Civil liability of the plastic surgeon in aesthetic procedures: legal and bioethical issues

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Abstract

This paper analyzes the civil liability of the plastic surgeon in aesthetic procedures, according not only to legal-obligational aspects, but also considering those involved in the doctor-patient relationship, like the duty to warn and the informed consent of the patient. In this way, within the current perspective of individual rights valorization – dignity and liberty, for instance – it is also necessary to recognize the conscious will of the patient (aware of risks, harms and benefits of medical intervention to the aesthetic change) that, under this point of view, should be understood within the Legal Theory of Mean Obligations. In short, the article considers the bioethical parameters against the contractual and consumerist ones, under which medicine seems to have been often treated.

Key words: Patient rights. Bioethical issues. Duty to warn. Damage liability. Surgery plastic.

Resumo

Responsabilidade civil do cirurgião plástico em procedimentos estéticos: aspectos jurídicos e bioéticos

Este artigo analisa a responsabilidade civil do médico cirurgião plástico em procedimentos estéticos, não somente sob os aspectos jurídico-obrigacionais, mas também considerando aqueles envolvidos na relação médico-paciente, como o dever de informar e o consentimento livre e esclarecido do paciente. Na perspectiva contemporânea de valorização dos direitos individuais – como dignidade e liberdade, por exemplo –, faz-se igualmente necessário reconhecer a vontade consciente do paciente (sabedor dos riscos, malefícios e benefícios de uma intervenção médica que visa sua modificação estética) que, neste ponto de vista, deve ser compreendida conforme a teoria legal das obrigações de meio. O artigo pondera os parâmetros bioéticos em contraposição aos contratualistas e consumeristas, pelos quais a medicina frequentemente vem sendo tratada.

Palavras-chave: Direitos do paciente. Temas bioéticos. Responsabilidade pela informação. Responsabilidade civil. Cirurgia plástica.

Resumen

Responsabilidad civil del cirujano plástico en procedimientos estéticos: aspectos legales y bioéticos

Ese artículo analiza la responsabilidad civil del cirujano plástico en procedimientos estéticos, de acuerdo con aspectos no solamente jurídico-obligacionales, sino también de aquellos involucrados en la relación médico-paciente, como el deber de informar y el libre y consciente consentimiento del paciente. Por lo tanto, bajo la perspectiva contemporánea de valoración de los derechos individuales – libertad y dignidad, por ejemplo – es necesario también reconocer la voluntad consciente del paciente (conocedor de los riesgos, daños y beneficios de la intervención médica para su cambio estético) que en este punto de vista, debe ser entendido conforme la teoría legal de las obligaciones de medios. En resumen, el artículo pondera los parámetros bioéticos frente a aquellos contractuales y de consumo, por los cuales frecuentemente la medicina viene siendo tratada.

Palabras-clave: Derechos del paciente. Discusiones bioéticas. Deber de advertencia. Responsabilidad civil. Cirugía plástica.

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Nowadays, medicine is not only focused in illnesses and diseases, but also on enabling a better social and mental state for people, as defined by the World Health Organization (WHO): *health is the state of complete physical, mental, and social welfare, and it does not consist only of the absence of illness or disease*[1]. Therefore, aesthetic plastic surgery constitutes a procedure that is both beautifying and therapeutic al, since in addition to improving physical image, it also tries to provide the psychological (mental) well being of the patient.

For that reason, the fact that – differently from other medical specialties – cosmetic surgery is seen in a different manner from the legal standpoint, especially according to the Supreme Court of Justice[2], stands out. Legally, the practice of medicine is governed by the theory of *obligation of means*, which provides that the hired object is the actual medical activity, safeguarding the professional of the obligation of fulfilling a specific goal[3], but committing him/her to employ all of his/her knowledge and medical techniques to fulfill the intended purpose.

The question raised over aesthetic plastic surgery is that the obligation category is modified *for obligation of results*, in which the doctor is liable for completely achieving a specific and determinate result since the pinnacle of this obligation is the results desired by the patient. Therefore, it is not recognized that the risk of failure for this medical specialty is the same for overall medicine.

This article tries, in a theoretical-doctrinaire manner, to broadly analyze the theme, keeping in mind that not only simple legal-contractual aspects are implied by this difference, but mainly ethical and bioethical ones. Finally, it is verified the relevance and consideration of the free and clear choice by the patient in each obligation modality.

