CIVIL LIABILITY OF PLASTIC SURGEONS IN BEAUTIFUL AESTHETIC PROCEDURES

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ABSTRACT

On the subject of medical civil liability, the aim is to specifically address the liability of plastic surgeons who carry out strictly aesthetic procedures, since this issue still causes doubts among legal operators and generates divergent opinions. With this in mind, the aim is to create a historical and conceptual path until, having prepared the reader, we introduce the main theme of this article, which deals with the application of the civil liability of doctors as being subjective with presumed or objective guilt, and its respective consequences and implications. This is therefore a bibliographical and jurisprudential study, by means of an integrative review, which aims to study the opinion of the best doctrine, as well as the position of the higher courts, in addition to analyzing how the Brazilian legal system stands on this issue. In addition, the majority of doctrine, as well as the courts, take the view that the plastic surgeon's obligation in aesthetic procedures is one of results and, as stated above, may have objective or subjective civil liability with a presumption of guilt. In short, in view of the studies carried out, it can be seen that the aforementioned liability cannot be objective. This issue stems from the lack of legal provision and/or application of risky activity, in addition to the fact that the Civil Code and the Consumer Defense Code clearly demonstrate the application of subjective liability, taking into account that there are scholars who confuse the concepts and their respective applicability, as well as courts that differ in the application of the typicality of liability, which can lead to insurmountable difficulties for doctors involved in such disputes.

Keywords: *Aesthetic surgery; obligations of means and ends; civil liability; medical law.*

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1 INTRODUCTION

Generally speaking, civil liability is a successive legal duty that arises from the breach of obligations entered into, whether contractual or non-contractual (aquiliana). In short, it is the legal consequence of failure to comply with the duty agreed between two or more individuals, as well as society in general.

Applying the above theme to the medical field, especially to cosmetic surgery, the issue becomes questionable, given the confusion among the operators of the law themselves, whether they are doctrinaires or judges, making the issue difficult to resolve. Among the main issues that generate debate in this world is the question of the nature of the obligation that the plastic surgeon assumes and the consequence of defaulting on this obligation, which is the subject of this article.

The aim of this article is to demonstrate, by means of a thorough bibliographical and jurisprudential research, through specialized doctrine and the case law of the higher courts, what type of civil liability would be credible and plausible, applicable to aesthetic beautifying procedures, when the possibility of applying objective liability will be investigated, as well as subjective liability with presumed guilt, which is the nodal point of this article.

Furthermore, the issue is of the utmost importance to medical professionals who work in aesthetic plastic surgery and the legal community, given that today's jurisprudence attaches far too much probative weight to guilt, not to mention impossibility. What's more, this situation doesn't just concern the aforementioned specialty, but also has practical consequences for other medical areas.

Corroborating the topicality of the issue, today there is a stigma surrounding medical activity about the so-called "medical error", which can be attributed to any unachieved results or bad results resulting from procedures carried out by medical professionals. This imbroglio generates discussion about the use of the term mentioned, with the Brazilian College of Surgeons (CBC) recently requesting "a review of the concept and nomenclature of medical error in compensation lawsuits throughout the country" (Collucci, 2023).

Furthermore, this research will seek to highlight an interpretation that achieves more justice in the doctor-patient relationship, thus bringing more equity in duties and rights. In this way, society as a whole will benefit from the debates that will be held in

this article, which will be based on the best specialized doctrine, as well as recent judgments to demonstrate the positions currently applied.

2 HISTORICAL NOTIONS OF PLASTIC SURGERY AND PROPEDECTIVE CONCEPTS

The origin of plastic surgery is linked to the healing of wounds, dating back thousands of years, caused by handling stones, weapons, arrows and animal attacks. Faced with such situations, in a period marked by the lack of appropriate instruments for care, primitive peoples dealt with major problems, such as bleeding, infections, pain, among other problems, which, in theory, healed slowly, however, from then on, intentionally, they began to apply means for rapid healing, which can be characterized as the first example of a reparative procedure (Neligan; Gurtner, 2015).

Continuously, there is a lot of information about surgeries that took place in remote times, such as in Ancient Egypt (many of them contained in the Smyth papyrus, the oldest medical text), in Mesopotamia (800 blocks of medical texts were discovered in excavations at the palace of Nineveh), India (whose medical knowledge can be found in the holy book *Ayurvedam),* Greece (whose medicine was influenced by Hippocrates, the greatest physician of his time), among other ancient peoples who had great influence in their eras (Neligan; Gurtner, 2015).

