Cosmetic surgery and responsible patient selection – does a legal duty to screen patients exist?

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OPSOMMING

Kosmetiese Chirurgie en Verantwoordelike Pasiëntkeuse – Bestaan daar 'n Regsplig om Pasiënte te Evalueer?

Daar is sekere unieke uitdagings wat pasiëntkeuse vir kosmetiese chirurgie betref. Die uitdaging wat kosmetiese chirurge in die gesig staar is hoe om reeds voor chirurgiese ingryping pasiënte te identifiseer wat 'n swak resultaat in terme van sielkundige aanpassing en psigososiale funksionering sal hê, ten spyte van 'n tegnies aanvaarbare resultaat. Aangesien sielkundige faktore onderliggend is aan die meeste versoeke vir kosmetiese chirurgie, word daar aan die hand gedoen dat kosmetiese chirurge 'n regsplig het om bewus te wees van algemeen erkende psigiatriese toestande en simptome. Kosmetiese chirurge, meer so as die meeste ander spesialiste, moet aandagtige luisteraars wees met kliniese vernuf wat strek buite die tipiese grense van medisyne en siekte. Die deliktuele, strafregtelike en kontraktuele aanspreeklikheid van 'n kosmetiese chirurg wat opereer op 'n sielkundig onstabiele pasiënt word in besonderhede bespreek. Die bespreking vind plaas aan die hand van 'n Amerikaanse saak, die enigste saak van sy soort ter wêreld, waar die vraag of 'n pasiënt wat ly aan liggaamsdismorfiese versteuring geldige toestemming tot kosmetiese chirurgie kan gee, aangespreek is.

1 Introduction

Medical techniques and technology are increasingly being used for purposes that seemingly deviate from the traditional goals of medicine. Medical techniques and technology are often implemented, not to prevent or cure illness, but to fulfil a patient's personal, individual and ostensibly non-medical wishes.[1] These wishes are often aimed at improving certain human characteristics beyond their normal healthy state.[2] A prime example of wish-fulfilling medicine is cosmetic surgery. The pursuit of beauty by means of cosmetic surgery is big business in modern societies and South Africa is catching up very fast in this

1 Buyx "Be Careful What You Wish For? Theoretical and Ethical Aspects of Wish-Fulfilling Medicine" 2008 *Medicine, Healthcare and Philosophy* 134.

2 Bordo "Material girl: the Effacements of Postmodern Culture" 1990 *Mich Qly R* 657; Gimlin "Cosmetic Surgery: Beauty as Commodity" 2000 *Qualitative Sociology* 80.

particular area. With the rise of cosmetic surgery, the contemporary body, instead of being a dysfunctional object requiring medical interventions, has become a primary symbol of identity and a commodity, not unlike "a car, a refrigerator, a house, which can be continuously upgraded and modified in accordance with new interests and greater resources".[3] Cosmetic surgery has in fact become a "modern body custom".[4] As exciting as this might be to some, certain legal and ethical issues must not be overlooked. The fact remains that cosmetic surgery involves the performance of very invasive surgical operations on otherwise healthy individuals for the sake of improving appearance. Miller *et al* describe cosmetic surgery as "a most unusual medical practice" and state[5] that:

> [i]nvasive surgical operations performed on healthy bodies for the sake of improving appearance lie far outside the core domain of medicine as a profession dedicated to saving lives, healing, and promoting health.

Due to the ethically ambiguous nature of cosmetic surgery, it is submitted that certain safeguards must be put in place in order to prevent ethical abuses. In the everyday practice of a cosmetic surgeon, at least some of these safeguards need to address the process of informed consent and patient selection.

2 Why the Relationship between Cosmetic Surgeons and their Patients Differs from the Conventional Doctor-Patient Relationship

The performance of cosmetic surgery necessitates a degree of ethical conduct on the part of the cosmetic surgeon that surpasses the level of ethical conduct normally required between a physician and patient as the relationship between a cosmetic surgeon and a patient differs from the traditional physician-patient relationship.[6] This is essentially due to the distinction, albeit tenuous, between elective and non-elective forms of medical treatment. Distinguishing between elective and non-elective medical treatments is difficult, but cosmetic surgery is usually elective in the sense that cosmetic surgery is opted for by a patient more freely and less for reasons of medical necessity in the narrow sense of the word.[7]

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3 Finkelstein *The Fashioned Self* (1991) 87; Gimlin 2000 *Qualitative Sociology* 80; Adams "Motivational Narratives and Assessments of the Body after Cosmetic Surgery" 2010 *Qualitative Health Research* 757.

4 Sullivan *Cosmetic Surgery, the Cutting Edge of Commercial Medicine in America* (2000) 10.

5 Miller *et al* "Cosmetic Surgery and the Internal Morality of Medicine" 2000 *Camb Qly Healthcare Ethics* 353.

6 Atiyeh *et al* "Aesthetic/Cosmetic Surgery and Ethical Challenges" 2008 *J Aesthetic and Plastic Surgery* 830.

7 Healy "Duties of Disclosure and the Elective Patient: a Case for Informed Consent" *1998 Medico-Legal J Ire* 26; Nugent "Cosmetic surgery on Patients with Body Dysmorphic Disorder: the Medical, Legal and Ethical

In some countries the courts have been hesitant to accept a distinction between elective and therapeutic or non-elective procedures, as all operations are elective in the sense that the patient always has a choice whether or not to undergo the procedure.[8] What these courts have not taken into consideration is the fact that there is a very real distinction between situations where the patient has very little choice but to undergo the procedure, as the treatment is indicated as the best or only option, and situations where the patient can comparatively afford not to undergo the procedure. This viewpoint was expressed quite eloquently by McCarthy J in the Irish case of *Walsh v Family Planning Services Ltd* when he held that:

> All surgery, in a sense, is elective although the election may have to be implied from the circumstances rather than determined as express ... A patient's condition may be such as to demand surgical intervention as the only hope for survival. Such may be called non-elective surgery. The patient given the choice between enduring pain and having limb replacement surgery or fusion surgery may technically be electing as between pain and the surgery but the election may be more apparent than real. An extreme of elective surgery would be what is purely cosmetic – simply to improve the natural appearance rather than to remedy the physical results of injury or disease. Even it may have an element of quasi-medical care because of the psychological reaction of the patient to personal appearance. A like argument may be advanced in respect of contraceptive surgery, male or female. Such surgery does not have a direct effect on the health or wellbeing of the patient nor in prolongation of life; it may alleviate marital stress or other domestic pressure and in that sense be therapeutic. Essentially, however, it is for the improvement of the sex life of the couple concerned.[9]

Cosmetic surgery, as an example of elective surgery, is a treatment which comparatively, the patient can afford not to undergo.[10] Conventionally, a patient experiencing specific symptoms seeks help from a physician and the physician makes a subsequent diagnosis based on objective scientific knowledge.[11] The diagnosis is followed by the performance of a suitable treatment, provided of course that the physician has obtained the patient's informed consent to the administration of such treatment.[12] Conversely, cosmetic surgery patients generally have no symptoms and therefore a resultant diagnosis

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Implications" http://works.bepress.com/cgi/viewcontent.cgi?article = 1004& context = Kristen_nugent (accessed 2012-02-14); Buyx 2008 *Medicine, Healthcare and Philosophy* 135.

