

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF MARDOSAI v. LITHUANIA

(Application no. 42434/15)

JUDGMENT

STRASBOURG

11 July 2017

FINAL

11/10/2017

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.



In the case of Mardosai v. Lithuania,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Ganna Yudkivska, *President,*
Paulo Pinto de Albuquerque,
Faris Vehabović,
Egidijus Kūris,
Iulia Motoc,
Georges Ravarani,
Péter Paczolay, *judges,*

and Marialena Tsirli, *Section Registrar,*

Having deliberated in private on 6 June 2017,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 42434/15) against the Republic of Lithuania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Lithuanian nationals, Ms Vaida Mardosienė ("the first applicant") and Mr Vygandas Mardosas ("the second applicant"), on 21 August 2015.

2. The applicants were represented by Ms S. Mardosaitė, a lawyer practising in Vilnius. The Lithuanian Government ("the Government") were represented by their Agent, Ms K. Bubnytė.

3. The applicants complained under Article 2 of the Convention regarding the effectiveness of the criminal investigation into the alleged medical negligence which had led to their newborn daughter's death.

4. On 25 May 2016 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The first and second applicants were born in 1981 and 1971 respectively and live in Jurbarkas. They are wife and husband.

A. Death of the applicants' newborn daughter

6. On 15 May 2009 the first applicant, who was nine months pregnant and already past her due date, was admitted to the obstetrics and gynaecology ward of Jurbarkas Hospital.

7. On the morning of 20 May 2009 she was given medication in order to induce labour, but the medication was subsequently discontinued and she was given sedatives. In the late afternoon her waters broke. The doctors noticed that the heartbeat of the foetus was weak and decided to perform a Caesarean section. Following the surgery, the first applicant gave birth to a daughter. The newborn baby was in a serious condition, so she was taken to a hospital in Kaunas for intensive care.

8. On 22 May 2009 the baby died. The applicants decided not to have an autopsy performed on her body – according to them, they were informed by doctors that an autopsy was not necessary. The Government contested this and submitted that the applicants had been informed that an autopsy had been necessary but refused it nonetheless.

9. Following the baby's death, Jurbarkas Hospital conducted an internal inquiry into the medical services provided to the first applicant. The inquiry report, issued on 16 June 2009, found that some erroneous entries had been made in the first applicant's medical file, the assessment of her and the baby's condition had probably been inadequate, and certain actions to resuscitate the baby had been taken too late.

10. At the applicants' request, the Ministry of Healthcare also conducted an inquiry into the medical services provided to them at Jurbarkas Hospital. A provisional report, issued on 22 June 2009, found that the first applicant's labour had not been induced in compliance with the relevant rules, the condition of the foetus had not been properly monitored, there had been shortcomings in the resuscitation of the baby, and one of the doctors (R.B.) had not been properly qualified to provide obstetric services. The report issued a series of recommendations to the hospital, and also suggested that the State Inspectorate for Medical Inquiries conduct a more in-depth inspection of the medical services at Jurbarkas Hospital.

11. The State Inspectorate for Medical Inquiries issued its report on 26 August 2009, in which it identified several shortcomings in the work of doctors who had provided care to the first applicant, and concluded that the medical services had been inadequate.

12. Subsequently, doctor R.B. was dismissed from Jurbarkas Hospital, and the hospital stopped providing obstetric services, citing a lack of qualified medical personnel. V.K., a gynaecologist, and three other doctors were officially reprimanded for having provided inadequate medical services to the first applicant and V.K. was later dismissed at her own request.

B. Criminal proceedings

1. Pre-trial investigation

13. On 22 June 2009 the applicants asked the Jurbarkas district prosecutor (hereinafter "the prosecutor") to open a pre-trial investigation into the medical negligence at Jurbarkas Hospital which had led to their newborn daughter's death. The pre-trial investigation was opened on the same day and carried out by the Jurbarkas police. In July and August 2009 the applicants were interviewed and granted victim status in the investigation.

14. On 7 August 2009 a court-appointed doctor delivered a specialist opinion (*specialisto išvada*) that the applicants' daughter's death had resulted from asphyxia during birth and meconium aspiration syndrome.

15. In August and September 2009 the police interviewed the doctors who had provided medical services to the first applicant, and obtained various documents from Jurbarkas Hospital.

