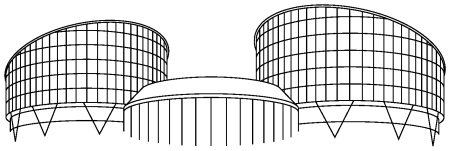

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

# CASE OF JURICA v. CROATIA

*(Application no. 30376/13)*

JUDGMENT

STRASBOURG

2 May 2017

*This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.*

**In the case of Jurica v. Croatia,**

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

Işıl Karakaş, *President,*
Julia Laffranque,
Nebojša Vučinić,
Valeriu Griţco,
Ksenija Turković,
Jon Fridrik Kjølbro,
Georges Ravarani, *judges,*

and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 21 March 2017,

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

# PROCEDURE

1. The case originated in an application (no. 30376/13) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Croatian national, Ms Gordana Jurica ("the applicant"), on 11 April 2013.

2. The applicant was represented by Mr D. Ivanić, a lawyer practising in Zagreb. The Croatian Government ("the Government") were represented by their Agent, Ms Š. Stažnik.

3. The applicant complained of lack of an effective domestic procedure to deal with her allegations of medical negligence, contrary to Articles 6 and 8 of the Convention.

4. On 18 December 2014 the application was communicated to the Government.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1953 and lives in Zagreb.

### A. Background to the case

6. In the period between 1987 and 1989 the applicant underwent several operations in the Zagreb Clinical Hospital Centre "Sestre Milosrdnice"

(*Kliničkі bolničkі centar Sestre Milosrdnice* – hereinafter "the hospital"), a public health-care institution, for a middle-ear dysfunction.

7. Following surgery in October 1989 the applicant's condition deteriorated, resulting in paralysis of the left side of her face. In this connection, she underwent further treatment until July 1997, when it was found that her condition was such that she would not recover. The applicant took early retirement on grounds of disability.

### B. Civil proceedings

8. On 29 January 1998 the applicant lodged a civil action against the hospital and the relevant insurance company with the Zagreb Municipal Civil Court (*Općinski (građanski sud) u Zagrebu*), claiming damages for alleged medical malpractice.

9. In September 1998 the applicant urged the Zagreb Municipal Civil Court to schedule a hearing in her case.

10. The parties exchanged further submissions in February and March 1999. The applicant submitted an expert report drafted by V.F., according to which her medical condition had notably deteriorated in January 1997.

11. The first hearing before the Zagreb Municipal Civil Court was held on 17 September 1999. Following questioning of the applicant, the hearing was adjourned until further notice.

12. In October 1999 and May 2000 the applicant urged the Zagreb Municipal Civil Court to speed up the proceedings.

13. On 27 September 2000 a hearing was held at which the Zagreb Municipal Civil Court decided to commission an expert report concerning the circumstances of the applicant's treatment.

14. On 14 November 2000 experts R.T. and P.S. were commissioned to write the report.

15. In December 2000 P.S. produced a report in which he stated that he had found no indications of medical malpractice in the applicant's treatment.

16. R.T. asked to be excluded from the proceedings on the grounds that he was employed in the hospital and that therefore an issue as to his impartiality could arise. As a result of his withdrawal, on 16 January 2001 the Zagreb Municipal Civil Court commissioned a report from another expert, J.G.

17. In her report of 5 February 2001, J.G. found that the applicant's condition was irreversible, but did not provide any conclusive findings as to the alleged medical negligence.

18. On the basis of an objection by the applicant to J.G.'s findings, on 8 March 2001 the Zagreb Municipal Civil Court invited the expert to supplement her report with findings concerning the applicant's allegations of medical malpractice.

19. On 9 April 2001 J.G. submitted a supplement to her report, finding that there were no indications of medical negligence in the applicant's treatment.

20. In April 2001 the applicant challenged J.G.'s findings and asked the Zagreb Municipal Civil Court to question the experts at a hearing.

21. On 8 November 2001 a hearing was held for the questioning of the experts, who reiterated their findings. The Zagreb Municipal Civil Court found that it was necessary to commission another expert report from the University of Zagreb Medical Faculty (*Medicinski fakultet Sveučilišta u Zagrebu*) concerning the question whether the applicant's condition was a result of medical negligence.

22. An expert report was commissioned from the University of Zagreb Medical Faculty on 14 January 2002.

23. The University of Zagreb Medical Faculty produced a report on 28 April 2005. It found that the applicant's facial paralysis was a result of complications during surgery and not medical malpractice.

24. In response to the expert report of the University of Zagreb Medical Faculty, the applicant specified her claim, arguing that the report established a causal connection between the surgery and the deterioration of her health. She also considered that according to the principle of objective liability, the hospital was responsible. The applicant did not express any objections concerning the report.

