When Breast Augmentation Surgery Goes Awry: Litigation And Liability Issues

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ABSTRACT

Anita was disillusioned with her unflattering shape and desired a more curvaceous figure. When exercising and massage failed to increase her breast size, the young woman had a breast augmentation. She was ecstatic with her new appearance until the fateful day that her body began to reject one of the implants. Much to Anita’s horror, the implant broke through the skin causing her to have additional surgery to correct the problem.

The American Society of Plastic Surgeons reports that the number of procedures to change one’s appearance has dramatically increased4 with facial operations and breast augmentation being the most popular procedures.5 This growth is caused by many factors including the increased numbers of plastic surgeons performing the procedures, the influence of the media, evolutionary interests, and personal factors relating to the patient.6

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5. Id.
This article will provide a unique perspective on breast augmentation surgery. It will offer a medical analysis of how the procedure is performed, along with its attendant risks. It will then focus on the court cases and legal theories that have arisen when things go wrong.

**BREAST AUGMENTATION—AN OVERVIEW**

Breast augmentation uses different substances such as saline or fat to enlarge breast size, to reestablish breast dimension as the result of weight loss or childbirth or to reconstruct the chest area after a mastectomy or injury. Augmentation mammoplasty serves several purposes: it can augment fullness and projection of the breasts, it can improve a person’s body image and it can enhance an individual’s shape.

**Anatomy of the Breast**

Mammary glands are tear-shaped organs that cover the pectoral or chest muscles. In turn, they are suspended over the ribs. They are kept in position by supporting soft tissues which give breasts their shape. Anatomically, the female breast is composed of an array of fat cells known as adipose tissue. The mammary glands have no muscle and the volume of fat establishes their size. The milk-producing part of the breast will have 10 to 20 sections positioned in a circular pattern dubbed “lobes.” Each lobe consists of a number of smaller lobules, the glandular tissue that creates milk in nursing women. Milk ducts connect the lobes and lobules and serve as conduits to transport the milk to the nipple. The darker aspect of the breast encircling the nipple is the areola. It includes tiny sweat glands called Montgomery’s glands which secrete the liquid that lubricates the nipple during breastfeeding. The breast also contains a series of blood and lymph vessels as well as lymph nodes. These lymphatic vessels drain to the lymph nodes located in the underarm and underneath the sternum.

**Types of Implants**

Breast augmentation enlarges or reestablishes breast size by using silicone and saline implants or fat transfer. Saline implants are encased in a silicone shell filled

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8. Id.
with sterile salt water. The shell is empty when first inserted into the breast and then filled with saline to the desired size. On the other hand, a silicone implant consists of an outer shell that is prefilled with a plastic gel. A number of patients prefer this type of implant because it feels more like a natural breast, but it presents a greater hazard of leaking.

Surgery

Breast augmentation surgery is routinely performed by plastic surgeons, and there are a variety of ways to perform the procedure. The goal is to make an incision in an inconspicuous area to minimize visible scarring. Incision placement will differ based upon the kind of implant, the extent of the enlargement, the patient’s anatomy and the preference of the patient and physician. Common incision areas include the area around the nipple, under the fold of the breast, in the armpit or the belly button. The location of the incision, however, can have a bearing on the visibility of the scar and post-surgical complications.

The underside of the breast is the most utilized location because the cut can be made in the natural folds of the skin. This placement, however, may cause a more visible scar, particularly in younger and thin women. An under the arm incision, a technique known as a transaxillary incision, will generally necessitate the employment of an endoscope to help the physician guide the implant into its proper location. Its obvious advantage is that there will be no visible scar around the breast. The disadvantages are that of a higher complication rate of malposition, poor symmetry, increased bleeding, and the inability to use silicone implants. A periareolar incision involves cutting around the edge of the nipple but its drawback is that the patient may experience a loss or change of feeling in the areola.

Utilizing the undersurface of the breast as the incision point will require a 4 to 5 cm opening to insert the implant into a generous pocket beneath (submuscular) or above (subglandular) the pectoralis muscle. The submuscular approach provides direct and easy access to the muscle in order to dissect a pocket beneath it, and it provides a predictable and reliable result with the lowest complication rate. Additionally, the implant is less likely to become exposed, or “rejected,” so to speak, due to the strong muscle overlying it.

