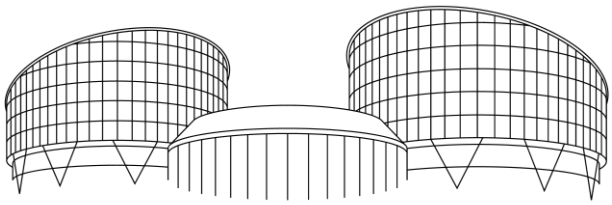

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF KUDRA v. CROATIA

(Application no. 13904/07)

JUDGMENT

STRASBOURG

18 December 2012

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 Kudra v. Croatia,

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

Isabelle Berro-Lefèvre, *President,*
Elisabeth Steiner,
Nina Vajić,
Anatoly Kovler,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque, *judges,*

and André Wampach, *Deputy Section Registrar,*

Having deliberated in private on 27 November 2012,

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

PROCEDURE

1. The case originated in an application (no. 13904/07) 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 four Croatian nationals, Mr Stjepan Kudra, Ms Ruža Kudra, Mr Josip Kudra and Ms Ivana Kudra ("the applicants"), on 6 March 2007.

2. The applicants were represented by Ms V. Šnur, a lawyer practising in Vinkovci. The Croatian Government ("the Government") were represented by their Agent, Ms Š. Stažnik.

3. On 16 February 2012 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicants were born in 1956, 1965, 1986 and 1988 respectively and live in Nuštar.

5. On 17 October 1993, Ivan Kudra, the then eight-year old son of the first and second applicants and the brother of the third and fourth applicants, sustained a serious head injury while playing near a construction site in Vinkovci, Croatia. After the incident he was taken to the Vinkovci Medical

Centre (*Medicinski centar Vinkovci*) where cranial surgery was performed without the consent of the parents.

6. On the same day a doctor on duty at the Vinkovci Medical Centre informed the Vukovarsko-Srijemska Police (*Policijska uprava Vukovarsko-srijemska*; hereinafter: the "police") about the incident. The police interviewed the doctor and the second applicant concerning the circumstances of the incident and drafted an official note of their findings.

7. The police also interviewed P.M., a friend of Ivan Kudra, who was an eyewitness to the event. He described how they had been playing near a construction site in their neighbourhood when Ivan Kudra had fallen on some metal netting and a piece of metal had pierced his head.

8. Ivan Kudra's health deteriorated on 18 October 1993 when he fell into a coma. He was then transferred to the Osijek Clinical Hospital Centre (*Klinički bolnički centar Osijek*) for further treatment.

9. On 19 October 1993 the police took photographs of the construction site and interviewed L.S., an employee of the construction company, Akord s.p.o. ("company A"), in charge of the construction site at issue.

10. Ivan Kudra died in the Osijek Clinical Hospital Centre on 21 October 1993.

11. On 24 May 1994 the applicants brought a civil action before the Vinkovci Municipal Court (*Općinski sud u Vinkovcima*) against company A., the Housing and Communal Activities Fund (*Fond za financiranje stambeno-komunalnih djelatnosti*) and the Vinkovci Medical Centre, claiming damages for the death of their relative.

12. They claimed that A., as the construction company, and the Housing and Communal Activities Fund, as the investor, were liable for not having secured the construction site despite being aware that people with children lived nearby. They also held the Vinkovci Medical Centre responsible for medical negligence in the treatment of Ivan's injuries.

13. A hearing scheduled for 3 August 1994 was adjourned because the parties informed the trial court that they could not attend the hearing.

14. At the hearing held on 11 October 1994 the defendants denied any responsibility for the death of Ivan Kudra. At the same hearing the applicants asked the trial court to commission a medical report concerning the circumstances of Ivan's treatment. On 9 January 1995 they further substantiated their request and asked that the medical report be commissioned from the Medical Faculty of the University of Zagreb (*Medicinski fakultet Sveučilišta u Zagrebu*).

15. On 11 January 1995 the Vinkovci Municipal Court ordered the hospital and the police to submit all the relevant documents and reports concerning the death of Ivan Kudra. Documents were submitted on 20 January 1995 and 7 February 1995 respectively.

16. On 20 February 1995 the Vinkovci Municipal Court found that the police had failed to submit all the relevant documents and requested them

again to submit all their documents and reports. The police complied with the Vinkovci Municipal Court's order on 6 March 1995 and submitted the requested documents.

17. On 10 January 1996 the Vinkovci Municipal Court asked the Osijek Clinical Hospital Centre to submit the documents concerning the medical treatment of Ivan Kudra. The Osijek Clinical Hospital Centre complied with the order and submitted the documents on 16 January 1996.

18. On 7 January 1997 the Vinkovci Municipal Court commissioned a medical report from the Medical Faculty of the University of Zagreb concerning the circumstances of the medical treatment of Ivan Kudra.

19. On 8 April 1998 the applicants urged the Vinkovci Municipal Court to continue with the proceedings, which had been pending for four years. They also pointed out that if the medical experts had been unable to submit their report within a reasonable time, the trial court should have commissioned a new report by other experts.

20. The Medical Faculty of the University of Zagreb informed the Vinkovci Municipal Court on 23 March 1999 that they had been unable to provide the medical report because they had not had all the relevant documents and reports concerning the medical treatment of Ivan Kudra.

21. At a hearing on 13 May 1999 a representative of the Housing and Communal Activities Fund informed the trial court that that Fund had ceased to exist and that its successor was the Vinkovci Municipality (*Grad Vinkovci*). A representative of the Vinkovci Medical Centre also informed the trial court that it had now become the Vinkovci Health Centre (*Dom zdravlja Vinkovci*) and the Vinkovci General Hospital (*Opća bolnica Vinkovci*).

