

## The Legal Qualification of Liability in the Field of Cosmetic Surgery



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### Abstract

Cosmetic surgery has held significant importance in human life since ancient times, as it aims to introduce improvements to the human body. With the increasing demand for cosmetic procedures, there has been a corresponding rise in medical errors. It raises substantial legal issues, due to its unique nature and the legislative shortcomings in addressing this type of medical error and defining the nature of liability. This often leads the patient, as a victim of such medical error, to seek appropriate compensation for the serious harm suffered. However, the patient is confronted with the difficulty of proving the error of the. Consequently, jurisprudence and the judiciary, in order to provide greater protection and assurance for the patient, have inclined towards establishing the principles of objective liability as an alternative to fault-based liability for compensating medical errors in the field of cosmetic surgery, thereby ensuring both civil and criminal liability.

### Keywords

Cosmetic Surgery;  
Medical Error;  
protection;  
Fault-Based Liability;  
Objective Liability.

### الكلمات المفتاحية

جراحة تجميلية؛  
خطأ طبي؛  
حماية؛  
مسؤولية خطئية؛  
مسؤولية موضوعية.

### التكليف القانوني للمسؤولية القانونية في مجال الجراحة التجميلية ملخص

تكتسي الجراحة التجميلية منذ العصور القديمة أهمية بالغة في حياة الإنسان، كونها تستهدف ادخال تحسينات على الجسم البشري، و مع زيادة الاقبال على العمليات التجميلية ادى ذلك بالمقابل الى زيادة الاخطاء الطبية، فهي تطرح الإشكالات القانونية نظرا خصوصيتها في ظل القصور والفراغ التشريعي لمعالجة هذا النوع من الأخطاء الطبية وتحديد طبيعة المسؤولية، ما يدفع بالمريض ضحية هذا الخطأ الطبي المطالبة بتعويض مناسب له نتيجة الأضرار الجسيمة التي تعرض لها، وهنا يصطدم مع صعوبة إثبات الخطأ من جانب الطبيب، لذلك فقد اتجه الفقه والقضاء ولتوفير حماية وضمانة أكبر للمريض إرساء قواعد المسؤولية الموضوعية كبديل عن المسؤولية الخطئية للتعويض عن الأخطاء الطبية في مجال الجراحة التجميلية حتى تتعدد مسؤولية الطبيب المدنية و الجنائية.

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## **I- Introduction:**

Medicine plays a crucial role in human life as it is directly related to a person's health and physical well-being. The development and advancement of medical sciences have led to the emergence of new aspects that may appear foreign to the existing legal framework, as the law, in its various provisions, seeks to protect the physical integrity and life of individuals from any form of assault. Among these new developments is cosmetic surgery, a modern medical specialty within the medical and legal fields, which has sparked a legal debate regarding the legitimacy and nature of the legal liability it entails. This interest in the topic arises due to the increasing number of victims of medical errors committed by cosmetic surgeons during surgical procedures (Amna, 2015, p. 02).

Patients, in many cases, are unable to obtain compensation for the harm they have suffered, mainly due to the difficulty of proving fault on the part of the surgeon. Additionally, the specific nature of cosmetic surgery, often lacking justifiable medical necessity for surgical intervention, underscores the importance of addressing this topic. The significance of this study lies in its attempt to clarify various aspects concerning the legal liability of physicians performing cosmetic procedures, especially when errors occur—whether intentional or unintentional—and to define the causal link between the errors made by surgeons, the unexpected outcomes, and the penalties prescribed in the context of the legislative void concerning the regulation of such operations.

Given the inherent risks of cosmetic surgery in general, and its increasing prevalence across all segments of society, often resulting in severe consequences, it becomes imperative to address this issue in this research paper, particularly from a legal perspective. This is especially important in light of the ambiguity and legislative inadequacies in dealing with this type of surgery, as well as the legal questions it raises regarding the civil and criminal liability of cosmetic surgeons, despite the enactment of the Health Law under Ordinance No. 18-11, dated July 2, 2018 (Law No. 18-11, 18 Shawwal 1439 AH corresponding to July 2, 2018).

