



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

COURT (CHAMBER)

CASE OF MANTOVANELLI v. FRANCE

(Application no. 21497/93)

JUDGMENT

STRASBOURG

18 March 1997

In the case of Mantovanelli v. France¹,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A², as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,

Mr Thór VILHJÁLMSSON,

Mr L.-E. PETTITI,

Mr R. MACDONALD,

Mrs E. PALM,

Mr M.A. LOPES ROCHA,

Mr P. JAMBREK,

Mr P. KURIS,

Mr E. LEVITS,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 28 October 1996 and 17 February 1997,
Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 22 January 1996, within the three-month period laid down by Article 32 para. 1 and Article 47 of the Convention (art. 32-1, art. 47). It originated in an application (no. 21497/93) against the French Republic lodged with the Commission under Article 25 (art. 25) by two French nationals, Mr Mario Mantovanelli and his wife Andrée, on 26 February 1993.

The Commission's request referred to Article 48 (art. 48) and to the declaration whereby France recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the

¹ The case is numbered 8/1996/627/810. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

² Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

respondent State of its obligations under Article 6 para. 1 of the Convention (art. 6-1).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicants stated that they wished to take part in the proceedings and designated the lawyer who would represent them (Rule 30).

3. The Chamber to be constituted included ex officio Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention) (art. 43), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 para. 4 (b)). On 12 February 1996, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr R. Macdonald, Mrs E. Palm, Mr F. Bigi, Mr M.A. Lopes Rocha, Mr P. Kuris and Mr E. Levits (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43). Subsequently Mr P. Jambrek, substitute judge, replaced Mr Bigi, who had died (Rule 22 para. 1).

4. As President of the Chamber (Rule 21 para. 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the French Government ("the Government"), the applicants and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicants' memorial on 9 May 1996 and the Government's memorial on 21 June 1996. On 9 July 1996 the Secretary to the Commission indicated that the Delegate did not wish to reply in writing.

5. On 10 July 1996 the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

6. In a letter received on 2 September 1996 an American non-governmental organisation, Rights International, sought leave to submit written comments under Rule 37 para. 2. The President decided not to grant them leave.

7. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 22 October 1996. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr J. LAPOUZADE, administrative court judge on
secondment to the Legal Affairs Department,
Ministry of Foreign Affairs,

Agent;

(b) for the Commission

Mr L. LOUCAIDES,

Delegate;

(c) for the applicants

Mr F. HUMBERT, of the Nancy Bar,

Counsel.

The Court heard addresses by Mr Loucaides, Mr Humbert and Mr Lapouzade.

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

A. Background

8. On 27 January 1981 the applicants' daughter, Jocelyne Mantovanelli, who was then 20, was admitted to the Nancy Orthopaedic and Accident and Emergency Clinic for an operation on a whitlow on her left thumb.

On the same day, she was transferred to the surgical ward of the Jeanne d'Arc Hospital (Nancy Regional Hospital Centre - "CHRN") at Dommartin-lès-Toul, where she had a second operation the next day. For a year she received periodical treatment there and underwent surgery seven times in the form of repeat operations and skin grafts, and an arterio-vascular examination.

Owing to an infection discovered in February 1982, Miss Mantovanelli was operated on again and a week later the second phalanx of her thumb was removed.

9. On 13 March 1982, having contracted jaundice, Miss Mantovanelli was transferred to the gastroenterology department of Brabois Hospital (CHRN) at Vandœuvre-lès-Nancy. Her condition deteriorated and she fell into a hepatic coma. On 27 March she was transferred to the department for infectious diseases and neuro-respiratory intensive care, where she died two days later.

10. The surgical operations referred to above and the arterio-vascular examination Miss Mantovanelli underwent were carried out under a general anaesthetic. On each occasion a varying combination of seven different drugs was used which always included halothane.

B. The proceedings in the administrative courts

11. Mr and Mrs Mantovanelli were convinced that their daughter's death had been caused by excessive administration of halothane and applied to the administrative courts for a ruling that the CHRN was liable for her death.

1. In the Nancy Administrative Court

12. On 29 November 1982 the applicants were granted legal aid and on 11 January 1983 their lawyer was appointed. On 26 April 1983 they applied to the Nancy Administrative Court for an interim order for the appointment of an expert and instituted proceedings to obtain a declaration that the CHRN was liable.