A historical leap is made due to the few pages that this article covers, as explained by Wanderby Lacerda Panascom <13074>(apud</13074> Stoco, 2007), plastic surgery was recognized as a specialty from 1914 onwards, for the purpose of adapting people who had gone through the trauma of war.

Furthermore, it is worth mentioning that the aforementioned specialty is one that has evolved the most in recent years. This achievement stems from the great adherence and prestige acquired by society, as well as the unparalleled results that this branch has been presenting (França, 2021).

Currently, the issue is gaining importance and drawing the attention of specialists in the field, given that Brazil ranks second internationally among the countries that perform the most plastic surgeries, second only to the United States (Valor Econômico, 2022). This phenomenon has sparked debates about self-image

in the context of consumer society, where the human body and image have come to be seen as products (Fontanive, 2023).

In view of the above, and finally, according to Cavalieri Filho (2021, p. 477), plastic surgeries are distinguished into corrective, or reparative, and aesthetic. The first aims to “correct congenital or traumatic physical deformity”. The other, which is the subject of this article, has the aim of “improving appearance, correcting some physical imperfection - thinning the nose, eliminating facial wrinkles”, among other things.

2.1 DIFFERENTIATION BETWEEN OBLIGATIONS OF MEANS AND RESULTS AND OBJECTIVE AND SUBJECTIVE LIABILITY

Having made the initial explanations about plastic surgery, and still dealing with introductory issues, it is necessary to point out that civil liability does not necessarily arise when a contract is made and/or an obligation is entered into. This is a successive legal duty, in other words, in a legal relationship that deals with an obligation, if it is found that the obligation has been breached, civil liability arises from this breach (Gagliano; Pamplona Filho, 2022).

It is also necessary to explain that, within the universe of obligations, they are subdivided in terms of content, being obligations of result and obligations of means, the classification of which is attributed to René Demogue, according to the doctrine of Tartuce (2022). In this vein, Venosa (2022, p. 61) states that in the case of results, “what matters is whether the desired result has been achieved. Only then will the obligation be deemed to have been fulfilled”, and continues that in “obligations of means, it must be assessed whether the debtor has used good diligence in fulfilling the obligation”.

Corroborating the above thesis, Diniz (2022) makes the distinction in a lighter and more palatable way for readers, saying that in the obligation of means, the debtor should only apply prudence and common diligence in an attempt to obtain a result, but without being committed to achieving it. And with regard to the obligation of result, he says that the debtor is bound to produce a result, and if he fails to do so, the obligation assumed is defaulted.

As discussed above, the breach of an obligation gives rise to the so-called liability, which in this article will be in the civil field, not forgetting, however, that it may

exist in the criminal sphere, taking into account the existence of contractual and non-contractual obligations (aquiliana), concepts that will not be dealt with here. It should be noted, therefore, that the purpose of liability is to try to bring the obligation back to its *status quo,* and, if this is not achieved, compensation will be sought for the damages resulting from non-compliance (Gagliano; Pamplona Filho, 2022).

Looking back over history, the revoked Civil Code of 1916, as a result of the French influence adopted by Clóvis Bevilaqua, based civil liability on the prism of subjectivity, and guilt was measured by means of the institutes of imprudence, malpractice and negligence, as stated in art. 159 of that *Codex.*

Nevertheless, the aforementioned Code also included objective civil liability in specific and sparse articles, which were not very representative, as concluded, for example, in art. 1.529 (Gagliano; Pamplona Filho, 2022).

On the institutes of guilt, provided for in arts. 186 and 951 of the current Brazilian Civil Code with regard to medical liability, the concept is that negligence manifests itself in an omissive act, when the debtor of the obligation fails to take the necessary precautions in carrying out a certain activity, as well as acting with sloppiness, inattention and lack of interest in the obligation. Recklessness, on the other hand, is characterized by commissive conduct, in which unjustified, hasty acts are observed, without the observance of caution in carrying them out. Lastly, malpractice can be translated into the inability to perform a certain duty, as well as "the lack of observation of the rules, the deficiency of technical knowledge of the profession, practical unpreparedness" (Kfouri Neto, 2021, p.110).

Currently, the civil code in force, in addition to including the general clause of subjective liability, expressed in arts. 186 and 927[1], *caput,* expressly enshrined the general clause of strict liability, the exegesis of the Sole Paragraph of Article 927, thus introducing the Theory of Risk in the words of the Code (Pereira, 2022).