16. In September 2009 the applicants asked the prosecutor to exhume their daughter's body so that an autopsy could be performed and the cause of her death could be more precisely determined. However, the prosecutor denied their request, relying on an opinion from medical experts that performing an autopsy more than three months after the baby's death would not give any results because of the significant post-mortem changes to the body during that time.

17. In October 2009 the police asked four court-appointed doctors for a specialist opinion on the causes of the baby's death and the actions of the doctors at Jurbarkas Hospital. The applicants also submitted questions and their questions were forwarded to the specialists. The opinion, delivered on 5 May 2010, stated that no causal link between the doctors' actions and the death could be established, and that it was not possible to determine whether the death could have been avoided because an autopsy of the body had not been performed. Subsequently, the applicants asked the police to order another opinion from specialists, and they submitted additional questions. On 10 February 2011 three other court-appointed doctors provided answers to the applicants' questions. Their overall conclusions were the same as those of the previous specialists.

18. On 4 March 2011 the prosecutor discontinued the pre-trial investigation on the grounds that no causal link between the actions of the doctors at Jurbarkas Hospital and the baby's death had been established. On 24 March 2011 a senior prosecutor upheld that decision, but on 2 May 2011 the Jurbarkas District Court upheld a complaint submitted by the applicants and reopened the pre-trial investigation. The court found that the two specialist opinions (see paragraph 17 above) had not answered some of the questions submitted because certain medical data had not been made

available. It also found that the investigation had not established why an autopsy had not been performed (see paragraph 8 above). Therefore, the court ordered the prosecutor to ask additional questions of some of the witnesses and order a comprehensive forensic examination.

19. On 2 June 2011 the prosecutor asked the court to order a forensic examination of the causes of the baby's death and the causal link between the doctors' actions and the death. The applicants submitted a list of additional questions to be forwarded to the forensic expert. On 27 June 2011 the Jurbarkas District Court ordered the examination, but that order included only the prosecutor's questions and did not provide any reasons as to why the applicants' questions had not been included. The applicants appealed against it, but on 14 October 2011 the Kaunas Regional Court dismissed their appeal on the grounds that deciding which questions to forward to the expert was the lower court's prerogative.

20. On 25 October 2011 the applicants again submitted their questions to the prosecutor and asked for an additional forensic examination. On 5 December 2011 the Jurbarkas District Court ordered an additional forensic examination, and that order included the applicants' questions. However, the court's order was only forwarded to the forensic expert on 5 February 2013.

21. On 29 January 2013 a court-appointed forensic expert delivered the answers to the prosecutor's questions (see paragraph 19 above). The expert found that the cause of the baby's death had been determined correctly, the medical services provided to the first applicant had been adequate, and there was no causal link between the doctors' actions and the death.

22. On 13 February 2013 the applicants submitted a complaint to the Prosecutor General, stating that the pre-trial investigation was being conducted inefficiently and with undue delays. They complained, in particular, that the court's decision of 5 December 2011 to order an additional forensic examination (see paragraph 20 above) had not been forwarded to the expert until 5 February 2013, one year and two months after it had been issued. The Prosecutor General's Office conducted an official inquiry, which on 18 June 2013 concluded that Jurbarkas prosecutors had committed disciplinary violations, and that the pre-trial investigation had not been properly conducted and supervised. The inquiry found that the Jurbarkas district prosecutor's office had been reorganised in 2012, which was the likely reason for the above-mentioned shortcomings. No individuals were penalised.

23. On 25 June 2013 a court-appointed forensic expert delivered the answers to the applicants' questions (see paragraph 20 above). Among other things, the expert found that some of the doctors' actions had not been in line with the relevant requirements, but there was no direct causal link between their actions and the applicants' daughter's death.

24. On 5 July 2013 the prosecutor discontinued the investigation on the grounds that no causal link between the actions of the doctors at Jurbarkas Hospital and the applicants' daughter's death had been established (see paragraphs 17, 21 and 23 above). The applicants appealed against that decision, and on 4 November 2013 a senior prosecutor reopened the pre-trial investigation and assigned it to a different police department. The senior prosecutor considered that, following the decision to discontinue the investigation, new relevant circumstances had emerged, although he did not specify what those circumstances were.

25. On 28 February 2014 V.K., the gynaecologist, was served with a notice that, under Article 229 of the Criminal Code, she was suspected of having failed to perform her official duties (see paragraph 37 below). On 8 April 2014 the case was referred to the Jurbarkas District Court for examination on the merits.