Aesthetic plastic surgery as a legal liability

Basically, the law only exists if it is linked to a liability, much as the liability has its existence connected to a law. As soon as one identifies a right to something, it should be equally verified that such right is bound to a duty, the obligation of giving, performing or not to a certain event. So, liabilities are discerned according to its non compliance: *obligation of results* and *obligation of means.*

According to this line of thought, analyzing the figures of doctor and patient, the jurisprudence and legal doctrine seem to understand that the obligation of the cosmetic plastic surgeon should be the results, whose main reasoning is the fact that the patient does not show any signs of illness, looking only for aesthetic improvement. It can be observed, for instance, the jurisprudence of the Court of Justice of Rio Grande do Sul[4], which distinguishes in the same act two different surgical procedures: the obligation of means of a doctor in his/her job of repairing the nose septum alignment and the obligation of results in his/her job of aesthetically recomposing the nose.

Considering that no person would be subject to the surgical act if not to obtain the expected result, Cavalieri Filho understands that there is no doubt that when the patient has the intention of correcting body imperfections, such as the shape of the nose or face wrinkles, improving his/her physical appearance, the doctor is liable for the results since he/she is committed to the patient to provide the intended purpose. If such result is impossible to reach, the surgeon should give a previous warning and refuse to perform the surgery[5]. According to the author, *the desired results are clear and precise, such as that if they are impossible to reach the doctor is responsible for proving that the – total or partial – failure occurred to due to unforeseeable factors*[5].

Therefore, in case of obligation of results, the obligator should comply with the purpose, i.e. there is a commitment to reach a specific result since there is not – even – an evident risk that might interfere in the obligated purpose. Hence, there is presumption of guilt, justifying the reverse burden of proof. For the *obligation of results*, the guilt is irrelevant for contractual breach, being enough for the creditor to prove that there was no performance, that what was promised was not fulfilled by the obligator[6].

It is clear by this definition that the core is not the professional activity, but the results obtained through medical procedures, which if they are not fulfilled in the promised manner will presuppose *medical responsibility*[7]. Other than that, it is also evidenced that the will of the patient is clearly dismissed since – even if it is his/her will to be subject to a surgical procedure, conscientious of the risks – it is the duty of the doctor to refuse to perform it if the results cannot be guaranteed. In this case, the *duty to inform* by the doctor is restricted to a mere formality, as the event has *presupposed medical responsibility*, even after the occurrence of a detailed informative process and the consent from the patient.

Obviously, there is no reference here to cases where the damage caused by cosmetic surgical intervention to the patient is evident. The request of

placing a disproportional volume of silicone in the breasts, which could cause back pains to the patient, is clearly a case where the doctor should refuse to perform the surgery due to the non-maleficence principle – although it does not change its obligation category.

At the same time, the *obligation of means* does not require the concrete result of a purpose, but the commitment to employ all care, attention, and techniques available for achieving the desired results. Therefore, the probative charge is analyzed by the agent's conduct, which can be in compliance or not with the customary and demandable, not assuming, therefore, guilt (incompetence, negligence, or imprudence): *the creditor is responsible for proving that the obligator did not comply with the obligation*[6]. It is clear from that definition the reason for classifying medical performance as *obligation of means*: there is no way to promise a cure.

Those who decide to classify cosmetic aesthetic medicine under this general conception of medicine acknowledge that the inherent risks to such specialty are the same as those inherent to all medical practices, while the clinical literature is very strict in saying that the reactions of the human body are unpredictable in many cases. According to that, one can mention Resolution 1.621/01 from the Federal Council of Medicine (CFM) that, after defining that the purpose of plastic surgery is to provide the *benefit of health to the patient, be it physical, psychological, or social* (article 2), clarifies:

(...) in Plastic Surgery, as in any medical specialty, one cannot promise results or ensure the success of the treatment, and the doctor is responsible for clearly informing the patient of the benefits and risks of the procedure (article 3)[3].

Article 4 of the same document doesn't leave any doubts when it states says that *the purpose of the medical action in Plastic Surgery, as in any medical practice, constitutes the obligation of means and not of ends or results*[3].

Justice Carlos Alberto Menezes Direito, after an extensive analysis of clinical practices, said that *the many surgical subspecialties do not show essential or constructive differences among themselves. Every surgery is a form of treatment*[8] .In this sense, Moisset de Espanés and Miosá[9] clarify that the doctrine that the eminent French legislator, François Chabas, advocates: *cuando se trata del cuerpo humano, siempre queda un alea (lo que es criterio de la obligación de medios)* (...), *eso nos permite afirmar que, en Derecho médico, no hay lugar para una obligación de resultado, sino, para una obligación de medios*. That is, one can see that the alea factor (risk and unpredictability factor, in this case, of the human body or the human skin) is determinant for Chabas to classify cosmetic surgery as an obligation of means.