25. In September and December 2006 the applicant urged the Zagreb Municipal Civil Court to schedule a hearing.

26. At a hearing held on 2 February 2007 the Zagreb Municipal Civil Court questioned the applicant and ordered that the experts from the University of Zagreb Medical Faculty, N.Šp. and J.Šk., be questioned at the next hearing.

27. On 24 May 2007 the Zagreb Municipal Civil Court heard evidence from N.Šp. and J.Šk. They reiterated their findings, according to which the deterioration of the applicant's condition had been a result of complications during surgery.

28. A further hearing was held on 16 May 2008 at which the Zagreb Municipal Civil Court decided that K.R., the doctor who had treated the applicant, would be questioned as a witness.

29. A hearing on 17 October 2008 was adjourned because K.R., who at the time lived in Serbia, had not been properly summoned to appear as a witness.

30. At a hearing on 4 December 2008 the Zagreb Municipal Civil Court questioned the applicant. It also found that K.R. had not been properly summoned.

31. On 22 April 2009 a hearing was held at which the Zagreb Municipal Civil Court questioned K.R., who explained the circumstances of the applicant's operations and further treatment.

32. On 7 May 2009 the Zagreb Municipal Civil Court commissioned another expert report from D.V. with regard to the question of a causal link between the applicant's condition and her disability pension. In a report of 8 July 2009 the expert found that there was a direct causal link between the applicant's condition and her retirement on grounds of disability.

33. At a hearing on 20 January 2010 the applicant asked that experts from another European Union State be appointed as expert witnesses in her case. The Zagreb Municipal Civil Court dismissed that request and concluded the hearing.

34. In a further submission of the same date the applicant challenged the impartiality of the expert witnesses from Croatia, arguing that it was clear from the negligible number of cases where medical malpractice had been established that they were biased in favour of the defendants.

35. On 29 January 2010 the Zagreb Municipal Civil Court dismissed the applicant's civil action, holding that in the case at issue the principle of presumed fault (*presumirane krivnje*) should be applied. That meant that it was for the defendants to show that the hospital had acted in accordance with professional standards and that the damage was not the result of a lack of diligence on the part of the doctor who had performed the surgery. Relying on a detailed assessment of the expert reports obtained during the proceedings, the court found that on the facts of the case, the deterioration of the applicant's health had been a result of complications in the treatment and not of medical malpractice. It also pointed out that there was nothing putting into doubt the quality of the expert reports commissioned during the proceedings and that the applicant's request that another expert report be commissioned from abroad would unnecessarily further prolong the proceedings and generate further expense.

36. On 17 March 2010 the applicant appealed against that judgment before the Zagreb County Court (*Županijski sud u Zagrebu*) alleging, *inter alia*, that the medical experts who had drafted the reports had a personal and professional conflict of interest in the proceedings, as they involved allegations of malpractice against their colleagues and the experts were financially dependent on the hospital system.

37. On 14 September 2010 the Zagreb County Court dismissed the applicant's appeal as unfounded on the grounds that there was no reason to doubt the quality and findings of the expert reports.

38. On 11 November 2010 the applicant lodged an appeal on points of law with the Supreme Court (*Vrhovni sud Republike Hrvatske*), reiterating her previous arguments concerning lack of impartiality on the part of the experts and the quality of the expert reports commissioned during the proceedings.

39. On 31 August 2011 the Supreme Court dismissed the applicant's appeal on points of law as unfounded, endorsing the reasoning of the lower courts.

40. On 2 June 2012 the applicant lodged a constitutional complaint before the Constitutional Court (*Ustavni sud Republike Hrvatske*) complaining of lack of an effective procedure before the competent civil courts to deal with her allegations of medical negligence. She also reiterated her complaints as to the lack of impartiality of the medical experts, arguing that the relevant statistics showed that it had been impossible to establish her allegations of medical negligence on the basis of the expert reports commissioned from the domestic experts.

41. On 26 September 2012 the Constitutional Court declared the applicant's constitutional complaint inadmissible as manifestly ill-founded. The decision of the Constitutional Court was served on the applicant on 12 October 2012.

### C. The applicant's length of proceedings complaint

42. On 7 January 2008 the applicant complained to the Zagreb County Court about the excessive length of the proceedings before the Zagreb Municipal Civil Court.

43. On 26 August 2008 the Zagreb County Court found a violation of the applicant's right to a trial within a reasonable time and awarded her 11,000 Croatian kunas (HRK – approximately 1,530 euros (EUR)) in compensation. It also ordered the Zagreb Municipal Civil Court to terminate the proceedings within a further period of eight months following the service of its decision.

44. The decision of the Zagreb County Court was served on the Zagreb Municipal Civil Court on 22 October 2008.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### A. Relevant domestic law

#### 1. *Relevant domestic law concerning responsibility for medical negligence*

45. The relevant domestic law concerning civil responsibility for medical negligence under the Civil Obligations Act (*Zakon o obveznim odnosima*) is set out in the case of *Kudra v. Croatia*, no. 13904/07, § 83, 18 December 2012.

