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### BRIEF REPORT

## Analysis of claims based on alleged medical professional liability related to mastopexy<sup>☆</sup>



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### KEYWORDS

Mastopexy;  
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Malpractice;  
Claims;  
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### Abstract

**Introduction:** Mastopexy is one of the most common aesthetic procedures, and is also one of the causes of increased litigation in the past few years.

**Material and methods:** 50 provincial court judgements were checked in the period between 2010 and 2018, as well as claims made to the Professional Liability Service of the Catalanian Colleges of Physicians between 2009 and 2018 regarding mastopexy.

**Results:** Most of the 50 judgements were based on an information defect and/or technical malpractice. In 26 cases all claims were dismissed. The compensation average in the 24 condemnatory judgements was 22,583 Euros. The case study analysis revealed 28 complaints regarding mastopexy, 17 were out-of-court claims, 7 civil, and 4 criminal. The average amount claimed in civil proceedings was 47,551.24 Euros, while the average compensation was 30,734.32 Euros.

**Discussion:** The number of resolutions remained stable over the studied period. The lack of information as well as the judicial recognition of an obligation of means or results is essential in these types of claims. There is a notable difference between the amount claimed and the compensation in the cases of conviction.

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**PALABRAS CLAVE**

Mastopexia;  
 Cirugía estética;  
 Ptosis mamaria;  
 Malpraxis;  
 Reclamaciones;  
 Responsabilidad  
 profesional médica

## Análisis de las reclamaciones por presunta responsabilidad profesional médica relacionadas con la mastopexia

**Resumen**

**Introducción:** La mastopexia es uno de los actos más comunes en cirugía estética, constituyendo asimismo una de las causas de litigiosidad más creciente en los últimos años.

**Material y métodos:** Se revisaron las sentencias de audiencias provinciales del periodo 2010-2018 y se analizaron las reclamaciones de la casuística del Consell de Col·legis de Metges de Catalunya entre el año 2009 al 2018 relativas a la mastopexia.

**Resultados:** Se obtuvieron 50 sentencias en las que la mayoría de las reclamaciones se basaron en un defecto de información y/o mala praxis técnica. En 26 casos se desestimaron las pretensiones de la actora. La media del quantum indemnizatorio en las 24 resoluciones condenatorias fue de 22.583 euros. El análisis de casuística objetivó 28 reclamaciones relativas a mastopexia, siendo extrajudiciales en 17 casos, civiles en 7 y penales en 4. La media de cuantía reclamada en vía civil fue de 47.551,24 euros y la indemnizada fue de 30.734,32 euros.

**Discusión:** El número de resoluciones se ha mantenido estable en el periodo estudiado. El defecto de información, así como la estimación jurídica de una obligación de medios o de resultados es clave en este tipo de reclamaciones. Existe una notable diferencia entre el quantum reclamado y el indemnizatorio en los casos de condena.

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**Introduction**

Mastopexy, or breast elevation, an operation indicated for correcting excessive breast ptosis, is currently one of the most common cosmetic surgery procedures (whether performed alone or combined with mammoplasty); and alleged malpractice stemming from it has become one of the fastest-growing reasons for lawsuits in the last few years.<sup>1-3</sup> From a legal point of view, it should be remembered that the surgeon's obligation in every mastopexy (given that it is a voluntary medical procedure) is linked to the means and not to results. At least, that is what the classic Spanish Supreme Court case 534/2009<sup>4</sup> (30 June) sentence of José Antonio Seijas Quintana indicates. This case established the springboard for setting the current service contract framework for the doctor-patient relationship in these cases: provision of services regardless of the therapeutic value or the voluntary nature of the medical procedure.

**Material and methods**

This article presents a double analysis. First of all, we reviewed the lawsuit sentences in the *Thomson Reuters Aranzadi* and *El Derecho* databases corresponding only to Spanish provincial court (PC) rulings given between 2010 and 2018. Our review was limited to PC sentences because there was just 1 case fitting the nature of the study that reached the Supreme Court during the study period.<sup>5</sup> The keywords used in these searches were "mastopexia" (mastopexy) in the *Thomson Reuters Aranzadi* database, and "mastopexia" and "cirugía estética" (cosmetic surgery) in the *El Derecho* database.

