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BALTIC JOURNAL OF LAW & POLITICS

A Journal of Vytautas Magnus University
VOLUME 15, NUMBER 7 (2022)
ISSN 2029-0454

Cite: *Baltic Journal of Law & Politics* 15:7 (2022): 390-402
DOI: 10.2478/bjlp-2022-007028

Acceptance of risk as a means of driving medical liability in non-therapeutic businesses

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Received: October 15, 2022; reviews: 2; accepted: December 14, 2022

Abstract

The aim of the research is to clarify and demystify the idea of risk acceptance as a means to advance the medical civil liability in cosmetic operations, and to indicate whether acceptance of the risk is required to be issued by a person of a certain age, or that mere knowledge of the risk in cosmetic operations is considered an acceptance of it and thus the possibility of paying the medical civil liability that It is based on it , and based on the above, the researcher reached a set of results, the most important of which is that cosmetic operations may be therapeutic and may be ameliorative, and this classification has a role in determining the impact of accepting risks on this medical procedure. Because it is a valid acceptance of a legitimate procedure, but if the surgery is ameliorative, there is no room to say that the risks are accepted because the intent of the treatment is not available, which results in the expected benefits not being proportional to the expected harms . its terms and conditions, and considering acceptance of the risk as a means of paying the responsibility of the attending physician.

key words

Acceptance of risk, medical civil liability, plastic surgery.

Introduction

Plastic surgery is one of the most common surgeries in the world, and it is accepted by both sexes, but the percentage of women far exceeds the percentage of men, and due to this prevalence, mistakes are possible, so the plastic surgeon must be under the circle of legal accountability in all its forms, due to the increasing

incidence of errors in the field of plastic surgery Which in many cases may lead to death, or exposure to serious effects and injuries that lead to permanent disability that negatively affects and disrupts organ functions.

In order to determine the nature of civil liability for medical errors and damages between tort and contractual, we find many legal problems, which also exist in describing that civil liability between exerting care and achieving the result, especially in plastic surgeries that resort to people who do not complain of any symptoms but rather the desire to improve the look and appearance. In most cases , and accordingly, the subject of our study will be the acceptance of risk in non-therapeutic medical actions (cosmetic operations) as a means to ward off civil liability on behalf of the defendant who caused the damage, to the effect that there are many means leading to the thrust of civil liability on behalf of the defendant, and these means are called exceptional means to ward off Civil liability, which means that the defendant who caused the damage can pay legal responsibility for himself if he can prove that there is no personal fault with regard to the injured party.

Problem Research

The problem of the study is the lack of legislative and legal texts that directly affect plastic surgery and regulate the liability arising from it in a detailed and clear way, and how to pay responsibility for it as a result of accepting the risk in its procedure. Therefore, the research problem can be formulated by answering several questions **with: Medical civil liability in plastic surgery? Is it required to accept the risk to be issued by a person of a certain age? Is mere knowledge of the risks involved in plastic surgery considered acceptance?**

Importance Research

The importance of the study is highlighted by the importance of its topic, risk acceptance as a means of pushing the plastic surgeon's civil liability in the Jordanian legislation, where the plastic surgeon 's civil liability raises a great deal of controversy in the medical and legal world due to the continuous development in the field of plastic surgery operations, yet this responsibility can be paid according to the acceptance theory risk.

Objectives Research

The idea of the research is to clarify and remove the ambiguity about the idea of risk acceptance as a means to push the medical civil liability in cosmetic operations, and to indicate whether accepting the risk is required to be issued by a person of a certain age, or is it mere knowledge of the risk in cosmetic operations considered acceptance of it and thus the possibility of paying civil medical liability for which you are doing.

Methodology Research

The researcher will rely on several approaches to achieve the objectives of the study and address its problem. Among the most prominent of these approaches is the descriptive and analytical approach to study the phenomenon as it exists in reality and describe it accurately. Beautification by referring to specialized books and references.

first topic

Legal conditions for the idea of accepting the medical risk

Medical intervention requires compromising the safety of the human body, through the doctor's use of medical devices and equipment, as well as inserting a scalpel into the patient's body during surgical operations, which may cause the patient to suffer wounds and pain.