### **Study problem:**

Based on these considerations, we propose the following central question:

**To what extent is legal liability in the field of cosmetic surgery unique, especially in the absence of specific legal provisions that clearly define surgical medical errors?**

In order to answer the posed question, we primarily relied on descriptive methods in order to define some concepts such as defining medical error and plastic surgery, as well as we used the analytical methods to analyzing legal texts related to the subject.

To explore this topic, the research will be divided into the following sections:

- First Section: The conceptual framework of medical error in the field of cosmetic surgery.
- Second Section: Cosmetic surgery between risk and legality.
- Third Section: Legal liability arising from medical error in the field of cosmetic surgery.
- Fourth Section: The shift from fault-based liability to objective liability in the field of cosmetic surgery.

### **I.1. The Conceptual Framework of Medical Error in the Field of Cosmetic Surgery:**

Medical error that results in legal liability, in general, refers to any error proven on the part of the physician, whether it relates to their professional performance—commonly referred to as technical or professional error, which involves deviating from the accepted professional practices and violating established scientific and medical principles—or whether it is an ordinary error not directly related to the profession, caused by the physician's negligence, lack of caution, or failure to exercise the care and prudence required by their duty to be diligent and observant (Lamine, 2015, p. 160).

What is notable in this regard is the difficulty in formulating a comprehensive and specific definition of medical error due to the variety and multiplicity of its forms. Therefore, we will attempt to provide a broad definition of medical error.

### **I.1.1 Definition of Medical Error:**

The concept of medical error first emerged among church scholars in the Middle Ages, but it was the legal scholar Domat who is credited with its development. Legislators typically do not engage in defining concepts, leaving room for legal scholars and jurisprudence to explore various definitions. In general, medical error is defined as “a failure in the duties and obligations of the physician towards the patient under their care, where such an error would not occur from a prudent physician who found themselves in the same external circumstances as the accused physician. It also refers to any breach or deviation by the physician from established and recognized medical practices, both theoretically and practically, at the time of performing the medical act, or a failure to observe the precautions and care required by law. Such an error leads to serious complications, harm, and consequences for the patient (Al-Jabari, 2011, p. 94).”

Additionally, medical error is also defined as “the error resulting from the physician's failure to fulfill their professional obligations, which inherently encompass the physician's duty not to harm others. This duty is based on the legal obligation to avoid causing harm, and its scope is determined by the professional rules that govern and clarify its extent. Medical error is the failure to fulfill the specific duties imposed by medicine or professional rules regarding the standards of practice or the overstepping of those rules (Othmani, 2011, p. 170).”

Dr. Munther Al-Fadl defined medical error as “a breach by the physician of their duty to exercise attentive, diligent care in accordance with established scientific facts, or a failure in the physician's conduct that would not be expected from a prudent physician under the same external circumstances.”

This is the general definition of medical error. Since we are focusing on cosmetic surgery, it is essential to provide a comprehensive definition of this type of surgery.

### **I.1.2 The Nature of Cosmetic Surgery:**

The expansion and advancement of medical sciences have led to the widespread practice of cosmetic surgery. The German surgeon Karl Ferdinand von Graefe was the first to become well-known for performing numerous aesthetic operations. As a result of this development, the scope of cosmetic surgery expanded to include the treatment of burns, deformities, and congenital defects. This progress was accompanied by advancements in the tools and techniques used. Cosmetic surgery, by its nature, does not differ significantly from general medical surgery (Amin, 2019, p. 16).

Cosmetic surgery refers to procedures performed for functional or aesthetic purposes, aiming to restore harmony and balance to a part of the body by aligning it with beauty standards specific to that part. It is also defined as a group of operations related to appearance, intended to correct natural or acquired defects in the human body's exterior that affect an individual's personal or social value.

Another definition states that cosmetic surgery aims to repair body parts or replace those lost or affected by congenital defects present from birth (Ahmed, 2011, p. 16).

Based on these previous definitions, cosmetic surgery can be defined as follows: “Cosmetic surgery is surgery that is not intended for therapeutic purposes but rather to correct a defect or deformity in the body.”