2. Court proceedings

26. On 28 April 2014 the Jurbarkas District Court held an oral hearing. V.K. was not present and her lawyer informed the court that she had been admitted to hospital, although no medical certificate was submitted. The court adjourned the case until 12 May 2014.

27. On 12 May 2014 V.K. was again not present, and the court received a medical certificate confirming her hospitalisation until 14 May 2014. The court decided to adjourn the case and proposed three alternative dates: 13 May, 16 May and 19 May 2014. V.K.'s lawyer stated that V.K. would not be well enough by 13 May, and that on the later dates he would be unable to represent her. The court adjourned the case until 25 June 2014.

28. On 23 June 2014 the applicants applied to the court to reclassify the charges against V.K. as negligent homicide in violation of special conduct security rules under Article 132 § 3 of the Criminal Code (see paragraph 38 below). The court adjourned the case until 14 July 2014 in order to give the accused enough time to acquaint herself with the case file.

29. On 14 July 2014 the Jurbarkas District Court terminated the case on the basis that it was time-barred. It held that V.K. had been charged with a crime of negligence, and the five-year statutory limitation period had ended on 21 May 2014 (see paragraphs 8 above and 39 below). The court also dismissed the application to reclassify the charges and noted that, in any event, reclassification would not alter the statutory limitation period.

30. The applicants appealed against that judgment. They submitted that, in line with the Criminal Code, the statutory limitation period must have been suspended while the examination of the case had been adjourned owing to V.K.'s illness (see paragraph 40 below).

31. On 6 November 2014 the Kaunas Regional Court dismissed the applicants' appeal and upheld the judgment of the first-instance court. It

firstly held that the legal provision cited by the applicants had been adopted after the alleged offence had been committed, and that at the time the alleged offence had been committed domestic law had not provided for suspension of the statutory limitation period during the adjournment of a case (see paragraphs 39-40 below). The court further held that, in any event, the examination of the case had been adjourned for an important reason - V.K.'s hospitalisation – so there were no grounds for suspending the statutory limitation period.

32. On 24 February 2015 the Supreme Court refused to examine a cassation appeal lodged by the applicants, on the grounds that it did not raise any important legal questions.

C. Civil proceedings

33. The Government in their observations informed the Court that on 15 September 2011 the applicants instituted civil proceedings against Jurbarkas Hospital, claiming compensation in respect of pecuniary and non-pecuniary damage caused by inadequate medical services provided to the first applicant and their newborn daughter. They revised their claim in December 2011 and August 2013. The applicants claimed a total of 600,000 Lithuanian litai (LTL – approximately 173,770 euros (EUR)) in respect of non-pecuniary damage and a total of LTL 16,295 (approximately EUR 4,720) in respect of pecuniary damage, consisting of funeral expenses and the second applicant's lost earnings during his time off work after their daughter's death.

34. On 26 November 2014 the Kaunas Regional Court granted the applicants' claim in part. Relying on the available inquiry reports, as well as the specialist opinions and results of the forensic examinations delivered in the criminal proceedings (see paragraphs 9, 10, 11, 17, 21 and 23 above), the court held that the doctors at Jurbarkas Hospital had breached their duty of care and that their actions "had contributed" (*turėjo įtakos*) to the death of the applicants' daughter, so there were grounds for the hospital incurring civil liability. However, the court considered that the doctors' actions had not been premeditated or grossly negligent, so the applicants' claim in respect of non-pecuniary damage was granted in part, and they were awarded a total of LTL 80,000 (approximately EUR 23,170) under that head. They were also awarded a total of LTL 6,716 (approximately EUR 1,945) in respect of pecuniary damage, on the basis of the documents in the court's possession.

35. The applicants and the hospital appealed against that judgment, but on 17 September 2015 the Court of Appeal upheld the lower court's findings. The hospital transferred the awarded amount to the applicants' bank accounts in November and December 2015.

II. RELEVANT DOMESTIC LAW

36. Article 19 of the Constitution of the Republic of Lithuania reads:

"The right to life of a human being shall be protected by law."

37. At the material time, Article 229 of the Criminal Code provided:

Article 229. Failure to perform official duties

"A civil servant or a person equivalent thereto who, by negligence, has failed to perform or has inadequately performed his or her official duties and has thereby caused major damage to the State, an individual or a legal entity, shall be punished by deprivation of the right to have a certain occupation or to engage in a certain type of activity, or a fine, or detention, or imprisonment for a term of up to two years."

