Evaluating judgments and decisions related to lawsuits involving aesthetic plastic surgery

Avaliação de sentenças e jurisprudências relacionadas a ações judiciais envolvendo cirurgias plásticas estéticas

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ABSTRACT

Introduction: There is a legal consensus that the results of medical activities represent obligations of means, not results. However, there is ample discussion when it comes to aesthetic procedures. Resolution 1621/2001 of the Federal Council of Medicine also defines the objective of a medical act in plastic surgery as an obligation of means. This study evaluated 106 cases between November 2015 and November 2017 to verify whether the decisions of the Judicial Power agree with the Resolution of the Federal Council of Medicine. The number of lawsuits and the percentage of claims granted or denied were quantified, and the opinions of jurists and courts that supported the claims granted were verified. The number of cases in which the judge’s decision was related to the opinion of a medical expert was also quantified. Methods: The authors searched the judgment database located on the website of the Court of Justice of the State of São Paulo (SP) for damage related to aesthetic plastic surgery, using the keyword “Plastic Surgery” for all actions. Results: A total of 61 claims (58%) were denied, and 45 (42%) were granted. In 96% of cases (102) the judgment was positively related to the expert report. Conclusion: There were 102 cases in which the judgment agreed with the expert reports and only four cases in which the judgment did not agree with the reports. These data show the crucial importance of experts’ reports in defining judicial judgments. The analyses of all judgments showed that there were no cases in which the judge considered the Resolution of the Federal Council of Medicine.

Keywords: Aesthetics; Plastic surgery; Jurisprudence; Court decisions; Legal Medicine.

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increase in the number of lawsuits over alleged poor professional performance in surgeries and procedures. In the context of aesthetic plastic surgery, these lawsuits are usually caused by patients’ perceptions of unsatisfactory results, false promises, and irregular advertising.²

Adverse plastic surgery outcomes can be caused by factors intrinsic to patients (such as poor tissue perfusion in smokers and diabetics, or the tendency of plastic surgery patients to develop hypertrophic and keloid scars), extrinsic diseases (including the development of postoperative infections),² or patients’ lack of careful adherence to the orders of their medical professionals and surgeons. However, in a small number of cases adverse outcomes are the result of medical errors caused by malpractice, recklessness, or negligence. Many patients, believing that they were injured by their doctors, seek awards for damages as a compensation for discretionary, material, and cosmetic damages.

There are two types of obligation related to medical practice results: obligation of means and obligation of result. Obligation of means is a concept...
widely accepted for general medical activities in which the duty to compensate does not stem from the risk of the activity performed. This type of obligation states that the duty to repair damages should be imposed by negligent, reckless, or unskillful conduct, and not by the results of the surgery itself. However, in cases of aesthetic procedures, there is ample discussion for an obligation of result. This type of obligation states that physicians have a duty to compensate for damages caused if the results of a procedure differ from the patient’s expectations, and that physicians must prove their innocence in these cases. In other words, obligations of results shift the burden of proof from the patient to the physician or surgeon.

Resolution No. 1621/2001 of the Federal Council of Medicine (CFM) defined the medical act in plastic surgery – as in all medical practice – as an obligation of means, not of result. However, there are jurists and courts in our legal system that consider aesthetic plastic surgery as a commercial activity, and therefore, as an activity covered under obligation of result.

**OBJECTIVE**

To analyze actions for damages as a compensation for discretionary, material, and cosmetic damages involving aesthetic plastic surgery in order to:

- Quantify the number of lawsuits and the percentage of claims granted or denied.
- Show the opinions of jurists and courts that supported the claims granted and verify whether their opinions agree with CFM Resolution No. 1621/2001.
- Quantify the number of cases in which the decision of the judge was positively or negatively related to the opinion of the court’s medical expert and analyze the expert’s importance in forming the legal basis of judgments.

**METHODS**

The authors searched the judgment database located on the website of the Court of Justice of the State of São Paulo (SP) using the keyword “Plastic Surgery.” They selected and evaluated all cases of damages awarded as compensation for discretionary, material, and cosmetic damages available to the public domain between November 2015 and November 2017 – a total of 106 lawsuits (Annex 1).