It is noteworthy that the French legislator, similar to the Algerian legislator, in Law No. 2002-303 issued on March 4, 2002, concerning the protection of patients, replaced the term "therapeutic" with "medical" in order to integrate cosmetic surgery within the scope of medical acts. However, this is something that we did not observe when reviewing the legislative texts in Algerian law (Boumediene, 2011).

Despite the unique nature of medical surgical errors of cosmetic surgery in particular, given the potential negative impacts on the patient, the Algerian legislator has not given this issue significant attention and has not enacted legal provisions regulating the limits of legal liability resulting from it. In light of this legislative deficiency, the judge often finds themselves lost between the rules governing unintentional errors as outlined in the Algerian Penal Code, specifically Articles 288, 289, and 442 (Law No. 06-23 amending and supplementing Ordinance 66-155, 29 Dhu al-Qi'dah 1427 AH corresponding to December 20, 2006).

### **I.1.3 The Legal Nature of the Cosmetic Surgeon's Obligation:**

In cosmetic surgery, it is essential that the surgeon performing such procedures be qualified, as these operations require a high level of precision and special care. While, in general surgical practice, the physician is only required to inform the patient of the typical risks, as the obligation to provide full disclosure is often limited by necessity or the patient's best interest—particularly to avoid undermining their morale, which could jeopardize the success of the surgery—the situation is different in the realm of cosmetic surgery (Al-Jumaili, 2011, p. 341). In this field, the cosmetic

surgeon must disclose even the slightest risk associated with the procedure so that the patient can make an informed decision with full awareness. This is because the cosmetic surgeon's intervention is not driven by any urgent necessity. Additionally, the surgeon must exercise genuine care and vigilance, doing their utmost to provide the best care for the patient. This duty applies in all cases and under all circumstances (Al-Jumaili, 2011, p. 342), but care and vigilance are particularly emphasized in cosmetic surgery.

This shift in the surgeon's obligation is a general one but reflects the prevailing view in cosmetic surgery: such procedures are not urgently required, nor are they necessary for the patient's survival. The aim is to enhance physical appearance, not to address a life-threatening condition, which demands greater caution to avoid exposing the patient to unnecessary risks. Given this, the question arises regarding the nature of the cosmetic surgeon's obligation: Is it an obligation to exert due care or to achieve a specific result, wherein the surgeon's error would be considered merely due to the failure of the cosmetic outcome?.

### **I.1.3.1 The Cosmetic Surgeon's Obligation to Exert Due Care:**

Legal scholars almost unanimously agree that the physician's obligation toward the patient is one of due care. Consequently, this obligation does not guarantee a specific result, such as curing the patient, but rather requires the physician to apply their skills and effort to achieve the best possible outcome, as recovery is inherently uncertain (Lafi, 2009, p. 216).

The level of care required by law is the care that any reasonable person in the same situation would exercise, meaning the standard of care expected from an ordinary, prudent, and rational person belonging to the same professional group as the physician in question, if placed in the same circumstances.

Cosmetic surgery is a specialization within general medicine, and medicine itself is not an exact science. Several factors influence the outcome of treatment or surgical intervention, many of which cannot be controlled. Both the physician and the surgeon are professionals in the field of medicine; their duty is to treat, while the success of treatment or surgery lies in God's hands. The inexact nature of medicine in all its branches often means that the cause of death, for instance, is only revealed after an autopsy. Some materials used in treatments may also have adverse effects on certain individuals, leading to unexpected outcomes (Kaki, 2020).

Although the cosmetic surgeon's obligation remains one of due care, the judiciary has become stricter in this area. The cosmetic surgeon must employ all available expertise and qualifications to achieve the agreed-upon outcome with the patient.

Given the unique nature of this field of surgery, especially as the cosmetic surgeon deals with the external parts of the human body, heightened care and attention are required.

