

Legal Aspects of Cosmetic and Plastic Surgery

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ABSTRACT

The tendency to beauty is an intrinsic and natural desire and quest of every human-being. According to the history, surgery to improve one's looks existed in Alexandria and in ancient Rome. Considering the developments and expansions made in the meaning of "Disease", the psychiatrists and knowledgeable people at that time, started to declare that the person's physical defects were a reflection of an inner mental disorder, thus physical features which did not meet a certain degree of perfection were seen as a kind of disease and consequently cosmetic surgical operations aimed at reflecting inner beauty, in this case, mental beauty were seen as the only kind of treatment of this disease. The main doubts regarding the legality of cosmetic surgeries were removed by considering the aim of the treatment of these kinds of surgeries and also the contemporary theories in authorization of surgeries aimed at improving one's looks, so that cosmetic surgeries now are considered legal and lawful. Although in most legal systems as well as in Islamic countries, the nature of medical obligations is the obligation to the means, however in some special cases, the nature of medical obligations is the obligation to the results. In the Iranian's legal system, the nature of surgeons' obligations has been introduced as the obligation to the results which seems reasonable and logical. So in this article, with a brief description of the history of the subject and the views of proponents and opponents, the nature of surgeons obligations it's been tried to comparatively study. An analytical investigation of the nature of the obligations of the surgeons has been dealt with in some controversial, common and related instances, i.e cosmetic and/or plastic surgery.

Keywords: Cosmetic Surgery, Plastic Surgery, Obligation to the Results, Obligation to the Means, Surgeons.

Introduction

The inclination toward beauty and youthfulness has always been residing in human beings and on introducing this idea into medicine one of the most complex

medical fields was formed; 'Cosmetic surgery'. In old myths, achieving the elixir of life and beauty was the main cause of a great many of wars and battles. The perfectionist

human seeks physical beauty and superiority as well as other material possessions and conceives of it as demonstrating their inner virtues. Progress in technology and science and increase in human ability to manipulate natural phenomena helped them step on the way to achieve the old desire; beauty. This progress continued so long that nowadays almost everybody could modify the parts of their body as they personally favor [1].

There is a significant link between cosmetic surgery and the cultural grid of a nation. British young people, for instance, care much about the shape of the lower part of their body. This is what justifies the high number of liposuction surgeries in Britain. On the other hand, in Islamic countries, due to the special type of women's clothing, facial features attract most attention; in other words, seeking facial beauty is the main reason for most of the cosmetic surgeries. In Iran, for instance, the number of rhinoplasty surgeries is comparable with the total number of other types of cosmetic surgery [1].

'Cosmetic Surgery' within the Legal Framework

'Cosmetic surgery', is not done to treat a physical defect, thus it is different than plastic surgery which is reconstructive and aims to treat a defect, such as a cleft lip [2]. Islamic religious authorities, whether Shiite or Sunni, are in disagreement regarding the permissibility of cosmetic surgery in Islam. Some regard it as totally impermissible (Haraam) while others permit it under certain conditions [3]. In the United States of America, medical negligence form the majority of the claims against plastic surgeons, which includes, "claims for improperly performed surgery, early postoperative complications (typically bleeding or infection) and long-term problems such as scarring or deformity...In addition it includes direct claims against the

surgeon arising from the administration of local and general anesthesia, for errors or delays in diagnosis, and misjudgments and omissions in the plan of treatment." [4]

Plastic surgeons like any other medical professional embark on a contractual obligation with the patient. In fact, "the patient will have a contract with her doctor and/or with the clinic or hospital where she receives treatment." [5] However, the nature of such contracts depends on the hospital, clinic, medical professional and treatment, and the breach of such contractual obligations will eventually give rise to an action for breach of contract.

Contractual Obligations of plastic surgeons: obligation to the result or to the means?

Since Mercier's verdict was delivered on May 20th, 1936 in the French Court, the majority of jurists have been in agreement that the relationship between a surgeon and his/her patient is a contractual relationship [6]. Thus far, this approach has attracted many opponents [7]. Also in common law, although less attention has been paid to the contractual aspect of this relationship, some medical liabilities are considered to be based on contract [8]. Likewise, the Iranian legal system considers medical liability to be mainly contractual [9].

To better examine the issue of obligation, jurists have made a distinction between obligation to the means and obligation to the result, a distinction which was originally proposed by Demogue, the French jurist [10]. Later on, obligation to the guarantee was also added by some other scholars [11]. Based on this distinction, the guarantor may guarantee to provide the means to achieve a determined objective and to utilize all their expertise. In such a case, confirming that the contract has not met its final objective would not suffice to prove failure to fulfill the contract. It is simply because the guarantor

has not guaranteed to meet the objective [12]. Although having been objected to by some jurists [13], such a distinction proves helpful in demarcation of obligations, especially those of the owners of medical careers [14]. It is also noteworthy that such objections were not founded on a solid ground [15].