There are variations to this technique. For instance, the surgeon may utilize a saline implant, because it can be rolled up like a cigarette and inserted through an

25. Id.
26. Id.
27. Id.
even smaller incision and then filled once in place under the muscle. Some surgeons will use a subglandular approach and place the implant on top of the pectoralis muscle. The disadvantages of this technique include slightly increased pain when elevating the muscle, as well as increased anatomical deformity, which is basically the movement of the implant with activation of the overlying pectoralis muscle.

**Complications**

Common difficulties associated with implants are capsular contracture, additional surgery, implant removal, and rupture or deflation of the implant. Patients commonly ask, “What if my body rejects the implant?” In reality, it is not a case of rejection. The implant, whether saline or a silicone gel, still possesses a silicone shell or outer layer. That layer is a foreign body, and if one develops even a small infection after the surgery, bacteria can adhere tightly to the implant, making it difficult to cure the infection. As the infection builds, it may erode through the incision and begin to drain fluid or pus. It is through this opening that the implant will extrude. A significant infection is difficult to eradicate without removal of the implant, much like an infected artificial knee or heart valve.

Bleeding is a rare occurrence, but it can be encountered. Blood can accumulate and form a hematoma. This complication can sometimes lead to additional surgery to locate the source of the bleeding and to evacuate the hematoma. As previously noted, a capsular contracture is a known complication. The body will recognize the implant as a foreign object and will isolate it by forming a thin shell of scar tissue causing a hardening around the implant. If the patient’s body makes an inappropriately thick scar that becomes tight and starts to squeeze the breast, a distortion of the implant and pain can occur. This complication is known as a high-grade capsular contracture and sometimes demands additional surgery to resect the tight scar tissue.

Occasionally, patients are not pleased with the aesthetics of the implants, claiming that they are malpositioned, asymmetrical, too large or too small, fake in appearance, or their scars are too wide or thick. Patients can also suffer injury to the sensory nerve to the areolar complex. This complication occurs in about 15% of cases and is significant in that sensual arousal of the nipple will be lost, as will the suckling response of a nursing infant, thus creating an inability to breastfeed. An extremely rare complication is a pneumothorax or collapsed lung. This can happen when dissecting the plane beneath the pectoralis muscle just above the ribs. If the patient is very thin, so too are the tissues in that area, and one can inadvertently cause a small hole or tear in the pleura, causing a collapsed lung.

Hypertrophic scarring occurs in 2% to 5% of patients. Proper treatment may require additional surgery or steroid injections into the scar area.

29. Dr. Miles prefers going under the muscle, as it is yet one additional layer of well perfused and strong muscle protecting the implant from the outside world.
31. This statistic is based upon the personal experience of Dr. Miles.
33. This statistic is based upon the personal experience of Dr. Miles.
35. Id.
RECENT LITIGATION

The types of lawsuits and theories of liability run the gamut from cases of malpractice to whether an exotic dancer can claim breast augmentation surgery as a proper business expense. This summary will focus on the lawsuits involving breast implants filed in the 21st Century.

Capsular Contracture

Capsular contracture is a known complication of breast augmentation surgery. Statistically, there is a higher rate of capsular contracture in those who receive silicone implants as compared to those with saline implants. Because the condition results from bacteria, it is a common source of breast implant litigation.

In Maynard v. Sena, the plaintiff filed a malpractice action against a plastic surgeon claiming that he was negligent in her postoperative care by not wearing surgical gloves when he drained fluid that had developed in the plaintiff's left breast as the result of a capsular contracture. She maintained that this failure caused her to develop an infection, which resulted in lengthy and extensive difficulties. A defense verdict was rendered and the primary issue on appeal was whether the trial judge committed error by allowing the physician to testify as to his custom of always wearing gloves in his office when conducting surgical procedures. The appellate court upheld the verdict and stated: "Evidence of a habit of a person or the retained practice of an organization is admissible to prove that the conduct of the person or organization on a particular occasion was in conformity of the habit or routine practice."