Therefore, it can be observed that the inherent risk factors and the unexpected or unplanned consequences cannot be separated from the surgical act, even if the patient was not informed in a precise manner or if the completely clear consent was not obtained. Not even in this case can the doctor be considered responsible due to *obligation of results*, but he/she can be responsible for guilty breach of the *obligation of means*.

Furthermore, even if a plastic surgeon eventually commits to the achievement of certain results, the nature of the obligation is not defined by it, and there is no change of the *legal category, which is still the same obligation of providing a risky service*[10], even if it is performed due to force majeure. According to this line of thought, it is interesting to read the continuation of the (defeated) vote by Justice Menezes Direito when he says: (...) *we should not forget that one cannot assume, as it has been done by jurisprudence, that the plastic surgeon has promised wonders and that he/she did not provide the proper information for the patient, constituting a contract with exact and determinate results. Only an affirmation from the patient in the request for a suit for damages is not enough to cause the presumption of guilt by the doctor, reversing the burden of proof (...) The patient should prove that such a thing occurred, that he/she did not receive competent and broad information on the surgery*[8].

That is, there is no exception in the cosmetic surgical act that could cover the doctor's liability as an obligation of results due to the dispositions of a Article 14, §4 of the Consumer Defense Code (CDC), which expressly says: *The personal responsibility of liberal professionals is proven by the verification of guilt*[11]. For this reason – due to the inherent risks of the surgical act – such radical concept of absolute success carried by some specialties classified as having *obligation of results* is currently seen with reservation. Therefore, it is understood that the doctor cannot be considered guilty when one concludes that, even after using all of his/hers professional knowledge, his/her performance was useless against the circumstances of the case[12]. However, more than that, *to punish in such circumstances stubbornly claiming an 'obliga-*

tion of results' would not only be an exaggeration. It would be an inequity[12].

So, it is of extreme importance to value the free and clear consent and the will of the patient. One can only understand its importance when the autonomy of those who subject themselves to the surgical act is respected and acknowledged, i.e. when one accepts that cosmetic surgery is not different from other clinical practices, being part of the obligation of means area.

Plastic surgery in the bioethical sphere

The doctor, due to ethical principles, has the duty to inform the patient on the procedure he/she will be submitted to. The process of information is more than a medical duty, it is the patient's right, who should express his/her will in continuing or not with the act: to give his/her consent on the proposed treatment after acknowledging the benefits and risks of the procedure, from the time of recovery to other events caused by surgical intervention.

Therefore, if we observe the consent only in the legal realm, we could ensure that is based on the contract's objective good faith[13], in which both parties sign a licit agreement not only concerning the requirement for the will of the contracting parties, but also on the assumption of an honest, loyal, and truthful behavior, according to the legal and social standards in force – which, as emphasized by Reale, can be understood as "public honesty"[14]. However, it should be considered that the objective good faith is based more on the corrective interpretation of contract terms on the expected honesty and its potential for integrating and creating conduct duties[15] than on a good active and reciprocal communication process between doctor and patient.

Accordingly, the duty of a doctor of informing is established for giving the other party sufficient information on the contracted service, summarized as a "duty of" from the provider to the receiver of services – and not actually an ethical behavior denied by the defensive medicine. It means that, within this concept, it would be enough for the doctor to give the information to the patient and to obtain his/hers express consent through the free and clear consent term (TCLE), in order to understand the job as done, i.e. there would be no need for a proper dialogue between the parties.

However, the doctor-patient relationship cannot be summarized in such a simple legal-contractual matter. During the continuous communication process aiming the autonomous and informed decision from the patient, in order to respect his/her auto-determination[16], he/she also has the duty of informing the doctor of his/her qualities, doubts, and needs, establishing a consistent and ponderable dialogue.

In this bioethical approach, the informed consent (or free and clear) refers to the voluntary decision, performed by an autonomous and capable person, taken after an informative and deliberative process, aiming to accept a specific or experimental treatment, knowing of its nature, its consequences, and its risks[17]. Therefore, *the informed consent is a humanitarian, ethically correct, and legal manner of expressing and conducting the relationship between doctor and patient*.