38. Article 132 § 3 of the Criminal Code provides:

Article 132. Causing death by negligence

"...

3. Anyone who has [negligently caused the death of another person] by violating special conduct security rules shall be punished by imprisonment for a term of up to eight years."

39. The relevant parts of Article 95 of the Criminal Code, in force from April 2003 until June 2010, provided:

Article 95. Statute of limitations for conviction

"1. A person who has committed a criminal offence cannot be convicted if:

1) the following period has lapsed: ...

b) five years, in the case of a crime of negligence or a minor premeditated crime; ...

2) during the period laid down in sub-paragraph 1, the person did not evade the pre-trial investigation or the trial and did not commit a new criminal offence ..."

40. In June 2010 a new version of Article 95 of the Criminal Code was passed, the relevant parts of which provide:

Article 95. Statute of limitations for conviction

"1. A person who has committed a criminal offence cannot be convicted if:

1) the following period has lapsed: ...

b) eight years, in the case of a crime of negligence or a minor premeditated crime; ...

2) during the period laid down in sub-paragraph 1, that person did not evade the pre-trial investigation or the trial and did not commit a new premeditated criminal offence ...

5. During the examination of a case before a court, the statute of limitations is suspended for the period during which:

1) the court adjourns the examination of the case because of the absence of the accused or his or her counsel;

2) the court adjourns the examination of the case until a forensic examination requested by the court or a specialist investigation has been carried out, or until a legal assistance request sent to another State has been executed;

3) the court adjourns the examination of the case and instructs a prosecutor or a pre-trial investigation judge to carry out investigative measures provided for in the Code of Criminal Procedure;

4) the court adjourns the examination of the case in order to allow newly appointed defence counsel to acquaint himself or herself with the case file ..."

THE LAW

I. ALLEGED VIOLATION OF THE PROCEDURAL LIMB OF ARTICLE 2 OF THE CONVENTION

41. The applicants complained that the criminal investigation into the alleged medical negligence which had led to their newborn daughter's death had been lengthy and ineffective. They relied on the procedural limb of Article 2 of the Convention, the relevant part of which reads:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally ..."

A. Admissibility

42. The Government submitted that the applicants had failed to exhaust domestic remedies, because they had not lodged a civil claim against the State for compensation in respect of damage caused by the allegedly ineffective criminal proceedings. They provided examples of domestic case-law where damages had been awarded in similar cases. The Government also submitted that the applicants could have lodged a civil claim for compensation in respect of damage caused by the excessive length of the criminal proceedings – a remedy which the Court had found to be effective in *Savickas and Others v. Lithuania* ((dec.), no. 66365/09, 15 October 2013).

43. The applicants submitted that they had exhausted criminal and civil remedies against Jurbarkas Hospital and were therefore not required to initiate any more proceedings.

44. The Court observes that the applicants have fully exhausted both the criminal and civil law avenues in pursuit of their complaint concerning medical negligence. Accordingly, it does not share the Government's view that they ought to have used a separate remedy of civil proceedings against

the State (see *Kraulaidis v. Lithuania*, no. 76805/11, § 51, 8 November 2016, and the cases cited therein). Furthermore, the Court has previously held that, in the assessment of the authorities' compliance with the procedural obligation under Article 2 of the Convention, length of proceedings remedies are insufficient, as it is not merely the length of the proceedings which is in issue. The main question is rather whether, in the circumstances of the case seen as a whole, the State could be said to have complied with its procedural obligation under Article 2 of the Convention (see *Bilbija and Blažević v. Croatia*, no. 62870/13, § 110, 12 January 2016, and the cases cited therein). The Government's argument as to non-exhaustion of domestic remedies must therefore be dismissed.

45. The Court further notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention, nor is it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

46. The applicants argued that the criminal proceedings concerning their daughter's death at Jurbarkas Hospital had been lengthy and ineffective. They submitted that the pre-trial investigation had been discontinued and reopened twice (see paragraphs 18 and 24 above), there had been unexplained periods of inactivity, and the prosecutor had only forwarded the order for a forensic examination to the relevant expert one year and two months after it had been issued (see paragraph 20 above). They further submitted that the Jurbarkas District Court had not made any effort to speed up the examination of the case before the expiry of the statute of limitations.