8 *Sidaway v Bethlem Royal Hospital Governors* 1985 1 ALL ER 643 (HL); *Gold v Haringey Health Authority* 1987 2 ALL ER 888 (CA).

9 *Walsh v Family Planning Services* 1992 1 IR 496 517-518.

10 Healy 1998 *Medico-Legal J Ire* 27.

11 Nordenfelt "The Concepts of Health and Illness Revisited" 2007 *Medicine, Health Care and Philosophy* (*Med Health Care Philos*) 8; Buyx 2008 *Medicine, Healthcare and Philosophy* 135.

12 *Ibid.*

is impossible.[13] When performing cosmetic surgery, cosmetic surgeons are subjecting otherwise perfectly healthy individuals to medical risks, side effects and complications for benefits that are, arguably, non-medical.[14] The treatment selection is determined, or at the very least guided, by the patient's wishes.[15] The patient chooses to have cosmetic surgery, rather than the surgery being an absolute necessity, therefore the decision for surgery is a joint process.[16] Communication between the cosmetic surgeon and the patient takes place on a different level as the patient typically expects to relate more democratically with the cosmetic surgeon.[17] Positions of interaction are therefore uniquely different for both the patient and the cosmetic surgeon.[18] In the case of therapeutic or non-elective operations the patient is often reluctant to consent to surgery and must even be persuaded by the physician, whereas the cosmetic surgery patient requests the operation and sometimes actually talks the cosmetic surgeon into performing it.[19] The cosmetic surgeon does not play a crucial role in determining the course of treatment and primarily acts as a source of information to the patient.[20]

Furthermore, when aesthetics is involved, the success of the treatment is entirely dependent upon the patient's subjective opinion.[21] More so than in the case of non-elective or therapeutic surgery, psychological factors are particularly relevant in the case of cosmetic surgery.[22] The motivation for cosmetic surgery differs from therapeutic or non-elective surgery and is often overlooked by the cosmetic surgeon or disguised by the patient.[23] The patient may appear to be very well adjusted, but it

13 Buyx 2008 *Medicine, Healthcare and Philosophy* 135; Heyes & Jones "Cosmetic Surgery in the Age of Gender" in *Cosmetic Surgery: a Feminist Primer* (ed Heyes) (2009) 5.

14 Devereaux "Cosmetic Surgery" in *Medical Enhancement and Posthumanity* (eds Gordijn & Chadwick) (2009) 163; Buyx 2008 *Medicine, Healthcare and Philosophy* 134.

15 Simon "Physician's Duty to Screen Patients for Elective Surgery" 1978 *Ariz LR* 670; Buyx 2008 *Medicine, Healthcare and Philosophy* 135; Heyes & Jones 5.

16 Wright "Management of Patient Dissatisfaction with Results of Cosmetic Procedures" 1980 *Arch Otolarygol Head Neck Surg* 466; Heyes & Jones 5.

17 Wright 1980 *Arch Otolarygol Head Neck Surg* 467; Ezekiel & Emanuel "Four Models of the Physician-Patient Relationship" 1992 *J Am Med Ass* 2221.

18 Wright 1980 *Arch Otolarygol Head Neck Surg* 467; Buyx 2008 *Medicine, Healthcare and Philosophy* 134.

19 Wright & Wright "A Psychological Study of Patients Undergoing Cosmetic Surgery" 1975 *Arch Otolarygol Head Neck Surg* 145.

20 Buyx 2008 *Medicine, Healthcare and Philosophy* 135.

21 Preminger & Fins "Plastic Surgery, Aesthetics and Medical Professionalism: Beauty and the Eye of the Beholder" 2009 *Ann Plast Surg* 342; Ericksen & Billick "Psychiatric Issues in Cosmetic Plastic Surgery" 2012 *Psychiatric Qly* 2; Francis "Informed Consent in Body Dysmorphic Disorder" http://www.medscape.com/viewarticle/758800_4 (accessed 2013-02-20).

22 Wright 1980 *Arch Otolarygol Head Neck Surg* 467; Sarwer *et al* "Psychological Investigations in Cosmetic Surgery: a Look Back and a Look Ahead" 1998 *Plastic and Reconstructive Surgery* 1137; Ericksen & Billick 2012 *Psychiatric Qly* 2.

23 Wright & Wright 1975 *Arch Otolarygol Head Neck Surg* 145.

must be kept in mind that cosmetic procedures will always involve the patient's psyche.[24] The cosmetic surgery patient has the luxury of indulging in his or her own personal whims, wishes, and unrealistic expectations.[25] The cosmetic surgeon must therefore be cognisant of underlying psychological manifestations and take into consideration that behind every request for cosmetic change, there is always the desire for an improved self-image or self-concept.

Changes in the public's attitude toward the physician's role are particularly prominent in cosmetic surgery because of the differences between cosmetic surgery and other areas of medicine. We live in an era where physicians are seen as health providers and patients as health consumers within a larger health industry. According to Wright, technological advancements have widened the sphere of modern medicine, but it also tends to objectify medicine and mislead the public.[26] An inherent danger is that medicine can be oversold and patients may unconsciously try to contract with their physicians for a product or have unrealistic expectations of success.[27] Then, when the patients find that despite the wonders of modern medicine they cannot buy miracles, they may still want to see the physician as an all-knowing healer.[28] Modern-day physicians, particularly cosmetic surgeons, therefore find themselves confronted with patients who apparently understand the capabilities of modern medicine and who want to have more say in the physician-patient relationship, yet they do not want to abandon the traditional concept of the physician's role.[29]

Cosmetic surgeons, more so than any other medical specialists, also face inherent conflicts of interests as performing cosmetic surgery and other cosmetic procedures is a lucrative venture, particularly as it is often a market of pathological repeat customers.[30] To some extent all physicians face a variation of this problem, namely that their livelihoods depend on performing the interventions they recommend.[31] However, economic self-interest is far less blatant when a general surgeon insists that a sick patient have an appendectomy, even if he or she stands to profit from the procedure, as opposed to when a cosmetic surgeon