### **I.1.3.2 The Cosmetic Surgeon's Obligation to Achieve a Result:**

Cosmetic surgeries, or what some refer to as enhancement procedures, have become increasingly important in people's lives (Tekari, 2015, p. 198), which has, in turn, heightened the risks patients may face due to potential errors by the surgeon. Based on this, there are those who argue that the physician's obligation in this context is to achieve a specific outcome. This view was first supported by some courts, such as the 1913 decision by the Paris Court of Appeal, which established the responsibility of the cosmetic surgeon on the basis of presumed fault. The ruling suggested that merely undertaking a medical procedure aimed solely at aesthetic improvement constitutes a fault in itself, with the physician bearing all the consequences of the surgery, even if the doctor applied the proper medical standards (Kaki, 2020, p. 73).

## **I. 2. Cosmetic Surgery Between Prohibition and Permissibility:**

The author of the article in this section explains clearly how to select the sample, determine the variables and how to measure them, how to collect the data and describe how the data are summarized (average, percentage, ...), Statistical and standard tools used in data analysis, hypothesis testing and statistical significance. Sometimes it may be necessary to mention the programs used in the calculation. When using a method previously used and published by another researcher, must be referred to as marginalization without being re-described, Though There are changes in the method, which must be explained and explained.

Cosmetic enhancements were once limited to improving outward appearance alone. However, with advancements in medical technology and surgical science, it has become possible to go beyond mere cosmetic improvement to restoring or enhancing the beauty and appearance of the body, or even reconstructing it through certain modifications. With this medical progress, the responsibilities of cosmetic surgeons have increased, sparking debates among legal, religious, and

ethical scholars regarding the legitimacy of certain cosmetic surgeries, particularly those that are not aimed at treating medical conditions or illnesses.

### **I. 2.1 The Islamic Perspective on Cosmetic Surgery:**

There are differing opinions within Islamic jurisprudence regarding the permissibility of cosmetic surgery. One viewpoint tends toward prohibiting these procedures, considering them a form of altering God's creation. However, if the surgery is intended to help a body part perform or regain its function, it is deemed permissible. The second view leans toward allowing cosmetic surgeries as long as they do not involve any forbidden elements. The third perspective distinguishes between different types of cosmetic procedures: those aimed at correcting a deformity that restores the body part from an abnormal state to its natural form are considered lawful, such as surgeries following traffic accidents. On the other hand, surgeries intended to alter the natural form of a body part, merely to achieve a more aesthetically pleasing appearance, are not permissible according to Islamic law (Ahmed, 2011, p. 191).

### **I. 2.2 The Legal Perspective on Cosmetic Surgery:**

The legitimacy of cosmetic surgeries has sparked considerable debate within legal scholarship, with some supporting and others opposing these procedures. One prominent opponent, the legal scholar "Garson," argued that general medical principles require surgical intervention to have a therapeutic purpose (Mundher, 1992, p. 29).

This view is criticized for not being decisive, as certain deformities and congenital defects can affect a patient's psychological and physical well-being, making cosmetic surgery necessary. On the other hand, proponents who support and broaden the scope of cosmetic surgery consider these procedures to be therapeutic, viewing them as a means of combating illness and bringing happiness to the patient. A middle-ground position allows for cosmetic surgeries in cases where deformity is so severe that life becomes a heavy burden. However, for cases that involve merely correcting the effects of aging or enhancing beauty, there is no justified reason for a physician to perform the surgery (Kaki, 2020, pp. 67-68).

### **I. 2.3 Cosmetic Surgery in Algerian Legislation:**

While comparative law has managed to keep pace with the developments in cosmetic surgery, Algerian law remains distant from regulating this sensitive medical specialty. It has yet to address this field explicitly, despite enacting legislation influenced by others, particularly French law (Sahraa, 2006, p. 27).

However, this legislative void does not imply that these operations are illegal. The legislator has permitted scientific medical experiments under the provisions of Articles 168, paragraphs 1, 2, 3, and 4, of Law 90/17, which amends and supplements the Law on Health Protection and Promotion (Law No. 90-17 amending and supplementing Law No. 85-05 dated February 16, 1985, 9 Muharram 1441 AH corresponding 1990).

Additionally, other provisions, though general, can be consulted, such as Article 44 of the Code of Medical Ethics, which pertains to the patient's consent. It requires that the patient's consent be free and informed before proceeding with this type of surgery. Article 17 of the same code also emphasizes the necessity of proportionality between the risks and benefits of cosmetic surgery, a principle considered fundamental in this field (Executive Decree No. 92-276, 5 Muharram 1413 AH corresponding to 1992).