It is not possible to start medical work except after obtaining the patient's consent, and it became clear to us that there is a difference between the acceptance necessary to start the medical work by the attending physician, and the acceptance of the medical risk, because the latter is done after enlightening the patient about the medical actions and the means that will be taken, as well as the potential risks of Medical work, and after this foresight, acceptance is issued to bear the possible damages that result from medical intervention, away from the doctor's fault outside the principles of medical technical rules. In addition to the fact that accepting the medical risk has an impact on the civil liability of the attending physician if approval or acceptance is made according to the conditions necessary for the idea of accepting the medical risk. Accordingly, we will divide this research into two requirements:

First requirement : the informed consent issued by the patient

The doctor cannot start or proceed with the medical work, until the consent or consent of the patient is obtained, because this consent is important in not fulfilling the doctor's responsibility or fulfilling his responsibility in the event of not obtaining consent(Al-Taie,2016). It is the responsibility of the doctor to obtain the consent of the patient before embarking on any therapeutic intervention (Please refer to the text of Article (8/a) of the Medical and Health Liability Law of 2018), because the doctor cannot force the patient to enter into a therapeutic intervention (Al-Shaiban,2009). In the event that the surgical intervention involves risk, obtaining the patient's consent is particularly important (Al-Taie,2016). As a general principle, consent is required from the patient himself as long as he is able to express his will, and this acceptance is considered legally, but if the patient is in a condition that does not allow him to express his acceptance, then the acceptance issued by his legal representatives can be considered(Mansour,2000) .

In addition, the patient's consent to perform a medical intervention is one of the established and stable principles of medical law. Each person has the right to decide whether or not to submit his body to treatment (Adawi, 2001). Likewise, the doctor's commitment to obtaining the patient's consent is a condition for carrying out medical work, and acceptance must be available at every stage of medical treatment as well. Surgical procedures on his body, that is, the doctor is obligated to obtain from the patient himself a new acceptance for each medical work (Khalil, 2016).

The doctor may not touch the patient's body, even for the purpose of treatment, except after obtaining his consent. Otherwise, that is, in the event that the doctor does not take the patient's consent, the doctor is mistaken, and he bears the consequences of the risks that result from the medical work, even if he did not commit mistakes in undertaking the medical work (Mansour, 1999).

not only a condition for carrying out medical work, but it is a necessary and necessary condition for carrying out medical interventions as well. As for the form of acceptance issued by the patient, it is either explicit or implicit. The explicit acceptance is in writing, orally, or by the customary sign (Al-Awn, 2004).

As for tacit acceptance, when the patient goes to a doctor's clinic after stating his specialization and academic qualifications through the media, this is considered tacit acceptance by the patient. The direction of the doctor, and the Jordanian Medical Constitution of 1972 confirmed this by saying: "Every medical work must target the patient's interest and be done with his consent or the consent of his commander if he is a minor or unconscious."

Acceptance may be issued by the patient himself, and in this case it is not required that the patient enjoy full capacity, and it is sufficient for the patient to be distinguished, that is, to be able to assess his circumstances and the risks he faces through surgical intervention, because the patient in this case does not commit to anything, but rather expresses His right to dispose of his body for the legitimate aim of ridding him of disease (Nakreesh, 1995). And the acceptance may have been issued by his legal representative in the event that the patient was unable to express his will, as the Jordanian Human Organ Transplantation Law required the consent of the guardian in the surgical work. The consent issued by the donor may be tacit or explicit, and it may also be oral or written. As for the Jordanian legislator, it is stipulated that the donor's consent be written and express before starting the process of organ transplantation, as stipulated in Article (4/a) of The law of utilization of human organs, where it says: "3- That the donor agrees in writing, with his full will and capacity, to transfer the organ from his body, before carrying out the transfer." Through the previous text, we find that the Jordanian legislator has given protection to the donor, as he will give up one of his organs and stipulated that It is before the operation until the donor is satisfied after a long deliberation.