Only cases involving patient dissatisfaction with the results of cosmetic surgery were selected. Cases involving restorative plastic surgery or lawsuits for non-aesthetic reasons – such as death or other postoperative clinical complications like venous thrombosis and pulmonary embolism – were excluded from the study.

**RESULTS**

A total of 61 claims (58%) were denied and 45 cases (42%) were granted (Figure 1). In four cases the judgment differed from the expert report. Therefore, in 102 cases (96%), the judgment was positively related to the expert report (Figure 2).

**DISCUSSION**

Notwithstanding the freedom a judge has to rule according to his justified understanding, the analyses of the above cases showed that 96% of judgments were based on the medical expert’s report. The Code of Civil Procedure (NCPC), published in 2015, recognizes the importance of expert evidence, introduces major innovations to appoint such experts, and requires clear grounds for court judgments based on expert reports. The code states that judges’ reasoning should reflect the grounds that legally justify the findings.5

According to the head provision of Article 156 of the NCPC, the judge will be assisted by an expert when the proof of the fact depends on technical or
scientific knowledge.\textsuperscript{5} The technical expert should provide the judge with specialized knowledge that the judge does not have in order to provide the judge with the objective conditions they require to make the best decision possible by basing their findings on the technical clarification of controversial issues.

In summary, the NCPC values expert knowledge, demands greater transparency for expert appointments, and reinforces the courts’ need for specialized technical knowledge in order to corroborate the principles of morality, transparency, impersonality, and efficiency. The NCPC’s innovations bear in mind that the judicial process, and not the judge, is the actual recipient of expert evidence.

In all cases analyzed, aiming at the invalidity of the plaintiff’s claim for damages, the defendants used the understanding of the CFM as part of their legal argumentation. The 4th Article of the CFM Resolution No. 1621 of May 16, 2001, published in the Federal Register on June 6, 2001, rectified in the Federal Register No. 14 of January 21, 2002, defines the medical act in plastic surgery – as in all medical practice – as an obligation of means, not of result.\textsuperscript{4}

However, this study’s analyses of 106 judgments indicate that the CFM’s understanding – although cited by 100% of the defendants – was not cited by the judges in any of these judgments.

Physicians’ civil liability is based on the theory of guilt – that is, there must be guilt in the actions of the physician. In the Brazilian legal system, this guilt manifests itself through intent. It is unlikely that such guilt would manifest itself in cases of medical error, because such guilt requires conscious and deliberate intent to cause harm, or a reasonable assumption that it may occur. However, such guilt would undoubtedly manifest itself in physicians’ negligence, imprudence, or malpractice. The presence of one or more of these characterizes physicians’ guilt in a narrow sense.\textsuperscript{6}

Guilt as a cause of liability for damages is well-provided under Brazilian law in Article 186 of the Civil Code: “Whoever, through voluntary action or omission, negligence or imprudence, violates a right and causes damage to another, even if exclusively moral, commits an unlawful act.”\textsuperscript{7} This is complemented by Article 951 of the same Civil Code, \textit{verbis}:

The provisions of articles 948, 949 and 950 also applies in the case of damages due by one who, in the exercise of a professional activity, by negligence, imprudence or malpractice, causes the death of a patient, aggravates his illness, causes injury or disables him to work.\textsuperscript{7}

In the same vein, a paragraph of Article 14 of the Consumer Protection Code (Law No. 8,078 of September 11, 1990) states: “The personal liability of self-employed professionals shall be ascertained by the verification of guilt.”\textsuperscript{8}

It is possible to defend physicians’ liability by claiming force majeure, a fortuitous event, and/or exclusive guilt of the patient or a third party unrelated to the provision of professional medical service. The latter two are provided in the Consumer Protection Code in Article 14, Item II, Paragraph 3: “The service provider shall not be liable except when he proves: (...) II - the exclusive guilt of the consumer or third party.”\textsuperscript{8}

As for claims of force majeure or a fortuitous event, Article 393 of the Brazilian Civil Code provides these as excluding liability for damages resulting from breach of contract. It states: “The debtor is not liable for damages resulting from fortuitous event and force majeure (...). Sole paragraph. A fortuitous event or force majeure is verified in the necessary fact, whose effect could not be prevented or avoided.”\textsuperscript{7}

Brazilian jurists and courts accept an obligation of result in the service relationship established between physicians and plastic surgery patients, but not in relation to reparative and restorative plastic surgery (which would fall under an obligation of means). The opinions of jurists and case laws which formed most of the judges’ decisions in the judgments analyzed in this study are found below.