22. On 3 July 1999 the applicants amended their civil action by naming the Vinkovci Municipality, the Vinkovci Health Centre and the Vinkovci General Hospital as the defendants.

23. Another hearing was held on 22 September 1999, at which the trial court ordered that a further medical documentation shall be requested from the Osijek Clinical Hospital Centre. On 7 October 1999 the Osijek Clinical Hospital Centre complied with that request.

24. At a hearing on 25 January 2001 the trial court asked the parties to submit the further documents to which they had referred in their submissions.

25. On 24 May 2001 the representative of company A. informed the Vinkovci Municipal Court that on 23 April 2001 insolvency proceedings had been opened in respect of that company in the Osijek Commercial Court (*Trovački sud u Osijeku*).

26. At a hearing on 7 June 2001 the trial court informed the parties about the change in the legal status of company A.

27. On 13 June 2001 the Vinkovci Municipal Court ordered that the proceedings be stayed until the insolvency administrator of company A. had

decided whether to participate in the proceedings. The insolvency administrator informed the Vinkovci Municipal Court on 23 July 2001 that it would participate in the proceedings.

28. On 20 August 2001 the Vinkovci Municipal Court referred the case to the Osijek Commercial Court on the grounds that the insolvency proceedings had been opened in respect of company A.

29. On 10 September 2001 the applicants lodged an appeal with the Vukovar County Court (*Županijski sud u Vukovaru*) against the decision of the Vinkovci Municipal Court, arguing that the Vinkovci Municipal Court had been competent in the matter.

30. On 23 November 2001 the Vukovar County Court dismissed the applicants' appeal as ill-founded.

31. On 14 February 2002 a hearing was held before the Osijek Commercial Court at which the parties made preliminary oral submissions.

32. On 29 April 2002 the Osijek Commercial Court commissioned a new medical report from the Croatian Medical Expert Reports Association of the Croatian Health Board (*Hrvatsko društvo za medicinska vještačenja Hrvatskog liječničkog zbora*) concerning the medical treatment of Ivan Kudra.

33. On 14 June 2002 a medical expert of the Croatian Association for Medical Expertise, Ž.G., submitted his report to the Osijek Commercial Court. He found that there had been flaws in the Vinkovci Medical Centre's treatment of Ivan Kudra, which had eventually resulted in Ivan's death. The relevant part of the report reads:

> "If treated properly, with the available medical equipment, the injury [sustained by Ivan Kudra] could have been treated with minimum, even barely noticeable, consequences.
>
> The decision to carry out an exploration of the skull under full endotracheal anaesthetic without a neurological preparation (CT), and without the appropriate instruments and a qualified brain surgeon, on a patient who was conscious, had no neurological deficit and whose life was not in imminent danger, was absolutely wrong, all the more so since it was done without the consent of his parents."

34. On 12 July 2002 the Vinkovci General Hospital lodged an objection against the medical report, arguing that it was substantially flawed. The Vinkovci Municipal Court forwarded the objection to the Croatian Medical Expert Reports Association for reply.

35. On 15 November 2002 the expert witness, Ž.G., submitted an additional report to the Osijek Commercial Court, reiterating all his previous findings.

36. At a hearing on 5 December 2002 the trial court ordered the applicants to specify their civil action given the fact that insolvency proceedings had been opened in respect of company A. The applicants complied with this order and submitted their specified civil action on 10 December 2002.

37. A hearing scheduled for 9 January 2003 was adjourned because the defendants failed to appear.

38. On 22 January 2003 the Osijek Commercial Court, acting in the insolvency proceedings concerning company A., terminated the proceedings and ordered that company A. be deleted from the register of companies.

39. At a hearing on 4 February 2003 the applicants were again requested to specify their civil action and to provide evidence as to the legal connection between the defendants against which they had initially lodged their civil action and the defendants indicated in their specified civil action of 10 December 2002.

40. On 12 February 2003 the applicants submitted an amended civil action to the Osijek Commercial Court.

41. At a hearing on 27 February 2003 the parties made further oral submissions and the hearing was adjourned.

42. On 8 May 2003 the Osijek Commercial Court terminated the proceedings against company A. on the ground that it had ceased to exist. The court also found that it had no competence in the matter and ordered that the proceedings against the Vinkovci Municipality, Vinkovci Health Centre and Vinkovci General Hospital be referred to the Vinkovci Municipal Court.

43. On 17 June 2003 a hearing was held before the Vinkovci Municipal Court at which the parties made further oral submissions.

44. On 7 July 2003 the Vinkovci General Hospital asked the Vinkovci Municipal Court to commission a further medical report from another expert witness, arguing that the previous medical report had numerous flaws.

45. At a hearing on 4 September 2003 the applicants' representative asked the trial court to allow her additional time to submit her reply to the objections raised by the defendants. Her request was granted and she submitted her observations on 15 September 2003.

46. On 2 October 2003 another hearing was held at which the trial court heard oral evidence from the first and second applicants.

47. On 27 October 2003 the judge conducting the proceedings inspected the scene of the accident.

48. On 31 October 2003 the applicants urged the Vinkovci Municipal Court to decide on their civil action, arguing that all the relevant facts had been sufficiently established.

49. At a hearing on 27 November 2003 the trial court commissioned another medical report from the Medical Faculty of the University of Zagreb on the grounds that the defendants had a number of objections concerning the report of the Croatian Medical Expert Reports Association.

50. On 30 September 2004 two medical experts of the Medical Faculty of the University of Zagreb, P.M. and D.S., submitted their medical report to the Vinkovci Municipal Court. They found that there had been no flaws

in the medical treatment of Ivan Kudra in the Vinkovci Medical Centre and that the further health complications could not be attributed to the doctors.

51. The applicants lodged an objection to the findings of the medical experts on 6 December 2004. They argued that the two medical expert reports, the first drafted by Ž.G. and the second by P.M. and D.S., were contradictory and asked that the experts be confronted to clarify and adjust their findings.