There was a difference of opinion about the acceptance of the minor's acceptance, so a trend went to the acceptance of his acceptance in medical intervention, especially in human organ transplants (Al-Fadl, 1990). Another

approach went to not counting the minor's admission, because his acceptance represents a danger that threatens his life, and the legal representative's acceptance is approved and is based on a judicial decision. A team tended to distinguish between the privileged minor and the undistinguished minor, that is, relying on a certain age at which the minor can understand the medical intervention and the risks surrounding this intervention, and what he is exposed to in his health condition, meaning that the acceptance of the minor can be considered in the event of understanding and awareness without taking the consent of his legal representative. Sometimes the approval of his legal representative is taken as a precaution.

And if the general principle is that the doctor obtains the patient's approval to start medical work, then the doctor can bypass obtaining the patient's approval in case of urgency, as the doctor may have to perform medical intervention in a dangerous situation that requires speed, because waiting for the patient's approval or his legal representative to be taken. There is a threat to the patient's life or the safety of his body, therefore, and for the benefit of the patient, the doctor has the right to bypass obtaining the consent of the patient or his legal representative. Or the doctor proposes to perform a surgical operation after obtaining the patient's consent, and during the operation it becomes clear that there is a disease other than the one for which the operation was performed, and his treatment does not allow any delay for him to take the procedure before obtaining the approval (Al-Haddad, 2003).

Likewise, the doctor can bypass obtaining the patient's consent in the event of intervention in order to immunize him from infectious diseases and epidemics, because the matter is related to preserving the health of citizens, so the matter does not depend and does not depend on the patient's acceptance or non-acceptance (Al-Abrashi, 2010). The Jordanian Medical and Health Responsibility Law of 2018, Article (7/f), indicated that it is possible to bypass the patient's consent, but on the condition that his family, representatives, or legal representative be informed in case the patient's life is in danger.

We conclude from this that the patient's consent is of great importance in the doctor's direct medical intervention on the patient's body, because if the patient's consent is not obtained, the doctor cannot initiate medical interventions. And it requires that acceptance be before starting any medical intervention, and the importance of patient acceptance increases as the risks surrounding the medical work increase. Also, the doctor cannot initiate medical work on the patient's body without the patient's consent, even if this intervention is for the benefit of the patient, and his consent is required at every stage of the medical intervention. A doctor who performs medical work without the consent of the patient is at fault and bears the risks resulting from this intervention. The acceptance issued by the patient is either explicit, like signing a pledge, or it is implied. In Jordan, work in hospitals and governmental health institutions is done by obtaining the patient's consent explicitly and in writing by signing an undertaking form certified by the legal department supporting the patient's consent to surgical intervention, as well as the signature of his legal representative (the

patient's family). If the patient is fully competent, then his consent is expressed by him, but if he is a minor, he must have an understanding, awareness and assessment of the risks surrounding the medical intervention. In Jordan, the consent of the patient's guardian is taken instead of the minor to perform the medical intervention. In addition to the possibility of the doctor bypassing obtaining the patient's consent or his legal representative in case of urgency, or if the patient's life is in danger and requires medical intervention without waiting for the patient's approval, then the approval and notification of his legal representative or guardian is obtained. In addition to the attending physician obtaining the patient's acceptance of the medical intervention, this acceptance must also have been issued by the patient after being informed by the doctor of the necessary information about the medical intervention in terms of the information, means and risks surrounding this intervention. This insight is considered one of the obligations of the doctor for the purpose of Informing the patient of the risks involved when performing a medical intervention.

Second requirement : the insight of the patient

We said previously that the conditions necessary for the application of acceptance of medical risk, that there be an acceptance issued by the patient before the doctor begins the medical work, and acceptance is of great importance in medical intervention, and this acceptance must be issued by the doctor's insight, and the doctor's obligation to see his patient according to the contract The medical practice is the best application of the principle of respecting the will of the patient, as the doctor cannot perform any medical intervention without obtaining the patient's own consent or his legal representative. And the acceptance issued by the patient cannot be counted unless it is issued by an informed will, as the doctor must enlighten his patient by providing him with all the necessary information about his health condition(Al-Obeidi,1998) .