As for the Algerian judiciary, it is almost entirely absent on this matter, with no established stance, despite the fact that cosmetic surgery has seen some development in Algeria. This absence of judicial precedent can be attributed to the fact that cosmetic surgery in Algeria is still in its early stages compared to Western countries (Sahraa, 2006, p. 28).

## **I. 3. Legal Liability Arising from Medical Error in the Field of Cosmetic Surgery:**

Although medicine is fundamentally a humanitarian profession, it is also a complex field, as errors within it can have profound impacts on human life, potentially leading to death in some cases. With the rapid and extraordinary advancements in medical science—what some call a "scientific explosion"—the risks have increased (Al-Maaytah, 2014, p. 04), necessitating the surgeon's responsibility, both civil and criminal. When a physician deviates from the legal and ethical boundaries of their profession, they lose the protection that these principles afford them if they fail in their duty toward the patient. Consequently, they become subject to accountability for such failures.

So, what are the limits of this responsibility, both in civil and criminal contexts? And does this responsibility have any particularities when it comes to cosmetic surgery?

### **I. 3.1 Civil Liability:**

Civil liability in the medical field arises when a physician breaches their legal duty of care, caution, and vigilance, resulting in harm to the patient. In such cases, the physician would be held liable under tort law, as there is no contractual relationship (i.e., no medical contract). However, if the physician breaches obligations arising from a treatment contract with the patient, they are held contractually liable (Mourad, 2017, p. 144).

There has been considerable debate among legal scholars regarding whether a physician's liability should be considered tort-based or contract-based. Some argue that this type of liability is rooted in contract law, making it contractual (Ambarek & Abdelhalim, 2019, p. 920).

#### **I. 3.1.1 Contractual Liability of the Cosmetic Surgeon:**

One side of the contract (Al-Sheikh, 2001, p. 32).

In medical terms, this involves both positive and negative actions performed by physicians or those engaged in medical practice, for which they are held accountable under laws and regulations when harm occurs to the patient. Such harm is often addressed through compensation to remedy the damage caused (Al-Maaytah, 2014, p. 37).

French jurisprudence, particularly, has tended to view the cosmetic surgeon's liability as contractual, especially since the landmark decision of the French Court of Cassation on March 20, 1936. This ruling stated, "A real contract exists between the physician and the patient, under which the physician is obligated to provide careful, vigilant, and scientifically sound treatment, and any breach of this obligation, even if unintentional, results in liability of a contractual nature (Ambarek & Abdelhalim, 2019, p. 922)."

For contractual liability to arise, a valid and mutually agreed-upon medical legal scholarship holds that a physician's liability is contractual if there is a valid contract between the parties, and the harm results from a breach of that medical contract. Contractual liability refers to the consequence of one party's failure to fulfill the obligations arising from

contract must exist. So, when can a cosmetic surgeon be held contractually liable?

In this regard, the Egyptian Court of Cassation ruled on June 26, 1969, stating that "the liability of a physician chosen by the patient or their representative for treatment is contractual, based on the contract that forms between the physician and the patient." It is well-established, both legally and judicially, that the relationship between a cosmetic surgeon and their patient is governed by a medical contract, which results in medical contractual liability, regardless of whether the contract is explicit or implied.

As for Algerian legislation, its stance can be inferred from the Code of Medical Ethics, specifically Article 45, which states that when approving any request to treat a patient, the doctor is obligated to ensure that treatment is provided. he must be characterized by sincerity and his work must conform to the modern technology and science. he may also seek the assistance of specialized doctors.

In conclusion, the establishment of medical liability between the patient and the physician arises from a medical contract, even though it is not classified as a formal contract. The matter is thus governed by general principles of law, specifically civil law, leaving the terms of the medical contract to be shaped by the will of the parties, in line with the principle of autonomy of will. In this contract, the physician is obligated to do everything within their power to heal the patient by providing the necessary treatment and medical care in accordance with established scientific practices (Lafi, 2009, p. 65).