Murphy v. U.S. also involved a non-sterile environment. Murphy had breast augmentation surgery at a military facility and soon discovered a lump in her breast which caused increasing pain. A consultation with another surgeon revealed that a four-inch human hair was attached to the left implant which caused a capsular contracture. This condition was described as "a shrinkage of the natural scar tissue that forms around a breast implant and causes the implant to become tight and feel firm and hard." The primary dispute was whether the strand of hair caused the capsular contracture. The plaintiff's expert testified that capsular contracture develops in five percent of breast implant patients. While the problem is not fully understood, it is caused by something other than an implant that is left inside the pocket of the breast, such as bacteria or a human hair. The government's expert opined that if the hair found on the implant had caused the capsular contracture, it would have resulted in an inflammatory response and the hair would have been surrounded by a scar. Since the hair was attached to the implant rather than embedded in a scar, the expert noted that the foreign matter did not cause the condition. The court found in favor of the plaintiff and determined that the hair was the primary cause or significantly exacerbated her condition. The experts both agreed that

38. Id. at 543-44.
39. Id.
41. Id.
42. Id. at 2.
43. Id. at 2.
44. Id. at 3.
bacteria is the primary culprit in the development of this painful condition, but the court found the explanation provided by claimant’s expert more persuasive.45

**Tax Deduction for Breast Implants**

One of the more unusual cases involves a claim brought by Cynthia Hess, a/k/a Chesty Love, challenging an Internal Revenue Service determination that breast implants were not an ordinary and necessary expense in relation to a business.46 Ms. Hess was a topless dancer whose agent convinced her to have breast implants in order to enlarge her breast size from a 56FF to a 56N. The Special Trial Judge determined that the surgical procedure was deductible because it enhanced her breasts, was only useful in her line of work, and as such, the breasts were a necessary business prop.47

**Invasion of Privacy**

An entity can be held liable for the disclosure of private information about an individual, even if accurate, under the tort of the public disclosure of a private fact.48 Would a woman have a viable cause of action for invasion of privacy if her plastic surgeon accidentally sent pictures of her naked torso to the Human Resources Department of the plaintiff’s employer for a pre-surgery coverage determination instead of to her insurance company? That was the issue in *Mays v. The Marshall University Board of Governors*.49 The plaintiff had a mastectomy and reconstructive surgery to her left breast that involved the use of an implant. A few years later, she became concerned over the appearance of her breast and visited a surgeon about additional surgery. During the examination, pictures were taken of her naked breast in order to obtain pre-approval for payment from her insurance carrier. Unfortunately, the pictures were inadvertently sent to the plaintiff’s employer. The transmittal letter contained the plaintiff’s name along with the images. The envelope was opened by a representative of the Human Resource Department who immediately showed them to her supervisor. The manager directed that the pictures be forwarded to the plaintiff in a sealed envelope marked confidential.50 The court dismissed the lawsuit, noting Mays’ medical information was not disclosed to the public. It ruled that the tort entails widespread disclosure and it cannot be limited to a small group of people. In this case, the pictures were only viewed by two people, so the plaintiff did not have a viable cause of action.51

**Defamation**

In *Loftus v. Nazari*, a physician filed a defamation action against his patient over negative comments that she posted on a website.52 The facts demonstrated that

45. *Id.* at 4.
47. *Id.*
50. *Id.* at 7.
51. *Id.*
Nazari had breast implant surgery and a breast lift. She was unhappy with the results and posted her opinion on a website complaining that the doctor had left her with permanent nerve damage, terrible scars and disfigured breasts. The defendant then went on to say that she had filed a complaint with the U.S. Attorney and the Ohio Medical Board. The court dismissed the claim, finding that the statements concerning her poor surgical results were protected opinion.

In Smith v. Garber, the plaintiff had a breast augmentation performed by Dr. Garber. Because the plaintiff believed the surgery was done incorrectly, she filed a malpractice suit. Subsequently, a magazine ran a story about the storied career of Sal Calabro, M.D., a well-known plastic surgeon, who was affiliated with Dr. Garber. The article stated in part:

Over the years, Calabro has been named in a handful of lawsuits; some were thrown out of court, and his name was removed from others directed at the work of his associate physicians. Dr. Brett Garber, who handles some of Calabro’s breast work now, is involved in two suits from patients at Calabro’s center ‘I’m pissed that I got sued at Sal’s, but do I think these are frivolous charges? Yes’, he says. ‘Was Sal involved in either of them? No. When you’re a celebrity, you’re going to get kooks.’