(a) The application for an interim order for the appointment of an expert

13. In their application Mr and Mrs Mantovanelli asked for the expert to be given the following tasks:

"1. Seek all the information on the circumstances in which Miss Jocelyne Mantovanelli was admitted to hospital, received treatment and underwent operations in different departments of the CHRN between February 1981 and the date of her death;

Read any document and interview any expert witness to that end;

2. Establish the circumstances surrounding her death and its causes; Provide this Administrative Court with ethical and other data such as to enable it to determine any liability incurred by identifying any failures to comply with accepted medical practice or any shortcomings in the functioning of the service;

3. Draw up a report on the foregoing and file it at the registry of this Court within the time to be allotted."

14. In an order of 28 April 1983 the president of the administrative court refused the application on the ground that allowing it would prejudice the trial of the merits and that the requisite urgency for ordering interim measures was lacking, seeing that the application for them had not been lodged until 26 April 1983 although the applicants' lawyer had been appointed on 11 January 1983.

(b) The action for damages against the CHRN

15. In their statement of claim Mr and Mrs Mantovanelli submitted:

"...

It is clear both from the report of Professor Dureux [head of the intensive care unit at the CHRN] and from the autopsy report that [Miss Mantovanelli's death] ... was the result of hepatitis caused by halothane.

Halothane is an anaesthetic that was used for the surgical operations. Repeat use of halothane for anaesthetic after only a short interval is known to be very dangerous as there is a serious risk of causing serious or even occasionally fatal injury to the liver. Miss Mantovanelli was given halothane as an anaesthetic on several occasions, the last two being within a short interval of each other, and the hepatotoxicity followed which was to prove fatal.

The unit therefore displayed gross negligence in its complete disregard of the basic rules for administering halothane, making the CHRN liable to the applicants for the loss suffered as a result of their daughter's death.

The plaintiffs therefore ask the Court to find the CHRN liable and to order that public body to pay each of them FRF 50,000 in compensation for the various losses suffered by them.

..."

16. On 21 September 1983 the CHRN filed their defence. The applicants replied on 11 October 1983 and renewed their application for an expert report.

17. On 28 March 1985 the administrative court delivered the following interlocutory judgment:

"...

As the parties disagree as to the facts and the Court has not found evidence in the case file to enable it to rule on the merits, it is necessary to order that an expert report which complies with the adversarial principle be carried out by an expert whose instructions are ... [to]:

...

(a) inspect Miss Jocelyne Mantovanelli's full medical file, in particular the autopsy report and Professor Dureux's report;

(b) describe the treatment the patient received, making it clear whether the complaint from which she was suffering was a common one or a rare one and how complex the operations were;

(c) indicate, if possible, the patient's chances of recovery, having regard to her general condition and to the characteristics of her complaint;

(d) state whether halothane was used and in what circumstances; whether any such use was in accordance with accepted practice and whether the subsequent complications were linked to this use; and if so, whether such complications are common and, if possible, how common they are in statistical terms;

(e) make all the necessary findings and interview all the relevant witnesses and generally provide all the information needed to enable the Court to decide on the merits.

..."

18. On 4 April 1985 the expert appointed by the court, Professor Guilmet, took the oath.

He examined various medical files and interviewed five members of the medical staff at the CHRN, including the surgeon who had performed the last operation on Miss Mantovanelli and the anaesthetist.

His report, which was lodged with the court on 8 July 1985 and communicated to the parties on 19 July, contained the following findings:

"Although in most cases a whitlow is a minor ailment, Miss Mantovanelli presented with a whitlow that was unusually serious owing mainly to the delay in seeking effective medical treatment and, in particular, surgery.

I have discovered no concurrent deterioration in her general state of health or any progressive disease in her past history, or any special feature of the local germ in question that could have affected the intensity of the presenting picture.

From 27 January 1981 Miss Mantovanelli was cared for diligently in accordance with current scientific knowledge.

The unusual complexity and length of the treatment were related to the extent of the lesions and of damage to the tissue, which delayed the healing process, repair of the loss of matter and the remedying of the sequelae. A new infection finally led to complete failure.

When the patient was found to have jaundice fourteen months after the whitlow in question appeared, she was transferred to two specialist departments. The appropriate treatment she received there failed to halt a rapid worsening of her condition.