The most cited case laws in the judgments were:

a) “Civil and consumer procedural law. Special appeal. Action for cosmetic and material damages. Aesthetic surgery. Obligation of result. Shift of the burden of proof. Rule of instruction. Analyzed articles: 6th, viii, and 14, head provision and § 4th, of the consumer protection code. 1. Action for material and cosmetic damage, filed on September 14, 2005. This special appeal was extracted from this action, under advisement on June 25, 2013. 2. Controversy about the physician’s responsibility for cosmetic surgery and the possibility of shifting the burden of proof. 3. Cosmetic surgery is an obligation of result, since the service provider accepts to achieve a specific result, which is the core of the obligation itself, without which it will not be performed. 4. In these hypotheses, there is the presumption of guilt with a shift in the burden of proof: 5. The use of the appropriate technique in cosmetic surgery is not sufficient to exempt the physician from the guilt of not fulfilling his obligation. 6. The opinion of the 2nd Section, after the judgment of responsibility 802.832/MG, Reporting Justice Paulo de Tarso Sanseverino, Court Register of 09.21.2011, established that the shifting of the burden of proof is a rule of instruction, not of judgment. 7. Special

b) “The Superior Court of Justice stated that the physician who performs cosmetic plastic surgery assumes obligation of result (Resp. 81.101/PR, Reporting Justice Waldemar Zveiter, Federal Court Register of 05.31.1999 in RSTJ 119/290; Resp. 326.014/RJ, Court Register of 10.29.2001.) Case law was cited in eight of the 106 cases evaluated in this study (cases 5, 6, 22, 36, 61, 63, 83, 104).

The most cited jurists in the judgments were:

a) Rui Stoco: “What is important to consider is that nowadays the professional in the field of plastic surgery promises a certain result (in fact, this is his core activity) predicting, even in detail, this new desired aesthetic result. Some even use computer software to show the edited new image (nose, mouth, eyes, breasts, buttocks etc.) on a computer screen or printed for the customer to decide. A contractual obligation of result that must be honored is undoubtedly established between physician and patient” (Stoco R. Responsabilidade civil e sua interpretação judicial. São Paulo: Revista dos Tribunais; 2010). Cited in seven out of 106 cases evaluated (cases 9, 18, 46, 52, 61, 85, 92).

b) Sérgio Cavalieri Filho: “The Consumer Protection Code contains no special privileged regime for self-employed professionals; it merely states that the determination of their responsibility would continue to be established based on guilt, according to the traditional system. Thus, the rules of subjective liability with proof of guilt continue to apply to them in cases where they assume an obligation of means; and the rules of subjective liability with presumption of guilt in cases where they assume an obligation of result,” Filho concluded, emphasizing that “[...] in the case of failure in cosmetic surgery, because it is an obligation of result, there will be a presumption of the guilt of the physician who performed it, and it is up to him to eliminate this presumption by proving the occurrence of an imponderable factor that could eliminate his duty to compensate” (73). The obvious, which follows from the rules of common experience, cannot be denied; no one bears the risks of surgery, nor is willing to spend a lot of money to look the same or worse. The desired result is clear and precise, so that if it cannot be achieved, it will be up to the physician to prove that the total or partial failure of the surgery was due to imponderable factors.” (Cavalieri Filho S. Programa de responsabilidade civil. São Paulo: Editora Malheiros; 2010). Cited in ten out of 106 cases evaluated (cases: 13, 26, 34, 35, 46, 47, 51, 53, 54, 57).

