

# The Plasticity of the Body, the Injury, and the Claim: Personal Injury Claims in the Era of Plastic Surgeries

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# THE PLASTICITY OF THE BODY, THE INJURY, AND THE CLAIM: PERSONAL INJURY CLAIMS IN THE ERA OF PLASTIC SURGERIES

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## ABSTRACT

The accelerated rise in the number of plastic surgeries has created an inflation of personal injury claims in connection with this cultural practice. This Article, on the one hand, aims to understand how the culture of plastic surgeries affects the tortious area of personal injury law (terms, concepts, goals, procedures, remedies, etc.), and on the other to understand how the significance of plastic surgery popular culture is designated by law. The Article suggests a new paradigm for defining personal injuries in order to face the legal challenges raised by plastic surgery culture and, in light of the culture's re-designation by law. In addition, this Article examines the current law in light of the suggested paradigm. The discussion is based on field research, the first of its kind. The research includes all of the personal injury claims following plastic surgeries, which were filed in the State of Israel, and published in the online legal databases, to date.

## INTRODUCTION

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#### INTRODUCTION

*I've had so much plastic surgery, when I die they will donate my body to Tupperware.<sup>1</sup>*

—Joan Rivers

Joan Rivers's joke about herself reflects, to a large extent, the change the term "body" has undergone through the popular use of plastic surgery technology. In addition, the terms "bodily damage," "disability," "identity," "aesthetics," and "health" have been reconceptualized in the era of plastic surgery. Since these are key terms in central disciplines, such as medicine and law, the influence of the practice of plastic surgery on these disciplines and their designation is not surprising.

An area of law, in which the above-mentioned terms play a central role is torts; there is clear influence of plastic surgery practice on these terms in personal injury claims following plastic surgeries. This Article aims at understanding how plastic surgery culture affects the tortious area of personal injury law (terms, concepts, goals, procedures, remedies, etc.) on the one hand—and how the popular culture of plastic surgery is designated by law—on the other. The Article is divided into the following sections: Part I presents a short

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1. Deborah Solomon, *Cutup*, N.Y. TIMES MAG. (Dec. 31, 2008), <https://www.nytimes.com/2009/01/04/magazine/04wwln-Q4-t.html> [<https://perma.cc/Q6L4-S4BB>].

review of the emergence of the plastic surgery era and the transformation of these surgeries into a product for consumption. Part II discusses the interrelation between bodily modification by plastic surgery and the transformations of identities. Part III maps the legal literature about plastic surgery, situates my work within it, and presents its contribution to it. Part IV discusses the reasons for choosing the research field for this study. Part V discusses the influence of the culture of plastic surgery on law, by analyzing the challenges faced by personal injury claims following failed plastic surgery. The challenges faced by personal injury claims to be discussed and exemplified include: 1) the blurring of the distinction between the proper and the improper body; 2) undermining medical expertise in favor of aesthetic judgment; 3) determining the justified arsenal of bodily modulations; 4) rephrasing the relationship between body and mind; 5) putting on trial the entire identity; and 6) handling the disempowerment of the patients in the clinic. Part VI discusses the influence of law on culture, by describing the designation of plastic surgery culture through the tortious discourse on bodily damages following plastic surgeries. Part VII introduces a new paradigm for conceptualization of the body, in order to deal with the challenges faced by personal injury claims following plastic surgery. The last paragraphs offer concluding remarks.

#### I. THE EMERGENCE OF A PLASTIC SURGERIES' ERA AND TURNING PLASTIC SURGERIES INTO A PRODUCT FOR CONSUMPTION

The medical techniques on which plastic surgeries are based emerged in the years following World War I.<sup>2</sup> Male soldiers returned from the front with new injuries that required “correction” or “erasure” and the domain of plastic surgery began to develop.<sup>3</sup> Therefore, the practice of plastic surgery historically began with an attempt to “normalize” damaged male bodies and turn them into reparable ones.<sup>4</sup> As time went by, plastic surgery became a product highly desired by the masses, but paradoxically since the 1950s they have been consumed mainly by women.<sup>5</sup> The implementation of plastic surgery is mostly in the hands of men.<sup>6</sup> In 2015, eighty-seven percent of all

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2. See SANDER L. GILMAN, *MAKING THE BODY BEAUTIFUL: A CULTURAL HISTORY OF AESTHETIC SURGERY* 157–68 (1999); ELIZABETH HAIKEN, *VENUS ENVY: A HISTORY OF COSMETIC SURGERY* 29 (Johns Hopkins Univ. Press ed. 1997).

3. GILMAN, *supra* note 2, at 166.

4. *Id.* at 174.

5. *Id.* at 178–79.

6. See Nina Wolpow, *Plastic Surgeons Are Mostly Men, but Their Patients Are Mostly Women*, RACKED (Aug. 16, 2017, 9:32 AM), <https://www.racked.com/2017/8/16/16135076/plastic-surgery-gender-gap> [<https://perma.cc/SJ4L-A84Z>].

plastic surgeries in North America were performed on women while only seven of fifty plastic surgeons were women.<sup>7</sup>

Over the years, plastic surgery has been normalized and is no longer conceived as out of the ordinary or as mainly a treatment for injury. Perception of plastic surgery as an object of embarrassment has gradually disappeared and the number and kinds of plastic surgeries performed is constantly on the rise.<sup>8</sup> From 2014 to 2015, the number of plastic surgeries performed in North America increased by twenty percent.<sup>9</sup>

Following the dramatic rise of the number of plastic procedures performed in North America, plastic surgery turned into a multi-billion-dollar industry and its market characteristics are clear.<sup>10</sup> Salesmen and women are involved in promoting plastic surgery, aggressive marketing strategies are used, and a massive advertisement system is mobilized towards creating demand for plastic surgery.<sup>11</sup> In the plastic surgery industry, patients have been perceived, for quite a long time, as customers, and their physicians as businessmen, for all intents and purposes.<sup>12</sup>

## II. PLASTIC SURGERIES, BODILY MODIFICATIONS AND CHANGING IDENTITIES

The emergence of plastic surgery as a product for consumption enabled the correction of impairments perceived as bodily deformities (e.g., torn lips, breast mastectomy, or transsexual organs). However, plastic procedures not only enabled the correction of perceived bodily impairments, but also the improvement of bodies and their desired modification (e.g., liposuction or facelift). The desired modification may award the body either a natural or unnatural look.<sup>13</sup> In

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7. See *Plastic Surgery Statistics Report*, AM. SOC'Y PLASTIC SURGEONS (2015), d2wir czt3b6wj m.cloudfront.net/News/Statistics/2015/plastic-surgery-statistics-full-report-2015.pdf [hereinafter *Plastic Surgery*]; Amanda K. Silva et al., *Melting the Plastic Ceiling: Overcoming Obstacles to Foster Leadership in Women Plastic Surgeons*, 138 J. AM. SOC. PLASTIC SURGEONS 721 (2016); Estelle Erasmus, *Why Are There So Few Female Plastic Surgeons?*, ZWIVEL (Oct. 5, 2016), <https://www.zwivel.com/blog/female-plastic-surgeons> [<https://perma.cc/3PKZ-4VMB>].

8. See, e.g., Abigail Brooks, "Under the Knife and Proud of It:" An Analysis of the Normalization of Cosmetic Surgery, 30 CRITICAL SOC., 207, 207 (2004).

9. *Plastic Surgery*, supra note 7, at 19.

10. *Id.* at 6.

11. Anne Bloom, *Plastic Injuries*, 42 HOFSTRA L. REV. 759, 774 (2014).

12. *Id.*

13. Two cultural iconic examples of acquired, unnatural looks through plastic surgery are Pamela Anderson's and Dolly Parton's breast enlargements. See Anthony Elliott, *I Want to Look Like That!': Cosmetic Surgery and Celebrity Culture*, 5 CULTURAL SOC. 463, 465-67 (2010).

one way or another, the person choosing plastic surgery wishes to achieve a desirable appearance.

During plastic surgery, the body is corrected, improved, reinvented, and even modified, which enables its owner to acquire a new or different identity. Hence, the possibility of acquiring various identities—both allegedly embedded and not embedded in the body—is enabled by the current culture of plastic surgery.