Before this unexpected complication, which proved fatal, Miss Mantovanelli had a foreseeable chance of recovering from her local lesion, albeit only in the long term. It does not appear that her general condition at the time put the prognosis for survival in doubt, despite the characteristics of her original complaint.

Halothane was used each time the patient was anaesthetised, as an adjunct to a number of other anaesthetics administered, in a way that was wholly appropriate and in accordance with accepted practice, without provoking any abnormal reaction.

There is no absolute certainty that the onset of hepatitis and the patient's death are directly linked to the use of halothane alone.

However, there must have been an atopic susceptibility (that is to say a predisposition to sensitisation through medication without any revealing signs) triggered first by the Epontol, use of which was later discarded, and then by the halothane, and exacerbated in terms of enzymatic action by a third substance, Nesdonal.

This is a plausible diagnostic hypothesis, constructed after the event and which, given that there were no warning signs of intolerance, obviously cannot call in question the choice or rejection of one anaesthetic rather than another.

An idiosyncrasy, in other words a reaction peculiar to her as an individual, must therefore have been responsible for Miss Mantovanelli's death, brought about by a particularly strong autoimmune process ... There are no frequency figures for such exceptional cases.

(Halothane's toxicity does not appear to be implicated and is in any case still widely disputed today. However, in so far as halothane is still suspected of causing necrosis

of the liver, statistics show that this phenomenon does not occur in more than 1 in 10,000 cases.)"

19. In a pleading registered on 30 July 1985 the applicants alleged that neither they nor their lawyer had been informed of the dates of the steps taken by the expert and that his report referred to documents which they had not been able to inspect. In their submission, there had thus been a breach of the principle of adversarial proceedings and this justified setting the expert report aside and ordering a new one.

On 3 October 1985 the CHRN filed a pleading in reply.

20. The administrative court held a hearing on 8 November 1988, and on 29 November 1988 it delivered the following judgment:

"...

While Mr and Mrs Mantovanelli are justified in submitting that there were irregularities in the production of the expert report on the medical file of their daughter who died in the [CHRN], seeing that they were not informed of the dates of the steps taken by the expert as required by Article R. 123 of the Administrative Courts and Administrative Courts of Appeal Code, they have not disputed the facts that appear from both their own evidence and the expert report. It must thus be taken as established that the hepatitis Miss Mantovanelli died from cannot definitely be attributed to the administration of halothane on the eleven occasions when she was given an anaesthetic and that, in any event, she presented no clinical signs of a contraindication against the use of that substance, which had been used in accordance with accepted practice and which only very rarely causes liver damage. No gross medical negligence can therefore be imputed to the [CHRN]. The action must therefore be dismissed.

..."

2. In the Nancy Administrative Court of Appeal

21. On 4 January 1989 Mr and Mrs Mantovanelli appealed to the Nancy Administrative Court of Appeal. They pointed out that the facts of the case were not disputed and that the purpose of the proceedings was to determine, after adversarial examination of all the evidence, the cause of the hepatitis from which their daughter had died in order to establish if the public hospital service was guilty of gross negligence. They maintained that they had been unlawfully deprived of the opportunity to make their own submissions on that point to the expert, submitted that the administrative court's judgment and Professor Guilmet's report should be set aside and asked the Court of Appeal to order that the report be removed from the case file and that a fresh one be produced.

On 17 May 1990 the CHRN produced a pleading in reply, to which the applicants replied on 12 December 1991.

22. The Nancy Administrative Court of Appeal held a hearing on 13 February 1992, and on 5 March 1992 it gave the following judgment:

"...

Where a court finds that an expert report has been produced in an irregular manner, it is not bound by any legal provision or general principle of law to order its removal from the case file and direct that a new report be drawn up. The fact that the expert report ordered did not comply with the adversarial principle as regards a party to the proceedings could not therefore prevent the judges at first instance from relying, in order to rule on the merits, on the facts in the report which they considered were not disputed by the applicants or were not seriously challengeable.

Mr and Mrs Mantovanelli had been given the expert report, which mentions all the evidence it is based on, and could therefore have challenged it but they have raised no valid objections to the findings or assessments in it. If they thought it inadequate, it was their responsibility to specify the points on which they considered further inquiries into the facts to be necessary. As they did not raise such an objection, the administrative court quite rightly held that, in view of the uncontradicted statements in the report, no gross negligence could be imputed to the hospital centre.