In general terms, subjective liability manifests itself under the aegis of guilt, and in some cases presumed guilt may be applied, while objective liability is exempt from the need for guilt in the *lato sensu,* form, and the reversal of the burden of proof is applied automatically, and it is up to the defendant to raise only issues relating to the

[1] Art. 927. Whoever, through an unlawful act (arts. 186 and 187), causes damage to others, they are obliged to make reparation. Sole Paragraph. There will be an obligation to repair the damage, regardless of fault, in the cases specified by law, or when the activity normally carried out by the author of the damage implies, by its nature, a risk to the rights of others.

causes excluding unlawfulness, and arguments relating to guilt cannot be raised in this case (Stoco, 2007; Gagliano; Pamplona Filho, 2022).

3 COSMETIC PLASTIC SURGERY: FROM THE NATURE OF THE OBLIGATION TO ITS LIABILITY

According to Kfouri Neto (2021, p. 237), plastic surgeries are differentiated into restorative plastic surgery, which aims to “repair real illnesses, congenital or acquired”, and aesthetic surgery itself, which is subdivided into strictly aesthetic surgery and aesthetic surgery *lato sensu*. For practical purposes, we will not apply the subdivision proposed by the author above, as this article is not intended to exhaust the subject.

In this sense, as stated above, plastic surgery has two modalities: it can be aesthetic or restorative, also corrective, in the words of Cavalieri Filho (2022), and this modality is determined by the end-object that the patient aims to achieve, generating, from this identification, the configuration of obligation of means or end (result). However, with regard to cosmetic surgeries, although they seem to be a settled issue, there are currents, albeit in the minority, that aim to reignite the above debate, according to Dantas (2022) and França (2021).

Moving on, having considered the nature of the obligation, we will come to the crux of this article, which is the most appropriate form of civil liability in cases of cosmetic surgery, subjective with presumed guilt, or objective? It should be noted that legal practitioners confuse the institutes, both legal scholars and judges, even though there are different consequences, as will be seen.

3.1 OBLIGATION OF RESULT OR OBLIGATION OF MEANS?

In the universe of medical specialties, there are those that generate, by unanimous opinion, obligations of result or means, allowing no questions to be asked. However, the same cannot be said of the field of aesthetic plastic surgery, as it is shrouded in nebulous doubts (Kfouri Neto, 2021).

In this regard, with regard to the opinion of the courts in Portugal, it should be noted that the Superior Court of Justice (STJ) has established an understanding,

despite doctrinal discussion to the contrary, that strictly cosmetic surgeries are obligations of result (França, 2021).

An example of this is the judgment in REsp n.° 236.708/MG, judged on 10/02/2009 by the STJ, in which the Court of Citizenship stated that, as a rule, the obligation assumed by doctors is one of means, whose object of the contract is not the cure, but the commitment to provide possible care, unlike cases of merely aesthetic plastic surgery, with the understanding that the doctor commits himself to a certain result for the patient, so he assumes an obligation of result.

3.2 OBJECTIVE OR SUBJECTIVE LIABILITY WITH PRESUMED GUILT?

As stated in the topic above, for the purposes of this debate we will adopt the majority position taken by the doctrine and case law regarding the nature of the obligation, which is one of result, as can be seen in Gagliano; Pamplona Filho (2022, p.278), Tartuce (2022, p. 894), Pereira (2022, p. 240), among others.

In a quick look back, the revoked Civil Code of 1916 regulated the civil liability of doctors through Article 1.545, attributing subjective liability to them, and guilt had to be verified. In addition, the current Civil Code provides, in its article 951, that the professional who, through fault, causes the death of the patient, aggravates an illness, causes injury or renders the patient unable to work must pay compensation, and the articles of the Civil Code can also be applied in medical cases. 186[2] and 927, *caput* and Sole Paragraph.

Having made the above points, the 4th panel of the STJ, in its case law report no. 491[3] - which is transcribed here in part - strengthened the view that cosmetic surgery results in subjective liability with presumed guilt, corroborating the thesis established in the judgment in REsp no. 236.708/MG, the text of which has already been transcribed in this article. Let's see:

> COSMETIC SURGERY. MORAL DAMAGES.
>
> In aesthetic surgical procedures, the doctor's liability is subjective with a presumption of guilt. This is the understanding of the panel which, in rejecting the special appeal, upheld the condemnation of the appellant - a doctor - for the moral damage caused to the patient. [...] It was then argued

[2] Art. 186. Anyone who, through voluntary action or omission, negligence or recklessness, violates a right and causes damage to another, even if exclusively moral, commits an illicit act.