The doctor's obligation to enlighten the patient in the field of medical responsibility in the event of the conclusion of a medical contract between the patient and the doctor is an obligation pursuant to a consequence, as this contract is not concluded without consent or approval, and this approval must have been issued by a free and informed will, as the doctor must Inform and provide the patient with all necessary information in order to issue acceptance in a free and informed manner. This commitment is in order to respect the patient's right to life and physical integrity, and this has importance in the medical field and is considered a warning or a previous warning in the medical contract. This is one of the risks as a result of medical intervention(Hussein, 2016).

The doctor must also inform the patient of the dangers that the disease may lead to and the consequent developments of this disease, in addition to providing him with all complete and truthful information and referring him to take the appropriate decision(Malas, 2019). Envisioning the patient is by informing him of his health condition, and it is a necessary and necessary means for the patient to

be in an environment of his order, and to be able to achieve a balance between the risks achieved and the desired benefit from the medical intervention, so that it becomes clear from this that the patient's insight includes informing the patient and providing him with all the necessary and necessary information and the risks that surround the medical work. It also includes the necessary treatment methods that the patient must follow in order for the patient to be able to make the appropriate decision and the medical interventions his body is exposed to.

And the case of necessity that requires the doctor to perform the surgery immediately, otherwise the patient's life will be endangered, so that there is no time to inform him or contact him, and this is what the Jordanian Medical Constitution stipulated in Article (18) of it, which states: "If the doctor requests an emergency in order to provide assistance to a patient who is incapacitated or who has lost his ability to act and who was unable to obtain legal approval in a timely manner, and to establish this in a timely manner, he must carry out the necessary treatment without regard to any other consideration.

required for the insight to be in a language that is easy for the patient to understand, while avoiding the use of medical and scientific terminology, and the doctor does not guarantee that his patient will be enlightened with all the technical details that he cannot absorb or understand scientifically (Hanna, 2008). Which indicates the existence of a close relationship and correlation between the acceptance issued by the patient and the obligation to inform him about the risks surrounding medical work (Ajaj, 2004).

We conclude from this that the acceptance of the medical risk requires an acceptance issued by the patient to undertake the medical work, and this acceptance requires that it be issued in the light of the doctor's insight to his patient with the necessary information, risks, benefits of the medical work and its complications, in order to make it easier for the patient to make the appropriate decision in that. It turns out that the patient's insight is one of the doctor's obligations, and unlike him, the doctor bears the civil responsibility for not informing the patient of his health condition and the risks that he may be exposed to. And the patient's insight so that he is aware of his order and can achieve a balance of the benefit achieved from medical work and the risks that he may be exposed to. In addition to the existence of a close correlation between the patient's acceptance and the commitment to his insight, as the patient's acceptance cannot be considered for the purpose of undertaking medical work unless this acceptance is issued by a free will and informed by the risks of medical work.

The second research

The impact of risk acceptance on the establishment of medical civil liability resulting from non-therapeutic actions

Non-therapeutic medical works are for the purpose of achieving a purely scientific goal, such as a medical experiment, or achieving a moral benefit for a person, such as plastic surgeries.

first requirement : the nature of the plastic surgeon 's civil liability (contractual or tort)

That for the application of the rules of contractual liability, there is a direct contractual relationship between the victim and the one who caused the damage, and given that plastic surgery does not imply the necessity that requires urgent surgical intervention, as it takes place in natural conditions in which the decision is taken carefully and deliberately, so the relationship between the plastic surgeon is considered. The patient has a contractual relationship except for the case of necessity, meaning that most cases of civil liability for plastic surgeons are contractual.

And we find that plastic surgery clearly shows the nodal nature, as the person who is about to perform these surgeries is desiring plastic surgery and enjoys good health and does not suffer from diseases or a physical ailment, so he has the freedom to choose for the cosmetic embarrassment who desires a free and sound will, so if the surgery was performed in a hospital It is public and the contract between the plastic surgeon and his patient was made in his private clinic, so the bond between them is contractual.

The legal nature of the doctor's responsibility, especially the plastic surgeon's, has sparked great controversy and a jurisprudential and judicial dispute. Some have turned to the doctrinal nature of the doctor's responsibility, while others have gone to the tortious nature of this responsibility. The existing contract between the doctor and the patient is valid - its elements and conditions are available - and damage resulted from the breach of the contractual obligation, the contractual liability is realized, and whenever the valid contract is not valid or non-existent, the tort liability is realized (Al-Fawzan, 2008).