It is clear from the foregoing that Mr and Mrs Mantovanelli are not justified in maintaining that the Nancy Administrative Court was wrong to dismiss their action in the impugned judgment.

..."

3. In the Conseil d'Etat

23. On 14 April 1992 the applicants lodged an application for legal aid with the Legal Aid Office of the Conseil d'Etat, which refused the application on 16 December 1992 on the basis that the grounds for an appeal on points of law were not sufficiently strong. This decision was notified to the applicants on 20 January 1993. They did not bring an appeal on points of law.

II. RELEVANT DOMESTIC LEGISLATION AND CASE-LAW

24. The former Article R. 123 (now Article R. 164) of the Administrative Courts and Administrative Courts of Appeal Code provides:

"The parties must be given notice by the expert or experts of the dates and times of the steps taken to produce their reports. This notice must be given at least four days beforehand by registered letter.

...

The parties' submissions during the preparation of the expert report must be recorded in the report."

25. In the *Autunes v. Commune de Decazeville* judgment of 1 July 1991 (Gazette du Palais, 8-9 April 1992, p. 41) the Conseil d'Etat stated:

"The expert appointed ... to examine Mrs Autunes carried out the medical examination without informing Decazeville Town Council of this beforehand and thus deprived it of the right to make submissions during the preparation of the expert report. That being so, the report was prepared in an irregular manner. That irregularity does not, however, prevent it from being adopted for information or preclude ruling on the merits without having to order a fresh expert report as the town council requested, since the latter was able to submit its observations during the written proceedings that followed the lodging of the report and the Conseil d'Etat now has the necessary information to decide the case.

..."

An irregularity in the preparation of an expert report is, however, a ground for setting aside a judgment where the latter was based on the report (Conseil d'Etat, 28 November 1988, Bruno Pierre Guy, Recueil Dalloz Sirey 1989, no. 129).

PROCEEDINGS BEFORE THE COMMISSION

26. Mr and Mrs Mantovanelli applied to the Commission on 26 February 1993. They complained that they had not had a fair hearing within the meaning of Article 6 para. 1 of the Convention (art. 6-1) since the expert report was not prepared in accordance with the adversarial principle.

27. On 17 May 1995 the Commission (Second Chamber) declared the application (no. 21497/93) admissible. In its report of 29 November 1995 (Article 31) (art. 31), it expressed the opinion by ten votes to three that there had been a violation of Article 6 para. 1 (art. 6-1). The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment³.

FINAL SUBMISSIONS TO THE COURT

28. In their memorial the applicants requested the Court to "hold that [their] application is well-founded ...".

29. The Government asked the Court to "dismiss Mr and Mrs Mantovanelli's application as ill-founded".

³ For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1997-II), but a copy of the Commission's report is obtainable from the registry.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 OF THE CONVENTION (art. 6-1)

30. Mr and Mrs Mantovanelli maintained that the procedure followed in preparing the expert medical opinion ordered by the Nancy Administrative Court had not been in conformity with the adversarial principle and had given rise to a violation of their right to a fair hearing as secured by Article 6 para. 1 of the Convention (art. 6-1), which provides:

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

Contrary to the former Article R. 123 of the Administrative Courts and Administrative Courts of Appeal Code, neither they nor their counsel had been informed of the dates of the interviews conducted by the expert. The expert had also referred in his report to documents which they had not seen and which it had been pointless to ask the hospital management to produce.

They had thus been deprived of the opportunity to examine the persons who gave evidence to the expert, to submit comments to him on the documents examined and on the witness evidence taken and to ask him to carry out additional investigations.

Admittedly, the expert report had later been communicated to the applicants, who could thus have challenged it in the administrative court. They had nevertheless been prevented from participating on an equal footing in the production of the report.

31. The Commission submitted that compliance with the principle of adversarial procedure meant that where a court ordered the production of an expert report, the parties should be able to challenge before the expert the evidence he had taken into account in carrying out his instructions. There were three reasons for this: an expert report of this kind, produced under a court's authority for its own enlightenment, was an integral part of the proceedings; as the court was unable to assess for itself all the technical issues considered, the expert's investigation tended to replace the taking of evidence by the court itself; and merely being able to challenge the expert report in court did not permit an effective application of the adversarial principle as the report had become final by then.

