to social security institutions or other third parties.

The defendant requests that the court:

dismiss the action.

The defendant states that he performed the circumcision professionally and in accordance with the wishes of the plaintiff's parents in accordance with religious regulations. In contrast to a medically indicated circumcision, in which in Western European countries both foreskin layers are removed through a circular incision, the foreskin is completely removed in the ritual circumcision in Arab countries. The complications and bleeding had occurred because the plaintiff was constantly touching the fresh wound with his hand, causing the suture to break open. He also did not claim to the plaintiff's parents or to third parties that he had thirty years of experience and medical training, nor had he been commissioned on the basis of medical training; on the contrary, however, it was common practice among religious Turks for ritual circumcisions to be performed by recognized persons with religious authority, who in no way had medical training. The parents of the plaintiff had attached particular importance to such a religious circumcision and had renounced such a circumcision under medical supervision. For this reason, contributory negligence was also to be imputed to the plaintiff. In addition, the claim for damages for pain and suffering was also excessive.

The court has heard the plaintiff as well as the defendant in the oral hearing personally on 26.03.2002 (sheet 34 - 36 of the A.) and has taken evidence by obtaining a specialized urological expert's opinion (expert's opinion of 29. 01.2004, sheet 90 ff. of the A.) which was explained by the expert in the meeting of 15.06.2004 (sheet 136 ff. of the A.).

Reasons for the ruling:

The action is admissible and partially well-founded.

I.

Per 823 Abs. 1, 847 BGB a. F. the plaintiff is entitled to compensation for pain and suffering at a value of 5.000,-- Euro. Insofar as the plaintiff demands compensation for pain and suffering in excess of this amount, the action is to be dismissed.

There are no doubts about the applicability of German law, since the defendant, according to his own statements (written statement of 20.3.2002, 51. 33 of the A.) is a German citizen and both parties have their habitual residence in Germany (see Palandt/Heldrich, BGB-Kommentar, 61. Aufl., Einl. v. EGBGB 3 (IPR), marginal no. 17 ff).

The requirements of §§ 823 Para. 1, 847 BGB old version are fulfilled on the merits.

The circumcision of the plaintiff by the defendant constitutes a sufficient causal injury to the plaintiff's body pursuant to § 823, Abs. 1, BGB.

1) The bodily injury is also unlawful. In the present case, the intervention on the then nine-year-old plaintiff was performed with the consent of both the plaintiff and his parents. Nevertheless, the requirements of justifiable consent are not met.

a) The consent of the plaintiff himself to the circumcision is already irrelevant because he was only nine years old at the time of the intervention and it cannot be assumed that a nine-year-old, according to his mental and moral maturity, can assess the significance and scope of the surgery and its permission (see Palandt-Thomas, BGB-Kommentar, 61st ed. N.).

b) Therefore, the consent of the plaintiff's parents as his legal representatives must be taken into account here. As already stated, both parents of the plaintiff consented to the ritual circumcision by the defendant. Such consent, however, does not preclude the unlawfulness of the bodily injury associated with the procedure. Because the consent of the plaintiff's parents to the non-medically indicated circumcision, performed by a non-medical person under unsterile conditions resulted in the offense of physical interference, in the opinion of the Chamber, against the child's welfare and is therefore no longer covered by the parental right of custody in accordance with §§ 1626, 1629, 1566 BGB. Under the law of personal custody, parents do not have the authority to make unreasonable decisions to the detriment of their children, which is why their freedom of decision is generally limited to medically indicated interventions. Cosmetic surgery is only permissible in very exceptional cases. The physical well-being of the child falls within the main obligations of parental care. A measure that endangers the child's well-being must therefore be judged to be no longer justifiable from a legal perspective if it proves to be unreasonable.

This is the case here.

In addition, it must be considered that the physical surgical procedure was carried out under hygienic conditions that do not correspond to any medical standard that applies in our country. Thus, the plaintiff lay during the circumcision on an unsterile table. Also, the defendant did not use sterile gloves. In addition, the plaintiff was only locally anesthetized with ice spray and was thus exposed to avoidable pain.

Such an intervention is not oriented to the best interests of the child. In the opinion of the Chamber, consent to such an intervention constitutes an abuse of custody and therefore cannot justify it. Also in

light of Article 4 1 of the Basic Law and taking into account the third-party effect of fundamental rights in civil law, the consent cannot prove to be effective.

In this context, it is not misjudged that the present case involved a ritual circumcision that was performed for religious reasons. In the opinion of the Chamber, however, even in the case of religious circumcisions that are not medically indicated, at least the medical standard applicable in Germany must be observed for the well-being of the child. This would also have been possible without any problems. As the expert explained in the oral explanation of her expert opinion on 15.6.2004 (sheet 140 of the appendix, last paragraph), such religiously motivated circumcisions are also carried out in German clinics. Thus, the plaintiff's brother was also circumcised earlier by a physician. In addition, there are now also a large number of trained physicians in Germany who also have religious authority and perform ritual circumcisions on young patients at home, whereby, however, a minimum medical standard is maintained.

c) The consent of the plaintiff's parents to the intervention is also already invalid because it was influenced by an error caused by the defendant and was therefore not given voluntarily (cf. Palandt-Thomas as above, para. 43). Whether the defendant claimed before the intervention that he had medical training can be left open. For as the defendant himself stated at his personal hearing on 26 March 2002, he advertised on the business card that he used, which he gave to the plaintiff's parents before the circumcision, that he was a scientific circumciser who circumcises without pain and without bleeding.