#### **I. 3.1.2 Tort Liability of the Cosmetic Surgeon:**

The basis for tort liability is found in Article 124 of the Civil Code, (Ordinance No. 75-58, 20 Ramadan 1395 AH, corresponding to 1975)." Tort liability arises when a person commits an act that causes harm to another, and that act is characterized as wrongful. Tort liability emerges from a breach of the legal duty not to harm others, and the consequence of breaching this duty is the performance of a harmful activity (Al-Sheikh, 2001, p. 25).

This harm can vary, being either prior or subsequent, material or moral.

So, what are the elements of tort liability that necessitate compensation in the context of cosmetic surgery?

### **I. 3.2 Elements of Tort Liability for the Cosmetic Surgeon:**

The elements of tort liability consist of fault, damage, and a causal relationship.

#### **I. 3.2.1 Fault Element:**

The element of fault in cosmetic surgery lies in the surgeon's failure to fulfill their obligations toward the patient. The standard for determining the surgeon's fault is to compare their actions with those of another surgeon of the same level and specialization, while considering the external circumstances surrounding the surgeon at fault and the degree of care and diligence required by the standards of the profession (Fatima, 2017, p. 212).

As for proving the surgeon's fault, given the specific nature of cosmetic surgery, the physician's obligation is primarily one of due care, but this obligation is more stringent than in regular surgery. Therefore, the burden falls on the patient to prove the surgeon's negligence or failure to exercise the required care, in order to establish the surgeon's liability.

However, it is noteworthy that, due to the particularities of cosmetic surgery, liability is no longer strictly based on proving fault. The judiciary has considered that the mere occurrence of harm is a presumption of the surgeon's fault (Fatima, 2017, p. 212).

#### **I. 3.2.1 Damage Element:**

For the surgeon's liability to arise, it is not sufficient to prove that the surgeon was at fault; there must also be harm caused to the patient undergoing the procedure. Damage refers to the injury inflicted on a person, whether it affects their life, physical integrity, emotions, or dignity (referred to as moral damage), or impacts their financial standing (referred to as material damage).

In cosmetic surgery, the patient may suffer material damage, such as the costs of the surgery, the need to stop working for a certain period, transportation expenses, and so on. Additionally, the patient may suffer moral damage, especially if the surgery fails and results in psychological distress, particularly when the outcome of the surgery leaves them in a worse condition than before.

For damage to be compensable, it must meet certain criteria: it must be certain, meaning it actually occurred, and it must be direct.

#### **I. 3.2.2. Causality Element:**

The element of causality refers to the direct connection between the medical error committed by the physician and the harm suffered by the patient. Establishing a causal link is a fundamental requirement for medical liability (Al-Maaytah, 2014, p. 61). Proving causality is often a challenging and complex task, which is why judges frequently rely on expert medical testimony to estimate the extent of the damage sustained by the patient.

In many cases, the judiciary tends to favor the injured party by presuming the existence of a causal relationship to facilitate the patient's ability to obtain compensation. This is sometimes achieved by establishing a presumption of causality or by adopting the "loss of chance" doctrine in cases where a direct causal link between the error and the harm cannot be definitively proven. The causal relationship is considered absent if the surgeon can demonstrate that the harm resulted from a sudden event or force majeure (Fatima, 2017, p. 213).

It is noteworthy that the judiciary generally leans toward establishing liability whenever harm is present, considering it a key element of objective liability in cosmetic surgery.

### **I. 3.3 Criminal Liability for Medical Error in Cosmetic Surgery:**

While civil liability leads to compensation, criminal liability is centered around punishment, depending on whether the offense is classified as a felony, misdemeanor, or infraction. This does not preclude the possibility of both punishment and compensation being imposed for a single act.

It should be noted that the Algerian legislator, in the Penal Code, does not specifically address cosmetic surgery. Thus, it is subject to the general rules and provisions governing the practice of medicine (Ambarek & Abdelhalim, 2019, p. 933).

Criminal liability arises when a person violates a mandatory legal provision, for which the law prescribes a penalty upon breach. This means committing an act that constitutes a crime as defined and punishable by law (Al-Maaytah, 2014, p. 39).