In the present case Mr and Mrs Mantovanelli had been unable to attend the expert's interviews with the witnesses (all members of the CHRN's medical staff) and the report referred to documents which they had not seen. The Nancy Administrative Court had refused their application for a second expert report and had reproduced the findings of the report in order to

dismiss their claims. There had therefore been a breach of Article 6 para. 1 (art. 6-1).

32. The Government maintained that in French law it was for the administrative courts to assess the outcome of investigative measures they ordered. They had discretion to take into account an expert report produced in breach of the provisions of the former Article R. 123 of the Administrative Courts and Administrative Courts of Appeal Code.

In this case the expert report, despite its irregularity, had fulfilled its purpose of enlightening the court. The issue actually being raised by the applicants was the court's assessment of the evidence, which was not subject to review by the Convention institutions.

Furthermore, as to observance of the adversarial principle, only the proceedings in court were of importance. The expert report had been communicated to the applicants on 19 July 1985 and could therefore have been the subject of adversarial argument in the administrative court. In any event, some of the documents examined by the expert had been filed by the applicants themselves; as to the other documents, parties were allowed, under case-law, to request access to a medical file through the intermediary of a doctor designated by them for that purpose (Conseil d'Etat, Judicial Assembly, 22 January 1982, *Administration générale de l'assistance publique à Paris*, *Actualité juridique, Droit administratif*, June 1982, p. 395).

33. The Court notes that one of the elements of a fair hearing within the meaning of Article 6 para. 1 (art. 6-1) is the right to adversarial proceedings; each party must in principle have the opportunity not only to make known any evidence needed for his claims to succeed, but also to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision (see, *mutatis mutandis*, the *Lobo Machado v. Portugal* and *Vermeulen v. Belgium* judgments of 20 February 1996, Reports of Judgments and Decisions 1996-I pp. 206-07, para. 31, and p. 234, para. 33, respectively, and the *Nideröst-Huber v. Switzerland* judgment of 18 February 1997, Reports 1997-I, p. 108, para. 24).

In this connection, the Court makes it clear at the outset that, just like observance of the other procedural safeguards enshrined in Article 6 para. 1 (art. 6-1), compliance with the adversarial principle relates to proceedings in a "tribunal"; no general, abstract principle may therefore be inferred from this provision (art. 6-1) that, where an expert has been appointed by a court, the parties must in all instances be able to attend the interviews held by him or to be shown the documents he has taken into account. What is essential is that the parties should be able to participate properly in the proceedings before the "tribunal" (see, *mutatis mutandis*, the *Kerojärvi v. Finland* judgment of 19 July 1995, Series A no. 322, p. 16, para. 42 in fine).

34. Moreover, the Convention does not lay down rules on evidence as such. The Court therefore cannot exclude as a matter of principle and in the

abstract that evidence obtained in breach of provisions of domestic law may be admitted. It is for the national courts to assess the evidence they have obtained and the relevance of any evidence that a party wishes to have produced. The Court has nevertheless to ascertain whether the proceedings considered as a whole, including the way in which the evidence was taken, were fair as required by Article 6 para. 1 (art. 6-1) (see, *mutatis mutandis*, the *Schenk v. Switzerland* judgment of 12 July 1988, Series A no. 140, p. 29, para. 46).

35. In the present case it was not disputed that the "purely judicial" proceedings had complied with the adversarial principle.

The former Article R. 123 (now Article R. 164) of the Administrative Courts and Administrative Courts of Appeal Code (see paragraph 24 above) provides that the parties must be informed of the dates of the steps taken by the expert. The failure to comply with that provision cannot on its own put the fairness of the proceedings in issue seriously in doubt (see paragraph 34 above).

36. However, while Mr and Mrs Mantovanelli could have made submissions to the administrative court on the content and findings of the report after receiving it, the Court is not convinced that this afforded them a real opportunity to comment effectively on it. The question the expert was instructed to answer was identical with the one that the court had to determine, namely whether the circumstances in which halothane had been administered to the applicants' daughter disclosed negligence on the part of the CHRN. It pertained to a technical field that was not within the judges' knowledge. Thus although the administrative court was not in law bound by the expert's findings, his report was likely to have a preponderant influence on the assessment of the facts by that court.