This article prompted a second lawsuit for defamation, which claim was dismissed. The court stated that “[q]uestionable rhetoric or hyperbole do not constitute defamation.” It is reasonable that the plaintiff would take offense to being referred to as a “kook,” but the article was not reasonably capable of a defamatory meaning.

Social Security Disability

In Hays v. Colvin, the plaintiff applied for social security benefits alleging a variety of ailments, one of which was related to her breast implants. The plaintiff previously had silicone breast implants, which were found to be leaking. These were eventually replaced with saline implants. The plaintiff had trouble sitting, standing, lifting, and bending, and had several epidural blocks. Ultimately, the Administrative Law Judge (“ALJ”) found that the plaintiff did not qualify for disability benefits because she could still perform a full range of light work, and her impairments could reasonably be expected to produce no worse than a moderate degree of pain. The District Court upheld the findings of the ALJ, because absent an abuse of discretion, the District Court will not disturb the ALJ’s findings.

Pneumothorax

In Benson v. Vernon, a former patient had sued Dr. Royal Benson for injuries resulting from a breast augmentation procedure. She (Vernon) alleged that Dr. Benson

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53. Id. at 852.
54. Id. at 854.
56. Id. at 1.
57. Id.
60. Id. at 4.
61. Id.
62. Id.
63. Id. at 3.
64. Id. at 7.
caused a pneumothorax during this operation, which commonly occurs when a needle for local anesthesia is advanced too far or is misplaced and enters the pleural cavity.66

Dr. William Gorman, the plaintiff’s expert, opined that Dr. Benson breached the standard of care by causing Vernon to suffer a pneumothorax.67 Dr. Gorman opined that the defendant strayed outside of the normal dissection plane and entered the pleural cavity.68 Combined with the fact that plaintiff showed no signs of a pneumothorax before the procedure, Dr. Gorman concluded the pneumothorax was the fault of the surgeon.69 In the recovery room, the patient complained of shortness of breath and chest wall pain, but the pneumothorax went undiagnosed for nearly a week.70 Dr. Gorman stated that these symptoms should never be ignored and that Dr. Benson breached the standard of care for surgical treatment and postoperative care.71

At trial, Dr. Benson filed a motion to dismiss based on Dr. Gorman’s failure to provide a fair summary of the standard of care, and what the defendant should have done differently to prevent and treat the pneumothorax.72 The trial court, however, found that Dr. Gorman’s reports discussed the appropriate standard of care with sufficient specificity to fulfill the statutory requirements.73 The Court of Appeals stated Dr. Gorman’s reports need only fulfill two purposes: “(1) inform Dr. Benson of the specific conduct [plaintiff] called into question; and (2) provide a basis for the trial court to conclude that the claims have merit.”74 The Court of Appeals upheld the trial court’s decision, noting that an expert report need not marshal all of the plaintiff’s evidence, as long as the required purposes are fulfilled.75

In Flannery v. President and Directors of Georgetown College, plaintiff filed suit after breast enlargement surgery allegedly resulted in a hemopneumothorax, which is essentially blood and air in the lungs.76 Plaintiff claimed this was caused as a result of a local anesthetic procedure called an intercostal nerve block.77 The defendant did inform the plaintiff of the risks of the surgery itself, but she was not warned about the dangers associated with the anesthetic procedure.78

The record showed there was no warning about a hemopneumothorax; however, there must be a causal relationship between the physician’s failure to adequately divulge the risk and the damage to the patient.79 The patient testified that she would have forgone surgery had she known about the risk of a hemopneumothorax, but did not testify that she would have foregone the surgery if she knew the risk of a pneumothorax.80 She also did not prove that she would have selected general anesthesia as opposed to a local anesthetic had she known the risk of a pneumothorax.81

66. Id. at 758.
67. Id.
68. Id.
69. Id.
70. Id.
71. Id. at 763.
72. Id.
73. Id.
74. Id. at 760.
75. Id.
76. Flannery v. President and Directors of Georgetown College, 679 F.2d 960, 961 (D.C. Cir. 1982).
77. Id.
78. Id.
79. Id. at 962.
80. Id.
81. Id.
While the court agreed that a plaintiff should be warned of all material risks, it stated the claimant failed to establish a causal link between a failure to warn and the injuries she suffered. Therefore, a directed verdict in favor of defendant was appropriate.\textsuperscript{82}