(b) The Government

47. The Government firstly argued that the criminal proceedings had been effective. They submitted that the pre-trial investigation had been opened on the day of the applicants' request, it had been conducted by independent and impartial authorities, the applicants had been given sufficient opportunity to participate in it, and the authorities had carried out all the necessary investigative measures, such as obtaining documents, questioning witnesses and requesting forensic examinations. The Government argued that the decisions to discontinue the investigation had not been arbitrary, because they had been based on specialist opinions and forensic examinations which had found no causal link between the doctors' actions and the baby's death. The Government also argued that the

applicants themselves had contributed to the length of the investigation by requesting additional specialist opinions and forensic examinations.

48. The Government further submitted that the length of the pre-trial investigation had resulted mainly from the time taken to deliver specialist opinions and perform forensic examinations, and that had been caused by the experts' workload. While acknowledging that the order for an additional forensic examination had only been forwarded to the expert one year and two months after it had been issued (see paragraph 20 above), the Government contended that that had not significantly prolonged the investigation, because the results of that examination had been delivered only five months after those of the previous forensic examination (see paragraphs 21 and 23 above).

49. Lastly, the Government submitted that the State's positive obligations under Article 2 of the Convention did not require criminal liability in cases concerning medical negligence. They submitted that the applicants had successfully lodged civil proceedings against the hospital and had been awarded compensation for pecuniary and non-pecuniary damage caused by inadequate medical services (see paragraphs 33-35 above). The Government submitted that the Court had acknowledged the adequacy of the Lithuanian legal framework with regard to the liability of doctors in *Rinkūnienė v. Lithuania* ((dec.), no. 55779/08, 1 December 2009).

2. The Court's assessment

(a) Relevant general principles

50. The Court reiterates that the procedural obligation under Article 2 of the Convention requires the States to set up an effective independent judicial system so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable (see *Šilih v. Slovenia* [GC], no. 71463/01, § 192, 9 April 2009, and the cases cited therein). This procedural obligation is not an obligation of result but of means (see *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 71, ECHR 2002‑II).

51. The Court also reiterates that, although the Convention does not guarantee a right to have criminal proceedings instituted against third parties, the effective judicial system required by Article 2 may, and under certain circumstances must, include recourse to criminal law. However, if the infringement of the right to life is not caused intentionally, the procedural obligation imposed by Article 2 does not necessarily require the provision of a criminal-law remedy in every case. In the specific sphere of medical negligence the obligation may also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction

with a remedy in the criminal courts, enabling any responsibility of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and/or for the publication of the decision, to be obtained (see *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 51, ECHR 2002-I; *Vo v. France* [GC], no. 53924/00, § 90, ECHR 2004-VIII; and *Šilih*, cited above, § 194).

52. Lastly, the Court reiterates that, apart from the concern for the respect of the rights inherent in Article 2 of the Convention in each individual case, more general considerations also call for a prompt examination of cases concerning death in a hospital setting. Knowledge of the facts and possible errors committed in the course of medical care is essential to enable the institutions and medical staff concerned to remedy the potential deficiencies and prevent similar errors. The prompt examination of such cases is therefore important for the safety of users of all health services (see *Byrzykowski v. Poland*, no. 11562/05, § 117, 27 June 2006, and *Šilih*, cited above, § 196).

(b) Application of the above principles to the present case

53. Turning to the circumstances of the present case, the Court will firstly address the applicants' submissions concerning the effectiveness of the criminal proceedings at the pre-trial and trial stage.

54. The pre-trial investigation in the case lasted more than four years and nine months (see paragraphs 13 and 25 above), a period which the Court considers excessive even taking into account the complexity of the case. As seen from the case file, there were several periods of inactivity (almost four months from October 2009 to February 2010, three months from June to September 2010, almost four months from September 2010 to January 2011, more than five months from December 2011 to May 2012, and more than two months from July to October 2012), which together amounted to about one year and six months of inactivity imputable to the authorities. The Court also notes that for the rest of the time the investigation was conducted very slowly and the investigative measures were sparse.