24 Wright 1980 *Arch Otolarygol Head Neck Surg* 467; Sarwer *et al* 1998 *Plastic and Reconstructive Surgery* 1137.
25 Wright 1980 *Arch Otolarygol Head Neck Surg* 467; Ringel "The Morality of Cosmetic Surgery for Aging" 1998 *Arch Derm* 430.
26 Wright 1980 *Arch Otolarygol Head Neck Surg* 466.
27 *Ibid.*
28 Wright 1980 *Arch Otolarygol Head Neck Surg* 466; Bordo "Twenty Years in the Twilight Zone" in *Cosmetic Surgery: a Feminist Primer* (ed Heyes) (2009) 28.
29 Wright 1980 *Arch Otolarygol Head Neck Surg* 466.
30 Cantor "Cosmetic Dermatology and Physician's Ethical Obligations: More Than Just Hope in a Jar" 2005 *Seminars in Cutaneous Medicine and Surgery* 155; Atiyeh *et al* 2008 *J Aesthetic and Plastic Surgery* 834 Heyes & Jones 5.
31 Cantor 2005 *Seminars in Cutaneous Medicine and Surgery* 155; Atiyeh *et al* 2008 *J Aesthetic and Plastic Surgery* 834.

suggests a patient undergo some extra liposuction along with their abdominoplasty or a chin augmentation along with their rhinoplasty.[32]

3 Cosmetic Surgery and Patient Selection – the Challenges

There are unique challenges to cosmetic surgery patient selection. Considering the large numbers of individuals who choose to undergo cosmetic surgery, it is probable that all of the major psychiatric diagnoses occur in this population.[33] However, certain disorders, particularly those with a body image component, may be more prevalent in cosmetic surgery patients and may contraindicate surgery.[34] Furthermore, studies have shown there to be a strong correlation between preoperative psychological problems and adverse postoperative effects such as depression, general unhappiness with the surgical results, suicidal thoughts, feelings of anger and resentment towards the cosmetic surgeon and the onset of psychotic episodes.[35] Studies have shown that factors such as youthfulness, unrealistic expectations, previous unsatisfactory cosmetic surgery, a disproportionate concern over a minimal deformity, motivation based on relationship issues and a history of depression, anxiety, body dysmorphic disorder, thought disorders and eating disorders are all associated with poor psychological outcomes.[36] If surgery does not prove to be a solution to these problems, these types of patients might have severe adjustment traumas when they come to the realisation that their difficulties were caused by factors other than

32 *Ibid.*

33 Grossbart & Sarwer "Psychosocial Issues and Their Relevance to the Cosmetic Surgery Patient" 2003 *Seminars in Cutaneous Medicine and Surgery* 140; Crerand *et al* "Body Dysmorphic Disorder and Cosmetic Surgery" 2006 *Plastic and Reconstructive Surgery* 173; Newell "Informed Consent for Plastic Surgery. Does It Cut Deeply Enough?" 2011 *J Leg Med* 328.

34 Holder "Cosmetic Breast Surgery" 1972 *J Am Med Ass* 1102; Grossbart & Sarwer 2003 *Seminars in Cutaneous Medicine and Surgery* 140; Cantor 2005 *Seminars in Cutaneous Medicine and Surgery* 159; Crerand *et al* 2006 *Plastic and Reconstructive Surgery* 172.

35 Reich "Factors Influencing Patients Satisfaction With the Results of Aesthetic Plastic Surgery" 1975 *Plastic and Reconstructive Surgery* 5; Wright & Wright 1975 *Arch Otolarygol Head Neck Surg* 145; Simon 1978 *Ariz LR* 672; Cantor 2005 *Seminars in Cutaneous Medicine and Surgery* 159.

36 Goin *et al* "A Prospective Psychological Study of 50 Female Face-Lift Patients" 1980 *Plastic and Reconstructive Surgery* 436; Beale *et al* "Augmentation Mammoplasty: the Surgical and Psychological Effects of the Operation and Prediction of the Result" 1985 *Ann Plast Surg* 473; Grossbart & Sarwer 2003 *Seminars in Cutaneous Medicine and Surgery* 142; Honigman *et al* "A Review of Psychosocial Outcomes For Patients Seeking Cosmetic Surgery" 2004 *Journal of Plastic and Reconstructive Surgery (Plastic and Reconstructive Surgery)* 1229; Ericksen & Billick 2012 *Psychiatric Qly* 5; Nugent "Cosmetic Surgery on Patients With Body Dysmorphic Disorder: the Medical, Legal and Ethical Implications" http://works.bepress.com/cgi/viewcontent.cgi?article=1004&context=Kristen_nugent (accessed 2012-02-14)

their physical appearance.[37] When psychological problems are blamed solely on a cosmetic deficiency, removal of the deficiency my actually increase the severity of the problem and the cosmetic surgeon risks feeding the patient's pathology and violating the ethical principle of non-maleficence.[38] An emotional reaction such as this may lead to allegations that the cosmetic surgeon, not the patient, was at fault.[39] Patients like these are generally hard to please and can become litigation-minded quite easily.[40] Cosmetic surgeons are taught how to and when to operate, but being taught when not to operate is often discounted.[41] The challenge that cosmetic surgeons face is how to identify, prior to surgical intervention, those patients who may have a poor result in terms of psychological adjustment and psychosocial functioning in spite of a technically acceptable result.[42] As "appearance is so laminated to psychological cohesion"[43] and because psychological factors are at the root of most requests for cosmetic surgery, it is submitted that a legal duty on the part of the cosmetic surgeon to remain sensitive to widely recognised dangerous symptomology should exist.

4 The Psychiatric or Psychological Evaluation

It would of course be unreasonable to expect cosmetic surgeons to conduct extensive personality tests on their patients.[44] An actual psychiatric or psychological evaluation is impractical as a routine screening process.[45] Psychiatric or psychological evaluations are expensive, laborious and time-consuming.[46] They certainly represent an astute patient selector, but besides being impractical, psychiatric or psychological evaluations could also be unreliable if employed by the untrained, inexperienced interviewer.[47] A true psychiatric or psychological evaluation is also likely to put the real problem patients on

37 Holder 1972 *J Am Med Ass* 1102.
38 Holder 1972 *J Am Med Ass* 1102; Cantor 2005 *Seminars in Cutaneous Medicine and Surgery* 159.
39 Holder 1972 *J Am Med Ass* 1102.
40 Holder 1972 *J Am Med Ass* 1102; Nugent "Cosmetic Surgery on Patients With Body Dysmorphic Disorder: the Medical, Legal and Ethical Implications" http://works.bepress.com/cgi/viewcontent.cgi?article = 1004&context = Kristen_nugent (accessed 2012-02-14); Carstens & Pearmain *Foundational Principles of South African Medical Law* (2007) 708.
41 Sykes 2009 *Curr Opin Otolaryngol Head Neck Surg* 322.
42 Honigman *et al* 2004 *Plastic and Reconstructive Surgery* 1230; Sykes "Managing the Psychological Aspects of Plastic Surgery Patients" 2009 *Curr Opin Otolaryngol Head Neck Surg* 322.
43 Jefferson "The Psychiatric Assessment of Candidates For Cosmetic Surgery" 1976 *J Nat Med Ass* 411; Simon 1978 *Ariz LR* 685.
44 Nugent "Cosmetic Surgery on Patients With Body Dysmorphic Disorder: the Medical, Legal and Ethical Implications" http://works.bepress.com/cgi/viewcontent.cgi?article = 1004&context = Kristen_nugent (accessed 2012-02-14); Cantor 2005 *Seminars in Cutaneous Medicine and Surgery* 159.
45 Simon 1978 *Ariz LR* 680.
46 *Ibid.*
47 Wright & Wright 1975 *Arch Otolarygol Head Neck Surg* 150.

