

Medical liability in sex reassignment surgery according to Brazilian legislation

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Abstract

This study investigates medical liability in sex reassignment surgery in light of Brazilian legislation. Normative diplomas were examined to understand the duties of physicians. Court decisions were analyzed to identify cases of medical errors in these surgeries and the understanding of courts. Damage liability is understood by the establishment of a contract between physician and patient. Upon being contracted by the patient, the surgeon must act according to the ethics and rules of the profession. The author, act, culpability, harm and causal nexus should be taken into account when considering medical liability. The analysis of court decisions found four cases in which physicians were considered guilty of medical errors. Although patients dissatisfied with results of sex reassignment surgery should seek their rights, liability requires the surgeon to act with imprudence, negligence or malpractice.

Keywords: Damage liability. Liability, medical. Medical errors. Sex reassignment surgery. Transexualism.

Resumo

Responsabilidade médica na cirurgia de readequação sexual de acordo com a legislação brasileira

Este estudo investiga a responsabilidade médica na cirurgia de readequação sexual de acordo com a legislação brasileira. Diplomas normativos foram examinados para entender os deveres médicos. Decisões judiciais foram analisadas para identificar os casos de erros médicos nessas cirurgias e o entendimento dos tribunais. A responsabilidade por danos é entendida pelo estabelecimento de um contrato entre médico e paciente. Ao ser contratado, o cirurgião deve agir de acordo com a ética e as regras da profissão. O autor, ato, culpabilidade, dano e nexo causal devem ser levados em conta ao considerar a responsabilidade médica. A análise das decisões judiciais encontrou quatro casos em que os profissionais foram considerados culpados de erros médicos. Embora pacientes insatisfeitos com os resultados da cirurgia de redesignação sexual devam buscar seus direitos, a responsabilização exige que o cirurgião tenha agido com imprudência, negligência ou imperícia.

Palavras-chave: Responsabilidade civil. Responsabilidade legal. Erros médicos. Cirurgia de readequação sexual. Transexualidade.

Resumen

Responsabilidad médica en la cirugía de reasignación sexual según la legislación brasileña

Este estudio evalúa la responsabilidad médica en la cirugía de reasignación sexual según la legislación brasileña. Se examinaron las normativas para comprender las obligaciones médicas. Se analizaron las decisiones judiciales para identificar los casos de errores médicos en estas cirugías y los resultados de los tribunales. La responsabilidad por daños se entiende como un contrato entre médico y paciente. Al ser contratado, el cirujano debe actuar conforme la ética y las normas de la profesión. Hay que tener en cuenta al autor, el acto, la culpabilidad, el daño y el nexo causal al considerar la responsabilidad médica. En las decisiones judiciales hubo cuatro casos en que declararon culpables por errores médicos a los médicos. Los pacientes insatisfechos con los resultados de esta cirugía buscan sus derechos, y la responsabilidad recae sobre el cirujano que ha actuado con imprudencia, negligencia o mala praxis.

Palabras clave: Responsabilidad civil. Responsabilidad legal. Errores médicos. Cirugía de reasignación de sexo. Transexualidad.

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In 1997, Resolution 1,482/1997 of the Federal Council of Medicine (CFM) of Brazil authorized sex reassignment surgery (SRS) for transsexual patients¹. The surgical intervention is legal provided that the patient meets the criteria necessary for the procedure and the rigid treatment program, including the assessment by a multidisciplinary team, hormone therapy and psychiatric follow-up².

Prior to the judgment of the Direct Action of Unconstitutionality 4,275 by the Federal Supreme Court in 2018, transsexual individuals needed to turn to the judiciary system to change their name and sex in the civil registry³.

SRS was first performed in 1970, when Edgerton and Bull used tissues of the penis and scrotum to configure female external genitalia⁴. In Brazil, the first surgeries of this type were conducted by Farina in São Paulo in 1971⁵. The history of the transsexualizing process in the country has three major marks: 1) the criminal charges against Farina in 1971 as penalty for the intervention on a body without authorization; 2) regulation as a medical procedure in 1997 by CFM, normalizing medical interventions on trans bodies; and 3) transformation into public policy in 2008, with the creation of the transsexualizing process provided by the Brazilian Unified Health System (SUS), marked by the judicialization of the demand⁶.

Given this context, this study aimed to investigate medical liability in SRS in light of the Brazilian legislation. Therefore, the focus is not the acceptance or non-acceptance of transsexual individuals, but on analyzing SRS from the current legislation, as patients dissatisfied with their surgical treatment should seek their rights and medical liability could exist.