Under such circumstances, and in the light also of the administrative courts' refusal of their application for a fresh expert report at first instance and on appeal (see paragraphs 19-22 above), Mr and Mrs Mantovanelli could only have expressed their views effectively before the expert report was lodged. No practical difficulty stood in the way of their being associated in the process of producing the report, as it consisted in interviewing witnesses and examining documents. Yet they were prevented from participating in the interviews, although the five people interviewed by the expert were employed by the CHRN and included the surgeon who had performed the last operation on Miss Mantovanelli, and the anaesthetist. The applicants were therefore not able to cross-examine these five people who could reasonably have been expected to give evidence along the same lines as the CHRN, the opposing side in the proceedings. As to the documents taken into consideration by the expert, the applicants only became aware of them once the report had been completed and transmitted.

Mr and Mrs Mantovanelli were thus not able to comment effectively on the main piece of evidence. The proceedings were therefore not fair as

required by Article 6 para. 1 of the Convention (art. 6-1). There has accordingly been a breach of that provision (art. 6-1).

II. APPLICATION OF ARTICLE 50 OF THE CONVENTION (art. 50)

37. Article 50 of the Convention (art. 50) provides:

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

38. Mr and Mrs Mantovanelli claimed 100,000 French francs (FRF) each in compensation for essentially non-pecuniary damage that they had sustained on account of the infringement of their right to a fair hearing.

39. The Government asked the Court to dismiss the claim. The Delegate of the Commission made no submissions.

40. The Court considers that the present judgment constitutes in itself sufficient just satisfaction for the applicants' non-pecuniary damage.

As to pecuniary damage, it cannot speculate as to the outcome of the proceedings had there not been a breach of the Convention.

B. Costs and expenses

41. Mr and Mrs Mantovanelli sought FRF 25,000 in respect of costs and expenses incurred before the Strasbourg institutions.

42. Having regard to the fact that no objection was raised by either the Government or the Delegate of the Commission and making its assessment on an equitable basis, the Court allows the applicants' claim.

C. Default interest

43. According to the information available to the Court, the statutory rate of interest applicable in France at the date of adoption of the present judgment is 3.87% per annum.

FOR THESE REASONS, THE COURT

1. Holds by five votes to four that there has been a breach of Article 6 para. 1 of the Convention (art. 6-1);
2. Holds unanimously that the present judgment in itself constitutes sufficient just satisfaction as regards the alleged non-pecuniary damage;
3. Holds unanimously that the respondent State is to pay the applicants, within three months, 25,000 (twenty-five thousand) French francs in respect of costs and expenses, on which sum simple interest at an annual rate of 3.87% shall be payable from the expiry of the above-mentioned three months until settlement;
4. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 18 March 1997.

Rudolf BERNHARDT
President

Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 of the Convention (art. 51-2) and Rule 53 para. 2 of Rules of Court A, the following separate opinions are annexed to this judgment:

- (a) concurring opinion of Mr Jambrek;
- (b) dissenting opinion of Mr Thór Vilhjálmsson, joined by Mrs Palm and Mr Levits;
- (c) dissenting opinion of Mr Pettiti.

R. B.
H. P.

CONCURRING OPINION OF JUDGE JAMBREK

The finding of a breach of Article 6 para. 1 of the Convention (art. 6-1) is in my view well reasoned. In this opinion I only wish to be more explicit on the criteria derived from the Court's case-law which I have applied to the specific circumstances of the Mantovanelli case.

Criteria

The reasoning of the majority position, as I understand it, includes the following:

(a) the principle of equality of arms (within the wider concept of a fair trial, including the adversarial character of the proceedings, and an opportunity to contest the evidence of the other side) must also apply in the case of a report on technical matters;

(b) the present case should be considered by the Court with due regard to its specific legal and factual circumstances.

In this regard the following questions seem relevant to me:

(a) whether the answer by the expert to the medical question in issue was decisive for the outcome of the dispute;

(b) whether the manner of preparing the report, and the character of the report itself, allowed or even required the application of the adversarial principle prior to the presentation of the report to and before the court;

(c) whether the applicants in this case were given a genuine opportunity to comment on observations of the other parties (see the Ruiz-Mateos v. Spain judgment of 23 June 1993, Series A no. 262, p. 25, para. 63 in fine); and (d) whether the applicants in this case were placed at a substantial disadvantage, given that they were unable to influence the preparation of the report, and thereby to influence the collection of evidence and its assessment.