Types of plastic surgery on the basis of necessity

On this basis plastic surgery can be considered of two types:

Reconstructive plastic surgery

These surgeries aim to treat deformity as well as improving its aesthetic features, e.g. facial plastic surgery on a person who has been assaulted with acid. Such surgeries, the necessity of which is also conventionally approved, are subject to the general rules of the surgeon's civil liabilities. In such cases the surgeon's obligation is mainly to the means [16].

Aesthetic plastic surgery

This type is also known as cosmetic surgery. As studies show, improper or excessive use of customary surgical treatment has turned into a serious problem. According to one of the subcommittees of the American Congress, approximately 2 million unnecessary surgeries are practiced in a year which results in the death of 12,000 people and loss of 10 billion dollars [17]. This surgery is not practiced for the purpose of treating a defect, rather it is mainly because of the inclination toward beauty and luxury, e.g. rhinoplasty, facelift, liposuction etc [18].

According to statistics, over 50% of those who undergo plastic surgery do not medically need it. Moreover, the experts believe that 90% of these people are interested in cosmetic surgery due to psychological reasons [19]. There is a

consensus among the majority of jurists that, in this case, the surgeon is bound by obligation to the result [20]. Also in some verdicts delivered in French courts the cosmetic surgeon was known to be responsible for the result [21]. Some writers believe that it is challenging to make a clear-cut distinction between these two types of surgery and therefore consider the obligations of cosmetic surgeons to be to the means [22], while some others have confirmed both types and regard them as necessary arguing that, basically, the obligation of plastic and cosmetic surgeons is to the means[23].

Given the fact that plastic surgery has developed into an industry now[24] and, as some scholars envisage, it will give rise to a new wave of feminism worldwide [25] as well as considering the staggering fees, remarkable increase in claims and personality traits of patients [26], on the one hand, and non-necessity of the most of cosmetic surgeries on the other [27-28], we come to conclusion that the obligation of cosmetic surgeons is of the second type: obligation to the means.

According to some researches, the distribution of personality types among those who underwent cosmetic surgery was as follows: narcissistic (19%), hysterical (11%), obsessive (10%), avoidant (9%), schizoid (6%), borderline (4%), pessimistic (3%), dependent, antisocial and paranoid (1% each). The other 35% did not belong to any of the types. As it is obvious, narcissistic personality is the majority and it shows the influence of psychological factors on inclination toward cosmetic surgery [26].

Although some jurists do not explicitly express their own opinion about this issue while stating opposing and favoring views, they subject plastic surgeons to strict regulations and in most of the cases regard their obligation as being to the result[29-30]. Some jurists are on this belief that

encouraging and persuading people to undergo cosmetic surgery is a sort of 'misrepresentation' (Ghorur principle) and claim the surgeon as fully responsible for all probable health and financial damages [31].

Plastic surgeons who provide treatment are deemed that they have the "skill of the average member of that speciality and that he or she will apply that learning and skill with ordinary and reasonable care." [32].

The majority of cases against plastic surgeons are based on lack of informed consent and such cases vastly outnumber those based on medical negligence [33]. Informed consent is the consent freely given by the patient after being provided with adequate information by any medical practitioner, and in this case, by the plastic surgeon and, moreover, after having evaluated all the possible options available, such patient decides as to whether he/she should consent or refuse such medical procedure [34]. Informed consent is built upon three pillars: capacity, understanding and voluntariness. For informed consent to subsist all three of them should be present.

It is worth noting that permissibility of cosmetic surgeries, either necessary or unnecessary, is not associated with surgeons' civil liabilities and the type of obligation, whether to the means or to the result. Some writers, referring to the law as well as some religious scholars, prove various types of cosmetic surgery legal and permissible and on this basis strive to describe the obligation of cosmetic surgeons, even in unnecessary cases, as being to the means [19]. Albeit examining their arguments shows the questionability of them, because permissibility and legality of an action do not justify ignoring civil liabilities.

Conclusion

There is an unbreakable link between cosmetic surgery and the culture of a society. Cosmetic surgery is known as a surgery

which is not practiced for a medical reason and thus is contrasted with reconstructive plastic surgery. Reconstructive plastic surgery is conventionally approved and subject to general rules of the surgeon's civil liabilities. Apparently, in such cases the obligation of the surgeon is mainly to the means. Studies show that currently dramatic increase in the number of cosmetic surgeries has turned into a threatening problem. Under such conditions and with reference to the aforementioned reasons, it seems that we ought to regard the obligation of cosmetic surgeons as being the result in order to best preserve the rights of patients. Albeit making a clear-cut distinction between necessary and unnecessary surgeries is relatively difficult; on this ground the judge should distinguish between these types according to the unique conditions of each claim.

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