A long line of plastic surgeries constitute, form, or sharpen, sexual identity.<sup>14</sup> These include sex reassignment surgeries, reconstructive female breast surgeries, the removal of extra male chest tissues surgeries (gynecomastia<sup>15</sup>), female breast enlargement, and male penis enlargement surgeries. Manipulations are also performed in connection to the ethnic or racial identity of patients.<sup>16</sup> By means of cosmetic treatments, black skin can be whitened, slanted eyes may become widened, the “Jewish” nose can be turned into a snub one, and the all-over appearance can be westernized.<sup>17</sup>

Age identity is also changeable by the practice of plastic surgery.<sup>18</sup> Various surgeries are meant to rejuvenate the face and the body and erase the unavoidable signs of aging.<sup>19</sup> Inter alia, these surgeries include anti-aging facelifts or eyelid surgeries.<sup>20</sup> The aspiration to erase the signs of aging may take different forms and concern certain autobiographical elements or specific kinds of experiences. This is the case in relation to hymen reconstruction surgeries, which are intended to conceal plaintiffs’ sexual experiences.<sup>21</sup> In addition, treatments for facial fillers, used by gay people living with HIV/AIDS, intend to counteract one of the prominent markers of living with HIV/AIDS—facial wasting.<sup>22</sup>

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14. See Marge Berer, *Cosmetic Surgery, Body Image and Sexuality*, 18 REPROD. HEALTH MATTERS 1, 4 (2010).

15. The origin of the name *gynecomastia* is from ancient Greek. Its meaning is “woman’s breast-like chest.” For more information on this medical phenomenon, see Shirley A. Bembo & Harold E. Carlson, *Gynecomastia: Its Features, and When and How to Treat It*, 71 CLEV. CLINIC J. MED. 511 (2004).

16. See, e.g., Stephen R. Munzer, *Cosmetic Surgery, Racial Identity, and Aesthetics*, 19 CONFIGURATIONS 243, 243 (2011).

17. *Id.* at 263.

18. Bloom, *supra* note 11, at 765–66.

19. *Id.*

20. Laura Hurd Clarke & Meredith Griffin, *The Body Natural and the Body Unnatural: Beauty Work and Aging*, 21 J. AGING STUD. 187 (2007).

21. Marrie H. J. Bekker et al., *Reconstructing Hymens or Constructing Sexual Inequality? Service Provision to Islamic Young Women Coping with the Demand to Be a Virgin*, 6 J. COMM. & APPLIED SOC. PSYCH. 329 (1996).

22. Scott W. Mosser, *Facial Fillers Now Allow HIV-Positive & AIDS Patients to Avoid Social Stigma*, SCOTT W. MOSSER, M.D. PLASTIC SURGERY (Dec. 1, 2014), <https://drmosser.com/facial-fillers-now-allow-hiv-positive-aids-patients-avoid-social-stigma> [https://perma.cc/75LC-EZSY].

However, plastic surgery may create certain experiences, not only conceal them, like those surgeries that create a toned stomach.<sup>23</sup> Emotional mood can also be created by plastic treatments (e.g., a smiling face or filling wrinkles caused by anger).<sup>24</sup> Erasure of a plaintiff's disability in an attempt to create a "corrected" nondisabled identity is another example of the ways in which plastic surgery may change identities.<sup>25</sup> It is worthwhile to mention that not only physical disability, but also cognitive disability can be concealed by plastic surgery.<sup>26</sup> Good examples of such attempts is plastic surgery that aspires to normalize the faces of children with Down syndrome.<sup>27</sup>

Plastic surgery also has the ability to affect overall human identity in two main ways. The first is the possibility to alter one's human identity to another identity by plastic surgery. Facial surgery is an excellent example of such a change, since the face is considered intrinsic and instrumental to the ontology of a person and a means to reveal his/her self-identity. The second is the possibility to subvert the distinction between human and inhuman through plastic surgery.<sup>28</sup> This is the case of feline-look surgeries, in which patients seek to look more like cats.<sup>29</sup>

The influence of plastic surgery on patients' identities is not only a matter of symbolic distinctions or theoretical classifications. Changing a patient's identity also affects his/her attractiveness in the job market or sexual attractiveness.<sup>30</sup> Since a healthy, young, western, and sexual look is considered preferable and desirable, plastic surgery aspires to help guarantee patients a better and happier life.<sup>31</sup>

The normalization of plastic surgery, on the one hand, and its effect on the construction of various identities, on the other, gave rise to intensive research of the connections between plastic surgery,

23. Shahram Salemy, *Your Checklist to a Better Tummy Tuck*, AM. SOC'Y PLASTIC SURGEONS (June 5, 2018), <https://www.plasticsurgery.org/news/blog/your-checklist-to-a-better-tummy-tuck> [<https://perma.cc/MMV4-QV7T>].

24. Gwynn Guilford & Quartz, *Surgery for a Permanent Smile*, ATLANTIC MAG. (Aug. 28, 2013), <https://www.theatlantic.com/health/archive/2013/08/surgery-for-a-permanent-smile/279144> [<https://perma.cc/AG4X-67HT>].

25. See Sarah Goering, *Conformity Through Cosmetic Surgery: The Medical Erasure of Race and Disability*, in SCIENCE AND OTHER CULTURES: ISSUES IN PHILOSOPHIES OF SCIENCE AND TECHNOLOGY 172 (Robert Figueroa & Sandra Harding eds., 2003).

26. See Len Leshin, *Plastic Surgery in Children with Down Syndrome*, DS-HEALTH (2000), <http://www.ds-health.com/psurg.htm> [<https://perma.cc/CFZ4-YA7T>].

27. *Id.*

28. Tyler McCarthy, *'Catwoman' Jocelyn Wildenstein Denies Having Any Plastic Surgery, Cites Her Swiss Heritage*, FOX NEWS (Feb. 13, 2018), <http://www.foxnews.com/entertainment/2018/02/13/catwoman-jocelyn-wildenstein-denies-having-any-plastic-surgery-cites-her-swiss-heritage.html> [<https://perma.cc/5YFY-EL9Z>].

29. See *id.*

30. See Munzer, *supra* note 16, at 245.

31. *Id.* at 251.

identity construction models, and social-economic theories.<sup>32</sup> Some studies have shown that the aspiration to modify the body through plastic surgery reflects our illusion of autonomy.<sup>33</sup> According to this illusion, all the components of our life—including our bodily organs—can be successfully corrected by money and/or technology.<sup>34</sup> Such ideas, which derive from the spirit of traditional liberal thought, seek to enlarge the patients' possibilities of choice and enable them to attain autonomy and control over their bodies.<sup>35</sup> According to this perception, personal choice, rather than social dictation, leads to the performance of the surgeries.<sup>36</sup> Many patients take pride in the surgery they had performed, and their self-perceptions as being freer, reflect the understanding of plastic surgery as a vehicle for achievement of autonomy.<sup>37</sup>

A competing model for explaining the connection between plastic surgery, identity construction, and social-economic status locates the explanation for performing plastic surgery in society and its idealization of an appearance perceived as being young, westernized, sexy, and healthy.<sup>38</sup> This model perceives patients as victims of social

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32. See SUSAN BORDO, *UNBEARABLE WEIGHT: FEMINISM, WESTERN CULTURE, AND THE BODY* 45 (Univ. Cal. Press 1993); KATHY DAVIS, *DUBIOUS EQUALITIES AND EMBODIED DIFFERENCES: CULTURAL STUDIES ON COSMETIC SURGERY* 61 (Rowman & Littlefield 2003); KATHY DAVIS, *RESHAPING THE FEMALE BODY: THE DILEMMA OF COSMETIC SURGERY* 3 (Routledge 1995) [hereinafter *RESHAPING THE FEMALE BODY*]; CRESSIDA J. HEYES, *SELF-TRANSFORMATIONS: FOUCAULT, ETHICS, AND NORMALIZED BODIES* 112 (Oxford Univ. Press 2007); Kathryn Pauly Morgan, *Women and the Knife: Cosmetic Surgery and the Colonization of Women's Bodies*, in *THE POLITICS OF WOMEN'S BODIES: SEXUALITY, APPEARANCE, AND BEHAVIOR* 147 (Rose Weitz ed., 1998); VICTORIA PITTS-TAYLOR, *WELLNESS AND PATHOLOGY IN COSMETIC CULTURE* 158–86 (Rutgers Univ. Press 2007); NAOMI WOLF, *THE BEAUTY MYTH: HOW IMAGES OF BEAUTY ARE USED AGAINST WOMEN* 20–58, 218–70 (Harper Perennial 2002); Debra Gimlin, *The Absent Body Project: Cosmetic Surgery as a Response to Bodily Dys-Appearance*, 40 *SOC.* 699, 699 (2006); Debra Gimlin, *Cosmetic Surgery: Beauty as Commodity*, 23 *QUALITATIVE SOC.* 77, 96 (2000) (discussing studies on the connections between plastic surgeries, identity construction models, and social-economic theories); see also Vashti Neal, *Addicted to Boob Jobs* (2008), YOUTUBE (Aug. 2, 2015), [https://www.youtube.com/watch?v=Rdvq5Y-bjS0&has\\_verified=1](https://www.youtube.com/watch?v=Rdvq5Y-bjS0&has_verified=1) [<https://perma.cc/EQ7F-JQNW>]; Barcroft TV, *DOCS: 100 Men Own My Breasts*, YOUTUBE (Dec. 11, 2014), [https://www.youtube.com/watch?v=FGXGX8I-HYo&has\\_verified=1](https://www.youtube.com/watch?v=FGXGX8I-HYo&has_verified=1) [<https://perma.cc/3X24-N8M9>] for documentary films dealing with similar questions.