Criminal liability differs from disciplinary liability. A criminal offense constitutes a violation of the legal rules stipulated by the law, while disciplinary error involves any breach of the rules and duties imposed by professional codes of conduct (Ghosn, 2012, p. 42).

A surgeon may commit errors that cannot be overlooked, as they may cause injury to the patient, and in some cases, even result in death. In such situations, the issue of criminal liability arises, typically based on non-intentional error, as it is unreasonable to assume that a physician would deliberately harm their patient.

Despite the unique nature of surgical medical error and its potential impact on patients, the Algerian legislator has not given sufficient attention to the issue, nor has it established clear legal provisions to define the boundaries of criminal liability in such cases. In the face of this legislative gap, the judiciary continues to struggle between the rules governing non-intentional errors as stipulated in the Penal Code—specifically Articles 288, 289, and 442 of the Algerian Penal Code—while lacking the technical and specialized knowledge to properly address complex surgical issues as a medical field beyond the judiciary’s legal expertise (Nabila, 2018, p. 08).

Various forms of medical error that may lead to criminal liability include:

### **I. 3.3.1 Negligence:**

Negligence is defined as the failure to take the precautions required by caution, which any person in the same circumstances would normally take, and which would have prevented the incident from occurring. It is a passive stance that involves neglecting a duty imposed on any individual in similar conditions (Al-Qahwaji, 2002, p. 433). Negligence is often expressed as carelessness or lack of attention, encompassing all situations in which the wrongdoer adopts a passive attitude, refraining from or failing to achieve a required result (Al-Maaytah, 2014, p. 85).

This type of error includes omissions, where the wrongdoer fails to take the necessary actions that a prudent and reasonable person would have taken under the same circumstances to prevent harm. Such medical errors are frequently encountered in surgical procedures, where the physician is obligated to take all necessary precautions before, during, and even after the operation. One example from Algerian case law involved a Supreme Court decision in which a physician was convicted for failing to fulfill his duty to remain on call. The doctor stayed at his clinic, and after a traffic accident victim was brought to the hospital, the patient died due to the physician’s delayed arrival at the hospital (Nabila, 2018, p. 64).

### **I. 3.3.2 Recklessness:**

Recklessness refers to the lack of skill (Al-Maaytah, 2014, p. 87), attention, and proper judgment. It is characterized by carelessness, rashness, and poor estimation of the risks involved. Recklessness occurs when the wrongdoer engages in risky behavior without fully considering or understanding the potential consequences, which are punishable by law due to poor judgment, lack of skill, or insufficient experience.

### **I. 3.3.3 Lack of Precaution and Care:**

This type of error is often referred to as non-intentional but foreseeable error, or error with expectation. In this form of error, the wrongdoer is aware of the nature of their behavior and its potential harmful consequences on legally protected interests. Despite this knowledge, they continue with their behavior. Lack of precaution, unlike negligence, involves positive actions that violate the duty of care (Al-Maaytah, 2014, p. 86).

In one ruling by the Algerian Supreme Court, a physician was held responsible for failing to take the necessary precautions while monitoring a pregnant woman. As a result of the physician’s failure, the child was born blind due to a disease contracted during the pregnancy that could have been prevented (Nabila, 2018, p. 70).

### **I. 3.3.4 Failure to Observe Laws and Regulations:**

This form of error occurs when conduct, either by action or omission, deviates from the required behavioral standards as set out by laws, decrees, regulations, and rules, leading to harm being caused to others (Al-Maaytah, 2014, p. 88). This type of error is distinct from other forms of error and is characterized by the ease with which it can be proven. It is sufficient to demonstrate that the physician did not comply with laws or regulations to establish their liability for the violation.

#### **I. 4. The Shift from Fault-Based Liability to Objective Liability in Cosmetic Surgery:**

Under general rules of civil liability, the injured party must demonstrate the fault of the person responsible for the harm in order to receive compensation. However, this approach has become increasingly inadequate in light of the significant technological advancements that have affected all areas of life, especially the medical field. These developments have given rise to alternative legal theories (Mokhtar, 2015, p. 331).