**Cancer**

In *In Re: Silicone Gel Breast Implants Products Liability Litigation*, the plaintiff was the administrator of Toni Cagle’s estate, who was diagnosed with breast cancer about 14 months after receiving breast implants.\textsuperscript{83} The plaintiff alleged the implants caused or accelerated the cancer.\textsuperscript{84} The plaintiff did not allege that the silicone itself caused or accelerated the cancer, but instead maintained that the polyurethane foam (“PUF”), which coated the implants, broke down \textit{in vivo} into 2,4-toluene diamine (“TDA”), which is carcinogenic.\textsuperscript{85}

The defendants filed four motions \textit{in limine} to exclude the testimony of the plaintiff’s causation experts: Dr. Neugebauer (an epidemiologist), Dr. Batich (a polymer chemist), Dr. Lappe (a toxicologist), and Dr. Shanklin (a pathologist).\textsuperscript{86} Plaintiff’s causation theory, which relied heavily on expert reports, was as follows: one epidemiological study provided “suggestive evidence” of a causal link between PUF-coated implants and cancer; the PUF coating biodegrades after implantation in humans; the degradation products of the PUF-coating include TDA; TDA is known to be carcinogenic in animals and is a “probable” human carcinogen; and the amount of TDA likely to be released from Cagle’s implants, Cagle’s pregnancy (which began almost immediately after implantation) and the rare type of breast cancer Cagle suffered rendered it more likely than not that her tumor was caused by or its growth accelerated by TDA released from her implants.\textsuperscript{87}

The court ruled that the plaintiff was unable to offer scientifically reliable evidence to support the last proposition, and therefore, even assuming the first four theories were admissible, summary judgment was appropriate because the plaintiff could not establish that the breast implants caused the decedent’s cancer.\textsuperscript{88}

In *Enholm v. Cohen*, the plaintiff employed Dr. Steven Cohen to replace breast implants she had received in 1978.\textsuperscript{89} This procedure also involved injecting fat cells in her chest wall to produce softer breasts.\textsuperscript{90} Five months after the surgery, the plaintiff was diagnosed with uterine cancer, which she attributed to the fat cell injections.\textsuperscript{91} She sued Dr. Cohen, alleging that: he failed to obtain her informed consent, he committed fraud, and the fat cell injections violated FDA regulations.\textsuperscript{92}

The fat injections involved a procedure called cell-enhanced fat transfer (“CEFT”), which involves removing fat by liposuction from one area of the patient’s body and re-introducing it into the patient’s breasts.\textsuperscript{93} The patient asserted that Dr. Cohen did

\textsuperscript{82} Id. at 962-63.
\textsuperscript{83} *In Re: Silicone Gel Breast Implants Products Liability Litigation*, 318 F.Supp.2d 879, 886 (C.D. Cal. 2004).
\textsuperscript{84} Id.
\textsuperscript{85} Id. at 887.
\textsuperscript{86} Id.
\textsuperscript{87} Id. at 888.
\textsuperscript{88} Id. at 888.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{93} Id.
not inform her of the risks, and that the procedure was not FDA-approved.\textsuperscript{94} Additionally, had she known about the risks, the plaintiff maintained that she would not have had the surgery.\textsuperscript{95}

Defendant's expert stated that Dr. Cohen's "pre-operative care, consent discussions, and information provided to the patient on the CEFT procedure and study were at all times within the appropriate standard of care."\textsuperscript{96} The plaintiff admitted at her deposition that "(1) she had no complaints about the surgical results, (2) no physician had attributed her ovarian cancer to the surgery, and (3) she sustained no physical injury from the surgery[.]."\textsuperscript{97} Based upon this testimony, as well as other evidence, the court granted summary judgment in favor of Dr. Cohen.\textsuperscript{98}

The Court of Appeals upheld the granting of summary judgment.\textsuperscript{99} The court noted that the plaintiff submitted no expert testimony to refute the defendant's expert, and she also presented no evidence of damages.\textsuperscript{100} Even though the patient tried to present newly-discovered evidence on appeal, the facts were still overwhelmingly in favor of Dr. Cohen.\textsuperscript{101}