33. *RESHAPING THE FEMALE BODY*, *supra* note 32, at 17–19.

34. For sociological writing on the interrelations between the body's designations, the culture of consumption, illusion of autonomy, money, and technology, see generally LAURIE ESSIG, *AMERICAN PLASTIC: BOOB JOBS, CREDIT CARDS, AND OUR QUEST FOR PERFECTION* (2010).

35. Kathy Davis argues that plastic surgeries are vehicles of self-expression and self-determination. See *RESHAPING THE FEMALE BODY*, *supra* note 32, at 17–18. Based on this argument, plastic surgeries may be recognized as vehicles for demonstrating bodily autonomy and control over one's life. *Id.* at 17–19.

36. *Id.*

37. *Id.*

38. See generally WOLF, *supra* note 32; Morgan, *supra* note 32.

dictates concerning the rigid criteria of beauty, and they perform plastic surgeries as a result of, and in accordance with, social expectations of beauty.<sup>39</sup> A remarkable representative of such ideas is Dominance Feminism.<sup>40</sup> According to scholars who adopt this approach, women request plastic surgery in order to adjust their appearance to meet social standards of female beauty, dictated by men.<sup>41</sup>

Both the liberal model and the dominance model presume that the patient is a presignified subject. While the liberal model presumes a rational and autonomous subject who has free will, Dominance Feminism presumes a victim-like subject doomed to heavy social pressure. Another option offered by the post-structural models is the presumption of a non-prelinguistic subject.<sup>42</sup> A prominent representative of this way of thinking comes from the work of the post-structural feminist, Judith Butler.<sup>43</sup> In her most influential book, *Gender Trouble*, Butler argues that sex and gender are not natural, but rather constructed by regulative discourse.<sup>44</sup> These are repetitive performative acts (i.e., stylized acts) that establish (rather than describe) the appearance of an essential ontological gender.<sup>45</sup> Therefore, sex, gender, and the coherence between them, are all socially constructed.<sup>46</sup> Relying on Butler's work, several studies have suggested conceiving plastic surgery as repetitive performative acts that constitute the gendered, westernized, or healthy subject.<sup>47</sup>

### III. PLASTIC SURGERIES AND THE LAW

There is very little legal scholarly writing on plastic surgery. The majority of the scholarship is focused on analyzing policy considerations and discussing the tension between what is and ought to be the law concerning plastic surgery.<sup>48</sup> In the public area of law,

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39. *Id.*

40. *Id.*

41. *Id.*

42. See JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 96 (Linda J. Nicholson ed., 2d ed. 1999).

43. *Id.*

44. *Id.*

45. *Id.*

46. See *id.*

47. See ADI YOUCHT, THE BODY OF LAW: CONSTITUTING THE BODY, THE IDENTITY, AND THE PLAINTIFF IN PERSONAL INJURY CLAIMS (Ph.D. Dissertation, Tel Aviv University) (on file at TAU University Faculty of Law Library); Anne Bloom, *Rupture, Leakage, and Reconstruction: The Body as a Site for the Enforcement and Reproduction of Sex-Based Legal Norms in the Breast Implant Controversy*, 14 COLUM. J. GENDER & L. 1, 2 (2005) [hereinafter *Rupture, Leakage, and Reconstruction*]; Anne Bloom, *To Be Real: Sexual Identity Politics in Tort Litigation*, 88 N.C. L. REV. 357, 418 (2010) [hereinafter *To Be Real*].

48. See Bloom, *supra* note 11, at 760–74.

there are several law review articles that discuss the regulation of plastic surgery and its criminalization under certain circumstances.<sup>49</sup> In the tortious private area of law, there are a few more academic articles relating to product liability lawsuits after using either damaged silicone implants or carcinogenic implants.<sup>50</sup> Other articles look at liability for surgery on people diagnosed with dysmorphic disorder and examine the patients' true consent for surgery.<sup>51</sup> At least one article looks at the definition of the identity of transsexuals following plastic surgery.<sup>52</sup> There are many articles that present studies of the unique challenges of mass personal injury litigation following the performance of plastic surgery.<sup>53</sup>

A review of the few legal studies on plastic surgery shows that there is almost no non-normative writing on plastic surgery.<sup>54</sup> It is difficult to find scholarly work that examines the cultural influence of plastic surgery on the law, the influence of law on the culture of plastic surgery, and the kinds of discourses created by these interrelations. A remarkable exception of this is Anne Bloom's work.<sup>55</sup> Bloom examines the cultural conceptualization of injuries following plastic surgeries.<sup>56</sup> She criticizes the legal disregarding of the ways in which culture forms the definition of injury in torts.<sup>57</sup>

My work aims to develop the theme of cultural conceptualization of injuries in torts, upon which Bloom touches.<sup>58</sup> It uses cultural tools in order to better understand personal injury claims following plastic surgery. By doing so, my research also responds to the current academic spirit, as evidenced in a recent symposium in March 2014 that dealt with the ways in which legal injury is constructed by social and cultural practices.<sup>59</sup> Apart from the attempt to use cultural tools in order to better understand personal injury claims

49. See, e.g., Dennis J. Baker, *Should Unnecessary Harmful Nontherapeutic Cosmetic Surgery Be Criminalized?*, 17 NEW CRIM. L. REV. 587 (2014); Derrick Diaz, *Minors and Cosmetic Surgery: An Argument for State Intervention*, 14 DEPAUL J. HEALTH CARE L. 235, 235 (2012).

50. See, e.g., David E. Bernstein, *The Breast Implant Fiasco*, 87 CAL. L. REV. 457, 487 (1999); Peter J. Goss et al., *Clearing Away the Junk: Court-Appointed Experts, Scientifically Marginal Evidence, and the Silicone Gel Breast Implant Litigation*, 56 FOOD & DRUG L.J. 227, 228 (2001).

51. Goss et al., *supra* note 50, at 228.

52. *Rupture, Leakage, and Reconstruction*, *supra* note 47, at 3.

53. See, e.g., Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 961 (1993).

54. See *id.*

55. See Bloom, *supra* note 11, at 759.

56. *Id.* at 763.

57. See *id.* at 790.

58. *Id.* at 759.

59. See Symposium, *Injury as Cultural Practice*, 28 GLOBAL BUS. & DEV. L.J. 69, 69 (2014).

following plastic surgery, this Article additionally translates the current cultural atmosphere into a theoretical framework of thought by examining how the body and the identities derived from it are constructed in torts. Relying on the essential tradition of thought, to date, critical tort studies have refrained from challenging the presumption of a pre-discursive body, thus anchoring the identity in biology.<sup>60</sup>

My discussion of the influence of a culture of plastic surgery on the conceptualization of damages and the construction of body and identities in torts is based on a broad research field. This field includes ninety-nine personal injury claims following plastic surgeries filed in the State of Israel. These are all the personal injury claims following plastic surgeries that have been filed in Israel and published in online legal databases.<sup>61</sup> After locating the relevant cases for my study in the online databases, I applied for approval from the Israeli courts' management to study and copy the cases.<sup>62</sup> Since

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60. The feminist approach to torts has mainly focused on its male bias. *See, e.g.*, Leslie Bender, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 14 DUKE L.J. 848, 891 (1990); MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW 184–85* (N.Y. Univ. Press 2010); Leslie Bender, *Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575, 585 (1993); FEMINIST PERSPECTIVES ON TORT LAW 2–3, 145 (Janice Richardson & Erica Rackley eds., 2012); Martha Chamallas, *Importing Feminist Theories to Change Tort Law*, 11 WIS. WOMEN'S L.J. 389, 393 (1997). The disability studies of torts has mostly been dedicated to reconceptualizing the tortious liability of disabled people and how tort law relates life with disability to a tragic one. *See, e.g.*, Darcy L. MacPherson, *Damage Quantification in Tort and Pre-Existing Conditions: Arguments for a Reconceptualization*, in CRITICAL DISABILITY THEORY: ESSAYS IN PHILOSOPHY, POLITICS, POLICY, AND THE LAW 248 (Dianne Pothier & Richard Devlin eds., 2006); Sagit Mor, *The Dialectics of Wrongful Life and Wrongful Birth Claims in Israel: A Disability Critique*, in STUDIES IN L. POL. & SOC'Y 113 (Emerald Group ed., 2014); Anne Bloom & Paul Steven Miller, *Blindsight: How We See Disabilities in Tort Litigation*, 86 WASH. L. REV. 709, 709 (2011); Jacob E. McKnite, *When Reasonable Care is Unreasonable: Rethinking the Negligence Liability of Adults with Mental Retardation*, 38 WM. MITCHELL L. REV. 1375, 1387 (2012); Darpana M. Sheth, *Better off Unborn? An Analysis of Wrongful Birth and Wrongful Life Claims Under the Americans with Disabilities Act*, 73 TENN. L. REV. 641, 642 (2006). A remarkable exception is Anne Bloom's work which undermined the presumption of a pre-discursive body in torts. *See To Be Real*, *supra* note 47.