We next analysed the case law files of the Professional Responsibility Service (PRS) (*Servicio de Responsabilidad Profesional* in Spanish) of the Catalan Medical Association (*Consejo de Colegios de Médicos de Cataluña, CCMC*). This CCMC service manages the main medical indemnity insurance for medical professional responsibility (MPR) in Catalonia.<sup>6</sup> Any civil, penal or out-of-court claim for malpractice against a physician covered by MPR insurance is directly handled by the PRS, which has a database of more than 9700 claims dating from 1986. Physicians and lawyers specialising in MPR use a standard electronic form to enter database information; sources utilised are clinical records and notes, reports and expert evaluations, as well as reports of costs and results.

A descriptive analysis (covering from 1 January 2009 to 31 December 2018) was carried out, identifying and reviewing files of claims related to mastopexy procedures in the databases. For analysis purposes, the events causing the claims were divided into various categories based on the clinical data and the alleged crime or right violated. Procedures on completion were divided into legal and out-of-court procedures, based on whether courts were involved in resolving it; and in procedures with MPR or not, based on whether damages were awarded or not. The amount of the applicable compensation (excluding court costs and legal fees) was recorded.

**Results**

The case-law analysis yielded a total of 50 sentences. The number of lawsuit cases remained stable over the 10 years, ranging from 4 to 7 civil procedures between 2010 and 2015 (except for 2016, in which there were 10 cases); the cases

dropped to 4 and 3 in 2017 and 2018, respectively. As for 2019, there has not been any resolution in that respect up to now.

In regards to the motivation of the claims filed, it is worth noting that the majority of the cases were based on both faulty preoperative information and technique malpractice. There were only 3 cases in which the claims were based solely on malpractice.

As for court decisions, there were 26 (52%) resolutions that completely rejected the patients' claims, while the judgements were favourable in 24 cases (48%). However, 23 of these 24 cases were only upheld partially. The reasons for the compensation varied, although it can be said that incomplete/inaccurate information (either exclusively or together with another factor) appear to be the main cause leading the court to indemnify the patient. Of the 50 sentences reviewed, the amount claimed was specified in 28 cases, with the average (56%) being 91,996 Euros. Average compensation in the adverse rulings was 22,583 Euros.

As for the analysis of the claims received in the CCMC PRS for alleged mastopexy-caused damage, 28 closed proceedings were registered (the analysis covered up to the end of 2017 because there were no closed proceedings in 2018 and 2019 at the time of the study). Annual incidence was 1 in 7 cases, with an average of 3.1 cases a year. The number of claims in 2016 stands out, climbing to 7 (25% of the total in the period studied). The claims generally were handled through out-of-court means (17 cases, 60.71%), while there were 7 (25%) civil cases and 4 (14.28%) criminal.

Of the 17 out-of-court claims, 8 cases awarded the patient indemnity. The average amount claimed in these cases was 21,842.76 Euros, while the average compensation was 21,754.10 Euros because they were considered to be risk proceedings.

Of the 7 civil claims, responsibility was ruled in 3 cases. The causes for compensation were basically information defect and malpractice (in 1 case, disproportionate damage in the patient's aesthetic results was also mentioned). In 2 cases, a settlement was reached after the claim was presented. The average amount claimed in the civil cases was 47,551.24 Euros, and the average compensation was 30,734.32 Euros. (The other 2 claims correspond to a dismissal and to a call for preliminary investigation that was unsuccessful.)

It is noteworthy that no responsibility was attributed to the surgeon in any of the 4 criminal cases. The reason for this was that no malpractice was found to exist in them.

In 27 of the 28 cases (96.43%) studied, the medical procedure took place in private healthcare sites. The remaining case was carried out in a public hospital; it involved unsatisfactory curative treatment, where the patient underwent mastopexy due to macromastia with a negative impact on her health.

In 6 (21.43%) of the 28 claims, a defect was found in the information given to the patient. Although there was a written informed consent form (ICF), in all of the cases it was a generic ICF or a form that referred to a different surgical intervention (mammoplasty).