Method

Relevant articles were surveyed in the MedLine, SciELO and LILACS databases. Official medical and legal documents from Brazil were also consulted, including the 1988 Constitution of the Federative Republic of Brazil, the Civil Code, the Consumer Defense Code, the Code of

Medical Ethics, CFM resolutions the Penal Code, and court decisions.

Regarding the dignity of individuals and the right to one's own sexual freedom, the analytical concept of crime was analyzed by comparing principles and fundamental guarantees established in the Federal Constitution of Brazil. Medical liability and the duties of physicians were examined through the analysis of normative diplomas.

Decisions rendered in courts the state of São Paulo involving claims of medical error in SRS and, consequently, liability or non-liability of the professional, were analyzed. Decisions by the State of São Paulo Court of Law, the Supreme Court of Law and the Supreme Federal Court in the period from 1996 to 2023 were surveyed. The websites of the institutions were searched using the following keywords in Portuguese: "transgenitalization," "sexual reassignment," "transexual," "transsexuality," "transsexualizing surgery," "medical error," "operatory complications," "iatrogenesis," "medical liability," "negligence," "imprudence" and "malpractice."

Results

Patient's right to choose

The Supreme Federal Court used medical and biological conceptions of transsexuality—interaction and solidarity among sexual subjects⁷. Such rights include the right to sexual activity, pleasure, sexual and reproductive self-determination, expression, self-actualization, sexual consent, freedom of choice regarding sexual partners and public recognition of relationships^{8,9}.

Sexuality is fundamental to the social formation of individuals, correlating gender identity and sexual orientation¹⁰. This construct is based on the principles of human dignity, freedom, non-discrimination and privacy¹¹.

Patient consent is an essential point of the medical contract and the basis for the existence of the legal act. Any aggression to the human

body is forbidden, except in the hypotheses established by law. Consent is only valid for acts founded on rights¹² and cannot be invoked to exonerate physicians of their legal or penal liability in cases of guilt or willful misconduct. Consent must be free of errors, misconduct and physical, psychological or moral coercion; it cannot be obtained by simulation or misleading maneuvers, and must be clarified that the patient has the right to be adequately informed.

Legal liability

Legal liability can be understood as the adoption of measures to force someone to provide reparations for moral or material harm caused by the defendant based on subjective and objective theories¹³. Subjectivity is based on guilt, and the author's liability is argued when guilt, harm and a causal nexus exist. In objective theory, the liable person offers compensation for the harm caused without considering culpability.

In the 2002 Civil Code of Brazil, the principle of liability is based on the agent's guilt by defining an illegal act as that which, due to voluntary action or omission, negligence or imprudence, violates the rights or causes harm to another person, even if exclusively moral¹⁴.

Objective legal liability is that which results from the practice of an illegal act, the violation of the rights of others irrespective of the guilt of the agent that caused the harm, restricting the cases to the harm itself and causal nexus. In Sweden, a system of objective liability without guilt is used, by which the harm caused by a medical professional is compensated through special funds created for such and sustained by contributions from professionals¹⁵.

The legal liability of a physician is understood by the establishment of a contract with the patient¹⁶. However, considering medical liability as contractual is not a presumption of guilt, as it is a legal situation that, according to the Brazilian Civil Code, involves both contractual and extracontractual aspects between the two parties, in which the physician assumes the obligation of the means and not the outcome¹⁷. Upon being contracted by the patient, the physician

makes the commitment to act in accordance with the ethics and rules of the profession, and the patient commits to the payment for the service. The contract is thus onerous, and the physician is ensured contractual freedom¹⁸.

Regarding SRS, the autonomy of the patient is considered in light of the fact that an asymmetrical relationship exists between the surgeon and patient, as the surgeon holds technical knowledge that the patient does not.

Analysis of court decisions

Court decisions in the state of São Paulo were analyzed following the survey of the electronic systems for cases of medical errors and the liability of the surgeon in SRS procedures (Chart 1). The claims were upheld in four cases, with the consequent conviction of the surgeons and compensation awarded for medical errors.

In Civil Appeal 0001683-89.2011.8.26.0001, the judge determined the action proposed by the patient, a transwoman, well founded against the physician, who placed breast prostheses, but the plaintiff was the victim of error (negligence and imprudence). The court maintained the decision against the surgeon.

In Civil Appeal 1014957-39.2014.8.26.0344, the surgeon was not considered to be at fault. The plaintiff, a transman, was submitted to breast removal surgery to obtain a chest with a male appearance, but claimed the objective was not reached. The State of São Paulo Court of Law concluded that there was no medical malpractice or technical flaws in the procedures performed.

In Civil Appeal 1019345-90.2014.8.26.0309, the judge determined that the action proposed by the patient, a transwoman, was partially well founded against the surgeon who performed the gender reassignment procedure. Both the surgeon and patient appealed, and the State of São Paulo Court of Law altered the sentence, judging the action well founded and obligating the surgeon to pay for a new surgery.