52. At a hearing on 3 February 2005 the Vinkovci Municipal Court dismissed the applicants' request and terminated the proceedings on the grounds that all the relevant facts had been sufficiently established.

53. On 16 February 2005 the Vinkovci Municipal Court adopted a judgment dismissing the applicants' civil action. In respect of the applicants' action against the Vinkovci Municipality, the court noted:

> "Under section 207 of the Civil Obligations Act the investor and the constructor have joint liability for all damages to a third party in connection with the construction.
>
> ...
>
> The person who is indicated as the investor in the construction contract has joint liability with the constructor for any damages in connection with the construction ([Supreme Court's judgment] Vs Rev-86/91 of 16 May 1991, PSP-53/112).
>
> In the case at issue, regard being had to the contract of 28 September 1992, section 207 of the Civil Obligations Act is inapplicable in respect of the second defendant – the Fund, now the Vinkovci Municipality – since the second defendant was neither the investor nor the constructor on the construction site at issue. It is undisputed that the second defendant transferred, for a sum of money, the construction to the first-defendant A. and that therefore A. was the constructor and the investor.
>
> Moreover, the said contract obliged company A. to ensure that the construction was carried out according to the relevant technical requirements necessary for this type of work. If the construction site was not properly secured (and this court, based on the evidence from the case file, considers that it was not) and if there were flaws in the organisation of the work (security) which had caused the injury of Ivan Kudra, then the sole responsibility would be on A. as the investor and the constructor.
>
> However, during the course of these proceedings, insolvency proceedings were opened in respect of the first defendant, company A., and this court had no competence to rule on its liability..."

54. As to the applicants' action against the Vinkovci Health Centre and the Vinkovci General Hospital, the Vinkovci Municipal Court held that the medical expert report drafted by P.M. and D.S. had revealed that all the measures taken by the doctors were appropriate and that they could not be held responsible for Ivan's death, and therefore the hospital could not be held responsible either. As to the inconsistencies between this medical report and the one drafted by the expert Ž.G., the court noted:

> "Since the defendants submitted a number of objections to the report drafted by expert Ž.G. from Zagreb, and since that expert failed to provide a detailed reply to those objections during the proceedings before the Osijek Commercial Court, this

court considered that another medical report should be commissioned from the Medical Faculty of the University of Zagreb.

The medical experts from that institution, P.M., a specialist in brain-surgery and D.S., a specialist in forensic medicine, drafted an objective medical report, in which they sufficiently substantiated their findings concerning the medical treatment of Ivan Kudra. Therefore this court accepts their report."

55. On 24 February 2005 the applicants lodged an appeal with the Vukovar County Court (*Županijski sud u Vukovaru*) against the first-instance judgment of the Vinkovci Municipal Court, arguing that it had a number of substantive and procedural flaws. They pointed out in particular that the Vinkovci Municipal Court had failed to address all the obvious inconsistencies between the two medical reports and sought an explanation.

56. On 14 February 2006 the applicants lodged a complaint about the length of the proceedings before the Vukovar County Court, arguing that the proceedings had been excessively long.

57. On 23 February 2006 the Vukovar County Court dismissed the applicants' appeal and upheld the first-instance judgment in respect of the Vinkovci Health Centre and the Vinkovci General Hospital. It quashed the first-instance judgment and ordered a retrial in respect of the Vinkovci Municipality. The County Court found that the first-instance court had to establish whether company A. or the Housing and Communal Activities Fund was the owner of the construction site at the time of the accident. The County Court considered that the first-instance court had sufficiently substantiated its decision in respect of the applicants' complaint concerning the expert reports.

58. On 10 April 2006 the applicants lodged an appeal on points of law with the Supreme Court (*Vrhovni sud Republike Hrvatske*) against the part of the Vukovar County Court's judgment concerning the Vinkovci Health Centre and the Vinkovci General Hospital. They argued that the lower courts' judgments had been based on contradictory medical reports and that the lower courts had failed to address their complaints concerning those inconsistencies.

59. On 20 June 2006 the Supreme Court dismissed the first and second applicants' appeal on points of law as ill-founded, endorsing the reasoning of the lower courts. It declared the third and fourth applicants' appeal on points of law inadmissible *ratione valoris*.

60. On 11 January 2007 the applicants lodged a constitutional complaint with the Constitutional Court (*Ustavni sud Republike Hrvatske*) against the judgment of the Supreme Court. The applicants contended that their individual rights and the rule of law had been violated by the lengthy and unfair proceedings before the lower courts in which two contradictory medical expert reports concerning the death of their child had not been confronted and clarified, and no explanation for that had been given by the lower courts.

61. On 18 January 2007 a hearing was held before the Vinkovci Municipal Court in the retrial concerning the applicants' civil action against the Vinkovci Municipality.

62. Another hearing was held on 8 March 2007. The trial court heard evidence from the parties and their oral submissions, and concluded the hearing.

63. On the same day the Vinkovci Municipal Court dismissed the applicants' civil action against the Vinkovci Municipality on the ground that, pursuant to a contract dated 28 September 1992 between company A. and the Housing and Communal Activities Fund, ownership of the construction site had been formally transferred to company A. on 19 January 1993, before the accident had occurred. The court therefore noted:

> "Since for the event at issue, in the view of this court, a third person was responsible, company A. Vinkovci, and not the defendant the Vinkovci Municipality, this court dismisses the civil action under section 177 of the Civil Obligations Act as ill-founded."

64. On 29 March 2007 the applicants lodged an appeal with the Vukovar County Court, arguing that there had been a number of procedural and substantive flaws in the retrial before the Vinkovci Municipal Court.