Application

The two Conseil d'Etat judgments cited at paragraph 25 of the Court's judgment seem to affirm two different principles in dealing with an irregularity in the preparation of an expert report.

In its 1988 judgment the Conseil d'Etat accepted that non-compliance with Article R. 164 in the preparation of an expert report is a ground for setting aside a judgment based on the report. In its more recent judgment of 1991, however, the Conseil d'Etat states that such an irregularity does not prevent such a report from being accepted by a court for its information.

The Nancy Administrative Court of Appeal in its judgment of 5 March 1992 dismissed Mr and Mrs Mantovanelli's appeal on the grounds that it was their responsibility, after they had been given the expert report, to specify the points on which they considered further enquiries into the facts to be necessary. In this respect the Court of Appeal confirmed the reasoning of the previous judgment of 29 November 1988 of the administrative court, according to which the Mantovanellis should themselves have disputed the facts which appear from their own evidence and the expert report.

In my view, the Mantovanellis were right to assume that their Article R. 164 right confirmed by the Bruno Pierre Guy judgment of the Conseil d'Etat (28 November 1988) should be respected at its face value. They rightly considered that they should have had the opportunity either to inspect the preparation of the report from its initial stage on or at least to request that it be set aside by the court because of its procedural irregularity and that the court order the preparation of a new report.

The Court has already stated in the form of general principles that "law" should be understood as comprising written as well as unwritten law and implying qualitative requirements, notably those of accessibility and foreseeability (for a recent authority, see the C.R. v. the United Kingdom judgment of 22 November 1995, Series A no. 335-C, pp. 68-69, paras. 32-34, *passim*). The confidence in law requirement is thus also contained in the wider rule of law principle.

In this respect it should be considered that the applicants could hardly have relied upon the second of the relevant Conseil d'Etat judgments, namely that of 1 July 1991, published in the Gazette du Palais only on 8-9 April 1992. They could have relied, however, upon the first of the two judgments (Bruno Pierre Guy of 28 November 1988), the reasoning of which was consistent with their appeal of 4 January 1989.

At the hearing the Agent of the Government referred to the Schenk v. Switzerland judgment of 12 July 1988 (Series A no. 140), pleading that there the Court "clearly stated that it does not have jurisdiction to decide whether the national courts have properly assessed evidence brought before them". The relevant passage from the judgment, however, reads as follows: "In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. While Article 6 of the Convention (art. 6) guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law" (see p. 29, paras. 45-46).

The Schenk judgment therefore, in my view, rather supports the applicants' case: it stresses the supervisory role of the Court, and implies the element of foreseeability of the national law.

Conclusion

I wish to suggest that regulation under French law be considered as one of the specific circumstances of this case, distinguishing it in principle, *inter alia*, from other similar cases of judicial treatment of expert reports, which are regulated in different ways by other national legal systems. Given the relevant French legal provisions and the Conseil d'Etat's case-law on those provisions, the Mantovanellis could have reasonably foreseen that it was their right to obtain the setting aside of an irregular expert report, and it was not their responsibility to contest the report after it had been completed and sent to the court.

DISSENTING OPINION OF JUDGE THÓR VILHJÁLMSSON,
JOINED BY JUDGES PALM AND LEVITS

Article 6 para. 1 of the Convention (art. 6-1) provides that everyone is entitled to a fair hearing by a tribunal. One of the elements of a fair hearing is the right to adversarial proceedings. Each party must have a realistic possibility of commenting on all material filed with the court before the final decision is taken. The expert appointed by the administrative court did not constitute a tribunal, and the French courts held that his report was admissible even though it had not been produced in accordance with French law. It was for them to rule on the evidence in the case; the role of the European Court, as set out in Article 34 of the judgment, is to assess the fairness of the proceedings as a whole.