In Civil Appeal 1040707-83.2016.8.26.0114, the judge ordered the surgeon to pay compensation for material, moral and aesthetic harm due to medical error during bilateral

subcutaneous mastectomy on a transman, which had an unaesthetic outcome. The expert report recognized the causal nexus between the surgery and the outcome, maintaining the decision.

In Special Appeal 1719375-SP, the judge determined the suit as partially well founded. The plaintiff, a transwoman, underwent penectomy, obtaining unsatisfactory results. The defendant was found at fault.

Chart 1. Summary of court decisions found in present study

Tribunal	Process no.	Procedure	Decision
São Paulo Court of Law	0001683-89.2011.8.26.0001	Placement of breast prostheses	Physician found at fault
São Paulo Court of Law	1014957-39.2014.8.26.0344	Mastectomy	Rejection of initial request
São Paulo Court of Law	1019345-90.2014.8.26.0309	Gender reassignment surgery	Physician found at fault
São Paulo Court of Law	1040707-83.2016.8.26.0114	Bilateral subcutaneous mastectomy	Physician found at fault
Supreme Court of Law	1719375-SP	Penectomy	Physician found at fault

Discussion

When considering sex reassignment surgery, the expansion of individual and collective rights to care, health, medical activity and less resignation to pain and suffering are some of the factors reported to explain the growing importance of the liability of physicians. Media influence contributes to this situation, with the publicizing of facts and the emergence of technologies incorporated into medical work¹⁵.

The most recent update of CFM Resolution 2,265/2019, which regards the health of transgender individuals and all their needs, guarantees access to services in primary, specialized, urgent and emergency care¹⁹. Therefore, legal assistance is available for patients that need surgical procedures.

Regarding medical liability, health professionals must be aware of the meaning of the physician-patient relationship to ensure respect and dignity for the patient and their right to choose in order to avoid grievances and litigation involving compensations.

Error and guilt are terms that are often used interchangeably. Physicians are obligated to treat patients with zeal, diligence and kindness, using their technique and skill, and the cure is merely the desired probability. Medical error is only equivalent to the notion of guilt in cases of negligence, imprudence or malpractice²⁰.

An option to minimize expenditures on compensations resulting from medical liability is found in the model adopted in Sweden, in which harm caused by medical acts is compensated through special funds created for this purpose and financed by contributions from health professionals¹⁵. Thus, medical errors are not denied, but a more economical system is adopted in cases of the need for reparations due to the harm caused.

Medical errors have become increasing more common and severe worldwide, for example, approximately 180,000 people die every year due to medical errors in the United States of America²¹. According to Schulze²², 107,612 lawsuits involving medical errors were submitted in Brazil in 2018. With the bolstering of civil rights, consumer defense agencies have been strengthened, awakening in individuals notions of their rights and, thus, demanding the fulfillment of obligations and compensations from the providers of goods and services, which constitute the object of reparation actions for harm—legal and criminal liability²³.

Although physicians are service providers, they are also freelance workers. In Brazil, relationship between physician and patient is subordinate to the Consumer Defense Code²³. Thus, patients in Brazil have the right to receive clear, precise and complete information on the procedures to which they will be submitted, and the medical service provider has the duty

to provide this information to avoid possible compensatory claims.

Based on the data analyzed in this paper, a relatively small number of lawsuits have involved patients submitted to SRS in the state of São Paulo. This may be due to the recent transference of lawsuits to electronic media. Moreover, the Brazilian judicial system is sluggish, which leads to lawsuits that take years to resolve²⁴. Thus, only lawsuits in which the parties involved no longer have any recourses can be found on the websites of the courts. However, it is noteworthy that individuals often have no knowledge of their rights and do not seek legal solutions.

An increasing number of techniques have been developed to ensure the success of SRS and the right to such surgery has assimilated these developments, helping individuals to adjust to their new identity and ensuring support in cases of medical errors during surgical procedures. Society must respect the equality that exists among all

citizens²⁵. Therefore, further studies considering the transgender population, correlating the right to human dignity and analyses and discussions on gender reassignment surgery are needed.

Final considerations


Patients dissatisfied with sex reassignment surgery should seek their rights and have the right to choose linked to their dignity. For physicians to be liable, it is necessary to prove that they acted with imprudence, negligence or malpractice, as the disapproval of the aesthetic outcome is insufficient. The legal liability of physicians is of a contractual nature and the existence of guilt, harm and a causal nexus must be proven to establish compensation for the patient. A relatively small number of lawsuits was found in the Brazilian judicial system involving patients submitted to sex reassignment surgery.

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