65. On 23 July 2007 the Vukovar County Court dismissed the applicants' appeal as ill-founded and upheld the judgment of the Vinkovci Municipal Court.

66. The applicants lodged an appeal on points of law with the Supreme Court against the judgment of the Vukovar County Court, requesting that the lower courts' judgments be quashed.

67. On 2 April 2008 the Supreme Court dismissed the first and second applicants' appeal on points of law as ill-founded and declared the third and fourth applicants' appeal on points of law inadmissible *ratione valoris*.

68. On 13 May 2008 the Vukovar County Court upheld a length-of-proceedings complaint lodged by the applicants on 14 February 2006. It found the length of the civil proceedings excessive and awarded the first and second applicants jointly 12,600 Croatian kunas (HRK) in damages.

69. On 11 June 2008 the Vinkovci Municipal Court issued a separate decision in respect of the costs of the proceedings, ordering the applicants to pay HRK 14,134.96 to the Vinkovci Health Centre.

70. On 19 June 2008 the applicants lodged an appeal with the Vukovar County Court against the Vinkovci Municipal Court's decision.

71. On 26 June 2008 the applicants lodged a constitutional complaint with the Constitutional Court against the Supreme Court's judgment of 2 April 2008. The applicants argued, *inter alia*, that the lower courts had minimised any responsibility of those involved in the death of their child. In

their view, that had violated their human rights and breached the relevant domestic law.

72. On 12 January 2010 the Constitutional Court dismissed the first and second applicants' constitutional complaint of 26 June 2008 as ill-founded and declared the third and fourth applicants' complaint inadmissible as it had been lodged out of time. They had had no right to lodge an appeal on points of law and thus the time for lodging a constitutional complaint had started to run from the date of the Vukovar County Court decision.

73. On 28 October 2010 the Vukovar County Court dismissed the applicants' appeal against the decision of the Vinkovci Municipal Court concerning the costs of the proceedings, holding that all the relevant facts regarding the costs had been correctly established.

74. On 27 January 2010 the Constitutional Court dismissed the first and second applicants' constitutional complaint of 11 January 2007 as ill-founded and declared the third and fourth applicants' complaint inadmissible as it had been lodged out of time. The court reiterated its previous arguments.

75. On 3 December 2010 the applicants lodged a constitutional complaint with the Constitutional Court against the Vukovar County Court's decision of 28 October 2010 dismissing their appeal concerning the costs of the proceedings.

76. On 20 April 2011 the Constitutional Court declared the applicants' constitutional complaint inadmissible *ratione materiae*, on the grounds that the decision on the costs of the proceedings had not represented an individual act against which a constitutional complaint could be lodged.

77. On 6 March 2012 the Vukovar County Court found that it had omitted to include the third and fourth applicants' length-of-proceedings complaint in its decision of 13 May 2008. Therefore, finding the length of the civil proceedings excessive, it awarded the third and fourth applicants jointly HRK 12,600 in damages.

78. On an unspecified date in 2012 the applicants lodged an appeal with the Supreme Court against the above-mentioned decision, arguing that the amount awarded was insufficient, and on 4 June 2012 the Supreme Court dismissed their appeal as ill-founded.

II. RELEVANT DOMESTIC LAW

79. The Constitution of the Republic of Croatia (*Ustav Republike Hrvatske*, Official Gazette nos. 56/1990, 135/1997, 8/1998, 113/2000, 124/2000, 28/2001, 41/2001, 55/2001, 76/2010, 85/2010) in Article 21, under Head III – Protection of Human Rights and Fundamental Freedoms, Part 2 – Personal and Political Rights and Freedoms, provides:

> "Every human being has the right to life.

...”

80. The relevant part of section 62 of the Constitutional Court Act (*Ustavni zakon o Ustavnom sudu Republike Hrvatske*, Official Gazette nos. 99/1999, 29/2002, 49/2002) reads:

> “1. Anyone may lodge a constitutional complaint with the Constitutional Court if he or she deems that a decision of a State body, a body of local and regional self-government, or a legal person with public authority concerning his or her rights and obligations, or about a suspicion or an accusation of a criminal act, has violated his or her human rights or fundamental freedoms, or his or her right to local and regional self-government guaranteed by the Constitution (hereinafter: a constitutional right)...
>
> 2. If another legal remedy exists against the violation of the constitutional right [complained of], the constitutional complaint may be lodged only after that remedy has been exhausted.
>
> 3. In matters in which an administrative action or, in civil and non-contentious proceedings, an appeal on points of law is allowed, remedies shall be considered to have been exhausted only after a decision on these legal remedies has been given.”

81. The relevant parts of the Criminal Code of the Republic of Croatia (*Krivični zakon Republike Hrvatske*, Official Gazette nos. 32/1993, 38/1993) provide:

> **DANGEROUS CONSTRUCTION**
>
> **Article 148**
>
> “(1) Anyone who, in the design, supervision or construction of a building or in the execution of construction work, by acting contrary to regulations or generally recognised professional standards, endangers people’s lives or property of considerable value shall be punished by a fine or by imprisonment for a period of between three months and five years.
>
> (2) If the offence referred to in paragraphs 1 and 2 of this Article was one of negligence, the perteptrator shall be punished by imprisonment for a period of up to three years.”
>
> **DAMAGE TO SAFETY EQUIPMENT IN THE WORK PLACE**
>
> **Article 149**
>
> “ ...
>
> (2) A person responsible for a mine, factory, workshop, or another place where work is carried out who does not install safety equipment, or does not maintain it in working condition, or fails to make it available for use if needed, or fails to act in accordance with the regulations on safety measures at work, thereby endangering the life and limb of people or property of considerable value, shall be punished by imprisonment for a period of between three months and five years.
>
> (3) Anyone who commits the criminal offence referred to in paragraphs ... and 2 of this Article by negligence shall be punished by imprisonment for a period not exceeding three years.