46. In addition to the provisions on civil responsibility, the relevant domestic law provides for a comprehensive set of norms and principles on the professional responsibility of doctors for medical malpractice (see *M.S. v. Croatia (no. 2)*, no. 75450/12, §§ 37-39, 19 February 2015, and *Bilbija and Blažević v. Croatia*, no. 62870/13, § 78, 12 January 2016).

47. Medical negligence is also a criminal offence under the Criminal Code (*Kazneni zakon*). Article 166 of the consolidated text of the 1993 Criminal Code of the Republic of Croatia (Official Gazette no. 31/1993), incorporating the Criminal Code of the Socialist Republic of Croatia (Official Gazette nos. 25/1977; 50/1978; 25/1984; 52/1987; 43/1989; 8/1990; 9/1991; 33/1992; 39/1992; 77/92; and 91/1992) defined medical malpractice as medical treatment by the application of an obviously inadequate remedy or method of treatment, by failure to apply the relevant hygiene standards, or by generally acting carelessly and thus causing damage to health. Further amendments to the Criminal Code removed the reference to "hygiene standards" and inserted a reference to the necessity to observe the relevant professional standards in medical treatment (see *Bajić v. Croatia*, no. 41108/10, § 50, 13 November 2012; and Article 181 of the Criminal Code, Official Gazette nos. 125/2011, 144/2012, 56/2015 and 61/2015).

*2. Relevant domestic law concerning the position of court experts in civil proceedings*

48. The position of court experts in civil proceedings is regulated under sections 251-262 of the Civil Procedure Act (*Zakon o parničnom postupku*, Official Gazette nos. 53/1991, 91/1992, 58/1993, 112/1999, 88/2001, 117/2003, 88/2005, 2/2007, 84/2008, 123/2008, 57/2011, 148/2011, 25/2013 and 89/2014).

49. Under section 251 of the Civil Procedure Act, as applicable at the relevant time, the commissioning of an expert report was within the competence of the court conducting the proceedings. Before commissioning an expert report, the competent court was required to hear the parties with regard to the choice of expert (section 251(2) of the Civil Procedure Act). If the particular circumstances of the case so required, the competent court was allowed to commission a report from another expert.

50. An expert report is principally commissioned from a permanent court expert. However, under section 252(2) of the Civil Procedure Act, a report may be commissioned from an institution (including a public institution such as a university), and if the matter at issue concerns specific and complex professional questions, the report must be primarily commissioned from a specialist institution.

51. The provisions on the disqualification of judges are applicable *mutatis mutandis* to the disqualification of experts (sections 254-255 of the Civil Procedure Act).

52. Under section 258 of the Civil Procedure Act court experts are required to provide their opinions objectively, impartially and to the best of their knowledge. Experts are also informed of the legal consequences of perjury.

53. Sections 259-261 of the Civil Procedure Act regulate the way in which an expert report is to be examined. In particular, the judge conducting the proceedings sets out the scope and aim of the expert report and directs the expert witness as to the particular issues on which he or she should give an opinion. The expert has to provide a reasoned opinion either in the form of a written report or orally at the hearing, depending on the instruction of the judge conducting the proceedings. If the expert fails to meet those requirements, he or she can be questioned again concerning the particular issues, or another expert report may be commissioned from the same or a different expert. In each case, however, the expert opinion must be subjected to adversarial argument by the parties and examination by the competent court.

54. In addition to the Civil Procedure Act, the position of court experts is determined by the Court Experts Ordinance (*Pravilnik o stalnim sudskim vještacima*), particularly as regards their appointment and general legal and professional obligations. In the course of the proceedings in the case at hand, two amendments to the Court Experts Ordinance were introduced (Official Gazette nos. 21/1998 and 88/2008, with further amendments). In so far as relevant, the amendments did not make any substantial changes to the general position of court experts.

55. Under the Court Experts Ordinance a court expert in a particular field may be any person possessing the appropriate professional expertise and level of education. Legal persons may be appointed as competent institutions for expertise if they have registered such a business activity in the register of companies and if they employ permanent court experts. Court experts, including institutions, are appointed by a decision of the President of the competent County Court or Commercial Court. Under the Court Experts Ordinance court experts are required to provide their opinions objectively, impartially and to the best of their knowledge.

### B. Relevant practice

56. According to the information provided by the Government, there are no official statistics concerning cases of medical negligence in Croatia. There are statistics on criminal convictions for offences affecting people's health, but this includes a broader range of offences.