61. Among the online legal databases from which the cases for my study were drawn include: Dinim Veod, Nevo, Pador, PsakDin, Takdin, Lawdata, and 4balance. These databases were last accessed in August 2017. There are two possible explanations for the relatively few cases that were located online in comparison to the significant amount of lawsuits filed following plastic surgeries: (1) The cases are not published in order to maintain the plaintiffs' privacy; and (2) settlement agreements, which include bans on publication in order to protect the reputation of the plastic surgeons and the clinic. *See Dan Even*, *16 Million NIS—The Greatest Compensation for Medical Malpractice*, HAARETZ (Oct. 2, 2009), <https://www.haaretz.co.il/hasite/spages/1118354.html> [<https://perma.cc/F822-UFZ3>]; *Koblotek* (Channel 10 broadcast Dec. 21, 2010).

62. Among the courts from which the cases were collected include: Tel Aviv Magistrate's Court, Tel Aviv District Court, Tel Aviv Regional Labor Court, Herzliya Magistrate's Court, Kfar Saba Magistrate's Court, Netanya Magistrate's Court, Hadera Magistrate's Court, Nazareth Magistrate's Court, Nazareth Regional Labor Court, Haifa Magistrate's Court, Haifa District Court, Haifa Regional Labor Court, Tiberias Magistrate's Court,

judicial opinions are very often the sole kinds of documents that exist in the online legal databases, approval for studying and copying the rest of the documents relating to the case (e.g., pleadings, affidavits, summaries, court manuscripts, etc.) was required. Though the procedure of locating the cases, obtaining the required approvals, studying, and copying the cases lasted five years, this research has led to some prominent innovations and advantages.

This is the first field research of its kind. It broadly, systematically, and thoroughly studies all personal injury claims filed in a given country following plastic surgery.<sup>63</sup> As explained above, I did not find it sufficient to only examine the judicial opinions; I also analyzed the legal discourse as presented by the different legal agents in all cases.<sup>64</sup> This methodology led to the study's major contribution to the meager legal literature on plastic surgery. The fieldwork has led to the recognition of new, additional influences of the culture of plastic surgery on tort damages' perceptions and construction of the body. In addition to better understanding the influence of plastic surgery culture on personal injury claims, the fieldwork also contributed to a better understanding of the role of torts (as a cultural field) in organizing the human body and constructing identities. The empirical findings also gave rise to the necessity of outlining a new paradigm for defining personal injuries. This paradigm will be offered below.

#### IV. THE RESEARCH FIELD

Choosing an Israeli research field is not obvious, and should be justified.

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Jerusalem Magistrate's Court, Jerusalem District Court, Jerusalem Regional Labor Court, Israel Supreme Court, Rishon Lezion Magistrate's Court, Ramla Magistrate's Court, Ashdod Magistrate's Court, Beer Sheva District Court, Beer Sheva Regional Labor Court, and Dimona Magistrate's Court.

63. The kinds of plastic surgeries that are highly represented in the claims are also more represented in this study. Out of the ninety-nine cases included in this study, fifty-two cases concerned breast surgeries. Therefore, I present more examples of this kind of surgery in this Article. An additional consideration during the process of selecting the examples was choosing the texts that best served the research questions and/or arguments.

64. As Michel Foucault explains, the term "discourse" describes a structured field of linguistic activity that has no "author" or given identified source. *See* MICHAEL FOUCAULT, *THE HISTORY OF SEXUALITY—VOLUME 1: AN INTRODUCTION* 11 (Robert Herley trans., 1990). The legal discourse on bodily damages following plastic surgery is an effect of human activity, within power relations, that lead to certain regimes of knowledge. These regimes dictate which bodies are properly organized, how to distinguish between these bodies and improperly organized bodies, which identities are considered "natural" and "real" (as opposed to "artificial" and "false"), and which bodies and identities can and should be corrected. Legislatures, judges, attorneys, plaintiffs, respondents, and medical experts are all legitimate speakers in the legal field. The power relations in this field are not necessarily organized according to the speaker's identity, but rather based on epistemological frameworks (ideas, perceptions, or terms).

When plastic surgery turned into a product for consumption in Israel, it was difficult to find many Israelis rushing to the operating table.<sup>65</sup> As Tzedi Tzarfati, one of the leading and most esteemed theatre and television directors in Israel, mentioned in a newspaper article about Israeli celebrities performing plastic surgery:

It was embarrassing to undergo plastic surgeries [in Israel] in the past since Israel was a very provincial and conservative country . . . . The ‘what would be said’ ruled everywhere, and definitely also in relation to this issue. The Israeli ethos was to look as natural and rugged [as you could]. If you underwent plastic surgery, a non-serious image was attached to you.<sup>66</sup>

Furthermore, Dr. Klein, one of the leading plastic surgeons in Israel, mentioned in the same article that “at the same time, celebrities used to secretly show up for surgeries . . . . The treatments were deliberately performed in very small hospitals with no one being aware and with little as possible medical staff members.”<sup>67</sup> However, as time went by, the problematic perception of plastic surgery in Israel disappeared and Israel has been turned into a plastic surgery empire.<sup>68</sup> The embarrassment attached to plastic surgery has gradually faded, and “just as every celebrity has a personal trainer,” explains Dr. Klein, “he also has a plastic surgeon.”<sup>69</sup>

Data collected by the Israeli Association for Plastic Surgeons shows that the demand for plastic surgery is constantly rising in Israel.<sup>70</sup> In 2007, 11,600 surgeries took place, and in 2005, there were 10,000 surgeries.<sup>71</sup> In 2010, 14,000 plastic surgeries were performed in the country.<sup>72</sup> In 2012, more than 18,000 plastic surgeries were

65. See Eran Suissa, *Plastic Stars*, ISRAEL HAYOM (Oct. 31, 2014), <https://www.israelhayom.co.il/article/229565> [<https://perma.cc/B2ZL-SGMU>].

66. *Id.* (translated by author).

67. *Id.* (translated by author).

68. Israel is considered the number one country in the world in plastic surgery on young women and, in 2014, it was included in the top thirty countries of estimated number of plastic surgeons. See *Statistics About Women’s Health in Israel, WOMEN & THEIR BODIES*, <https://www.wtb.org.il/english/womens-health-information-%20center/data> [<https://perma.cc/AN7V-WJRF>]; *ISAPS International Study on Aesthetic/Cosmetic: Surgery Procedures Performed in 2016*, ISAPS (2014), <https://www.isaps.org/Media/Default/global-statistics/2015%20ISAPS%20Results.pdf>.

69. Suissa, *supra* note 65 (translated by author).

70. See Itai Gal, *Plastic Surgery Report in Israel: What is the Most Operated Bodily Organ?*, YNET (Nov. 6, 2007, 1:01 PM), <https://www.ynet.co.il/articles/0,7340,L-3468168,00.html> [<http://perma.cc/2L9W-W7ZU>].

71. See *id.*

72. Dalia Mazuria, *Israeli Women Prefer Breast Enlargement Surgeries*, NRG (Oct. 26, 2010, 9:57 AM), <https://www.makorrishon.co.il/nrg/online/29/ART2/170/901.html> [<https://perma.cc/2UDU-H9VM>].

performed in Israel.<sup>73</sup> Eleven percent of Israeli women admitted that they had undergone plastic procedures.<sup>74</sup> The female breast is the bodily organ most operated on in Israel.<sup>75</sup> More than a quarter of the plastic surgeries performed in Israel in 2010 were breast surgeries, and in 2007, breast surgeries constituted forty percent of the plastic surgeries performed.<sup>76</sup> Amongst all breast surgeries, the most popular surgery is breast enlargement.<sup>77</sup> The second most popular plastic surgery in Israel is rhinoplasty surgery, and the popularity of the rest of the surgeries (e.g., facelift or tummy tuck) is more or less the same.<sup>78</sup> Eighty percent of patients in Israel are women, and an eyelid lift is the only surgery whose popularity among men is more than one percent.<sup>79</sup> Plastic surgery expertise is dominated by males in Israel, constituting ninety-three percent of the plastic surgeons in the country.<sup>80</sup> In addition to turning into a plastic surgery empire, another important characteristic of Israel for our discussion is its prosperous litigation culture.<sup>81</sup> A considerable number of studies show that Israel is highly involved in litigation.<sup>82</sup> According to data supplied by the Madanes Group, three percent of all medical malpractice lawsuits filed in Israel every year concern plastic surgery.<sup>83</sup> Becoming a plastic surgery empire highly involved in litigation, on the

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73. See Aaron Kalman, *Cosmetic Surgery in Israel Up by 30 Percent*, TIMES ISRAEL (June 25, 2012, 2:46 PM), <http://www.timesofisrael.com/more-israelis-choose-to-undergo-cosmetic-surgery> [https://perma.cc/TDG8-4RZQ].