... ”

SERIOUS PUBLIC SAFETY OFFENCES

Article 155

“ ...

(2) If the death of one or more persons has been caused as a result of the criminal offence referred to in Article ... 148, paragraph 1, and Article 149, paragraphs 1 and 2, of this Code, the perpetrator shall be punished by imprisonment for a period of at least three years.

...”

MEDICAL MALPRACTICE

Article 166

“(1) A doctor who, in rendering medical services, applies an obviously inadequate remedy or method of treatment, or fails to apply relevant hygienic measures, or in general acts carelessly, thus causing the deterioration of an illness or the impairment of a person’s health, shall be punished by imprisonment for a period of up to three years.

...

(3) If the offence refered to in paragraphs 1 and 2 of this Article was one of negligence, the perpetrator shall be punished by a fine or by imprisonment for a period of up to one year.”

SERIOUS DAMAGE TO HEALTH

Article 174

“ ...

(2) If the death of one or more persons has been caused as a result of the criminal offence referred to in ... Article 166, paragraphs 1 and 2 ... of this Code, , the perpetrator shall be punished by imprisonment for a period of at least three years

... ”

82. The relevant provisions of the Code of Criminal Procedure (*Zakon o kaznenom postupku*, Official Gazette nos. 110/1997, 27/1998, 58/1999, 112/1999, 58/2002 and 62/2003) provided:

Article 2

“(1) Criminal proceedings shall be instituted and conducted at the request of a qualified prosecutor only. ...

(2) In respect of criminal offences subject to public prosecution, the qualified prosecutor shall be the State Attorney and in respect of criminal offences subject to private prosecution, the qualified prosecutor shall be a private prosecutor.

(3) Unless otherwise provided by law, the State Attorney shall undertake a criminal prosecution where there is a reasonable suspicion that an identified person has

committed a criminal offence subject to public prosecution and where there are no legal impediments to the prosecution of that person.

... “

83. The relevant provisions of the Civil Obligations Act (*Zakon o obveznim odnosima*, Official Gazette, nos. 53/1991, 73/1991 and 3/1994) provided:

DAMAGES

Section 200

“(1) For any physical pain or mental suffering concerning the ... death of a close person ... the court shall, if appropriate under the circumstances of a given case, and particular if the intensity of the pain or fear and their duration so require, award non-pecuniary damages ...”

ENTITLEMENT TO DAMAGES

Section 201

“(1) In the event of the death of a person entitled to damages, the court can award appropriate non-pecuniary damages to the members of his or her immediate family (spouse, child, or parent).

(2) The same damages can also be awarded to the person’s brothers and sisters if sufficient family ties existed between them.

...”

84. The relevant provisions of the Courts Act (*Zakon o sudovima*, Official Gazette nos. 150/2005, 16/2007 and 113/2008) provided:

III. PROTECTION OF THE RIGHT TO TRIAL WITHIN A REASONABLE TIME

Section 27

“(1) A party to court proceedings who considers that the court has failed to decide within a reasonable time on his or her rights or obligations or a criminal charge against him or her, may lodge a request for the protection of the right to a hearing within a reasonable time with a court at the next level of jurisdiction.

(2) If the request concerns proceedings pending before the High Commercial Court of the Republic of Croatia, the High Court for Administrative Offences of the Republic of Croatia or the Administrative Court of the Republic of Croatia, the request shall be decided by the Supreme Court of the Republic of Croatia.

(3) The proceedings for deciding on a request under sub-section (1) of this section shall be urgent. The rules of non-contentious procedure shall apply *mutatis mutandis* in those proceedings and, in principle, no hearing shall be held.

Section 28

(1) If the court referred to in section 27 of this Act finds the request well founded, it shall set a time-limit within which the court before which the proceedings are pending shall decide on a right or obligation of, or a criminal charge against, the person who

lodged the request, and may award him or her appropriate compensation for a violation of his or her right to a hearing within a reasonable time.

(2) The compensation shall be paid out of the State budget within three months of the date on which the party's request for payment is lodged.

(3) An appeal, to be lodged with the Supreme Court within fifteen days, lies against a decision on the request for the protection of the right to a hearing within a reasonable time. No appeal lies against a Supreme Court decision, but a constitutional complaint may be lodged."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

85. The applicants complained that the civil proceedings which they instituted had failed to meet the requirement of promptness and effective establishment of responsibility for their relative's death. They relied on Article 2 of the Convention, which, in so far as relevant, reads:

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

A. Admissibility

1. Exhaustion of domestic remedies

(a) The parties' arguments

86. The Government argued that the applicants had failed to exhaust all available and effective domestic remedies. The Government considered that the applicants had failed to lodge a criminal or disciplinary complaint against the medical staff involved in the treatment of their relative concerning their allegations of medical malpractice. Furthermore, the applicants had failed to lodge a criminal complaint against the investor and constructor concerning the accidental injury sustained by their relative on the construction site. They could also have lodged a complaint with the Ministry of the Interior and a criminal complaint against the police officers involved for lack of diligence in the performance of their duties. The Government also considered that the applicants had failed to raise before the Constitutional Court the complaints they raised before the Court.

87. The applicants argued that they had had no obligation to lodge criminal or disciplinary complaints. They pointed out that an investigation of the offences at issue, namely medical malpractice and a dangerous construction site, had to be opened of the prosecutor's own motion, irrespective of their initiative. They also pointed out that they had raised all

their complaints concerning lack of diligence in the civil proceedings before both the Constitutional Court and the higher domestic courts. However, the Constitutional Court had failed to examine their complaints properly as required under the Constitution and the relevant law.