57. On 22 January 2004, in case no. Gzz 249/03-2, the Supreme Court explained the scope of civil responsibility for medical negligence in the following manner:

> "[A] health institution is responsible for damage caused by otherwise allowed and acceptable medical treatment if there was a fault [*krivnja*] in the conduct of [its employees] – responsibility on the basis of the principle of fault (section 154(1) of the Civil Obligations Act).

> Given that it has been established that in treating the plaintiff by administration of [the drug], the defendant acted in accordance with the rules of the medical profession, the defendant cannot be held responsible irrespective of the fact that [damage to health was caused].
>
> Many medical treatments represent a certain risk for the patient's health, because of the use of either drugs or various instruments. However, if such a treatment has been accepted medically, then the possibility that it could generate damage [to health] cannot make the health institution responsible on the basis of objective liability, irrespective of its fault."

58. The Supreme Court followed the same approach in case no. Rev-146/06-2 on 30 March 2006.

59. On 15 November 2007, in case no. U-III-1062/2005, the Constitutional Court dismissed a constitutional complaint against the decisions of the lower courts awarding damages for medical malpractice. The Constitutional Court accepted that in the particular circumstances of the case, given the nature of the treatment, responsibility could also be based on the principle of objective liability.

60. The Government provided further examples of the domestic courts' practice concerning the establishment of civil responsibility for medical malpractice. They included, in particular, the following judgments:

- Bjelovar Municipal Court (*Općinski sud u Bjelovaru*), P-757/02-83, 27 September 2005 and P-2188/04-31, 4 November 2005;
- Daruvar Municipal Court (*Općinski sud u Daruvaru*), P-1153/11-10, 9 October 2013;
- Križevci Municipal Court (*Općinski sud u Križevcima*), P-627/09-13, 17 February 2011;
- Kutina Municipal Court (*Općinski sud u Kutini*), P-425/11, 5 November 2014 ;
- Ogulin Municipal Court (*Općinski sud u Ogulinu*), P-96/13-34, 3 October 2014;
- Osijek Municipal Court (*Općinski sud u Osijeku*), P-271/2011-23, 23 June 2011;
- Rijeka Municipal Court (*Općinski sud u Rijeci*), P-1165/08, 19 November 2009;
- Sisak Municipal Court (*Općinski sud u Sisku*), P-1128/2010, 12 April 2011;
- Vinkovci Municipal Court (*Općinski sud u Vinkovcima*), P-077/06-59, 1 December 2008;
- Virovitica Municipal Court (*Općinski sud u Virovitici*), P-692/08-212, 13 April 2010;
- Vukovar Municipal Court (*Općinski sud u Vukovaru*), P-62/07, 27 May 2010 and P-300/07-64, 16 November 2012;
- Zagreb Municipal Civil Court, Pn-4234/06-58, 25 October 2011, Pn-1370/11-155, 27 December 2011, Pn-1628/12-194, 7 March 2013, and Pn-6082/96-78, 22 October 2013.

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLES 6 AND 8 OF THE CONVENTION

61. The applicant complained that the civil proceedings she had instituted concerning her allegations of medical negligence had been inordinately lengthy and ineffective. She relied on Articles 6 § 1 and 8 of the Convention, which, in so far as relevant, read as follows:

**Article 6**

"In the determination of his civil rights and obligations ... everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

**Article 8**

"1. Everyone has the right to respect for his private ... life ..."

### A. Admissibility

#### *1. The applicant's victim status*

##### (a) The parties' arguments

62. The Government pointed out that in connection with the applicant's use of the length of proceedings remedy, the Zagreb County Court had acknowledged a violation of her right to a fair trial and awarded her adequate compensation. In the Government's view, the applicant could not therefore complain of excessive length of proceedings.

63. The applicant maintained that she had been the victim of a breach of the Convention in connection with the ineffective civil proceedings for damages concerning her allegations of medical negligence.

##### (b) The Court's assessment

64. In accordance with the Court's settled case-law, a decision or measure favourable to the applicant is not in principle sufficient to deprive him or her of the status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and subsequently afforded appropriate and sufficient redress for the breach of the Convention (see, amongst many others, *Cocchiarella v. Italy* [GC], no. 64886/01, §§ 65-107, ECHR 2006-V, and *Scordino v. Italy* (no. 1) [GC], no. 36813/97, §§ 178–213, ECHR 2006‑V).

65. The Court notes that the just satisfaction awarded by the Zagreb County Court is not reasonable in comparison with the awards made by the Court in similar cases. Accordingly, the compensation awarded cannot be

regarded as sufficient in the circumstances of the case, especially given the fact that the Zagreb Municipal Civil Court did not comply with the Zagreb County Court's order to terminate the proceedings within a period of eight months (see paragraphs 35 and 43-44 above).

66. In these circumstances, the applicant has not lost her victim status. The Court therefore rejects the Government's objection.