74. Ayelet Rosen, *Small in a Large Place: How Are Plastic Surgeries Today Different?*, MAKO (Mar. 10, 2015), <https://www.mako.co.il/health-magazine/Article-712e0095caefb41006.htm> [https://perma.cc/V7Z8-VV5N].

75. See Mazuria, *supra* note 72.

76. See *The Most Popular Plastic Surgeries in 2010*, MAKO (Dec. 26, 2010), <https://www.mako.co.il/women-fitness/Article-68ed2900a922d21004.htm> [https://perma.cc/892Y-ZKMG]; see also Gal, *supra* note 70.

77. Gal, *supra* note 70.

78. Rosen, *supra* note 74.

79. Daphne Youdovich & Anat Cohen, *Battle Knives: The Plastic Surgeries Domain Is on Rise Especially Following the Financial Crisis*, GLOBES (June 4, 2009, 6:23 AM), <https://www.globes.co.il/news/article.aspx?did=1000454961> [https://perma.cc/6ZTX-5ABW]; see also Rosen, *supra* note 74.

80. See *Union Members*, ISRAELI SOC'Y OF PLASTIC & AESTHETIC SURGERY, <https://www.plasticsurgery.org.il/?CategoryID=274> [https://perma.cc/88WL-LVDQ] (explaining that one hundred twenty-four plastic surgeons are members of the Israeli Association for Plastic Surgeons but only thirteen of them are women); see also Natasha Singer, *Does the Sex of the Surgeon Matter?*, N.Y. TIMES (Mar. 30, 2006), [https://www.nytimes.com/2006/03/30/fashion/thursdaystyles/30skin.html?\\_r=1&scp=66&sq=plastic%20surgery&st=cse](https://www.nytimes.com/2006/03/30/fashion/thursdaystyles/30skin.html?_r=1&scp=66&sq=plastic%20surgery&st=cse) [https://perma.cc/7H3H-B9C7] (discussing the lack of female plastic surgeons).

81. See Neta Ziv, *Regulation of Israeli Lawyers: From Professional Autonomy to Multi-Institutional Regulation*, 77 FORDHAM L. REV. 1763, 1775 (2009).

82. See, e.g., *id.*

83. See Edna Abramson, *Medical Malpractice: What Area of Law Is Most Litigated?*, YNET (Oct. 16, 2011), <https://www.ynet.co.il/articles/0,7340,L-4123551,00.html> [https://perma.cc/BZ3J-64AA].

one hand, and being a small country with limited population, on the other, have turned Israel into an excellent research field for examining the relevant files submitted and published in the country, which is a non-negligible participant in the global plastic surgery market.

Israel has an additional legal uniqueness which supports its selection as a research field. Unlike other common law countries, Israeli tort law uses a disabilities book in order to estimate bodily damages.<sup>84</sup> This estimation grounds the judicial ruling of both pecuniary and nonpecuniary damages.<sup>85</sup> The disabilities book helps the legal agents to evaluate the plaintiff's bodily damages by determining the disability percentage of different types of disabilities.<sup>86</sup> It fosters the approach that the determination of a disability is an objective, systematic, and almost technical procedure, in which the deviation of the plaintiff's body from the proper body is estimated. The legal presumption that underlies the unique Israeli usage of a disabilities book in torts, is that bodily damages should be universally measured. This presumption is strengthened by the importation of the above-mentioned disabilities book from the Israeli social security area of law. Though originally enacted for social security purposes, the Israeli disabilities book was also imported to, and transplanted into, the tort area of law.<sup>87</sup> This cross-doctrinal usage of the same disabilities legislation further emphasizes the universal disability approach embedded in it: since bodily disability is perceived as universal, it does not matter for which doctrinal area of law the disability is determined. Bodily disability is presumed to extend beyond any doctrinal framework of thinking and is regarded as external to it. This legal presumption is based on the essential approach towards the body.<sup>88</sup> According to this approach, the human body is universally given and predicated as natural, stable, and majority-shared. As will be elaborated below, plastic surgery culture destabilized the essential approach towards the body. Therefore, studying a research field that appears to support the essential approach towards the body may emphasize and sharpen the effects of plastic surgery practices on the law. However, alongside its empirical and legal advantages, it is worth noting the disadvantage of using Israel as a research field. It seems in Israel that there are few requests for plastic surgery to

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84. See generally YUCHT, *supra* note 47, at 43–50. The disabilities book is a shortened nickname for the addition made to Israeli National Insurance Regulations (Determination of Level of Disability for Work Injuries), 1956.

85. See *id.*

86. *Id.*

87. See *id.*

88. See generally THE ESSENTIAL DIFFERENCE (Naomi Schor & Elizabeth Weed eds., 1994); Natalie Stoljar, *Essence, Identity and the Concept of Woman*, 23 PHILOS. TOP. 261 (1995).

westernize a patient's physical appearance, even though such requests remain very popular around the world.<sup>89</sup>

## V. THE INFLUENCE OF CULTURE ON LAW: CHALLENGES FACED BY PERSONAL INJURY CLAIMS FOLLOWING PLASTIC SURGERIES

The accelerated rise of plastic surgery in Israel during the last thirty years has created an inflation of personal injury claims in connection with this cultural practice.<sup>90</sup> With respect to certain kinds of plastic surgeries, such as breast reduction surgeries, litigation has become so frequent that it was argued that “plastic surgeons assume that every woman who has undergone a breast reduction surgery may file a lawsuit and be granted compensation for the scars on her breast.” “These scars,” it was additionally stated, “which terrifically frighten the legal professionals are an integral part of the surgery.”<sup>91</sup>

Lawsuits following failed plastic surgery raise six unique challenges to the legal area of personal injury claims.<sup>92</sup> These challenges originate in the legal presumptions of the tort area of law, on the one hand, and the techno-medical possibilities, cultural effects, perceptual changes, and bioethical queries that plastic surgery raises, on the other.<sup>93</sup> The above-mentioned challenges faced by personal injury claims following failed plastic surgery will now be discussed and exemplified in detail.<sup>94</sup>

### *A. The First Challenge: Blurring the Distinction Between the Proper and the Improper Body*

The legal presumption that underlies the practice of filing personal injury claims is that there is a clear answer to the question of which body is considered to be proper. The legal logos of personal

89. See Gal, *supra* note 70.

90. See Abramson, *supra* note 83.

91. File No. 14901/01 Civ. Ct. (JRS), L.M. v. Dr. M.R. (2005) (pp. 19–20 of court transcript from June 6, 2004) (translated by author). Since the cases discussed in my study relate to medical matters, and in order to ensure the parties' right to privacy, their full names were replaced by initials.

92. The adjective “failed” is not intended to describe an objective medical or scientific state of affairs. Whenever the plaintiff expresses dissatisfaction with the surgery's result, for the purpose of this study, it is considered to be “failed.”