### Temporary Restraining Order

In \textit{Baker v. Patterson}, the plaintiffs filed a Motion for Temporary Restraining Order (TRO) asking the court to prevent Dr. Patterson from concealing, and to force him to disclose, any information available to him regarding the source of the breast implants he placed in plaintiffs' breasts.\textsuperscript{102} The claimants alleged Dr. Patterson used non-FDA approved implants manufactured in China when he performed their surgeries.\textsuperscript{103}

In order to obtain a TRO, the moving party must show: "(1) a likelihood of success on the merits; (2) a likelihood of irreparable harm to the moving party in the absence of preliminary relief; (3) that the balance of equities tips in favor of the moving party; and (4) that an injunction is in the public interest."\textsuperscript{104} The district court granted the TRO for only one plaintiff, Camille Adams, because her allegations indicated a likelihood of irreparable harm for the potential physical and emotional damage from non-FDA approved implants and the potential removal of the breast implants.\textsuperscript{105} Additionally, the balance of equities tipped strongly in her favor in light of the potential harm, and the absence of any cognizable hardship to Dr. Patterson from disclosing the information.\textsuperscript{106} Further, public policy is in favor of granting the TRO because it reflects the general interest in the safety of medical devices.\textsuperscript{107}

### Medical Malpractice

In \textit{Froneberger v. Owens}, the plaintiff appealed from the granting of defendant's motion for summary judgment.\textsuperscript{108} In 2008, Froneberger was diagnosed with an ag-
gressive form of breast cancer, and underwent a mastectomy of her left breast.\textsuperscript{109} Dr. Owens was present in the operating room to create a “pocket” by placing an expander under her skin to allow for the eventual placement of a gel-based implant.\textsuperscript{110} Dr. Owens performed the implant surgery in August 2010, and about two and a half weeks later, the plaintiff complained of pain and swelling in her breast.\textsuperscript{111} After a visit to the hospital, it was decided that the implant needed to be removed so the pocket could be cleared of infection, which Dr. Owens subsequently did.\textsuperscript{112} The patient sued Dr. Owens alleging medical negligence.\textsuperscript{113}

The plaintiff presented one expert, Dr. Kraus, whose deposition surprisingly provided the basis for the granting of summary judgment in favor of the defendant.\textsuperscript{114} Dr. Kraus initially testified that Dr. Owens departed from the standard of care by not having a variety of sizes and shapes of implants available when she performed the implant surgery and that the implant used was either too large or not the proper shape, leading to the infection.\textsuperscript{115} However, later in the deposition, Dr. Kraus stated that the implant itself could not have caused the infection to a reasonable degree of medical certainty.\textsuperscript{116} The trial court granted the defendant’s motion for summary judgment because the expert’s testimony did not “[offer] any of the factual underpinnings in the chain of causation.”\textsuperscript{117} Finding no abuse of discretion on the part of the trial court, the court of appeals upheld the ruling.\textsuperscript{118}

In \textit{Ditto v. McCurdy}, the plaintiff sued Dr. McCurdy, an ear, nose, and throat specialist and cosmetic surgeon, alleging negligence and fraud stemming from a breast augmentation procedure.\textsuperscript{119} The patient needed seven surgical procedures, some of which were performed without anesthesia, until the implants were removed.\textsuperscript{120} The jury awarded $3,500 in special damages, $1,000,000 in general damages, $400,000 in damages for fraud, and $600,000 in punitive damages.\textsuperscript{121} The Supreme Court of Hawaii reversed the finding of liability with respect to the fraud count and vacated the award of punitive damages.\textsuperscript{122}