[3] https://www.stj.jus.br/publicacaoinstitucional/index.php/informjurisdata/article/view/4620/4796

> that, although the obligation is one of result, the doctor's responsibility remains subjective, with a reversal of the burden of proof, and it is up to him to prove that the damage suffered by the patient came from external factors unrelated to his professional activity.
> In other words, the surgeon's presumption of guilt for unsuccessful plastic surgery can be overturned by conclusive proof of the occurrence of an imponderable factor, capable of exempting him from the duty to indemnify. It was also considered that, although unforeseeable circumstances and force majeure are not expressly provided for in the CDC, they can be invoked as grounds for excluding the liability of service providers. [...] REsp 985.888-SP, Min. Luis Felipe Salomão, judged on February 16, 2012.

However, despite the establishment of the aforementioned thesis, the STJ panels differ on the nature of liability, sometimes applying subjective liability with presumed guilt, sometimes applying objective liability. In this vein, the Fourth Panel of the STJ, in a recent judgment, applied strict liability, as will be seen below.

> INTERLOCUTORY APPEAL IN SPECIAL APPEAL. DECISION OF THE PRESIDENCY. RECONSIDERATION. ACTION FOR DAMAGES. INFRINGEMENT OF ARTS. 3, § 2, AND 4 OF THE CDC. LACK OF PREQUESTIONING. ADMISSION OF FICTITIOUS PREQUESTIONING. NEED TO INDICATE INFRINGEMENT OF ART. 1.022 OF THE NCPC. PLASTIC SURGERY. STRICT LIABILITY. OBLIGATION OF RESULT. EXCLUDING SITUATIONS. ABSENCE. DUTY TO INDEMNIFY. REVIEW. PRECEDENT 7/STJ APPLIES. INTERLOCUTORY APPEAL GRANTED TO HEAR THE INTERLOCUTORY APPEAL AND DISMISS THE SPECIAL APPEAL.
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> [...]
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> 3. According to the jurisprudence of this Court, "since cosmetic surgery is an obligation of result for which the doctor's responsibility is presumed, it is up to the doctor to demonstrate that there is any exclusion from his responsibility that could rule out the patient's right to compensation" (AgRg no REsp 1.468.756/DF, Rap. Minister MOURA RIBEIRO, DJe of 24/5/2016).
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> [...]
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> (AgInt no AREsp n. 1.988.403/RJ, rapporteur Minister Raul Araújo, Fourth Panel, judged on February 13, 2023, DJe of February 24, 2023).

This position has even been applied to other judgments over the years, as can be seen from the following quotes: 1) AgInt no AREsp n. 1.518.298/DF, judged on 29/10/2019; 2) AgInt no REsp n. 1.544.093/DF, judged on 9/8/2016; 3) AgRg no REsp n. 1.468.756/DF, judged on 19/5/2016; among others. In addition, the speech of Justice Luis Felipe Salomão of the STJ, delivered in the judgment of REsp n°. 062.996/PR, who, when referring to the surgery that was the subject of the dispute, said, "if it were the case of cosmetic surgery, because there would be an obligation of result, we could still think of objective liability, even if in lato sensu".

In the opposite direction, the aforementioned court has on several occasions taken the position of subjective liability with presumed guilt, among them: 1) REsp n. 985.888/SP, judged on 16/2/2012; 2) REsp n. 1.269.832/RS, judged on 6/9/2011; and 3) REsp n. 236.708/MG, judged on 10/2/2009.

The reader of this article may be wondering what the practical importance of applying one or the other responsibility is, as it seems that both have the same purpose. However, Tartuce (2022 p.453) makes a precise distinction between the two:

> [...] it is pertinent to clarify the practical difference between presumed guilt and strict liability, a topic that has always generated doubts among law enforcers. To answer this profound technical question, both presumed and strict liability reverse the burden of proof, meaning that the plaintiff does not need to prove the defendant's fault. However, as a key difference between the categories, in presumed guilt, a hypothesis of subjective liability, if the defendant proves that he was not at fault, he will not be liable. On the other hand, in the case of strict liability, this proof is not enough to exclude the agent's duty to make reparation, which is only removed if one of the causal link excluders is proven [...]. (Tartuce, 2022, p. 453).