93. See *infra* Sections V.A–F.

94. The six challenges to be discussed differ from each other. Some of them relate to the conceptualization of legal terms central to the studied area of law. Others deal with the cultural foundations or effects of legal questions. Additional aspects concern the implications of the legal procedure on the parties. While some of the challenges are unique to personal injury claims following plastic surgeries, others are only intensified in this area of law. However, all these aspects are considered, for the purpose of this Article, as “challenges,” since they all describe serious questions or problems raised by the accidental encounter between the law and plastic surgeries.

injury claims is that there is a distinction between the proper and the damaged body. Only acceptance of this presumption enables and justifies the practice of filing personal injury claims. The argument is that, unless there is a body society considers to be proper, how can one allege to have a damaged body? On what basis of comparison would such an allegation be heard? Only adoption of a bodily standard considered to be proper as a basis of comparison may legitimize the legal recognition of bodily damages.<sup>95</sup>

Despite the legal area of personal injury claims that presumes a clear definition of a proper body and determines a distinction between the proper and the improper body, the countless techno-medical possibilities for infinite bodily correction enabled by plastic surgery undermine the definition of “proper body” and add flexibility to its distinction from the improper body. Consequent to blurring the differences between the “right” and the “wrong” body, the legal standards for estimating bodily damages may be subverted. If the human body is open to constant correction, and if the possibilities for correction are infinite, it is very difficult to point to a body considered to be ‘proper.’ There will always be more wrinkles to stretch, hair to remove, or bodily asymmetry to fix. In other words, the practice of plastic surgery has created a culture, according to which no body is proper enough and all bodies should be in continuous movement toward correction.<sup>96</sup>

The tension between the legally presumed existence of a proper body and its subversion by the practice of plastic surgery is most evident in lawsuits questioning whether the plastic surgeries the plaintiffs underwent were necessary to begin with, or were negligently performed to proper bodies.<sup>97</sup> The more the pre-surgery body is found to be proper, the more the plastic surgery will be perceived as being unnecessary, and vice versa.<sup>98</sup>

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95. This logic may be, *prima facie*, contradicted considering the traditional purpose of the tort area of law of *Restitutio in Integrum*. *Restitutio in Integrum*, BLACK'S L. DICTIONARY, <https://thelawdictionary.org/restitutio-in-integrum> [<https://perma.cc/G46A-DLG7>]. We could have argued that the pre-tortious incident body should be the standard for the proper body and not a universally given standard of proper body. Thinking seriously about this argument reveals that it is unconvincing. If the pre-tortious incident body was considered to be the proper body, any bodily modification could have justified compensation (if tortious liability was properly proved). Any plastic surgery (including the most successful one) could have justified filing a tortious lawsuit. However, it is clear that not any bodily modification may justify a tortious lawsuit, but rather only a worsening alteration, based on an estimation of a universally given standard of the proper body.

96. See Suissa, *supra* note 65.

97. See, e.g., File No. 846/01 Civ. Ct. (Hi), I.G. v. Dr. R.M. (2005) (pp. 6, 9 of court transcript from Mar. 27, 2003); File No. 1745/09 Magis. Civ. Ct. (JRS), Sh.T. v. Proportion—The Nat'l Ctr. for Plastic Surgeries ¶ 4 (2010), Nevo Legal Database (by subscription, in Hebrew).

98. See, e.g., cases cited *supra* note 97.

It often turns out that the plaintiffs underwent a series of plastic surgeries rather than one surgery.<sup>99</sup> Sometimes the plaintiffs were unsatisfied with the results of the first surgery and wished to correct them with additional surgeries, and sometimes these repetitive surgeries were targeted to preserve the results of the first surgery by different surgical procedures, such as exchanging the old breast implants with new ones.<sup>100</sup> Similar to single surgeries, the courts are called to evaluate the necessity of repetitive surgeries, based on the perfection of the pre-operated body.<sup>101</sup> In other words, the courts are required to determine at what stage it was better to be satisfied with the results of the last surgery rather than performing an additional surgery.<sup>102</sup>

The continuous and infinite corrections of the body, made possible by plastic surgeries, make judicial opinions as to whether the pre-operated body was properly organized almost impossible. With respect to repetitive surgeries, this difficulty becomes even clearer, due to the medical-cultural assumption that plastic surgery requires maintenance and preservation.<sup>103</sup> As one of the plastic surgeons testifying in court asserted, “[f]uture exchange of breast implants cannot be considered as a complication of breast surgery, but rather as its characterization. . . . It’s just like stating that a car’s tire would blow up someday.”<sup>104</sup>

The difficulty in determining which body is considered proper in the reality created by plastic surgery culture is evident not only regarding the question of whether the (first/repetitive) plastic surgery was actually necessary, but also with relation to the basis of

99. See, e.g., File No. 16981/07 Magis. Civ. Ct. (Hi), R.G. v. Shores Med. Serv. ¶ 3 (2010), Nevo Legal Database (by subscription, in Hebrew); File No. 57030/08 Magis. Civ. Ct. (TA), Y.O. v. Dr. A.R. (2010), Nevo Legal Database (by subscription, in Hebrew) (p. 1 of statement of claim); File No. 1219/06 Magis. Civ. Ct. (Kfar Saba), T.F. v. Dr. E.O. ¶ 1 (2009), Nevo Legal Database (by subscription, in Hebrew); File No. 14901/01 Civ. Ct. (JRS), L.M. v. Dr. M.R. ¶¶ 4–7 (2005), Nevo Legal Database (by subscription, in Hebrew); File No. 846/01 Civ. Ct. (Hi), I.G. v. Dr. R.M. ¶ 1 (2005), Nevo Legal Database (by subscription, in Hebrew); File No. 5193/00 Magis. Civ. Ct. (Petach-Tikva), G.B.L. v. Dr. M.T. ¶ 1 (2002), Nevo Legal Database (by subscription, in Hebrew).

100. See File No. 1745/09 Magis. Civ. Ct. (JRS), Sh. T. v. Proportion—The Nat’l Ctr. for Plastic Surgeries ¶ 4 (2010), Nevo Legal Database (by subscription, in Hebrew); File No. 846/01 Civ. Ct. (Hi), I.G. v. Dr. R. M. ¶ 6 (2005), Nevo Legal Database (by subscription, in Hebrew).

101. File No. 1754/09 Magis. Civ. Ct. (JRS), Sh. T. v. Proportion—The Nat’l Ctr. for Plastic Surgeries ¶ 4 (2010), Nevo Legal Database (by subscription, in Hebrew); File No. 846/01 Civ. Ct. (Hi), I.G. v. Dr. R.M. ¶ 6 (2005), Nevo Legal Database (by subscription, in Hebrew).

102. See *supra* note 101.

103. See File No. 217433/02 Magis. Civ. Ct. (TA), Dr. J.G. v. A.M.I Tech. (2008) Nevo Legal Database (by subscription, in Hebrew) (p. 24 of court transcript from Apr. 2, 2006).

104. *Id.* (translated by author).

comparison for defining bodily damages.<sup>105</sup> In order to determine that the plaintiff suffered from bodily damages and should be granted tort remedies, a clear definition of the proper body, used as a basis for comparison, should be required. However, the constant and infinite correction of the body enabled by plastic surgery undermines the fixity of the basis of comparison, turning it into an arbitrary, fluid, and unstable one.<sup>106</sup> Should the body considered as the basis for comparison in order to estimate bodily damages be the “natural” pre-operated body? Should it be the wished-for body, following the surgery? Or is there some other kind of universal standard?

A fascinating example of the instability and fluidity of the basis of comparison for evaluating bodily damages in the era of plastic surgery is in the case of R.G.<sup>107</sup> In this case, the plaintiff’s breasts were enlarged by a failed surgery.<sup>108</sup> Following this surgery, an inflammation was developed in the left breast and the skin around the surgery scar was opened wide, leaving the breast implant exposed.<sup>109</sup> With no other choice, the silicone implant was removed and the plaintiff was left with one (right) breast enlarged by silicone implant and one (left) breast in its “natural” size, and not enlarged.<sup>110</sup> This was the plaintiff’s bodily state of affairs until she had the courage to undergo a corrective surgery in which the right silicone implant was removed and two new breast implants were transplanted into her body.<sup>111</sup>

After the plaintiff filed a medical malpractice lawsuit, the parties disagreed regarding which disability rate should be granted to the plaintiff for the time she had one enlarged breast and one in its natural size.<sup>112</sup> The parties debated extensively the question of which body should be used as a comparison for determining disability after the failed breast surgery.<sup>113</sup> While the respondent’s expert asserted that the “natural” and non-operated body should be considered the comparison basis, the plaintiff’s expert claimed that the operated and technologically enhanced body should be treated as “the proper body,” for purposes of comparison.<sup>114</sup> On that basis, therefore, the plaintiff’s expert perceived the implant removal after failed breast

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105. See File No. 16981/07 Magis. Civ. Ct. (Hi), R.G. v. Shores Med. Serv. (2010), Nevo Legal Database (by subscription, in Hebrew).

106. See *id.*

107. File No. 16981/07 Magis. Civ. Ct. (Hi), R.G. v. Shores Med. Serv. (2010), Nevo Legal Database (by subscription, in Hebrew).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. File No. 16981/07 Magis. Civ. Ct. (Hi), R.G. v. Shores Med. Serv. (2010), Nevo Legal Database (by subscription, in Hebrew).

114. *Id.* (p. 49 of court transcript from Feb. 16, 2010).

surgery as a breast loss, and astonishingly granted the plaintiff disability status, based on mastectomy clauses in the Israeli disabilities book.<sup>115</sup> In other words, in the eyes of this expert, a silicone implant removal, following failed plastic surgery, is identical to a mastectomy following breast cancer.<sup>116</sup> Who would have anticipated that medical experts would adopt such a postmodern approach towards the body, and that this approach would be evidenced in tort law?