*2. The Court's temporal jurisdiction*

67. The Court notes that the applicant's allegations of medical negligence concern the deterioration of her state of health following surgery in October 1989, in respect of which she underwent further treatment until July 1997 when it was found that her condition was irreversible (see paragraphs 6-7 above). The applicant lodged a civil action alleging medical negligence in January 1998 (see paragraph 8 above) and the proceedings came to an end on 26 September 2012, when the Constitutional Court adopted its final decision concerning her complaint (see paragraph 41 above).

68. In order to satisfy itself that it has temporal jurisdiction to examine the proceedings set in motion to elucidate the circumstances of the alleged medical negligence and consequently to establish the scope of its examination (see *Blečić v. Croatia* [GC], no. 59532/00, § 67, ECHR 2006−III), the Court must take into account that the Convention entered into force in respect of Croatia on 5 November 1997, namely approximately eight years after the applicant's surgery and four months after the termination of her treatment.

69. The Court has already held that the procedural requirements concerning allegations of medical negligence constitute a separate and autonomous obligation on the domestic authorities, which was binding on them even though the impugned treatment took place before the date the Convention entered into force in respect of the respondent State (see *Šilih v. Slovenia* [GC], no. 71463/01, §§ 159-163, 9 April 2009; and *Bajić v. Croatia*, no. 41108/10, §§ 61-62, 13 November 2012, concerning the procedural requirements for medical negligence under Article 2; and *Isaković Vidović v. Serbia*, no. 41694/07, § 43, 1 July 2014, concerning the procedural requirements under Article 8 in general). The relevant assessment in this context was based on the criteria set out in the *Šilih* judgment according to which only procedural acts and/or omissions occurring after the critical date could fall within the Court's temporal jurisdiction. Moreover, a "genuine connection" between the impugned treatment and the entry into force of the Convention in respect of the respondent State needed to exist for the procedural obligations to come into effect (see *Šilih*, cited above, §§ 162-163).

70. The Court has further developed these criteria in the case of *Janowiec and Others v. Russia* ([GC], nos. 55508/07 and 29520/09,

§§ 145-148, ECHR 2013). The Court explained that its temporal jurisdiction was not open-ended. It extends to those procedural acts and omissions which took place or ought to have taken place in the period after the entry into force of the Convention in respect of the respondent State, provided that there is a "genuine connection" between the triggering event and the entry into force of the Convention. The "genuine connection" standard will be satisfied if the following two criteria are met: first, the lapse of time between the triggering event and the critical date must remain reasonably short, in any case not exceeding ten years; and secondly, a major part of the procedural steps must have been carried out, or ought to have been carried out, after the entry into force of the Convention in respect of the respondent State. The Court has recently applied these criteria in the context of the civil proceedings for damages concerning the allegations of medical negligence under Article 2 of the Convention (see *Shovgurov v. Russia* (dec.), no. 17601/12, §§ 56-65, 25 August 2015). In view of the fact that the procedural requirements under Article 2 concerning medical negligence accordingly apply under Article 8 (see, for instance, *Trocellier v. France* (dec.), no. 75725/01, § 4, ECHR 2006-XIV, and *Csoma v. Romania*, no. 8759/05, § 43, 15 January 2013, and the case-law cited in paragraph 84 below), the Court sees no reason for not applying the same criteria in the context of the present case.

71. In the present case the Court notes that the impugned surgery took place less than ten years before the entry into force of the Convention in respect of Croatia. This satisfies the first criterion of the "genuine connection" test mentioned above. Following the surgery, the applicant underwent further medical treatment and, after she had learnt the extent of the damage to her health, she instituted the relevant civil proceedings in January 1998, namely after the Convention had already entered into force in respect of Croatia. All the relevant procedural actions were carried out after that date and the proceedings finally ended in September 2012. It thus follows that the second criterion of the "genuine connection" test has also been satisfied.

72. The Court therefore finds that although the substantive issues related to the applicant's impugned treatment fall outside its temporal jurisdiction, it is not prevented from examining the procedural aspect of the requirements under Article 8 of the Convention related to the applicant's allegations of medical negligence.

*3. Conclusion*

73. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

## B. Merits

### *1. The alleged violation of Article 6 § 1 concerning the length of the proceedings*

#### (a) The parties' arguments

74. The applicant contended that the civil proceedings concerning her allegations of medical negligence had been inordinately lengthy and ineffective.

75. The Government maintained that the allegedly excessive length of the proceedings at issue had not been decisive given that the applicant had received compensation in that respect.

#### (b) The Court's assessment

76. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

77. The Court notes that the domestic proceedings lasted in total for more than fourteen years. There were several long periods of unexplained inactivity on the part of the domestic authorities. In particular, the first hearing in the proceedings was held almost a year and nine months after the applicant instituted the proceedings. It then took a further year for another hearing to be held in the case, without any procedural activity in the meantime (see paragraphs 11 and 13 above). Likewise, in the further course of the proceedings the hearings were not regularly scheduled and it took several months (see paragraphs 20-21, 28-29 and 31-30 above) and at times one or more years (see paragraphs 21-23 and 27-28 above) for the competent court to schedule a hearing.