According to Tartuce (2022), strict liability will manifest itself as a result of a legal provision or risky activity on the part of the perpetrator of said damage, according to the exegesis of art. 927, Sole Paragraph, of the CC/2022. Continuing, in his point of view, it is not credible to fit medical activity into the first possibility mentioned, given that there is no legal provision that expressly contemplates the above activity, nor in the second part of the Sole Paragraph mentioned, when it speaks of risky activity, since, specifically in aesthetic plastic surgeries, the risk is proposed by the consumer, it is he who comes out of inertia and seeks the medical professional for the purpose of beautification, assuming for himself the risks inherent in the procedure.

It is clear that the concept of risky activity has remained an open concept, thus generating various questions about what these activities might be in practice and the ways in which they might manifest themselves. In this sense, Gagliano and Pamplona Filho (2022, p. 186), in their explanations, call the term "an excessively open concept", in view of the explanatory gap that remained when the law was born.
Another point worth highlighting is found in the Consumer Defense Code, in its article 14, paragraph 4[4], which definitively enshrined the subjective liability of liberal

[4] §4 The personal liability of self-employed professionals shall be determined by establishing fault.

professionals, where it is expressly stated that liberal professionals will be held liable upon verification of fault.

In this sense, Nader (2015) explains the importance of identifying the nature of the obligation involved in the legal relationship, because if it is an obligation of result, and the result is not obtained, presumed guilt will be established, and the professional will need to demonstrate that it was not his conduct that caused the default of the obligation and/or prove that he acted in accordance with the practice in those procedures, as well as acting with technique, diligence and prudence. Faced with this situation, the so-called reversal of the burden of proof arises, regardless of whether the patient proves to be hypo-sufficient or not, and the verisimilitude of their statements is not taken into account.

In addition, the plastic surgeon can use evidence to prove that he was not at fault - negligence, imprudence and/or malpractice - in carrying out the medical activity, as well as the exclusions of unlawfulness that the national legal system has, the hypotheses being contained in art. 188 of the CC/2022 and in § 3 of art. 14 of the CDC, and, although not prescribed by law, unforeseeable circumstances and force majeure can be alleged as excluding causes, according to the judgment of REsp 985.888- SP, Min. Luis Felipe Salomão, judged on February 16, 2012, of the Fourth Panel of the STJ.

Lastly, it should not be forgotten that the liability of plastic surgeons in cosmetic surgeries, despite the nature of the obligation being considered one of results and the dichotomy of jurisprudence established by the higher courts, is subjective with presumed fault[5], and it is up to the medical professional to prove that he acted without fault, or even to demonstrate the existence of exclusions from unlawfulness, in order to be exempt from the intended indemnity, as is clear from the best doctrine, as well as the laws mentioned above in this article.

4 CONCLUSION

Since its inception, plastic surgery has aimed to re-establish the well-being of the individual, from the earliest days, with restorative surgeries, as well as attempts to “improve” the body through aesthetic surgeries. The law, for its part, has not shied

[5] Corroborating, see vote of Min. João Otávio de Noronha in the judgment of REsp n.° 236.708 - MG.

away from debating and studying the issue through its operators, a study that continues to this day.

However, it has to be said that, within the Brazilian context, cosmetic surgeries took a long time to be assimilated as something beneficial that medicine had provided, even generating debates about the legality of such procedures. Once the debate was over and the lawfulness of these procedures was seen, the doors were opened to them, even though they were still tainted by distrust in the courts.

In this work, as has been said, the majority position has been adopted in order to characterize the beautifying surgeon's obligation as one of result, although this author sees the possibility of debate on the subject.

That said, if strict liability were to be applied to doctor-patient relationships, it would be unnecessary to establish fault, and the doctor would only have to argue that there is no evidence of wrongdoing, which is often not easy to obtain, thus assigning the professional the task of carrying out "diabolical" proof, in other words, the doctor would be denied the right to prove that he acted in accordance with the practice in those procedures, as well as acting with technique, diligence and prudence. In fact, according to Kfouri Neto (2021), it is a clear mistake to treat the plastic surgeon's responsibility without measuring fault, giving it an objective connotation.

The plausible and accepted position regarding the professional plastic surgeon in aesthetic procedures is subjective liability with presumed guilt. This position is justified in order to give the medical professional a wider range of defenses, bringing equality of evidence to the parties, as well as by the legal provision set out in the Civil Code, as well as in the provisions of art. 14 §3 and 4 of the Consumer Defense Code.

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