The debate between experts in the R.G. case was not determined since the court dismissed the plaintiff's case and ruled that the respondents were not responsible for damages.<sup>117</sup> However, the plaintiff's expert's opinion, which supposedly reflects a medical and semi-judicial standpoint, offers a new understanding of the basis for comparison for estimating bodily damages following plastic surgeries. It appears that the culture of plastic surgery constructs the artificial body as a basis for reference and conceptualizes the unnatural body as "the proper body."

The constant and infinite possibilities for bodily correction in an era of plastic surgery affect not only the basis of reference for evaluating bodily damages, but also the tort remedies chosen by courts for compensation.<sup>118</sup> These remedies are tightly linked to, and directly stem from, the ways that courts define disabilities and conceptualize proper bodies.<sup>119</sup> The plaintiff's damaged body needs to be classified first as proper/improper and reparable/irreparable in order to determine which remedy is most suitable for him or her.<sup>120</sup> The courts aspire to estimate the extent to which the plaintiff's bodily damages are reversible, and thus attempt to determine whether the plaintiff's disability is permanent and stable, or temporary and variable.<sup>121</sup> In other words, the courts assess whether the plaintiff's body can be fixed or may remain damaged forever.<sup>122</sup>

Two main remedies are offered by courts after evaluating the possibility of the body's reparation: either the plaintiff's body will be signified by the courts as being permanently ruined and, therefore, compensation will be ordered for his or her disability, or the plaintiff's body will be perceived as reparable and, therefore, correctable by court

115. *Id.*

116. *Id.*

117. *Id.*

118. *See* File No. 846/01 Civ. Ct. (Hi), I.G. v. Dr. R.M. (2005), Nevo Legal Database (by subscription, in Hebrew); File No. 1745/09 Magis. Civ. Ct. (JRS), Sh. T. v. Proportion—The Nat'l Ctr. for Plastic Surgeries (2010), Nevo Legal Database (by subscription, in Hebrew); File No. 1565/05 Magis. Civ. Ct. (TA), B.Sh.O. v. Dr. G.F. (2009), Nevo Legal Database (by subscription, in Hebrew).

119. *See id.*

120. *See id.*

121. *Id.*

122. *See id.*

remedies (e.g., compensation in order to perform corrective surgery). Since a constant and infinite bodily correction is enabled by the practice of plastic surgery, the distinction between the reparable and irreparable body is subverted and undermined.

If we live in an era that culturally aspires to constantly improve the body, it is unclear in what manner an “irreparable body” is distinct from a “reparable body”; consequently, the art of ordering tort remedies becomes more and more difficult. Furthermore, ordering compensation for bodily correction is not only a question of possibility, but also a test of necessity. A basic principle in tort law is that the plaintiff does not deserve compensation for damages which she or he could have prevented, and that a duty to mitigate damages is imposed on him or her.<sup>123</sup> Considering this principle, and in light of the infinite possibilities for bodily correction by plastic surgery, Israeli courts are intensively preoccupied with the question of whether plaintiffs are obligated to undergo corrective surgeries in order to mitigate their damages.<sup>124</sup> Very often this question has been phrased as the following psychological pondering: Could the plaintiff be unsatisfied with his body, complain about the way it looks, suffer from it, and still refuse to perform repetitive surgeries in order to correct the damages and insist on preserving them?<sup>125</sup>

In all the cases included in this study, the courts negatively answered the above question. The courts ruled that it is impossible to complain about bodily damages while simultaneously insisting on preserving them and that that standpoint is contradictory and irrational.<sup>126</sup> Although the court’s viewpoint raises serious questions with respect to the plaintiff’s autonomy over his/her body and his/her right to bodily integrity,<sup>127</sup> judges have agreed to excuse the plaintiffs from performing repetitive surgeries only if there were psychiatric opinions stating that the plaintiffs were mentally incapable of

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123. R.W.M. DIAS & B.S. MARKESINIS, *TORT LAW* 77 (1984).

124. Adi Azar and Ilana Nirenberg argue that one of the most discussed and arguable issues in personal injury claims is the necessity of the plaintiff to receive corrective treatment. See ADI AZAR & ILANA NIRENBERG, *MEDICAL MALPRACTICE* 389–99 (2000).

125. File No. 14901/01 Civ. Ct. (JRS), *L.M. v. Dr. M.R.* (2005), Nevo Legal Database (by subscription, in Hebrew).

126. Forcing plaintiffs who are unsatisfied with their bodies to perform corrective surgery, despite their resistance to do so, exemplifies Hyde’s claim, according to which, external appearance norms are as rigid for people who endeavor to adjust to them as they are for people who aspire to avoid them. ALAN HYDE, *BODIES OF LAW* 123 (2001). Following the failure of the plastic surgeries, the plaintiffs had difficulties adopting the external appearance expected from them, on the one hand, and following their resistance to improve their appearance by plastic surgeries—they were required to undergo corrective surgeries—on the other.

127. Legally classifying the corrective surgeries as “elective” worsens the violation of the plaintiffs’ autonomy over their bodies and their right to bodily integrity. JUDITH BUTLER, *UNDOING GENDER* 84–85 (Routledge 2004).

undergoing corrective surgeries.<sup>128</sup> Of course this policy echoes the psycho-legal question: Why are plaintiffs forced to present psychiatric examinations, determining they are not competent to undergo additional surgeries, and their unwillingness to do so not enough? Is their standpoint so inconceivable that a supportive psychiatric opinion is required?<sup>129</sup>

Undermining the distinction between the reparable and irreparable body, which affects the plaintiffs' duty to mitigate damages, subverting the basis of reference for estimating bodily damages, and the difficulty to determine the necessity of plastic surgery, are all results of the accelerated rise of plastic surgery culture. The culture blurred, to a large extent, the distinction between the proper and improper body. Therefore, this made the decision of the surgeries' necessity, the procedure of choosing a basis for reference for the estimation of damages, and the process of ordering tort remedies, more difficult.

### *B. The Second Challenge: Undermining Medical Expertise in Favor of Aesthetic Judgment*

According to Israeli procedural tort law, examining the intactness of the plaintiff's body and estimating his/her disability rate should be an objective and neutral process by professional experts in medical or psychiatric sciences, supervised by courts.<sup>130</sup> Though these are not supposed to be subjective evaluations, social matters, or political questions, it turns out that the medical standards presumed to be objective are very often replaced by subjective aesthetic criteria in personal injury claims following failed plastic surgeries.<sup>131</sup>

Since plastic surgery is offered as a cosmetic product for consumption, the perfection of the plaintiff's body and the damages caused by the surgeries are estimated by aesthetic examinations well-grounded in current cultural norms.<sup>132</sup> Using aesthetic criteria for examining the perfection of the body is, first and foremost, evident in evaluating the essentiality and necessity of the first or repetitive surgery. The President of Haifa District Court, Judge Gilor, ruled, based on medical opinion, for instance, that the breast enlargement

128. See, e.g., File No. 14901/01 Civ. Ct. (JRS), L.M. v. Dr. M.R. ¶¶ 47–51 (2005), Nevo Legal Database (by subscription, in Hebrew).

129. Disability studies suggest an additional explanation for abstaining from correcting the body, which is not evidenced in the testimonies of the plaintiffs in this study. See John Swain & Sally French, *Towards an Affirmation Model of Disability*, 15 *DISABILITY & SOC'Y* 569, 571 (2000). According to this explanation, bodily disability constitutes the disabled's self and becomes part of him/her and his/her personality. See *id.* Therefore, she or he is not necessarily ready to rid him/herself of it. *Id.*

130. DAVID KATZIR, *REMEDIES FOR PERSONAL DAMAGES* 272 (2003).

131. See Bloom, *supra* note 11, at 784.

132. See *id.* at 764.

surgery the plaintiff underwent was necessary considering the proportion between her breast size and her body or nipples.<sup>133</sup> In another case, Judge Aviv ruled that the performance of a repetitive surgery was not essential, based on the pictures submitted by the plaintiff.<sup>134</sup> Estimating the essentiality or necessity of the first or repetitive surgery based on bodily proportion evaluation or impression from photographs determined the body's perfection by contingent subjective standards of beauty.<sup>135</sup>

Using aesthetic tests for evaluating the perfection of the pre-operated body connects to another way to evaluate the necessity and essentiality of the surgery: this classifies the surgery as being either cosmetic or medical.<sup>136</sup> Plastic surgeries are typically classified into two major groups: cosmetic and medical.<sup>137</sup> Cosmetic surgeries are intended to improve the external appearance.<sup>138</sup> Neither medical need nor emergency lead to their implementation and they are performed due to the subjective willingness of the plaintiff (e.g., breast enlargement surgeries).<sup>139</sup> Medical surgeries, on the other hand, are considered to be necessary medical procedures, which are performed in order to fix bodily impairments (e.g., breast reconstructive surgeries following cancer or corrective surgeries suggested for intersexual infants<sup>140</sup>).<sup>141</sup>

The distinction between cosmetic and medical surgeries is essential for the judicial procedure of evaluating the essentiality and necessity of the plastic surgery. The more that the surgeries performed on the plaintiffs are classified as medical, the more they will be

133. File No. 846/01 Civ. Ct. (Hi), I.G. v. Dr. R.M. (2005), Nevo Legal Database (by subscription, in Hebrew) (p. 6 of court transcript from Mar. 27, 2003).