In Jordanian legislation, we find that civil liability is based on error, and in addition to this responsibility based on the idea of error, there is responsibility from an objective point of view, which includes several cases that narrow the scope of liability based on error. What is required is to prove it, and this and the criterion for determining the error in the scope of tort liability is the deviation from the usual behavior of the man with awareness and realization of the duty entrusted to him, but in the scope of the contractual responsibility the criterion of error is the failure of the debtor to implement his obligations agreed upon in the contract or according to what is required by law, and the element of error It includes two elements: Material: It is an act of infringement on the part of the perpetrator of the error and takes the form of an act or omission. The other is moral: which is the element of perception (Abdel-Rahman, 1994).

This jurisprudence has clarified the cases of contractual liability of the plastic surgeon, which is (the case of the doctor's commitment to achieve a result - the case in which the goal of the surgical intervention is to repair and improve what has been spoiled by time, i.e. just for cosmetic purposes only), as well as cases of tort liability for him, including "cases in which the surgical intervention is

complementary as a result Disease or accident suffered by the patient in the event that the mutilation causes psychological pain for its owner, prompting him to get rid of it, and the surgeon must prove this with the testimony of psychologists.

In plastic surgery, the error is wider in scope than in other surgeries, as the plastic surgeon adheres to some issues and matters that are required by the specificity of plastic surgery in addition to the cases and images of error recognized in medical liability in general, and his failure to fulfill his contractual obligations will have committed an error that requires compensation .

Accordingly, the opinion in Jordan has settled in jurisprudence and jurisprudence that the responsibility of the doctor or plastic surgeon is originally contractual, based on the contract concluded between the doctor and the patient, and it is considered tort when this contractual bond does not exist or the contract is void. This is a rare occurrence, and we see that this trend applies in medicine Cosmetic surgery is significantly more than other branches of medicine, as the patient has absolute freedom to choose his cosmetic doctor and learn about the treatment method and its risks , unlike other medical specialties.

second requirement : the effect of accepting the risk in paying medical responsibility in plastic surgery

Acceptance of risk is when a person's will is voluntarily directed to accept a situation in which there is risk, with his prior knowledge of this risk and his acceptance of the possibility of realizing the damages resulting from this behavior. Therefore, the approval issued to conclude a medical contract cannot be considered an acceptance to bear the medical risk, as it requires the patient to be aware of the risks surrounding the medical work, whether explicitly or implicitly, and this is the responsibility of the attending physician to explain to him the risks of the medical work, and that his will be directed in a manner Optional and free to accept the potential harmful consequences of surgical intervention. Also, it is the doctor's responsibility to inform the patient of the risks of medical work and the means that will be used, and to inform him explicitly and in detail of the risks that may arise from medical work, and to inform him of every medical intervention procedure and the need to express the patient's acceptance of these medical actions, which is a reason to lift the civil responsibility of the attending physician In the event of damages as a result of medical intervention, as long as there was no error on the part of the doctor or a mitigation of the responsibility of the attending physician.

This plastic surgery varies into many types that can be monitored and limited to two main types: The first type: Necessary plastic surgery : which is performed with the aim of medical treatment and treatment. Whether it comes to acquired defects and deformities; Such as those that result from burns, wounds, accidents, wars, etc., or congenital, such as extra fingers, squint in the eye, cleft in the upper lip, or other things, which cause material or psychological harm to humans, which requires Carrying out a cosmetic operation to overcome these damages, which is a necessary operation with the original intent in view of its

reasons and obligations, and a cosmetic operation with the accessory intent in view of the resulting effects of beautification and improvement of the treated organ (Al-Khanchofi, 2014).