78. The Court also notes that it took several months for the Zagreb Municipal Civil Court to execute the relevant procedural measures, such as the commissioning of expert reports (see paragraphs 13-14 and 21-22 above), for which there appears to be no relevant justification. It is also striking that the Zagreb Municipal Civil Court remained passive for more than three years in the face of the University of Zagreb Medical Faculty's failure to deliver its expert report (see paragraphs 22-23 above). The Court sees no cause, in the circumstances of the present case, for departing from the usual principle that the primary responsibility for delays resulting from the provision of expert opinions rests ultimately with the State (see *Capuano v. Italy*, 25 June 1987, § 32, Series A no. 119).

79. Lastly, the Court considers that what was at stake in the litigation at issue undoubtedly was of crucial importance for the applicant since she had

been personally injured and the damage inflicted had a detrimental impact on her life. Thus, special diligence was required by the national authorities (see *Iversen v. Denmark*, no. 5989/03, § 74, 28 September 2006). Moreover, the Court notes that all the applicant's efforts to speed up the proceedings had no concrete effect. She urged the Zagreb Municipal Civil Court several times to schedule a hearing and to take the relevant procedural actions (see paragraphs 9, 12 and 25 above) and her use of the length of proceedings remedy failed to deliver a concrete result because the proceedings were not terminated within the time-limit indicated by the Zagreb County Court (see paragraphs 43-44 and 35 above).

80. In view of above considerations, the Court finds that the length of the proceedings complained of failed to satisfy the reasonable time requirement.

81. There has, accordingly, been a violation of Article 6 § 1 of the Convention.

### *2. The alleged violation of Article 8 concerning the applicant's allegations of medical negligence*

#### The parties' arguments

82. The applicant contended that the concept of medical negligence was not properly defined in the domestic legal system and that it was therefore impossible to obtain a judicial determination of the responsibility for medical malpractice. Furthermore, in the applicant's view, it was impossible to secure an independent and impartial expert report on the issue of medical negligence in Croatia given that the competent experts all worked and collaborated with those suspected of medical negligence. Moreover, given the inadequate legal framework, the findings of experts as to the differentiation between medical malpractice and complications during medical treatment could never be sufficiently conclusive. The applicant further contended that there was no doubt that her disability had been caused by medical malpractice during the surgery. However, owing to the deficiencies in the domestic procedure, nobody had been found responsible for her condition.

83. The Government argued that the civil proceedings which the applicant had instituted were an appropriate procedural avenue capable of elucidating the circumstances of her allegations of medical negligence. In the Government's view, the practice of the domestic courts showed that it was possible to obtain an adjudication of allegations of medical negligence in the domestic system. The applicant's allegations that medical experts lacked independence and impartiality were vague and unsubstantiated. In particular, when the expert reports had been commissioned and examined by the first-instance court, the applicant had made no objection as to lack of impartiality on the part of the experts. Moreover, all the expert reports

obtained during the proceedings had been consistent in their findings that there had been no indications of medical malpractice in the applicant's case.

*2. The Court's assessment*

**(a) General principles**

84. It is now well established that although the right to health is not as such among the rights guaranteed under the Convention or its Protocols (see *Fiorenza v. Italy* (dec.), no. 44393/98, 28 November 2000; *Pastorino and Others v. Italy* (dec.), no. 17640/02, 11 July 2006; and *Dossi and Others v. Italy* (dec.), no. 26053/07, 12 October 2010), the High Contracting Parties have, parallel to their positive obligations under Article 2 of the Convention, a positive obligation under its Article 8, firstly, to have in place regulations compelling both public and private hospitals to adopt appropriate measures for the protection of their patients' physical integrity and, secondly, to provide victims of medical negligence with access to proceedings in which they could, where appropriate, obtain compensation for damage (see *Trocellier*, cited above; *Benderskiy v. Ukraine*, no. 22750/02, §§ 61-62, 15 November 2007; *Codarcea v. Romania*, no. 31675/04, §§ 102-03, 2 June 2009; *Yardımcı v. Turkey*, no. 25266/05, §§ 55-57, 5 January 2010; *Spyra and Kranczkowski v. Poland*, no. 19764/07, §§ 82 and 86-87, 25 September 2012; *Csoma*, cited above, §§ 41 and 43; and *S.B. v. Romania*, no. 24453/04, §§ 65-66, 23 September 2014).