their guards as they will probably recognise what is going on and manipulate their way through the screening process.[48] According to Wright and Wright, a simplified, fairly stereotyped counselling routine is needed.[49] Such a routine would ideally encourage the patient to communicate forthrightly with his or her cosmetic surgeon and would safeguard even the less experienced cosmetic surgeons.[50]

Issues pertaining to the perceived physical flaw itself should be addressed.[51] Patients should articulate and describe their concern with their appearance in detail.[52] They should be questioned with regards to the length of time they have been concerned with the perceived deformity, the length of time they have been considering undergoing cosmetic surgery and the circumstances that occasioned the current consultation.[53] The cosmetic surgeon must determine whether the patient has undergone any previous cosmetic procedures and whether the patient was satisfied with the results of those surgeries. A history of previous surgeries, performed by different cosmetic surgeons, particularly if the patient was dissatisfied with most or all of these procedures, is reason for concern.[54] Any history of legal proceedings or apparent hostility toward previous cosmetic surgeons should also raise major concern.[55] Unrealistic expectations and improper motivations regarding the outcome of the procedure have also been shown to predict a poor psychological outcome.[56] The cosmetic surgeon should therefore assess the patient's expectations of both the proposed procedure and the desired outcome in cosmetic and personal terms.[57] The patient should be questioned to determine exactly what he or she desires, the realism of his or her expectations and his or her ability to accept imperfect results.[58] A distinction should be made between expectations regarding

48 Wright & Wright 1975 *Arch Otolarygol Head Neck Surg* 150; Simon 1978 *Ariz LR* 680.
49 Wright & Wright 1975 *Arch Otolarygol Head Neck Surg* 150.
50 *Ibid.*
51 Honigman *et al* 2004 *Plastic and Reconstructive Surgery* 1235.
52 Pruzinsky "Psychological Factors in Cosmetic Plastic Surgery: Recent Developments in Patient Care" 1993 *Plastic Surgical Nursing* 64; Honigman *et al* 2004 *Plastic and Reconstructive Surgery* 1235; Panfilov & Larkin *Cosmetic Surgery Today* (2005) 12.
53 Honigman *et al* 2004 *Plastic and Reconstructive Surgery* 1235.
54 Knorr "Feminine Loss of Identity in Rhinoplasty" 1972 *Arch Otolaryngol Head Neck Surg* 11, Goin *et al* 1980 *Plastic and Reconstructive Surgery* 436; Honigman *et al* 2004 *Plastic and Reconstructive Surgery* 1235.
55 Honigman *et al* 2004 *Plastic and Reconstructive Surgery* 1235.
56 Pruzinsky 1993 *Plastic Surgical Nursing* 64; Honigman *et al* 2004 *Plastic and Reconstructive Surgery* 1235; Sykes 2009 *Curr Opin Otolaryngol Head Neck Surg* 324; Panfilov & Larkin 12.
57 Aronoff "The Psychiatric Aspects of Rhinoplasty" in *Plastic and Reconstructive Surgery of the Face and Neck: Aesthetic Surgery* (eds Conley & Dickinson) (1972) 97; Wright & Wright "A Psychological Study of Patients Undergoing Cosmetic Surgery" 1975 *Arch Otolarygol Head Neck Surg* 150; Simon 1978 *Ariz LR* 673; Pruzinsky 1993 *Plastic Surgical Nursing* 64; Honigman *et al* 2004 *Plastic and Reconstructive Surgery* 1235.
58 Reich 1975 *Plastic and Reconstructive Surgery* 9; Simon 1978 *Ariz LR* 682; Panfilov & Larkin 12.

an improved self (for example an improved self-esteem) and expectations regarding enhanced external parameters (for example ending social isolation or getting a promotion at work).[59] Studies have shown the latter to be a reason for concern.[60] If the patient thinks that cosmetic surgery will provide a solution to social or interpersonal problems, the cosmetic surgeon should be wary of performing the procedure.[61] The cosmetic surgeon must carefully clarify what cosmetic surgery can and cannot accomplish.[62] If a patient refuses to enter into a mutual contract of responsibility with the cosmetic surgeon or does not view the surgery realistically, he or she may become a problem patient.[63] Simply asking a patient to state his or her motivation and expectations for the surgery may be insufficient. The mentally unstable patient may give misleading or inaccurate reasons for wanting the surgery and conceal his or her true, unhealthy motivations.[64] The reality is that many patients are far too sophisticated to reveal their true, unhealthy motivations during a simple diagnostic examination.[65] However, the cosmetic surgeon might be able to spot dangerous symptomology by paying attention to a patient's unrealistic responses to strategic questions.[66] Regardless of the patient's ability to camouflage underlying motivations, a cosmetic surgeon should at the very least make reasonable inquiries in order to identify danger signs widely recognised in the practice of cosmetic surgery.[67] Questions should focus on the decision-making process of the patient, family and marital relations, support shown by friends and family and the autonomy of the patient's decision.[68] The cosmetic surgeon must be wary of great enthusiasm, vague or disproportionate expectations, personal stress and paranoia.[69]

Studies have shown that a person with a history of depression, anxiety or a personality disorder is not an ideal candidate for cosmetic surgery in

59 Sarwer & Didie "Body Image in Cosmetic Surgical and Dermatological Practice" in *Disorders of Body Image* (eds Castle and Phillips) (2002) 37; Honigman *et al* 2004 *Plastic and Reconstructive Surgery* 1235.

60 Honigman *et al* 2004 *Plastic and Reconstructive Surgery* 1235 ; Panfilov & Larkin 12.

61 Honigman *et al* 2004 *Plastic and Reconstructive Surgery* 1235.

62 Wright & Wright 1975 *Arch Otolarygol Head Neck Surg* 150.

63 *Idem* 151.

64 Simon 1978 *Ariz LR* 671.

65 Wright & Wright 1975 *Arch Otolarygol Head Neck Surg* 146; Simon 1978 *Ariz LR* 671.

66 Wright & Wright 1975 *Arch Otolarygol Head Neck Surg* 148-50; Peterson & Topazian "Psychological Considerations in Corrective Maxillary and Midfacial Surgery" 1976 *J Oral Surg* 157; Simon 1978 *Ariz LR* 671.

67 Simon 1978 *Ariz LR* 671; Pitts-Taylor *Surgery Junkies: Wellness and Pathology in Cosmetic Culture* (2007) 131; Nugent "Cosmetic Surgery on Patients With Body Dysmorphic Disorder: the Medical, Legal and Ethical Implications" http://works.bepress.com/cgi/viewcontent.cgi?article = 1004& context = Kristen_nugent (accessed 2012-02-14).