(b) The Court's assessment

88. The Court reiterates that, under Article 35 § 1 of the Convention, it may only deal with an application after all domestic remedies have been exhausted. The purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, for example, *Mifsud v. France* (dec.) [GC], no. 57220/00, § 15, ECHR 2002-VIII). The obligation to exhaust domestic remedies requires an applicant to make normal use of remedies which are effective, sufficient and accessible in respect of his Convention grievances. To be effective, a remedy must be capable of resolving directly the impugned state of affairs (see *Balogh v. Hungary*, no. 47940/99, § 30, 20 July 2004).

89. The rule of exhaustion of domestic remedies must be applied with some degree of flexibility and without excessive formalism. At the same time it requires in principle that the complaints intended to be made subsequently at international level should have been aired before the domestic authorities, at least in substance and in compliance with the formal requirements laid down in domestic law (see *Azinas v. Cyprus* [GC], no. 56679/00, § 38, ECHR 2004-III; *Melnik v. Ukraine*, no. 72286/01, § 67, 28 March 2006; *Hummatov v. Azerbaijan*, nos. 9852/03 and 13413/04, § 91, 29 November 2007; and *Dvořáček and Dvořáčková v. Slovakia*, no. 30754/04, § 54, 28 July 2009).

90. However, in the event of there being a number of domestic remedies which an individual can pursue, that person is entitled to choose a remedy which addresses his or her essential grievance. In other words, when a remedy has been pursued, use of another remedy which has essentially the same objective is not required (see *T.W. v. Malta* [GC], no. 25644/94, § 34, 29 April 1999; *Moreira Barbosa v. Portugal* (dec.), no. 65681/01, ECHR 2004-V; *Jeličić v. Bosnia and Herzegovina* (dec.), no. 41183/02, 15 November 2005; and *Jasinskis v. Latvia*, no. 45744/08, § 50, 21 December 2010).

91. The Court reiterates that in some situations, compliance with the positive obligation to secure life under Article 2 of the Convention entails putting in place effective criminal-law provisions (see, for example, *Öneryıldız v. Turkey* [GC], no. 48939/99, § 93, ECHR 2004-XII, and *Railean v. Moldova*, no. 23401/04, §§ 27-28, 5 January 2010). However, if the infringement of the right to life or to personal integrity is not caused intentionally, the procedural obligation under Article 2 does not necessarily require such remedies (see *Mastromatteo v. Italy* [GC], no. 37703/97, § 90,

ECHR 2002-VIII). The State may meet its obligation by affording victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any responsibility of the individuals concerned to be established and any appropriate civil redress, such as an order for damages and/or for the publication of the decision, to be obtained (see *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 51, ECHR 2002-I; *Vo v. France* [GC], no. 53924/00, § 90, ECHR 2004-VIII; *Šilih v. Slovenia* [GC], no. 71463/01, § 194, 9 April 2009; and *Igor Shevchenko v. Ukraine*, no. 22737/04, § 51, 12 January 2012).

92. This accordingly means that before bringing their complaints to the Court, applicants alleging a violation of the positive obligation contained in Article 2 of the Convention in cases of alleged medical negligence or unintentional death, must avail themselves of the best means available in the domestic system to identify the extent of the liability of the individuals concerned for the death of their relative (see, *mutatis mutandis*, *Calvelli and Ciglio*, cited above, § 55).

93. Consequently, if the domestic system allows for more remedies which could in principle, if pursued successfully, be considered as the best way in which to determine the extent of the liability of the individuals concerned for the death of their relative, the applicants are obliged to exhaust a remedy which addresses their essential grievance. Use of another remedy which has essentially the same objective and which would not necessarily result in a more effective examination of the case is not required (see *Jasinskis*, cited above, §§ 52-53).

94. The Court notes that in the present case the applicants instituted civil proceedings in which they pursued their claim for damages in connection with the accidental death of their relative. The applicants persisted in their claims for a number of years and at various levels of jurisdiction, including the Osijek Commercial Court and the Vinkovci Municipal Court. Moreover, before bringing their complaint to the Court, the applicants complained before both the Constitutional Court and the higher domestic courts about the lack of diligence in the conduct of the proceedings; thus, in the Court's view, the applicants complied with the principle of subsidiarity.

95. As for the Government's argument that the applicants could have lodged a criminal or disciplinary complaint, the Court notes that it appears to be common ground that the civil proceedings, if pursued successfully, could have led to the establishment of the extent of the liability for the death of the applicants' relative and the award of the appropriate redress and/or publication of the decision (see, *mutatis mutandis*, *Šilih*, cited above, § 194, and *Jasinskis*, cited above, § 52). The Government have failed to demonstrate that the remedy offered by the criminal or disciplinary proceedings would have enabled the applicants to pursue objectives that are any different from the ones pursued through the use of the afore-mentioned remedy.

96. The Court therefore considers that, in the light of the circumstances of the present case, the applicants have properly exhausted the domestic remedies. It follows that the Government's objection has to be rejected.

2. Conclusion

97. The Court notes that this part of 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 parties' arguments

98. The applicants contended that the civil proceedings which they had instituted concerning the accidental death of their relative had failed to meet the requirement of promptness and effectiveness. They pointed out that the civil proceedings at issue had lasted for more than fifteen years and that during the proceedings the domestic courts had failed to elucidate the circumstances surrounding the accidental lethal injury and medical treatment of their son and brother. They were aware that they could not bring their relative back, but they had hoped that the liability for his death would be established. In their view, the failure of the domestic authorities to put in place an effective judicial system to deal with accidental death and medical malpractice represented a flagrant violation of Article 2 of the Convention.

99. The Government submitted that there had been no doubt that the death of the applicants' relative had been the result of an accident which had occurred while the children had been playing. In their view the domestic authorities had reacted properly and expeditiously, and the applicants' relative had been provided with appropriate medical treatment, particularly given the general social situation and the war in Vinkovci at the time, which the Government analysed in great detail. Therefore, the Government considered that there had been no violation of Article 2 of the Convention.