85. In order for this obligation to be satisfied, such proceedings must not only exist in theory but also operate effectively in practice (see *Gecekuşu v. Turkey* (dec.), no. 28870/05, 25 May 2010, and *Spyra and Kranczkowski*, cited above, § 88). This entails, *inter alia*, that the proceedings be completed within a reasonable time (see *Vasileva v. Bulgaria*, no. 23796/10, § 65, 17 March 2016).

86. It also entails, as in the case of the parallel positive obligation under Article 2 of the Convention, the possibility of obtaining an effective medical expert examination of the relevant issues. For instance, the authorities must take sufficient care to ensure the independence, both formal and *de facto*, of the experts involved in the proceedings and the objectivity of their findings, since these are likely to carry crucial weight in the ensuing legal assessment of the highly complex issues of medical negligence (see *Bajić*, cited above, § 95; and *Karpisiewicz v. Poland* (dec.), no. 14730/09, § 59, 11 December 2012; as well as the earlier case of *Skraskowski v. Poland* (dec.), no. 36420/97, 6 April 2000, in which the same requirement was laid down in less explicit terms). A further requirement is that the experts must examine carefully all the relevant points and set out in enough detail the reasons for their conclusions (see *Baldovin v. Romania*, no. 11385/05, § 23, 7 June 2011; and *Altuğ and Others v. Turkey*, no. 32086/07, §§ 78-81,

30 June 2015), and the courts or other authorities dealing with the case must then scrutinise those conclusions properly (see *Csoma*, § 56; and *Altuğ and Others*, § 82, both cited above). A system in which an opinion given by a specialised institution is automatically regarded as conclusive evidence which precludes further expert examination of the relevant issues falls foul of this requirement (see *Eugenia Lazăr v. Romania*, no. 32146/05, §§ 76-80, 16 February 2010; *Baldovin*, cited above, § 24; and *Csoma*, cited above, § 61).

87. At the same time, the High Contracting Parties have a margin of appreciation in choosing how to comply with their positive obligations under the Convention (see, as a recent authority, *Lambert and Others v. France* [GC], no. 46043/14, § 144, ECHR 2015 (extracts)), and enjoy considerable freedom in the choice of the means calculated to ensure that their judicial systems meet its requirements (see, albeit in different contexts, *König v. Germany*, 28 June 1978, § 100, Series A no. 27; *Taxquet v. Belgium* [GC], no. 926/05, §§ 83 and 84, 16 November 2010; and *Finger v. Bulgaria*, no. 37346/05, § 120, 10 May 2011).

88. Also, the mere fact that proceedings concerning medical negligence have ended unfavourably for the person concerned does not in itself mean that the respondent State has failed in its positive obligation under Article 8 of the Convention (see, in the context of Article 2 of the Convention, *Besen v. Turkey* (dec.), no. 48915/09, § 38 *in fine*, 19 June 2012).

**(b) Application of these principles to the present case**

89. On the basis of a comprehensive analysis of its case-law, the Court has recently found in the case of *Vasileva* (cited above, § 70) that in view of the broad margin of appreciation enjoyed by the High Contracting Parties in laying down their health-care policy, and in choosing how to comply with their positive obligations and organise their judicial systems, there is no basis on which to hold that the Convention requires a special mechanism which facilitates the bringing of medical malpractice claims at domestic level.

90. Indeed, in Croatia, as in many other Contracting States (see, for instance, *Powell v. the United Kingdom* (dec.), no. 45305/99, ECHR 2000‑V; *Iversen v. Denmark*, no. 5989/03, § 54, 28 September 2006; *Colak and Tsakiridis v. Germany*, nos. 77144/01 and 35493/05, §§ 19-20, 5 March 2009; *Šilih*, cited above, § 95; and *Vasileva*, cited above, § 70), compensation for medical malpractice can be claimed under the law of tort or contract (see paragraph 45 above).

91. It cannot be said that seeking compensation for medical malpractice in Croatia by way of a claim for damages is a possibility that only exists in theory. Although, according to the applicant, it is difficult to make a case for medical malpractice, the Court notes that it has been the subject of

adjudication and damages have been awarded at the domestic level (see paragraphs 59-60 above).

92. The Court is therefore unable to accept the applicant's arguments that there is no proper legislative framework in the domestic system for allegations of medical negligence. It notes, in particular, the relevant standards developed in the practice of the Supreme Court and the Constitutional Court, according to which civil responsibility for medical malpractice exists if a health-care institution has acted contrary to the rules of the medical profession and has thus caused damage to health. Such a responsibility is based on the principle of fault although, in the particular circumstances of a case, depending on the nature of the treatment, it may also be based on the principle of objective liability (see paragraphs 57-59, and also paragraph 35 above). A similar scope of responsibility exists in the legal systems of other High Contracting Parties (see, for instance, *Iversen*, cited above, § 54; *Colak and Tsakiridis*, cited above, §§ 19-20; and *Šilih*, cited above, § 95).