With regard to the impact of accepting the medical risk in cosmetic operations in terms of bearing the potential risks and damages resulting from performing the plastic surgery, and their impact on the doctor's responsibility, and with regard to the first part of plastic surgery, which includes orthopedic or necessary cosmetic operations, which are intended for treatment and recovery from deformities and defects and restore it to its normal state, whether functional or cosmetic, whenever the conditions and controls are met in terms of insight into risks and precautions, the issuance of an informed and frank acceptance, and the adherence to the foundations and technical rules, and the doctor did not commit any mistake on his part, so accepting the medical risk has an impact on the doctor's responsibility and exempting him from compensation about the damages that occur during the plastic surgery procedure (Brajat, 2014)

And the second type: ameliorative (cosmetic) surgeries : These are operations that are called cosmetic or cosmetic surgeries, and are performed with the aim of reaching the highest level of beauty and distinction compared to the rest of the people (Abu Al- Ghanem , At.al, 2010). As for ameliorative cosmetic operations, which are intended for beautification and not for the purpose of treatment, accepting the medical risk in the event of damage does not exempt the cause of the damage from civil liability because it has lost one of its conditions, which is treatment, just as the permissibility of harming the human body is one of its conditions with the intent of treatment, so it does not. It is possible to imagine that there is an acceptance of medical risk in this form of plastic surgery .

We conclude from this that the acceptance of the medical risk results from the necessary and therapeutic cosmetic operations, which are intended to treat deformities and defects that a person is exposed to from birth or as a result of accidents, for the purpose of returning them to their normal state in terms of functionality, and have an impact on the liability of the one who caused the damage when performing the plastic surgery. Exempting him from responsibility when the other conditions are met, such as the issuance of acceptance explicitly, after insight into the risks and caveats of the operation and following the principles of medicine for the plastic surgery, because accepting the risk is considered a mistake on the part of the patient and a lack of caution and caution for his safety, so he has committed a mistake on his part, and he has to bear the damages that result from. As for cosmetic surgery, as well as focusing on the fact that there is a proportionality between the risks of plastic surgery and the desired benefits. With regard to ameliorative plastic surgery, it is not conceivable that there is an acceptance of risk in it because it lacks the intention of treatment, and the patient's acceptance of the risks does not affect the liability of the cause of the damage. In the event that a mistake is made on the part of the doctor, such as not following the principles of cosmetic art, then he has committed a mistake on his part, so we are faced with two

mistakes, the patient's mistake for accepting the risk, and the doctor's mistake that he committed. In this case, the rules of common error must be applied.

Conclusion

At the end of this research Tagged **with " acceptance of risk as a means of paying medical responsibility in non-therapeutic actions (cosmetic operations) "** Through which the legal conditions for the idea of accepting medical risks were clarified, and the impact of this acceptance on liability, and based on the above, the researcher reached a set of findings and recommendations, the most prominent of which can be listed as follows:

First: the results

1- The idea of accepting the medical risk, in order to be a way to pay the doctor's civil liability in the event that the patient is exposed to damages as a result of medical interventions, must meet several conditions, including that there be an acceptance issued by the patient before the doctor begins the medical work, and this acceptance is considered as a green light for the doctor to start.

2- Cosmetic operations may be curative or ameliorative, and this classification has a role in determining the impact of accepting risks on this medical procedure. By accepting the risks due to the unavailability of the treatment intent, which results in the expected benefits being disproportionate to the expected damages.

3- over there It stresses the application of the rules of medical liability to doctors who specialize in the field of plastic surgery due to the special nature that distinguishes this surgery and the fact that it is a surgery that does not require a therapeutic necessity. Extremism is evident clearly in the requirement to obtain the free and express consent of the patient in advance before the surgical intervention, after the surgeon has explained and clarified in detail the usual, potential and exceptional risks resulting from the surgery, as well as the rare risks so that his civil liability is not established.

Second: Recommendations

1. necessity Adopting a strict legislative policy so that only those who are specialized and have sufficient experience perform this surgery.
2. Strictness in the obligations that lie with the surgeon and the hospital, so the necessary care must be taken that reaches the goal of plastic surgery and the need to enlighten and educate the patient about all the risks that occur in performing plastic surgery.
3. We suggest that the Jordanian legislator issue a law or a medical system for plastic surgeries of both types, curative and ameliorative, and indicate their terms and conditions, and consider accepting the risk as a means of paying the responsibility of the treating doctor.

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