The plaintiff’s claim for fraud was premised on the fact that McCurdy had a duty to disclose that he was not a board certified plastic surgeon, and this fact was material to her decision to allow the defendant to perform the surgery.\textsuperscript{123} Dr. McCurdy rebutted this allegation with two experts who claimed that there is confusion relating to two different certifying boards, and that Dr. McCurdy is a member of one of them.\textsuperscript{124} Additionally, the surgeon argued that, as a matter of law, a physician does not have an affirmative duty to disclose his qualifications to a patient prior to providing treatment. The Court agreed\textsuperscript{125} and stated that the doctrine of informed con-

\begin{itemize}
\item \textsuperscript{109} \textit{Id}. at 2.
\item \textsuperscript{110} \textit{Id}.
\item \textsuperscript{111} \textit{Id}.
\item \textsuperscript{112} \textit{Id}.
\item \textsuperscript{113} \textit{Id}.
\item \textsuperscript{114} \textit{Id}. at 3.
\item \textsuperscript{115} \textit{Id}.
\item \textsuperscript{116} \textit{Id}. at 4.
\item \textsuperscript{117} \textit{Id}. at 6.
\item \textsuperscript{118} \textit{Id}. at 8.
\item \textsuperscript{119} \textit{Ditto v. McCurdy}, 947 P.2d 952, 954 (reconsideration denied) (H I 1997) (hereinafter referred to as \textit{Ditto II}).
\item \textsuperscript{120} \textit{Ditto v. McCurdy}, 947 P.2d 961, 969-71 (Intermediate Court of Appeals of Hawaii 1997) as amended (June 20, 1997), \textit{aff’d in part, rev’d in part}, 947 P.2d 952 (H I 1997).
\item \textsuperscript{121} \textit{Ditto II} at 954, \textit{supra}, note 119.
\item \textsuperscript{122} \textit{Id}.
\item \textsuperscript{123} \textit{Id}. at 955.
\item \textsuperscript{124} \textit{Id}. at 955-56.
\item \textsuperscript{125} \textit{Id}. at 958.
\end{itemize}
sent merely means that a doctor has an affirmative duty to disclose the types of risks and alternatives to a proposed treatment or surgery. The Court reasoned that Dr. McCurdy was certified as an otolaryngologist, facial surgeon, and cosmetic surgeon, and at all times held himself out to be so. Further, this is a matter for the legislature and the board of medical examiners, and not the courts. Accordingly, because Dr. McCurdy did not have an affirmative duty to disclose his qualifications, he could not be found liable for fraud.

**Emotional Distress**

In *Maurer v. Heyer-Schulte Corporation*, the plaintiff claimed that she developed a fear of cancer after breast augmentation surgery, alleging, *inter alia*, deformation, scarring, several autoimmune diseases, mental pain and suffering, and the physical injury of having a carcinogen placed in her body. In order to prevail on a fear of cancer claim, the plaintiff’s fear must be reasonable and causally related to the defendant’s negligence. The plaintiff does not need to prove that the implants will lead to cancer, but must show that there is “any possibility of acquiring a disease, no matter how remote.” However, the patient has to produce at least some reliable scientific evidence that breast implants can cause cancer.

The surgeon produced two scientific reports which found that there is no association between breast implants and cancer, as well as voluminous epidemiological studies showing no causal link between breast implants and cancer. The court concluded, based on the large amount of evidence produced by the surgeon, that the defendant had met his burden in showing that the plaintiff’s fear of developing cancer was unreasonable as a matter of law. The patient merely submitted a handwritten memorandum and a committee staff report in support of her position, neither of which could be considered conclusive scientific evidence. She also submitted an FDA report that was dismissed by the court because it was based on an animal study.

**CONCLUSION**

Breast augmentation is one of the most popular forms of plastic surgery. This growth is a reflection of the number of physicians performing the techniques, reduced costs and the less-invasive nature of the modifications. After all, the procedure offers instant gratification but it is not without risk. Complications range from an infection to permanent nerve damage and even death.

From a litigation point of view, the dockets contain thousands of lawsuits involving breast implants. The volume of cases, however, is much less than 40 years ago during the frenzy over the safety of the devices. Nevertheless, breast augmentation is still a surgical procedure with its attendant complications and unfulfilled expectations by some patients. The types of lawsuits and theories of liability run the gamut like any other surgical procedure, but at least they no longer attempt to link the implants to a variety of diseases based upon flawed scientific studies.

126. Id.
127. Id. at 958-59.
128. Id. at 959.
130. Id. at 3.
131. Id. (*quoting Raney v. Walter O. Moss Regional Hospital*, 629 So.2d 485, 491 (La.App. 3d Cir.1993))
132. Id.
133. Id.
134. Id.
135. Id. at 4.