68 Simon 1978 *Ariz LR* 673.

69 Book "Psychiatric Assessment for Rhinoplasty" 1971 *Arch Otolaryngol Head Neck Surg* 54; Reich 1975 *Plastic and Reconstructive Surgery* 11; Peterson & Topazian 1976 *J Oral Surg* 162; Simon 1978 *Ariz LR* 683.

terms of surgical and psychological outcomes.[70] The patient should therefore be questioned regarding his or her psychiatric history and current mental state.[71] The cosmetic surgeon should rather not proceed with the surgery if the patient is significantly depressed, psychotic or suffers from body dysmorphic disorder.[72] It is neither a cosmetic surgeon's duty to diagnose a patient with a psychiatric or personality disorder, nor does it fall within their scope of practice, however as part of the screening process the cosmetic surgeon should at least be aware of signs that a patient might be suffering from body dysmorphic disorder.[73] Although psychiatric treatments for the disorder can be effective, many patients who suffer from body dysmorphic disorder do not seek psychiatric help, instead they vehemently pursue a surgical solution for a psychological problem.[74] The cosmetic surgeon should inquire as to the amount of time spent each day worrying about the cosmetic defect, how much distress the perceived imperfection causes and whether concern over the imperfection has had any behavioural consequences such as social avoidance.[75] If the patient is preoccupied with the perceived imperfection to the extent that it causes significant distress or impairment in functioning, body dysmorphic disorder may be present.[76] Furthermore, if the flaw in the patient's appearance is far more insignificant than the patient perceives it to be, this might also be indicative of body dysmorphic disorder.[77]

5 A Physician's Legal Liability Concerning Patient Selection: Application of General Delictual Principles

A psychological or psychiatric injury can be described as any recognisable harmful infringement of the brain or nervous system of a person.[78] Psychological injury can be sustained in a variety of ways, including nervous shock, fright or other forms of mental suffering.[79]

70 Honigman *et al* 2004 *Plastic and Reconstructive Surgery* 1236.
71 Reich 1975 *Plastic and Reconstructive Surgery* 9; Simon 1978 *Ariz LR* 682.
72 Honigman *et al* 2004 *Plastic and Reconstructive Surgery* 1236.
73 Pruzinsky 1993 *Plastic Surgical Nursing* 109 ; Sarwer *et al* 1998 *Plastic and Reconstructive Surgery* 1644 ; Honigman *et al* 2004 *Plastic and Reconstructive Surgery* 1236; Pitts-Taylor 131.
74 Honigman *et al* 2004 *Plastic and Reconstructive Surgery* 1236; Newell *J Leg Med* 318; Newell 2011 *J Leg Med* 318.
75 Honigman *et al* 2004 *Plastic and Reconstructive Surgery* 1236 ; Crerand *et al* 2006 *Plastic and Reconstructive Surgery* 171; Newell 2011 *J Leg Med* 318.
76 *Ibid.*
77 *Ibid.*
78 *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769 (A) 775; *Barnard v Santam Bpk* 1999 1 SA 202 (HHA) 208-209; *Majiet v Santam Ltd* 1997 4 All SA 555 (K) 567; Neethling "Deliktuele Aanspreeklikheid Weens die Veroorsaking van Psigiese Letsels" 2000 *TSAR* 1.
79 *Minister of Justice v Hofmeyr* 1993 3 SA 131 (A) 145-6; Neethling 2000 *TSAR* 1.

Thus far courts have been primarily concerned with delictual liability due to the infliction of nervous shock, however there is no reason why psychological or psychiatric harm caused in ways other than emotional shock would not be actionable.[80] Delictual liability is primarily determined with reference to the requirements of wrongfulness, fault and legal causation. The brain or nervous system is as much a part of the physical body as any limb and any infringement of a person's physical-psychological integrity is regarded as *prima facie* wrongful and therefore actionable.[81] The cosmetic surgeon's duty to screen patients in order to prevent psychological harm is rooted in the fiduciary relationship that exists between a physician and patient.[82] This duty can be legally enforced by applying the general principles of negligence.[83] In order to establish negligence, the reasonable foreseeability and preventability of the psychological harm must be ascertained. The essence of negligence lies in the foreseeability of harm that may give rise to a duty to take reasonable steps to prevent the harm.[84] The foreseeability of emotional harm resulting from the performance of an elective surgery (particularly cosmetic surgery) without prior screening is well documented within the medical research.[85] This is partly due to the fact that, in the case of cosmetic surgery, underlying psychological considerations will always be present.[86]

When applying the reasonable foreseeability test it is impossible to formulate exact legal criteria for the determination of the reasonable foreseeability of the harm.[87] There are, however, a few broad and flexible guidelines that can be followed in order to determine the foreseeability of the harm. The general guideline is that the foreseeability of the harm is dependent upon the degree of probability of the manifestation of the harm.[88] If there was a very strong possibility of harm occurring, then it is highly likely that the resulting harm was

80 Neethling 2000 *TSAR* 1; *Barnard v Santam Bpk* 1999 1 SA 202 (HHA) 208-209.

81 Neethling 2000 *TSAR* 1 4; *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769 (A) 779; *Barnard v Santam Bpk* 209.

82 Nugent "Cosmetic Surgery on Patients with Body Dysmorphic Disorder: the Medical, Legal and Ethical Implications" http://works.bepress.com/cgi/viewcontent.cgi?article = 1004&context = Kristen_nugent (accessed 2012-02-14); Panfilov & Larkin 6.

83 Simon 1978 *Ariz LR* 673.

84 Neethling *et al* 125; *Kruger v Coetzee* 1966 2 SA 428 (A) 430.

85 Jefferson 1976 *J Nat Med Ass* 411-3; Simon 1978 *Ariz LR* 684.

86 Wright & Wright 1975 *Arch Otolarygol Head Neck Surg* 151; Simon 1978 *Ariz LR* 686; Mantese *et al* "Cosmetic Surgery and Informed Consent" 2006 *Mich Bar J* 27.

87 Van der Walt & Midgley *Principles of Delict* (2005) 177-8; *S v Bochris Investments* 1988 1 SA 861 (A); Visser *et al General Principles of Criminal Law Through the Cases* (1990) 541-63; *Butters v Cape Town Municipality* 1993 3 SA 521 (K); *Deysel v Karsten* 1994 1 SA 447 (A); *Cape Town Municipality v Butters* 1996 1 SA 473 (K).