However, as the defendant himself stated at his personal hearing, he has no scientific training whatsoever. He is a hairdresser by profession and, according to his own statements, has only learned the craft of the circumciser from his father and another master.

d) Beyond that the defendant neither informed the plaintiff's parents about possible complications nor about risks of the interference. Therefore, the plaintiff's parents could only rely on the advertisements of the defendant's craft on the business card he used. As was shown by the surgery, however, this was a mistake.

The error of the plaintiff's parents about the training of the defendant and the risks of the procedure was also causal for the consent. It is to be assumed that the parents of the plaintiff would have acted with knowledge of the actual circumstances in accordance with the information and would have had the circumcision carried out in a clinic or by a physician under sterile conditions. The defendant argues that it was important to the plaintiff's parents to have a ritual circumcision performed in accordance with the religious regulations. However, this does not preclude the plaintiff's parents from acting in a manner that was in accordance with the disclosure requirements, because in the interest of the child's welfare they would in any case have commissioned a physician who could have performed the circumcision in accordance with their religious beliefs.

2) In addition, the defendant also performed the circumcision in a manner that was faulty in treatment. As stated by the expert, both in her written expert opinion and at her personal hearing (p. 136 et seq. of the appendix), the defendant removed too much of the skin of the shaft of the penis, even taking into account that this was a religious circumcision. The expert explained comprehensibly on the basis of the available video recording in the last appointment that the defendant, although he had no control because of the attached device, pulled the foreskin several times and thus cut away too much skin, so that a skin graft became necessary.

3) Contrary to the opinion of the defendant, no contributory negligence of the plaintiff's parents was to be taken into account in the assessment of the damages for pain and suffering, because they benefit from the liability principle of § 1664 BGB in conjunction with § 277 BGB.

Any contributory negligence on the part of the child's parents cannot be imputed as long as the breach of duty does not exceed the level of care customary in the child's own circumstances or is grossly negligent. Below this threshold the responsibility of the parent for setting a damage contribution does not exist (BGH NJW 1988, 2667). In the present case, the plaintiff's parents did not take the plaintiff to a hospital to be circumcised despite the existing possibility, but decided for a ritual circumcision at home. However, as already explained, the plaintiff's parents could only reasonably rely on the information provided by the defendant on his business card and trust him as a member of the same culture and the same religion. In any case, this does not constitute a breach of duty that exceeds the standard of care under § 1664.

4) The compensation for pain and suffering demanded by the plaintiff in the amount of 15.338,76 euros, however, appears to the Chamber to be too high. The Chamber considers a compensation for pain and suffering in the amount of 5.000,-- euros to be appropriate and sufficient. It had to be taken into account that the plaintiff had to undergo two further operations to correct the circumcision. As the expert XXX explained both in her written expert opinion and in her oral explanation, the transplantation of scrotal skin was necessary because too much skin had been removed during the circumcision and the mere sewing together of the skin edges would have led to the penis retracting inward and no longer protruding. In addition to the optical impairment, this would have led to subsequent erections going inwards and not outwards. Under certain circumstances, this could also have had an effect on the ability to procreate. According to the further information provided by the experts, it is doubtful whether normal sexual intercourse could have occurred at all under these anatomical conditions. Furthermore, when assessing the compensation for pain and suffering, it must be taken into account that the optical result is only moderate, as can be seen from the photos taken by the expert. As a result of the transplantation of the scrotal skin, there will also remain an optical adverse effect of the penis, since this skin is darker and, above all, hairy compared to the actual penile shaft skin.

On the other hand, it had to be taken into account that the two operations were without complications and the associated hospital stays were not of long duration. As the expert stated, the plaintiff was completely recovered after the first operation after about six weeks, and likewise after the second operation. It should also be borne in mind that even with a professionally performed circumcision, a period of six weeks is required until complete recovery.

A compensation for pain and suffering in the amount of 5.000,-- euros therefore appears appropriate and reasonable, taking into account the compensatory function but also the satisfaction function, whereby the poor financial situation of the defendant was also taken into account.

The further action is therefore to be dismissed.

II.

Pursuant to § 512, Subsection 1, Sentence 1, German Civil Code (Bürgerliches Gesetzbuch - BGB), the defendant is still obligated to repay the plaintiff the remuneration paid in the amount of 255,65 euros.

The remuneration was paid without legal basis. The contract concluded between the parties concerning the circumcision is ineffective, since the parents of the plaintiff, as already stated above, could not effectively represent the plaintiff at the time of the conclusion of the contract due to the circumstance that the intended circumcision was not in accordance with the law and due to the fact that the

circumcision under consideration was not in the best interests of the child. The undisputed amount paid in fulfillment of this invalid contract must therefore be repaid.

III

The motion for a declaratory judgment is also well-founded.

As the expert stated in her report, the occurrence of physical pain and other complications is not to be expected in the further growth of the child. However, according to this, no reliable assurances can be given about the later development of the scars and contraction or retraction of the skin. Further material and immaterial damage to the plaintiff cannot therefore be ruled out in the future. The claim for a declaratory judgment was therefore to be granted.

IV.

The interest decision follows from §§ 286, 288 I 1 BGB, the plaintiff has not proven any further damage caused by delay.

V.

The decision on costs is based on § 92 (1) ZPO, the decision on provisional enforceability is based on § 709 ZPO.

Decided and announced.

The amount in dispute is determined as follows:

Claim 1) 15.338,76 euros

Claim 2) 255,65 euros

Claim 3) 2.000,-- euros