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Legal disputes over informed consent for cosmetic procedures: A descriptive study of negligence claims and complaints in Australia

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Summary *Background:* Plastic surgeons and other doctors who perform cosmetic procedures face relatively high risks of malpractice claims and complaints. In particular, alleged problems with the consent process abound in this area, but little is known about the clinical circumstances of these cases.

Method: We reviewed 481 malpractice claims and serious health care complaints resolved in Australia between 2002 and 2008 that alleged failures in the informed consent process for cosmetic and other procedures. We identified all "cases" involving cosmetic procedures and reviewed them in-depth. We calculated their frequency, and described the treatments, allegations, and outcomes involved.

Results: A total of 16% (77/481) of the legal disputes over informed consent involved cosmetic procedures. In 70% (54/77) of these cases, patients alleged that the doctor failed to disclose risks of a particular complication, in 39% patients claimed that potential lack of benefit was not explained, and in 26% patients allegations centred on the process by which consent was sought. Five treatment types—liposuction, breast augmentation, face/neck lifts, eye/brow lifts, and rhinoplasty/septoplasty—featured in 70% (54/77) of the cases. Scarring (30/77) and the need for reoperation (18/77) were among the most prevalent adverse health outcomes at issue.

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Conclusion: A mix of factors “supercharges” the informed consent process for cosmetic procedures. Doctors who deliver these procedures should take special care to canvas the risks and possible outcomes that matter most to patients.

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Introduction

Plastic surgeons and other doctors who perform cosmetic procedures are more likely to experience litigation or formal complaints than most other specialists.^{1–3} Practitioners have attributed this elevated medico-legal risk to a variety of factors, including unrealistic patient expectations, aggressive plaintiffs’ lawyers,⁴ and inadequate pre-operative assessment⁵ and bad behaviour by a few substandard providers. Patient advocates and other commentators point to the commoditisation of medicine,^{6,7} promotion of suspect aesthetic norms,⁸ euphemistic portrayal of outcomes,⁹ and departure from established processes and standards for obtaining informed consent.¹⁰

A common thread in these perspectives is that the informed consent process is crucial in the context of cosmetic treatments^{11,12}; it exerts a strong influence on both patients’ perceptions of quality and doctors’ risks of experiencing legal disputes. However, there is very limited empirical information on the circumstances and nature of medico-legal disputes in this area.

In a recent analysis¹³ of nearly 10,000 medico-legal disputes, we found that plastic surgeons were sued and complained against over consent issues at more than double the rate of any other specialty or surgical subspecialty. In this study we analyse the cases that involved plastic surgeons and other cosmetic proceduralists. Our aim was to describe the frequency, characteristics, clinical circumstances and outcomes of these cases, and inform efforts to prevent them.

Methods

Study context

Avant Mutual Group Limited (Avant) and the Health Services Commissioner of Victoria participated in the study. Avant is Australia’s largest provider of medical indemnity insurance, providing coverage to more than half of the country’s registered medical practitioners. The Health Services Commissioner has statutory responsibility for resolving complaints about health care providers in Victoria, Australia’s second most populous state with 5.6 million residents. Complaints must be in writing but legal representation is not required. The system is impartial, free and advertised widely in health care facilities.

Case identification and study definitions

By screening 7846 medical malpractice claims and 1891 serious health care complaints resolved between 1 January 2002 and 31 December 2008, we identified 481 informed

consent disputes. These disputes included 263 malpractice claims brought against doctors insured by Avant in three states (New South Wales, Victoria and Queensland) and 218 conciliated complaints lodged with the Health Services Commissioner in Victoria during the same period. Our method for determining which claims and complaints met the definition of an informed consent dispute is detailed elsewhere.¹² We recap definitions of key terms here.

Following previous studies,^{14,15} we defined a “claim” as a written demand for compensation. “Conciliated” complaints are those the Health Services Commissioner considers too complex or serious to be resolved through facilitated communication alone, and so refers them to formal conciliation. Approximately 20% of all complaints lodged with the Health Services Commissioner proceed to conciliation.

The study definition of an “informed consent dispute” was broad: a claim or complaint that alleged a deficiency, either in the quality or quantity of information provided to the patient about a treatment prior to a decision about whether to undertake it, or in the process through which the patient was asked to consider such information and make decision. We did not seek to evaluate the merit of patients’ allegations. Doing so would have required more information than was available to us, as cases were typically resolved by out-of-court negotiation or conciliation. Moreover, concerns about the consent process often co-existed with other types of allegations which influenced the final outcome.

A “cosmetic procedure” was defined as an operation or other treatment involving a non-pathological body area with the aim of preserving, restoring, or enhancing physical appearance.¹⁶ Our study sample consisted of all informed consent disputes identified in the parent study that involved cosmetic procedures (hereafter “cosmetic cases”).

Case file review

In the parent study, three doctor reviewers examined the hardcopy claim and complaint files onsite at Avant offices (Melbourne, Sydney and Brisbane) and the HSC (Melbourne) between March 2009 and January 2010. The reviewers were trained on the structure and content of the case files, use of the study instrument, and confidentiality. The instrument guided collection of detailed information on each case, including patient and doctor characteristics, the episode of care at issue, and the patient’s allegations.

The instrument also directed reviewers to flag cases that involved a cosmetic procedure. For purposes of this study, three medically-trained investigators (MMB, AJG, DM) reviewed all flagged cases to verify that each met the study definition of a cosmetic procedure.

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