2. The Court's assessment

(a) General principles

100. The Court reiterates that it has held on many occasions that Article 2 of the Convention, in the first sentence of its first paragraph, lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction. These positive obligations entail above all a primary duty on the State to put in place a legislative and administrative

framework designed to provide effective deterrence against any threats to the right to life (see *Igor Shevchenko*, cited above, § 41).

101. In addition, in the event of a life-threatening injury or a death, States are required to set up an effective independent judicial system to provide appropriate redress (see, for example, *Anna Todorova v. Bulgaria*, no. 23302/03, § 72, 24 May 2011). As already indicated above, in the case of unintentional deprivation of life, an effective procedural response is to afford victims a civil-law remedy, either alone or in conjunction with a criminal-law one (see *Igor Shevchenko*, cited above, § 51). However, that remedy should exist not only in theory; it must operate effectively in practice, within a time-span allowing the case to be examined without unnecessary delay (see *Calvelli and Ciglio*, cited above, § 53; *Byrzykowski v. Poland*, no. 11562/05, § 105, 27 June 2006; *Dodov v. Bulgaria*, no. 59548/00, §§ 83 and 95, 17 January 2008; and *Šilih*, cited above, § 195).

102. In the context of health care, the acts and omissions of the authorities may in certain circumstances engage their responsibility under the positive limb of Article 2 of the Convention. However, where a Contracting State has made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients, the Court cannot accept that matters such as errors of judgment on the part of a health professional or negligent co-ordination among health professionals in the treatment of a particular patient are sufficient of themselves to call a Contracting State to account from the standpoint of its positive obligations, under Article 2 of the Convention, to protect life (see *Byrzykowski*, cited above, § 104).

103. The positive obligations require States to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives. They also require an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible held accountable (see, among other authorities, *Calvelli and Ciglio*, cited above, § 49).

104. In order to satisfy its positive obligation under Article 2 of the Convention, the State has a duty to ensure, by all means at its disposal, that the legislative and administrative framework set up to protect patients' rights is properly implemented and any breaches of those rights are put right and punished. Therefore, the Court's task is to examine whether there was an adequate procedural response on the part of the State to the infringement of the right to life (see *Konczelska v. Poland* (dec.), no. 27294/08, § 35, 20 September 2011), irrespective of the particular procedure carried out.

105. A requirement of promptness and reasonable expedition is implicit in the context of the effectiveness of the domestic proceedings set up to elucidate the circumstances of the patient's death. Even where there may be obstacles or difficulties which prevent progress in an investigation or a trial

in a particular situation, a prompt response by the authorities is vital in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in, or tolerance of, unlawful acts (see *Šilih*, cited above, § 195).

(b) Application of these principles to the present case

106. The Court notes that the present case concerns the death of the applicants' eight-year-old son and brother who was receiving health care after an accidental head injury. The Court would emphasise that it is not for the Court to substantiate itself the findings of the domestic authorities as to the causal connection between the injury or the alleged inappropriate medical treatment and the death of the applicants' relative, but to verify whether the domestic authorities discharged their procedural obligation under Article 2 of the Convention when confronted with the allegation of unintentional deprivation of life.

107. In such circumstances, given the fundamental importance of the right to life guaranteed under Article 2 of the Convention and the particular weight the Court has attached to the procedural requirement under this provision, it must determine whether the domestic system provided an appropriate remedy which satisfied all of the guarantees required by the Convention (see *Powell v. the United Kingdom* (dec.), no. 45305/99, 4 May 2000).

108. The Court firstly notes that the applicants' relative died in October 1993 and that the applicants lodged their civil action concerning his death in May 1994. The final judgment in the proceedings was adopted on 23 July 2007, when the Vukovar County Court dismissed the applicants' appeal, but the proceedings continued before the Supreme Court and the Constitutional Court following the applicants' appeals on points of law and constitutional complaints. The proceedings came to an end on 20 April 2011, when the Constitutional Court adopted its final decision concerning the applicants' complaint.

109. In this connection, in order to satisfy itself that it has temporal jurisdiction to examine the proceedings set in motion to elucidate the circumstances of the death of the applicants' relative 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 four years after the applicants' relative died.

110. The Court has held that the procedural obligation under Article 2 of the Convention constituted a separate and autonomous obligation on the domestic authorities, which was binding on them even though the death took place before the date the Convention entered into force in respect of the State. The Court's temporal jurisdiction, as regards compliance with the procedural obligation of Article 2 in respect of deaths occurring before the

entry into force of the Convention, exists if there is a genuine connection between the death and the entry into force of the Convention, and if a significant proportion of the procedural steps were or ought to have been carried out after the critical date (see *Šilih*, cited above, §§ 159, 161-63).

111. In the present case the Court notes that the proceedings in respect of the death of the applicants' relative commenced in May 1994, but that no relevant steps in the proceedings were taken before January 1997 when the trial court commissioned a medical report. This report was, notably, submitted only in March 1999, without any findings having been adopted (see paragraphs 18 and 20). The proceedings ended in April 2011, more than thirteen years after the Convention had entered into force in respect of Croatia, and all the relevant procedural steps were taken after its entry into force.

112. Therefore, the Court considers that the procedural aspect of Article 2 of the Convention falls within the Court's competence *ratione temporis* (see, *mutatis mutandis*, *Marta Jularić* (dec.), no. 20106/06, 2 September 2010, and *Igor Shevchenko*, cited above, § 48).