The informative process inherent to the consent is the moment when the patient has his/her doubts clarified, being alerted of the risks from surgical procedures and the possibilities of success of the results, as well as the chances of not achieving the expected. Regarding the information process, Kfouri Neto says that *it is impossible for the doctor to inform the patient of all the risks surrounding the treatment, under the risk of transforming a consultation in a medicine class. The information should be clear, exact, but limited to reasonable and statistically predictable risks,* although the author affirms that the plastic surgeon should inform the patient of all risks, including those that rarely take place[19] – which does not seem reasonable to us.

It is understandable that there is no way of establishing a limited list of the inherent risks of the cosmetic plastic surgery practice for the same reason that it cannot be determined for other surgery practices. However, it is fundamental to expose all important elements for the process, especially those with a reasonable tendency of happening. For such, the patient must receive information with an accessible and sufficiently clear vocabulary, aiming to make possible the effective knowledge of the information that is really relevant for making decisions[18].

However, it is hard to define which information is relevant for the free and clear consent by from the patient, and what is important or not for making decisions. Here, perhaps, we find the great discussion factor regarding informed consent. Nevertheless, generally speaking, the information that is relevant is that which most health professionals would give, those that most people would consider necessary to know (and that would make them give up or not of

the surgery). As mentioned before, the information that is most likely to occur. The informed consent (or free and clear) represents, according to this line of thought, the actual manifestation of will, autonomy, and self-determination by patient in being subject to the clinical-surgical act, and aware of the inherent risks of the event.

It is important to highlight that the consent does not necessarily needs to be expressed through a TCLE, but as the opportune informative procedure performed with the patient. If there is a TCLE, it should not be as detailed and extensive as the dialogue that took place before its presentation since it would mainly make the objective practice difficult: to formalize that a previous clarification took place before the procedure.

One should respect, once again, from the legal standpoint, the principle of objective good faith[13] regarding the demand for an acceptable conduct, in agreement with the average behavior, i.e. compatible with the general rules. From the bioethical standpoint, one should respect and expect an ethical conduct both from the health professional and from the patient subject to the medical procedure.

Differently from the legal conception, in bioethics the consent is not an instrument for defensive medicine, but a reciprocal informative process based on the patient's self-determination[20]. And so, it is proven that ethics, dignity, and autonomy are fundamental for the medical practice, since they justify and acknowledge that the patients have rights[21].

Final remarks

Considering the concept of free and clear consent and the express existence of a risk in all surgical procedures, which, for that reason, can present unexpected consequences, even in the absence of medical guilt, it is proven (although there is still a lot of disagreements in the doctrine and jurisprudence) that the best classification for cosmetic plastic surgery is to include it in the area of *obligations of means*. While if it is classified otherwise, apart from creating an undesirable exception to the criteria analyzed in each obligation modality, we would be summarizing the free and clear consent (and personal will) of the patient as a mere formality.

The doctrine from Andorno, who once advocated a contrary opinion, uses the very definition of *obligation of means* to classify cosmetic surgery, saying that the plastic surgeon has the right to use all adequate means and techniques, according to the current state of science, to reach the best result for the intervention requested by the patient, not being obliged, however, to obtain a result that makes the client happy[19]. Nevertheless, the lack of success for the medical service does not necessarily implies in non-compliance[22], since in the same way that one cannot promise a cure to a patient, it is wrong to previously ensure a satisfactory result due to the randomness of medical *lex artis* and the subjectivity of the patient liking or not of his/hers final appearance.

Still, demanding that the doctor refuses to perform the cosmetic surgery whenever there is a risk would make us destined to the non-performance of this practice, seeing that all surgery – including those for beauty purposes – offers risks to the human body. It is obvious that, as mentioned, a doctor should not – for ethical reasons – perform a cosmetic plastic surgery when it is clear that it will harm the patient's health. Furthermore, the argument that a healthy patient would not submit him/herself to a procedure that is dangerous to his/her health if he/she was informed of the risks (claim of those that do not agree with this opinion of obligation of means) becomes unfounded when one understands the informed consent and the respect to the autonomous will of the patient, emphasizing that not even the absence of this presumed information could alter the legal liability obligation as a whole.

During times when individual freedom, dignity, will, and ethics are valued, there is no consistent reason for separating cosmetic plastic surgery from other medical specialties. So, in summary, it is clear that the civil liability of the plastic surgeon in a cosmetic procedure is limited to caution, prudence, and diligence[4], represented by the theory of obligation of means.

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