In 24 cases (85.71%), the physician sued was a licensed specialist in plastic, aesthetic and reconstructive surgery. The most frequent reason for litigation was poor wound healing, involving unsightly scars. Another common motive was

the aesthetic defect caused by breast asymmetry. In the majority of the cases, technical malpractice claims were accompanied by charges of an information defect.

## Discussion

As for the legal analysis, based on international literature about this matter, our conclusion is that the courts reached a condemnatory verdict in a relatively high percent of cases (48%) because a defect in the information provided to the patient was found; patient information is thus something to be improved.<sup>7,8</sup> With respect to alleged faulty technical practice, the most common medical causes on which the claims were based were capsular contractures, post-operative infections and unsightly effects (very noticeable scars, asymmetry or accentuated ptosis). The results of the descriptive analysis of the CCMC PRS cases also revealed the same deficiency in patient information, with compensation being awarded in 39.3% of the cases.

It is worth noting that some authors have indicated that physicians practicing aesthetic surgery are more inclined to settle claims than those in other medical specialities. This is attributed to how damaging unfavourable publicity is to aesthetic surgeons, given that they practice medicine that is elective or not necessary, in which one's reputation is paramount when it comes to choosing a specialist. For that reason, the claims remain in the court of first instance and do not reach the High Court.<sup>9</sup>

In both the legal cases analysed and the CCMC's own PRS cases, the number of sentences has remained stable in the last few years, although 2016 stands out in both instances. The number increased significantly in that year, and the causes of that annual increase in claims have not been detected.

In the legal cases studied, the average compensation awarded (22,583 Euros) is far from the average sought (91,996 Euros), as no defect in technical or healthcare practice by the physician was seen in the majority of the cases. As for the compensations from the CCMC PRS, the average payment given in out-of-court cases was 21,754.10 Euros, while the average compensation on a civil basis was 30,734.32 Euros. It should be pointed out that the average amount given by the CCMC PRS in out-of-court cases is slightly less than the compensation established in the sentences studied. However, when the claims received by the CCMC PRS reached the courts, the compensation awarded was notably higher.

There are several questions to be clarified in discussing the motives registered for compensation. First of all, the obligation of the physician as to means and the assurance or guarantee of the result by the physician or by the medical centre's publicity led to 4 condemnatory sentences when the aesthetic improvement desired was not achieved (sentence of the provincial court of [SAP in Spanish] Barcelona No. 9/2016 of 18 January, SAP Madrid No. 230/2010 of 16 March and SAP Madrid No. 533/2014 of 25 November, and SAP Valencia of 31 March 2016).

In second place, it is also important to mention 3 sentences during the period studied (2000–2018) that contain a legal basis completely opposite the case-law precedent for this type of actions; the physician was condemned because

the relationship with the patient was considered to be a contract comparable to the contract for works and, consequently, establishing the physician's obligation for results (SAP Asturias No. 40/2010 of 1 February, SAP Madrid No. 380/2010 of 9 June and SAP Murcia No. 2/2013 of 3 January).

In third place, in the majority of cases the compensations correspond to 3 factors: the reimbursement of the amount paid for the intervention, damages for pain and suffering (calculated according to the discretion of the judge, or in agreement with the amount sought by the plaintiff) and, lastly, the sequelae (with the help of applying the monetary scale in effect at the time of the intervention).

In fourth place, it should be noted that the doctrine of lost opportunity is invoked up to 4 times, implicitly or explicitly, a concept which is of great medical and legal interest.<sup>10,11</sup> The doctrine is mentioned because a defect of information and physical damage not attributable to the physician's technical practice was seen in these cases. In all of them, compensation of 50% over the total of the bodily damage evaluated was given (SAP Madrid of 10 November 2017, SAP Valencia No. 297/2016 of 30 September, SAP Barcelona No. 101/2017 of 22 February – although no explicit mention appears here, 50% of the indemnity amount is applied – and SAP Granada of 21 June 2013).

In closing, we would like to emphasise the notable difference between the amount of compensation sought and the indemnity payment awarded. This is primarily due to the fact that in most of the condemnatory cases a defect of information is seen, but not a breach of technical *lex artis*, and the payment awarded never exceeded 60,000 Euros.

### Conflict of interests

There are no conflicts of interest to declare.

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