##### **I. 4.1 Jurisprudential Theorization of Objective Medical Liability:**

The fundamental structure for establishing civil liability has sparked extensive legal debate, particularly concerning its core element: fault. The influence of globalization across various domains has led to the decline of fault-based civil liability in both legal doctrine and court rulings. Legal scholars have shifted their view on the foundation of civil liability for physicians, moving away from the notion that obtaining compensation for the injured party requires proof of deviation in the behavior of the responsible party. Instead, they have embraced objective liability as the foundation for medical responsibility (Jawad, 2017, p. 90).

###### **I. 4.1.1 Risk-Bearing Theory:**

This theory originates from the criticisms directed at fault-based liability, particularly the difficulty in defining fault and establishing a comprehensive standard. Moreover, the concept of fault is seen as a moral notion with little practical utility, as the purpose of civil liability is not to punish the wrongdoer but to identify the party responsible for bearing the burden of harm.

###### **I. 4.1.2 Guarantee Theory:**

Proponents of objective liability, which focuses solely on the occurrence of harm, have encountered opposition from scholars who argue that both fault and risk should form the foundation of civil liability. Given the absence of a clear and precise standard indicating when liability is based on fault and when it is based on risk, legal scholars have sought to base liability on the concept of guarantee rather than fault or risk. This theory is credited to the legal scholar Charles (Jawad, 2017, p. 90).

##### **I. 4.2 Motivations for the Shift from Fault-Based Liability to Objective Liability in the Medical Field:**

Due to the influence of various factors and new developments, it has become necessary for legislators to reassess civil liability rules in general, and medical liability in particular, with a realistic and logical approach. These factors include scientific and technological advancements, specifically the development of medical equipment in our current era. These advancements have contributed to significantly reducing medical risks, and in some cases, eliminating them entirely. As a result, physicians can no longer easily rely on common or unexpected risks or the lack of resources and equipment as justifications. This has led legal scholars to align with the direction of progress, seeking to establish a form of medical liability without fault that better aligns with social realities (Jawad, 2017, p. 90).

Additionally, the role of insurance has contributed to the emergence of objective liability, which focuses on financial compensation for harm rather than punishing the individual who committed the error. The primary aim of objective liability is to remedy the damage. In liability insurance, the punitive aspect of civil liability is diminished, as it becomes a type of guarantee provided by an insurance fund for the injured party, offering greater protection to the victim.

## **II- Conclusion:**

The surge in cosmetic surgery procedures has swept across the world, particularly in developed countries, driven by rapid scientific advancements that have introduced highly sophisticated techniques and expanded the concept of treatment. Treatment now not only addresses physical ailments but also encompasses the patient's psychological well-being, this study has a set of results as follows:

-As a result, medical and surgical errors have become a significant reality, raising complex issues in determining the civil and criminal liability of cosmetic surgeons. Through our study of this topic, we have observed that the Algerian legislator remains far from keeping pace with these developments, despite the medical realities that demand intervention.

-It is necessary for legislators to regulate this field by introducing specific legal provisions, rather than merely relying on general rules that serve as guidelines. Furthermore, there is no consistent standard to define medical error, making it difficult for the patient to provide proof.

The study presents a set of proposals that we see as feasible, as follows:

- In light of the increasing frequency of medical errors, we call on the Algerian legislator to intervene with legislative tools that regulate and define the parameters of medical error in surgery, which trigger legal liability. The concept of medical error can only regain its true effectiveness if it is based on solid legal foundations that regulate and clarify the relationship between the patient and the treating physician.
- The judiciary should also play a more active and dynamic role. Although it does not have the authority to draft legal rules, the judiciary can contribute to the development of the law and prevent legal provisions from becoming stagnant, benefiting from the body of comparative judicial work, such as in France.
- To ensure adequate protection for patients, especially in private medical practices, we propose the establishment of special insurance funds within insurance companies to handle compensation for patients who are victims of medical errors.

In conclusion, to provide the necessary protection for victims of cosmetic procedures, it is essential to adopt the concept of objective liability as the foundation for holding physicians accountable for their medical errors. This approach focuses on the idea of harm, making it easier for patients to prove their case and secure compensation.

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