55. The Government submitted that many of the delays in the investigation had been caused by the workload of specialists and experts, but the Court cannot accept that argument and reiterates that it is for the State to organise its judicial system in such a way as to enable its institutions to comply with the requirements of the Convention (see, *mutatis mutandis*, *O'Reilly and Others v. Ireland*, no. 54725/00, § 33, 29 July 2004; *Rakhmonov v. Russia*, no. 50031/11, § 60, 16 October 2012; and *W. v. Slovenia*, no. 24125/06, § 69, 23 January 2014). The Government also argued that the applicants had themselves prolonged the investigation by requesting additional specialist opinions and forensic examinations. The

Court acknowledges that the applicants' request for an additional specialist opinion (see paragraph 17 above) appeared to have been based on their disagreement with the conclusions of the previous opinion rather than on any shortcomings therein. However, it notes that the authorities were not obliged to satisfy the applicants' request for an additional opinion if they did not consider it necessary (see *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, § 180, 14 April 2015). The Court further observes that the applicants' request for an additional forensic examination (see paragraph 20 above) resulted from the fact that their questions had not been forwarded to the experts conducting the previously ordered examination, without any reasons being provided (see paragraph 19 above), so in the Court's view, the applicants cannot be reproached for asking for another examination which would address their questions.

56. Of particular concern to the Court is the authorities' failure to forward an order for a forensic examination to the relevant experts for one year and two months, for which nobody was held responsible (see paragraphs 20 and 22 above). Although the Government submitted that that failure had prolonged the investigation by "only five months" (see paragraph 48 above), the Court considers such a delay to be significant, especially in view of the total length of the pre-trial investigation and the fact that the proceedings eventually became time-barred.

57. The Court further notes that, following the lengthy pre-trial investigation, the case was transferred to the Jurbarkas District Court for examination on the merits when only slightly more than one month remained until the expiry of the statute of limitations (see paragraphs 8 and 39 above). In such circumstances, the Court considers that there was little that the domestic court could do to avoid the case becoming time-barred, especially as the domestic law at that time did not allow suspending the statute of limitations (see paragraphs 39-40 above). It nonetheless observes that, after the first two hearings were adjourned as a result of the illness of the accused, the Jurbarkas District Court scheduled the next hearing on 25 June 2014 – a date which was already after the expiry of the statute of limitations – because of the defence lawyer's schedule, without examining the possibility of finding another date before 21 May 2014 or suggesting that the accused appoint a different lawyer (see paragraph 27 above).

58. Accordingly, the Court is of the view that in the present case the criminal proceedings could not be regarded as effective for the purpose of Article 2 of the Convention.

59. However, the Court observes that there is no dispute that the death of the applicants' daughter was not intentional. It reiterates that, in cases concerning medical negligence, the procedural obligation under Article 2 of the Convention does not necessarily require criminal liability, and civil liability may be sufficient (see *Calvelli and Ciglio*, § 51; *Vo*, § 90; and *Šilih*,

§ 194, all cited above). In the present case, the applicants lodged a civil claim against Jurbarkas Hospital and were awarded compensation for pecuniary and non-pecuniary damage caused by the inadequate medical services which had contributed to their daughter's death (see paragraphs 33-35 above).

60. The applicants lodged their civil claim in September 2011 (and revised it in December 2011 and August 2013 – see paragraph 33 above), but the first-instance judgment was only issued in November 2014 (see paragraph 34 above), thereby raising the question as to whether the proceedings were sufficiently prompt. No information was provided to the Court as to the reasons for that delay. However, it may be assumed that the civil proceedings were stayed pending the outcome of the criminal proceedings, especially as the courts in the former proceedings relied on the evidence obtained in the course of the latter (see paragraph 34 above; see, *mutatis mutandis*, *Koceski v. the Former Yugoslav Republic of Macedonia* (dec.), no. 41107/07, § 27, 22 October 2013). After the criminal proceedings became time-barred, the civil proceedings were concluded without undue delay (see paragraphs 29, 31 and 34 above).

61. The Court further observes that the amount awarded to the applicants in the civil proceedings (EUR 23,170 in respect of non-pecuniary damage and EUR 1,945 in respect of pecuniary damage) corresponded to the degree of the hospital's liability (see paragraph 34 above), and was adequate by Convention standards.

62. Lastly, the Court notes that the applicants complained only about the ineffectiveness of the criminal proceedings, but did not allege that the civil proceedings had been unfair or ineffective in any way, or that the amount awarded to them in the latter proceedings had been inadequate.