88 *Ibid.*

reasonably foreseeable.[89] As far as the preventability of foreseeable harm is concerned, four factors must be taken into consideration. These factors relate to the probability of harm, the gravity of potential harm, the importance and object of the wrongdoer's conduct and the gravity of the burden of preventing the harm.[90] These factors help determine how a reasonable cosmetic surgeon would act under similar circumstances. When the burden of taking steps to prevent the harm is light and the probability and gravity of harm is great, a legal duty to take steps to prevent the harm exists.[91] The probability of harm may be relatively small, but the burden of making reasonable inquiries and referring doubtful cases to psychologists or psychiatrists to avoid serious harm is negligible.[92] Therefore, the cosmetic surgeon carries a legal duty to take these precautions and performing cosmetic surgery without paying any attention to the emotional fitness of the patient will constitute negligence.[93] In this regard Van der Walt and Midgley[94] state that:

> In general the magnitude of the risk must be balanced against the utility of the conduct and the difficulty, expense or other disadvantage of desisting from the conduct or taking a particular precaution. If the magnitude of the risks outweighs the utility of the conduct, the reasonable person would take measures to prevent the occurrence of harm; if the actor failed to take such measures he or she acted negligently. On the other hand, if the burden of eliminating a risk of harm outweighs the magnitude of the risk, the reasonable person would not take any steps to prevent the occurrence of foreseeable harm.

A cosmetic surgeon's decision to perform cosmetic surgery on a psychologically and emotionally unfit patient could even sometimes, in rare cases, be seen as a misdiagnosis.[95] For example, further cosmetic surgery will not cure the patient suffering from body dysmorphic disorder. Such a patient needs psychiatric help, not additional surgery. That being said, a misdiagnosis will not always constitute negligence. An erroneous diagnosis *per se* is not necessarily negligent, but the failure to adequately examine a patient in order to formulate an accurate diagnosis is indeed negligent.[96]

The patient plaintiff would also have to prove that a reasonably close nexus existed between the cosmetic surgeon's breach of duty and the ultimate harm suffered by the patient.[97] The cosmetic surgeon's breach of duty must therefore be the proximate cause of the harm suffered by

89 *Ibid.*
90 Simon 1978 *Ariz LR* 685; Neethling *et al* 139-40; Van der Walt & Midgley 179.
91 Simon 1978 *Ariz LR* 686.
92 Wright & Wright 1975 *Arch Otolarygol Head Neck Surg* 151; Jefferson 1976 *J Nat Med Ass* 412; Peterson & Topazian 1976 *J Oral Surg* 157; Simon 1978 *Ariz LR* 686.
93 Simon 1978 *Ariz LR* 686.
94 Van der Walt & Midgley 179.
95 Simon 1978 *Ariz LR* 673.
96 *Ibid.*
97 *Idem* 688.

the patient. In the case of psychological harm following surgery, the patient plaintiff would have to prove that had the surgeon refused surgery or warned of the imminent risks of psychological harm, the surgery would never have been performed and the resulting psychological harm would not have been incurred by the patient. The patient plaintiff would not have to prove that he or she had no pre-existing psychological problems. Cause includes substantial or material factors contributing to ultimate injury, therefore a plaintiff would only have to prove that the surgeon's conduct had been a precipitating and significant factor that triggered new problems or substantially worsened existing problems.[98]

As far as the nexus between the defendant's conduct and harm suffered by an abnormally psychologically vulnerable patient is concerned, the *talem qualem* rule also becomes relevant. This is a well-established legal principle and is commonly referred to as the egg-skull rule.[99] This rule is traditionally expressed in the maxim "the wrongdoer must take the victim as he finds him".[100] Egg-skull cases arise where the plaintiff, because of one or other physical, psychological or economic weakness, suffers a worse injury or loss as a result of the wrongdoer's conduct than would have been the case had the plaintiff not suffered from the particular weakness.[101] The egg-skull rule has its origin in the English case of *Dulieu v White and Sons*[102] where the court held that: "If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer's claim for damages that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart."[103] Legal scholars generally agree that in such a case the wrongdoer should be held liable for all the harm which may be ascribed to the existence of the weakness.[104] Just as a defendant who injures a plaintiff with an egg-skull is not entitled to use the abnormal vulnerability of the plaintiff's skull as a defence, it could be argued that a cosmetic surgeon cannot use the extraordinary psychological vulnerability or the egg-skull psyche of an unstable cosmetic surgery patient as a defence.[105]

There are several theories on how the liability of the wrongdoer should be justified, or which test for legal causation should be used to express

98 *Idem* 689.
99 Neethling *et al* 191.
100 *Hay or Bourhill v Young* 1943 AC 92 109-110.
101 Neethling *et al* 191.
102 *Dulieu v White and Sons* 1901 2 KB 669.
103 *Idem* 679.
104 Neethling *et al* 192.
105 Simon 1978 *Ariz LR* 690; Neethling 2000 *TSAR* 10. Van der Walt & Midgley 173 state that: "The doctrine of direct consequences has exerted its strongest influence on the question of liability for personal injuries. Once a defendant has been proved to have acted wrongfully and negligently, his or her responsibility embraces any harm flowing from a latent physical condition of the plaintiff, however unforeseeable or abnormal. This principle, inherent in the theory of direct consequences, is usually expressed by stating that the tortfeasor 'must take the victim as he finds him'."

liability in egg-skull cases.[106] Suffice it to say that the most acceptable approach to egg-skull cases is a flexible test for legal causation as illustrated in the case of *Smit v Abrahams*[107] where Farmal J investigated the rule and came to the conclusion that the fact that a plaintiff has a proverbial egg-skull is just one more fact that needs to be considered when applying all the other facts of the particular case in terms of the flexible test for causality. One must therefore determine whether, on the basis of reasonableness, fairness and justice, and in the light of all the circumstances of the case, the damage should be reasonably be imputed to the defendant.[108] Other existing tests for legal causation may also play a secondary role when determining legal causality in terms of the flexible approach.[109] In particular, the direct consequences test may be one of several factors taken into account in egg-skull cases.[110] In terms of the direct consequences test, a wrongdoer is liable for all direct consequences of his negligent conduct, irrespective of whether these consequences were reasonably foreseeable.[111] The fact that the psychological harm to an abnormally vulnerable cosmetic surgery patient was not reasonably foreseeable would in terms of this test not constitute a defence. The direct consequences test cannot be applied as a general test for causality.[112] It may simply, along with all the other tests for causality, play a subsidiary role. It may be a particularly relevant factor, but not the only factor when determining legal causality in egg-skull cases.