CONCLUSIONS

This study reached two major conclusions. First, a total of 102 judgments agreed with the expert reports, and only four judgments differed from the understanding of the expert report (cases 9, 18, 19, and 89). Of these four outliers, claims were granted in three cases (cases 9, 18, and 89) due to the fact the plaintiffs could not produce a signed Informed Consent Form, revealing their supposed ignorance of the risks they took on by agreeing to undergo surgery. The other case in which the judge’s decision to grant the claim differed from the expert analysis (case 19) was decided on the grounds of alleged false advertising. In this case, the patient received a hair transplant and was not satisfied with the result. The expert analysis did not identify any medical error in this case. Nevertheless, the court understood that the physician’s advertisement on social media (Facebook) guaranteed a 100% success rate; therefore, the advertisement created an obligation to result, which was not fulfilled. Here is the judge’s decision: “The case file shows, especially in the expert report, that the plaintiff is severely bald. The same report also shows that the surgical technique used by the defendant for hair implantation was adequate, with no indication of malpractice (page 207). Therefore, it could be strictly concluded that the defendant, in the exercise of his professional activity, acted in accordance with the law, and this would exempt him from liability for the failure of the surgery. It turns out, however, that by advertising his work on social media (Facebook), he ensured 100% success ‘in hair growth after hair transplantation,’ so that the patient would have the same hair he had 20 or 30 years ago (page 87). That is, he guaranteed the result and was obliged to it, as stated in Article 30 of the Consumer Protection Code, and nothing in the file shows that the plaintiff did not follow the postoperative medical recommendations. His obligation, therefore, was of result, not of means; consequently, if the expected result is not obtained, the physician is civilly responsible for the damages.
caused to the consumer.” (Court of justice of the state of São Paulo – judicial district of Ribeirão Preto – jurisdiction of Ribeirão Preto, 4th civil court, Ribeirão Preto - SP - judgment: digital lawsuit no. 100782760.2015.8.26.0506)

The high rate of agreement between expert analysis and judgment in this study demonstrates the crucial importance of expert reports in defining judicial judgments in the Brazilian legal system.

Second, analyzing all 106 judgments, we noticed that in no case did the judges consider the 4th Article of the CFM Resolution No. 1621 of May 16, 2001, published in the Federal Register on June 6, 2001, rectified in the Federal Register No. 14 of January 21, 2002. Even in the cases denied, the understanding considered expert reports, the basis of the Civil Code and Consumer Protection Code, and the jurists and case laws previously cited.

COLLABORATIONS

FHJO  Analysis and/or data interpretation, Conception and design study, Data Curation, Methodology, Project Administration, Writing - Original Draft Preparation

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**CASE 5:** JUSTICE COURT OF SÃO PAULO, JUDICIAL DISTRICT OF SÃO PAULO, CENTRAL CIVIL JURISDICTION, 45th CIVIL COURT. Praça João Mendes, S/Nº, São Paulo - SP – Digital lawsuit No. 1034996-76.2015.8.26.0100.


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**CASE 12:** JUSTICE COURT OF SÃO PAULO, JUDICIAL DISTRICT OF SANTO ANDRÉ, JURISDICTION OF SANTO ANDRÉ, 5th CIVIL COURT. Rua José Caballero, 3, Santo André - SP – JUDGMENT: Digital lawsuit No. 100585542.2014.8.26.0554.

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continue...
Evaluating judgments and decisions involving aesthetic plastic surgery

Annex 1. Cases: Judgment Database - Website of the Superior Justice Court of São Paulo - SP


continue...
### CASE 42:


### CASE 43:


### CASE 44:


### CASE 45:


### CASE 46:


### CASE 47:


### CASE 48:


### CASE 49:


### CASE 50:


### CASE 51:


### CASE 52:


### CASE 53:


### CASE 54:


### CASE 55:


### CASE 56:


### CASE 57:


### CASE 58:


### CASE 59:


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Annex 1. Cases: Judgment Database - Website of the Superior Justice Court of São Paulo - SP
Evaluating judgments and decisions involving aesthetic plastic surgery

Annex 1. Cases: Judgment Database - Website of the Superior Justice Court of São Paulo - SP


Annex 1. Cases: Judgment Database - Website of the Superior Justice Court of São Paulo - SP

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Annex 1. Cases: Judgment Database - Website of the Superior Justice Court of São Paulo - SP