113. The Court notes at the outset that the civil proceedings in total lasted for almost sixteen years, notably thirteen years and five months after the Convention entered into force in respect of Croatia. The Court considers that in Article 2 cases concerning proceedings instituted to elucidate the circumstances of an individual's death, lengthy proceedings such as these are a strong indication that the proceedings were defective to the point of constituting a violation of the respondent State's positive obligations under the Convention, unless the State has provided highly convincing and plausible reasons to justify such a course of proceedings (see *Šilih*, cited above, § 203, and *Igor Shevchenko*, cited above, § 60). However, in the present case, the Government have failed to show any reason justifying such lengthy proceedings.

114. In view of the overall length of the proceedings, the Court cannot fail to observe several long periods of unexplained inactivity on the part of the domestic authorities (see, *mutatis mutandis*, *Dvořáček and Dvořáčková*, cited above, § 69).

115. The first medical report was commissioned in 1997. Two years after that, in March 1999, the Medical Faculty of the University of Zagreb informed the trial court that they could not provide a report owing to insufficient medical documentation. In the meantime no procedural measures were taken by the trial court to discipline the experts. Therefore, the Court sees no reason to depart from its principle that such an unreasonable delay in obtaining the expert report rests ultimately on the State (see *Surman-Januszewska v. Poland*, no. 52478/99, § 28, 27 April 2004).

116. The first-instance judgment in the case was adopted on 16 February 2005, notably, more than ten years after the applicants had brought their

civil action. On 24 February 2005 the applicants lodged an appeal against that judgment with the Vukovar County Court. On 23 February 2006 the Vukovar County Court quashed the first-instance judgment and ordered a retrial in respect of the Vinkovci Municipality. In the subsequent retrial, a first hearing before the Vinkovci Municipal Court was held in January 2007, namely, after almost a year. In the meantime, no procedural measures were taken in connection with the applicants' civil action against the Vinkovci Municipality.

117. Furthermore, the Court notes that during the proceedings, the domestic courts found that responsibility for the lethal injury of the applicants' relative could be attributed only to the constructor, company A. (see paragraphs 53 and 63), which in the meantime had become insolvent and in January 2003 ceased to exist. Therefore, any formal determination of its responsibility remained unresolved, leaving the applicants without any possibility to obtain redress for the injury and death of their relative.

118. Even if the insolvency of company A. cannot in itself be attributed to the domestic authorities, the Court notes that at the time when company A. ceased to exist the proceedings had already been pending for eight years and eight months (see paragraphs 11 and 38). During that period, the parties made submissions before the courts on several occasions, and an expert medical report was commissioned and provided.

119. In the absence of any explanation provided by the Government, the Court is unable, from the material submitted to it, to conclude that, or to speculate on the reasons why, the domestic courts did not adopt a judgment at that stage of the proceedings, which would have allowed a formal establishment of the alleged liability of company A. for the lethal injury of the applicants' relative and the award of appropriate compensation and/or publication of the decision.

120. Accordingly, the Court finds that the domestic system, faced with a case of unintentional deprivation of life, failed to provide an effective and prompt response consonant with the State's procedural obligations under Article 2 of the Convention.

121. There has accordingly been a violation of Article 2 of the Convention.

II. ALLEGED VIOLATION OF ARTICLES 6, 8 AND 13 OF THE CONVENTION

122. The applicants complained about the length of the civil proceedings which they had instituted concerning the death of their relative, that the failure of the national courts to establish all the relevant facts in the case had violated their right to respect for private and family life and that they had had no effective domestic remedy for their complaints.

The applicants relied on Articles 6, 8 and 13 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 and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 13

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

123. The Government contested those allegations.

A. Admissibility

124. The Court considers that these complaints are closely linked to the one concerning the procedural aspect of Article 2 of the Convention and must also therefore be declared admissible.

B. Merits

125. Having regard to the particular circumstances of the present case and to the reasoning which led it to find a violation of Article 2 of the Convention in its procedural limb, the Court considers that it is not necessary also to examine the case under Articles 6, 8 and 13 of the Convention (see, *mutatis mutandis*, *Öneryıldız v. Turkey* [GC], no. 48939/99, § 160, ECHR 2004-XII, and *Šilih*, cited above, § 216).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

126. 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

127. The first and second applicants claimed 30,359 euros (EUR) each and the third and fourth applicants claimed EUR 10,120 each in respect of non-pecuniary damage.

128. The Government considered the applicants' claims excessive, unfounded and unsubstantiated.

129. Having regard to all the circumstances of the present case, the Court accepts that the applicants suffered non-pecuniary damage which cannot be compensated solely by the finding of a violation. Making its assessment on an equitable basis, the Court awards the applicants EUR 20,000 jointly, in respect of non-pecuniary damage, plus any tax that may be chargeable to them.

B. Costs and expenses

130. The applicants also claimed EUR 23,784 for the costs and expenses incurred before the domestic courts and EUR 2,497 for those incurred before the Court.

131. The Government considered that the applicants had failed to substantiate their claims for costs and expenses in any way.

132. 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. As to the costs and expenses claimed in respect of the domestic proceedings, the Court notes, regard being had to the documents in its possession and the above criteria, that the applicants failed to specify and substantiate their claim in any respect. As to the proceedings before the Court, making its assessment on an equitable basis and in the light of its practice in comparable cases, the Court considers it reasonable to award the applicants, who were legally represented, the claimed sum of EUR 2,400, plus any tax that may be chargeable to them on these amounts.

C. Default interest

133. 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 the procedural aspect of Article 2 of the Convention;

3. *Holds* that there is no need to examine the complaints under Articles 6, 8 and 13 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicants, within three months from 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 20,000 (twenty thousand euros) jointly, plus any tax that may be chargeable to them, in respect of non-pecuniary damage;
      (ii) EUR 2,400 (two thousand four hundred euros), plus any tax that may be chargeable to the applicants, 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 applicants' claim for just satisfaction and costs and expenses.

Done in English, and notified in writing on 18 December 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach
Deputy Registrar

Isabelle Berro-Lefèvre
President