6 A Physician's Legal Liability Concerning Patient Selection: Assault Due to a Lack of Informed Consent

The cosmetic surgeon's duty to screen patients could also be enforced by applying the doctrine of informed consent. As a patient with a psychiatric disorder might possibly lack autonomy or the capacity to consent to treatment, he or she could be incapable of giving his or her informed consent to the treatment or surgery. Such a lack of informed consent due to a lack of capacity on the part of the patient could give rise to an action for battery against the surgeon. Capacity refers to competence; which is the functional ability to meet the demands of the decision-making situation by evaluating the potential consequences.[113] The fact that a patient's choice seems irrational, or does not accord with the cosmetic

106 For more information on the different theories of justification see Neethling *et al* 192-193.
107 *Smit v Abrahams* 1994 4 SA 1 (A).
108 Neethling *et al* 193.
109 Neethling *et al* 181; *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 4 SA 747 (A) 765.
110 Neethling *et al* 187; Van der Walt & Midgley 207.
111 Neethling *et al* 185; Van der Walt & Midgley 206.
112 Neethling *et al* 187 ; Boberg 442 ; Visser *et al* 112.
113 Carstens & Pearmain 879.

surgeon's view of what is in the patient's best interests *per se*, is not evidence that the patient lacks competence.[114] Furthermore, patients who have psychological problems or who are vulnerable to such problems are generally not mentally ill or incompetent to give consent.[115] Even mentally ill persons are generally able to consent to medical treatment as mental illness *per se* does not render a person unable to consent.[116] Mentally ill patients are only incapable of giving informed consent if their disorder prevents them from understanding what they are consenting to.[117] It is possible that severe psychological problems could render an individual incompetent to give consent to surgery.[118] This would be the case if the mental disorder prevents the patient from making definitive decisions, communicating his or her consent or accepting the need for medical intervention.[119]

7 A Physician's Legal Liability Concerning Patient Selection, Informed Consent and Body Dysmorphic Disorder: the Case of *Lynn G v Hugo*

An example can be found in the New York case of *Lynn G v Hugo*.[120] In this case, the plaintiff had visited the defendant, her cosmetic surgeon, nearly fifty times over a six year period to discuss various cosmetic surgery procedures. During that period, she underwent several cosmetic surgeries, including eyelid surgery, facial liposuction, eyebrow tattooing and wrinkle and skin growth removals. At some stage the plaintiff elected to undergo liposuction on her stomach. When the liposuction failed to produce the desired results, the plaintiff decided to undergo a full abdominoplasty to tighten her abdomen. Prior to the surgery, the defendant informed plaintiff of the risks associated with an abdominoplasty, including ugly scarring. The plaintiff acknowledged, in writing, her understanding of the risks and signed a consent form. Following her surgery, the plaintiff complained of an unsightly scar on

114 Par 9.2 HPCSA *Guidelines for Good Practice in the Health Care Professions, Seeking Patient's Informed Consent: The Ethical Considerations*.

115 Simon 1978 *Ariz LR* 691; Geffroy & Vernaglia "'But Are You Really Sure?': Requiring Psychiatric Proof of Patient's Informed Consent Prior to Elective Surgery" 2001 *Medicine and Health/Rhode Island* 142; Carstens & Pearmain 900; Cantor 2005 *Seminars in Cutaneous Medicine and Surgery* 159; Francis "Informed Consent in Body Dysmorphic Disorder" http://www.med scape.com/viewarticle/758800_4 (accessed 2013-02-20).

116 Carstens & Pearmain 900; Cantor 2005 *Seminars in Cutaneous Medicine and Surgery* 159; Francis "Informed Consent in Body Dysmorphic Disorder" http://www.medscape.com/viewarticle/758800_4 (accessed 2013-02-20).

117 Carstens & Pearmain 879; Francis "Informed Consent in Body Dysmorphic Disorder" http://www.med scape.com/viewarticle/758800_4 (accessed 2013-02-20).

118 Simon 1978 *Ariz LR* 691.

119 Carstens & Pearmain 901.

120 *Lynn G v Hugo* 96 NY2d 306.

her abdomen. The plaintiff then instituted legal action against the defendant, alleging a lack of informed consent and medical malpractice. Specifically, plaintiff claimed that she lacked capacity to consent to the procedures because she suffered from body dysmorphic disorder. The crux of her argument was that if a patient suffers from a mental disorder that is directly related to the procedure to which he or she is consenting, the validity of that patient's informed consent should be called into question.[121] The plaintiff claimed that her unusually high demand for surgical correction of minimal defects, together with the defendant's awareness of her use of antidepressant medication, should have alerted him to her condition, and that the defendant was negligent in not referring her to a psychiatrist before performing the surgeries. Furthermore, she asserted that body dysmorphic disorder had diminished her capacity to provide valid informed consent. The plaintiff neither contended that body dysmorphic disorder had rendered her incapable of concluding any contracts, nor that it had rendered her incapable of providing informed consent to surgery in general. The plaintiff simply claimed that body dysmorphic disorder had impacted her ability to properly evaluate risks and benefits of cosmetic surgery, as it had caused her to irrationally exaggerate her perceived physical imperfections. The court held that there was insufficient evidence to establish that the plaintiff actually suffered from body dysmorphic disorder. Consequently the court was silent on whether body dysmorphic disorder could potentially invalidate a patient's ability to provide informed consent to cosmetic surgery. Regardless, the case is still significant as the court's review of the adequacy of evidence to establish whether the plaintiff suffered from body dysmorphic disorder indicates that body dysmorphic disorder might potentially influence the validity of a cosmetic surgery patient's informed consent.[122] The court of appeal avoided making a pronouncement on the lower court's holding that cosmetic surgeons should be aware of established psychiatric conditions that affect body image and could impair a patient's ability properly to evaluate and consent to cosmetic surgery. The lower court's analysis of the surgeon's method to obtain informed consent was also sidestepped on appeal. The consequence of the lower court's opinion, never rejected at appellate level, is that when a patient suffers from compromised judgment, the determination whether or not to undergo surgery cannot exclusively be left with the patient.[123] Despite the fact that the court of appeal did not apply the doctrine of informed consent, the case is still significant as it is indicative of the fact that claims regarding informed consent by cosmetic surgery patients suffering from body dysmorphic disorder are beginning to emerge, that courts are starting to recognise that body dysmorphic disorder could potentially influence the validity of patient's consent and that cosmetic surgeons must take a more proactive

121 Mantese *et al* 2006 *Mich Bar J* 27; Pitts-Taylor 131; Newell 2011 *J Leg Med* 328.
122 *Idem* 325.
123 *Ibid.*

role in determining whether a patient should undergo cosmetic surgery when that patient's judgment is possibly impaired.[124]

8 A Physician's Legal Liability Concerning Patient Selection: Can a Physician Be Held Contractually Liable?

As far as a cosmetic surgeon's contractual liability for operating on a patient suffering from body dysmorphic disorder is concerned, courts are unlikely to hold a surgeon who operated in accordance with reasonable care and skill liable in contract for such a patient's poor physical or psychological outcome after surgery. That being said, if the court determines that the cosmetic surgeon, in operating on a patient ostensibly suffering from body dysmorphic disorder, did not treat the patient with a reasonable degree of professional skill and care and to a standard required by the professional and ethical rules of the profession, such a patient may have a claim based on a breach of contract. It is an implied or tacit term in healthcare contracts that the physician will treat the patient with a reasonable degree of professional skill and care and to a standard required by the professional and ethical rules of the profession.[125] Furthermore, as far as the formation and conclusion of a contract is concerned, informed consent is usually a precursor to the contract, but it may also form part of the terms of the contract itself.[126] It is generally an implied or tacit term in health care contracts that the patient's informed consent will be obtained with regard to treatment that is administered or surgery that is performed on the patient prior to the administration or performance of such treatment or surgery.[127] It is also worth noting that if the cosmetic surgeon had made a contractual promise of a certain surgical outcome to the patient, the issue of negligence and whether or not the patient had otherwise been competent to give informed consent is inconsequential with regards to the determination of the cosmetic surgeon's liability.[128] A representation which occurs during pre-contractual negotiations can be made part of the consensus between the parties and as such might become a term of the

124 *Ibid.*

125 Carstens & Pearmain 364. See Carstens & Pearmain 362 where it is said that there are a number of terms, including that a patient will be treated with a reasonable degree of professional care and skill, which may be inferred in a healthcare contract on the grounds of public policy, fairness and reasonableness. These terms are derived as much from the law of delict, constitutional law and administrative law as from the law of contract.