63. The foregoing considerations are sufficient for the Court to conclude that the State complied with its procedural obligations under Article 2 of the Convention. There has therefore been no violation of that provision in the present case.

FOR THESE REASONS, THE COURT

1. *Declares*, by a majority, the application admissible;

2. *Holds*, by five votes to two, that there has been no violation of Article 2 of the Convention under its procedural limb.

Done in English, and notified in writing on 11 July 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli Registrar	Ganna Yudkivska President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint partly dissenting opinion of Judges Yudkivska, Motoc and Ravarani;

(b) dissenting opinion of Judge Motoc;

(c) statement of dissent by Judge Paczolay.

G.Y.
M.T.

JOINT PARTLY DISSENTING OPINION OF JUDGES YUDKIVSKA, MOTOC AND RAVARANI

1. To our regret, we are unable to agree with the majority's finding concerning the admissibility of the application. Instead of finding no violation on the merits, the Court should have found the present application inadmissible, as the applicants had lost their victim status.

2. Even though the criminal proceedings might not have been effective, it follows clearly from the Court's case-law that where medical negligence is at stake, an award of damages through civil or administrative proceedings may offer appropriate redress, a fact also conceded in the present judgment (see paragraph 51 of the judgment). In *Calvelli and Ciglio v. Italy* the Grand Chamber found that "if the infringement of the right to life or to personal integrity is not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case. In the specific sphere of medical negligence the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged"[1]. In that case the Court also noted various procedural shortcomings in the criminal investigation, as a result of which the criminal proceedings instituted against the doctor concerned had become time-barred. However, since the applicants were also entitled to issue proceedings in the civil courts and had done so, the positive obligations arising under Article 2 were satisfied. In that connection, the Court reiterated that where a relative of a deceased person accepts compensation in settlement of a civil claim based on medical negligence he or she is in principle no longer able to claim to be a victim, and found it unnecessary to examine whether the fact that a time-bar had prevented the doctor being prosecuted for the alleged offence was compatible with Article 2. Therefore, having joined an objection on the applicants' victim status to the merits of the case, the Court found no violation of Article 2, basing its finding precisely on the lack of victim status. The same approach, we believe, should have been taken here.

3. As the judgment concedes in paragraph 59, the applicants also had access to civil proceedings and introduced a civil claim against the hospital. They were awarded compensation for the pecuniary and non-pecuniary damage caused by the inadequate medical services that contributed to their daughter's death. In its decision in *Kolaczyk and Kwiatkowski v. Poland* (no. 34215/11, 22 October 2013), the Court found that "the action for

1. *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 51, ECHR 2002-I.

damages in the civil courts was an effective remedy that enabled the applicants to obtain redress ... Therefore it is not necessary to assess the effectiveness of the criminal investigation carried out in the present case. There is no doubt that the procedural obligation under Article 2 was complied with in the present case"[2].

4. Against this background we wonder whether it was the correct approach, as stated in paragraph 53, to "firstly address the applicants' submissions concerning the effectiveness of the criminal proceedings at the pre-trial and trial stage", given that the detailed examination in paragraphs 54-57 ultimately led to a conclusion in paragraph 58 which remains a pure *obiter dictum*.

5. In sum, following the case-law of the Court and having regard to the fact that the present case concerns a death through negligence, we consider that the applicants had an effective remedy in civil proceedings (as they did not claim that these proceedings were unfair or ineffective3) and thus can no longer claim to be victims of the alleged violation of Article 2. Accordingly, this complaint is incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and should have been rejected in accordance with Article 35 § 4. We therefore voted against point 1 in the operative part of the judgment.

2. *Kolaczyk v. Poland* (dec.), no. 34215/11, § 50; see also *Vo v. France* [GC], no. 53924/00, § 91, ECHR 2004-VIII.

3. See § 60 of the judgment.

DISSENTING OPINION OF JUDGE MOTOC

I have voted for the inadmissibility of the case for the reasons I have set out with Judges Yudkivska and Ravarani in our joint separate opinion. I consider, however, that once the case had been considered admissible, it was logical for the Court to find a violation of the procedural limb of Article 2 of the Convention. In fact, the domestic courts had never properly addressed the procedural violation of Article 2, only the substantive violation.

STATEMENT OF DISSENT BY JUDGE PACZOLAY

I am unable to follow the finding of the majority that there has been no violation of Article 2 of the Convention.