93. Furthermore, the Court is unable to accept the applicant's arguments that the objectivity of expert opinions in cases of medical negligence can automatically be called into doubt on account of the fact that the experts are medical practitioners working in the domestic health-care system. On the contrary, the Court has held that it is normal for expert opinions in such cases to be given by medical practitioners (see *Csősz v. Hungary*, no. 34418/04, § 35, 29 January 2008). Moreover, the Court has also held that the very fact that an expert is employed in a public medical institution specially designated to provide expert reports on a particular issue and financed by the State does not in itself justify the fear that such experts will be unable to act neutrally and impartially in providing their expert opinions (see *Letinčić v. Croatia*, no. 7183/11, § 62, 3 May 2016). What is important in this context is that the participation of an expert in the proceedings is accompanied with adequate procedural safeguards securing his or her formal and *de facto* independence and impartiality.

94. In this connection, the Court notes that Croatian law lays down several safeguards designed to ensure the reliability of expert evidence. Under the Court Experts Ordinance, court experts are required to provide their opinions objectively, impartially and to the best of their knowledge. They have the same obligations under section 258 of the Civil Procedure Act, which also provides that experts must be informed of the legal consequences of perjury. Furthermore, the Civil Procedure Act provides that the provisions on the disqualification of judges are applicable *mutatis mutandis* to the disqualification of experts. It also provides detailed rules on the involvement of the parties in the process of commissioning and obtaining an expert report, as well as on the way in which expert opinions are examined (see paragraph 49-53 above; and compare *Vasileva*, cited above, §§ 72-73).

95. There is no evidence that those safeguards were not properly applied in the applicant's case or that the experts whose opinions formed the basis for the courts' rulings in the case lacked the requisite objectivity. One of the court experts initially ordered to produce a report withdrew from the proceedings because he was employed by the defendant hospital (see paragraph 16 above; and compare, by contrast, *Bajić*, cited above, § 98). The applicant's arguments that the experts who participated in the proceedings lacked impartiality were very broad and general, and contained no objectively justified indication raising doubts as to their independence or impartiality.

96. The Court also notes that the Zagreb Municipal Civil Court did not simply admit the written reports drawn up by the experts, but also heard them give evidence in open court, in the presence of the parties who were able to pose questions (see paragraphs 20-21 and 26-27 above). The court ordered several supplementary reports and fresh reports by new experts in order to cast further light on points which had remained unclear or had been contested (see paragraphs 18, 22 and 32 above; and compare *Vasileva*, cited above, § 74, with further references). The competent domestic courts also duly scrutinised the expert evidence and, on the basis of the consistent findings of the experts excluding the allegations of medical malpractice, dismissed the applicant's claim (see paragraphs 35, 36 and 39 above). Therefore, the domestic courts cannot be faulted for the manner in which they assessed the expert reports.

97. In these circumstances, the Court considers that it cannot be said that the authorities did not provide the applicant an effective procedure enabling her to obtain compensation for the medical malpractice to which she alleged to have fallen victim. To the extent that it could be considered that the effectiveness of the proceedings was undermined by their excessive length (see paragraph 85 above), the Court considers that in the circumstances of the present case that was sufficiently addressed in its finding under Article 6 § 1 of the Convention (see paragraphs 80-81 above; and, by contrast, *Oyal v. Turkey*, no. 4864/05, § 78, 23 March 2010).

98. In view of the above, the Court finds that there has been no breach of Article 8 of the Convention.

## II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

99. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

### A. Damage

100. In respect of pecuniary damage the applicant claimed 758,001.77 kunas (HRK) (99,737.07 euros (EUR)) for loss of earnings, as well as a further amount of HRK 4,556.87 (EUR 599.58) per month for future loss of earnings. In addition, she claimed HRK 336,146.58 (EUR 44,229.81) as a disability allowance and, on the same grounds, a further amount of HRK 1,094.94 (EUR 144.07) per month for future allowances. In respect of non-pecuniary damage, the applicant claimed HRK 320,000 (EUR 42,105.26). She also claimed statutory default interest.

101. The Government considered the applicant's claim excessive, unfounded and unsubstantiated.

102. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it awards the applicant EUR 3,500 in respect of non-pecuniary damage.

### B. Costs and expenses

103. The applicant also claimed HRK 178,036 (EUR 23,425.78) for the costs and expenses incurred before the domestic courts and for those incurred before the Court.

104. The Government contested the applicant's claim.

105. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,000 covering costs under all heads.

### C. Default interest

106. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

## FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds* that there has been no violation of Article 8 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Croatian kunas at the rate applicable at the date of settlement:
      (i) EUR 3,500 (three thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 2,000 (two thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

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

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| Stanley Naismith | Işıl Karakaş |
| Registrar | President |