The report was communicated to the applicants on 19 July 1985 and the administrative court held a hearing on 8 November 1988 and gave judgment on 29 November 1988. Thus the applicants had more than three years in which to comment on the report and to challenge the findings in it, for instance with the help of a medical expert of their own. Moreover, if they had any requests or complaints to make concerning the expert's investigation, they could have made them just as effectively to the administrative court. However they did not do so. Under these circumstances the failure to give them an opportunity to participate in the expert's investigations cannot constitute a breach of the principle of equality of arms as guaranteed by the Convention. There was in our view no violation of Article 6 para. 1 (art. 6-1).

DISSENTING OPINION OF JUDGE PETTITI

(Translation)

I voted with the minority in favour of the view that there had not been a violation of Article 6 of the Convention (art. 6).

The majority considered, wrongly in my view, that all the requirements of the adversarial principle entailed by Article 6 (art. 6) must also be satisfied during the stage when a technical expert report is prepared.

Under Article 6 (art. 6), however, the rules on adversarial proceedings must be distinguished from those on evidence.

In the instant case the proceedings before the national courts were essentially concerned with assessing the facts and the evidence.

The court could in theory have determined the merits on the basis of the post-mortem report.

According to the adage, the judge is the expert among experts. He is continually called upon to rule on technical expert reports, even though he is not a specialist.

In the instant case, in its legitimate concern to ascertain the truth and in order to have at its disposal all authoritative opinions, the administrative court ordered a technical expert report on 28 March 1975 before giving judgment; that expert report consisted of laboratory analyses.

It is of course to be regretted that the expert report did not comply with the adversarial principle and especially that the members of the CHRN interviewed by the expert were not brought face to face with the applicants. A reading of the expert report shows how technical the issue was, the determination of which did not apparently depend on witness evidence:

"However, there must have been an atopic susceptibility (that is to say a predisposition to sensitisation through medication without any revealing signs) triggered first by the Epontol, use of which was later discarded, and then by the halothane, and exacerbated in terms of enzymatic action by a third substance, Nesdonal.

There is a plausible diagnostic hypothesis, constructed after the event and which, given that there were no warning signs of intolerance, obviously cannot call into question the choice or rejection of one anaesthetic rather than another.

An idiosyncrasy, in other words a reaction peculiar to her as an individual, must therefore have been responsible for Miss Mantovanelli's death, brought about by a particularly strong autoimmune process ... There are no frequency figures for such exceptional cases.

(Halothane's toxicity does not appear to be implicated and is in any case still widely disputed today. However, in so far as halothane is still suspected of causing necrosis of the liver, statistics show that this phenomenon does not occur in more than 1 in 10,000 cases.)"

Admittedly, the expert report was irregular, but that did not vitiate the entire proceedings. The court could have ordered a second expert report if scientific arguments contrary to those in the report had been submitted to it. The applicants merely asked for the expert report to be set aside and for a fresh expert report to be produced, and did not give grounds for their request.

When ruling as it did, the court took the unchallenged expert report into account as a piece of evidence. It was not bound by that report. It was (contrary to what is said in paragraph 36 of the judgment) itself in a position to assess its validity, especially as the expert report did not contradict the post-mortem report. If the court had had before it a scientific report filed by the applicants that seriously called in question the expert report, it would almost certainly have ordered a second expert report. It was not required to do so of its own motion.

That is a matter for the national courts to assess. The Convention does not lay down rules on evidence as such or on the admissibility of evidence or the manner in which evidence is obtained under the national code of procedure (see the *Schenk v. Switzerland* judgment of 12 July 1988, Series A no. 140).

The requirements of the adversarial principle and of a fair trial do not apply just to the stage when the technical expert report is prepared, considered in isolation (and different methods are moreover required for a technical laboratory report from those needed for a report relating, for instance, to a road accident), where the courts of first instance and of appeal can both ensure that there is adversarial argument before them that enables the parties to challenge the evidence and the expert report (contrast paragraph 36 of the judgment).

Whatever the tragic aspects of the case and its effects on the family, in assessing the compatibility of the domestic decision with the requirements of Article 6 of the Convention (art. 6), the Chamber should have analysed the case in this manner in order to be consistent with the Court's previous case-law and to ensure conformity to it in the future.

The Court should, in my opinion, have held that there had been no violation of Article 6 (art. 6) in order to avoid confusing the rules on trial and adversarial proceedings with those governing evidence and its assessment by the national court. Finding that an expert report does not comply with formal legal requirements does not prevent a court from drawing conclusions from the facts that have been submitted to it. That was so in the present case.