126 *Idem* 313.

127 Carstens & Pearmain 364; *Castell v De Greef* 1994 (4) SA 408 (C); *Broude v McIntosh* 1998 (3) SA 60 (SCA).

128 Nugent "Cosmetic Surgery on Patients With Body Dysmorphic Disorder: the Medical, Legal and Ethical Implications" http://works.bepress.com/cgi/viewcontent.cgi?article=1004&context=Kristen_nugent (accessed 2012-02-14).

ensuing contract.[129] This is relevant in the case of patients suffering from body dysmorphic disorder as such patients are more likely to interpret statements of opinion made by the cosmetic surgeon with some optimistic colouring, in their own minds thereby transforming such statements into promises and guarantees.[130]

A claim based on breach of contract might be particularly attractive in cosmetic surgery cases where the plaintiff has trouble recovering on other grounds. When courts are permitted to infer contractual guarantees from speculative oral statements made by the cosmetic surgeon during consultation, the cosmetic surgeon's scope of liability is broadened by bringing an action for breach of contract.[131] From the plaintiff's perspective, the possibility of pleading a case in contract is attractive since it renders his or her burden of proof significantly lighter as there is no need to prove negligence on the part of the cosmetic surgeon.[132] This suggests that the cosmetic surgeon's potential liability is increased under the contractual theory, while under negligence theory it is limited to actions where fault can be proven.

An action in contract is also particularly attractive if the cosmetic surgeon advertised or engaged in puffery during consultation in a manner that vulnerable individuals, such as those suffering from body dysmorphic disorder, might have interpreted as an express guarantee of satisfaction or of a certain aesthetic result.[133] Given the high percentage of individuals opting for cosmetic surgery who suffer from body dysmorphic disorder, telling a patient that he or she can surgically achieve the same appearance as a model or a celebrity, or even using computerised digital imaging software is not recommended as patients may accuse surgeons of warranting the surgeon's ability to achieve that particular result.[134] Not even the most skilled cosmetic surgeon can make a patient look identical to the prognostic virtual image, and the patient suffering from body dysmorphic disorder's distorted perspective will focus on any deviations from the aesthetic ideal he or she had hoped

129 Van der Merwe *et al Contract General Principles* (2007) 106.

130 Nugent "Cosmetic Surgery on Patients With Body Dysmorphic Disorder: the Medical, Legal and Ethical Implications" http://works.bepress.com/cgi/viewcontent.cgi?article = 1004&context = Kristen_nugent (accessed 2012-02-14).

131 Bonebrake "Contractual Liability in Medical Malpractice – *Sullivan v O'Connor*" 1974 *DePaul LR* 217.

132 *Ibid.*

133 Nugent "Cosmetic Surgery on Patients With Body Dysmorphic Disorder: the Medical, Legal and Ethical Implications" http://works.bepress.com/cgi/viewcontent.cgi?article = 1004&context = Kristen_nugent (accessed 2012-02-14).

134 Chávez *et al* "Legal Issues of Computer Imaging in Plastic Surgery: a Primer" 1997 *Plastic and Reconstructive Surgery* 1601; Koch *et al* "Advantages and Disadvantages of Computer Imaging in Cosmetic Surgery" 1998 *Dermatologic Surgery* 195; Nugent "Cosmetic Surgery on Patients With Body Dysmorphic Disorder: the Medical, Legal and Ethical Implications" http://works.bepress.com/cgi/viewcontent.cgi?article = 1004&context = Kristen_nugent (accessed 2012-02-14).

to achieve.[135] A disillusioned patient could easily grab on to what he or she understood as a guarantee of perfection and complete satisfaction to initiate litigation against the surgeon. Recovering with a contractual claim under these circumstances might require a strained interpretation of the surrounding facts and will probably only be used as a cause of action as a last resort when the battery due to a lack of informed consent and medical negligence charges have failed.[136] If, however, the court believes that the patient could have reasonably interpreted the cosmetic surgeon's statements during consultation, the surgeon's advertising materials or the surgeon's use of computer imaging as a promise to attain a certain result, the court may allow the patient to recover damages.

9 Conclusions and Recommendations

Cosmetic surgeons could only benefit from being acutely aware of the psychological undercurrents and possible psychiatric disorders such as body dysmorphic disorder, unrealistic expectations or heightened narcissism not remediable with surgery.[137] The success of a physician-patient relationship is based on good communication.[138] Cosmetic surgeons, more so than most other specialists, need to be careful listeners with clinical acumen that extends beyond the typical borders of medical illness.[139] Most problem patients can be handled effectively by the cosmetic surgeon by being gentle, but completely candid during the counselling interview.[140] If the cosmetic surgeon believes that there might be present or potential psychological disturbances, he or she should candidly confront the patient and recommend that the patient arranges a psychiatric consultation prior to surgery.[141] The cosmetic surgeon is under no duty to cure the patient, but he or she must at least refer the patient to a specialist for counselling before even considering the possibility of proceeding with the surgery.[142] Implementing a basic screening process will not only promote the patient's best interest; it will also protect the cosmetic surgeon against unnecessary and malicious litigation.

135 *Ibid.*
136 Nugent "Cosmetic Surgery on Patients With Body Dysmorphic Disorder: the Medical, Legal and Ethical Implications" http://works.bepress.com/cgi/viewcontent.cgi?article = 1004&context = Kristen_nugent (accessed 2012-02-14).
137 Atiyeh *et al* 2008 *J Aesthetic and Plastic Surgery* 831; Ericksen & Billick 2012 *Psychiatric Qly* 2.
138 Sykes 2009 *Curr Opin Otolaryngol Head Neck Surg* 321; Koch *et al* 1998 *Dermatologic Surgery* 1601.
139 Sykes 2009 *Curr Opin Otolaryngol Head Neck Surg* 321.
140 Wright & Wright 1975 *Arch Otolarygol Head Neck Surg* 151.
141 Book 1971 *Arch Otolaryngol Head Neck Surg* 54; Simon 1978 *Ariz LR* 683; Aronoff 97.
142 Simon 1978 *Ariz LR* 688; Pitts-Taylor 140; Sykes 2009 *Curr Opin Otolaryngol Head Neck Surg* 324.