134. File No. 1745/09 Magis. Civ. Ct. (JRS), Sh. T. v. Proportion—The Nat'l Ctr. for Plastic Surgeries ¶ 4 (2010), Nevo Legal Database (by subscription, in Hebrew).

135. *See id.*

136. *Cosmetic Surgery vs. Plastic Surgery*, AM. BOARD COSMETIC SURGERY, <https://www.americanboardcosmeticsurgery.org/patient-resources/cosmetic-surgery-vs-plastic-surgery> [<https://perma.cc/WLD5-5Y9J>].

137. *See id.*

138. Melvin A. Shiffman, *Medical Liability Issues in Cosmetic and Plastic Surgery*, 24 MED. & L. 211, 211 (2005).

139. *See id.* (explaining that cosmetic surgery is to beautify, not for medical purposes).

140. For critical writing on the necessity to correct the intersexed bodies in the Israeli context, *see, e.g.*, LIMOR MEODED DANON, WHAT KIND OF BODY? THE AFFECTS OF THE SEXING PROCESS ON INTERSEXED PEOPLES' LIVES (Itzhak Benyamini & Idan Zivoni eds., Ronit Rosenthal trans., 2014); Sagit Mor et al., *Intersex Normalization Surgery: From Absence to Presence*, 44 MISHPATIM HEBREW U. L.J. 89, 89 (2013).

141. Judith Butler shows that similar surgical procedures (e.g., breastectomy) may be differently defined in various circumstances. BUTLER, *supra* note 42, at 84–85. She argues that breastectomy following cancer is perceived as a medical procedure and breastectomy of transgender people is perceived to be elective surgery. *See id.* at 85. Butler clarifies the materialistic consequences of this distinction and explains that it enables U.S. insurance companies to refrain from funding surgeries perceived as elective. *Id.* at 85–86.

perceived as essential and necessary, and the more surgeries are classified as cosmetic, their essentiality and necessity will be doubted. Despite the supreme significance related to the distinction between cosmetic and medical surgeries, it repeatedly turns out that this distinction is unstable, rigid, or hermetic, and that the border between aesthetics and medicine is not as clear as it was assumed to be.<sup>142</sup> It seems that classifying a surgery as medical is often based on aesthetic preferences and subjective discretion.<sup>143</sup>

The surgeon, who was the respondent, in the case of John Doe, pointed out these aesthetic preferences and subjective discretions which led to the performance of penis enlargement surgeries, and clarified the irrelevance of the attempts to classify the surgeries as being either cosmetic or medical in order to determine the extent of their desirability:

Q. Did you think that the plaintiff had some kind of problem with his penis, considering its thickness or length?

A. All the patients who apply for my care have no problem . . . . They are simply dissatisfied with their penis . . . .

Q. You testified that your patients aspire to undergo penis enlargement since their penis size is very exceptional in comparison to the average penis' thickness and length . . . . Was the plaintiff's penis size so unusual?

A. I don't know what the average penis size is, and if there is such a size, I would be glad to know what it is . . . . There are people who are unsatisfied with their penis and wish to improve it.

Q. Let's say that there are two categories of patients . . . . The first category of patients has objectively small penises, and the second category of patients . . . is subjectively interested in improvement.

A. I disagree. Let's suppose that in my view a penis that is 10 centimeters in length and 1.5 centimeter in diameter is totally proper because this is what I have and what I consider to be normal. Contrary to my view, another physician may think that my penis is small because he has a penis 20 centimeters in length and 4 centimeters in diameter. There are no parameters of normal or abnormal, I don't know what you are talking about. I diagnose patients . . . with tiny penises that are satisfied with what they have. The problem is perceptual.<sup>144</sup>

The respondent, in the John Doe case, refuses to conceptualize the motives for performing penis enlargement surgeries in terms of

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142. *Id.*

143. File No. 17040/00 Magis. Civ. Ct. (JRS), *John Doe v. Dr. A.B.* (2005), Nevo Legal Database (by subscription, in Hebrew).

144. *Id.* (pp. 100–01 of court transcript from May 26, 2003) (translated by author).

bodily “problem” or “exceptionality.”<sup>145</sup> He undermines the distinction between cosmetic and medical surgeries, suggested by the plaintiff’s attorney, and claims that it is impossible to objectively estimate the surgery’s necessity.<sup>146</sup>

This is also relevant for breast reduction surgeries; the boundaries between surgeries performed for aesthetic purposes and for medical surgeries, intended to diminish backaches, here too are undermined.<sup>147</sup> Since Israeli public medicine services (HMO) cover only the expenses of medical breast reduction surgeries, the undermining of the distinction between the cosmetic and medical is highly significant.<sup>148</sup> The legal battles between potential and actual patients, and HMOs regarding the classification of breast reduction surgeries, expose the fluidity of the boundary between the cosmetic and the medical in connection with breast reduction.<sup>149</sup> It appears that arbitrary and non-medical criteria dictate the classification of breast reduction surgeries.

In the T.M. case, for example, the HMO agreed to fund only reductions of “wide, prolapsed, or heavy breasts in which 600 grams of each side tissue would be removed.”<sup>150</sup> Of course, the width, downfall, or heaviness of breasts are determined by aesthetic judgment and subjective discretion.<sup>151</sup> Furthermore, the criterion of “600 grams reduction of each side tissue,” which is allegedly a medical and objective criterion, is an arbitrary one, since it does not take into account the general body size of the patient.<sup>152</sup> Reducing 600 grams of breast tissue from a woman who is 1.75 meters tall and weighs eighty

145. *Id.* (translated by author).

146. *Id.*

147. On undermining the distinction between medical and cosmetic surgeries in the context of breast reduction surgeries, see Diane Naugler, *Crossing the Cosmetic/Reconstructive Divide: The Instructive Situation of Breast Reduction Surgery*, in *COSMETIC SURGERY: A FEMINIST PRIMER* 225, 226 (Cressida J. Heyes & Meredith Jones eds., 2009).

148. *Id.* As opposed to female breast reduction surgeries, the default regarding male breast reduction surgeries (i.e., gynecomastia) is that they are medically necessary rather than cosmetically desired. However, just like female breast reduction surgeries, the classification of gynecomastia surgeries as a medical procedure is unclear since there is an arbitrary limit grounded in the aesthetic criteria between the proper and the improper size of the male breast. *Id.* Moreover, the medical necessity of gynecomastia surgeries is undermined in light of the funding policy of breast surgeries in Israel. See File No. 3496-09 Labor Ct.(BS) T.M. v. Maccabi Health Servs. (2010), Nevo Legal Database (by subscription, in Hebrew). According to the Israeli HMOs funding policy, while women with flat breasts do not deserve augmentation surgery funding, men with enlarged breasts do deserve funding for reduction surgery. See *id.*

149. See *id.*

150. File No. 3496-09 Labor Ct.(BS) T.M. v. Maccabi Health Servs. (2010), Nevo Legal Database (by subscription, in Hebrew) (translated by author).

151. See Bloom, *supra* note 11, at 795.

152. See File No. 3496-09 Labor Ct.(BS) T.M. v. Maccabi Health Servs. (2010), Nevo Legal Database (by subscription, in Hebrew) (translated by author).

kilograms is not identical to reducing the same tissue amount from a woman who is 1.55 meters in height and weighs sixty kilograms. Indeed, in the case of T.M., Judge Sofer undermined the classification between cosmetic and medical surgery in *obiter dictum* and stated, “the plaintiff does not fulfill the criteria set by the respondent for implementing the surgery. Nevertheless, it does not mean that the surgery requested by the plaintiff is cosmetic, nor that her medical situation will not be improved if she undergoes the surgery.”<sup>153</sup>

Undermining the distinction between cosmetic and medical surgery does not take place only on a factual level, but also on a legal one. It turns out that all plastic surgeries—both cosmetic and medical—are legally classified in Israel as “elective surgeries,” which requires increased duty of disclosure from potential complications.<sup>154</sup>

Apart from using aesthetic criteria in order to estimate the essentiality or necessity of the performed first or repetitive surgery, aesthetic parameters are also used for examining the compatibility of the surgery to the plaintiff’s body. In the case of breast surgeries, for instance, it was tested whether the implants’ types, sizes, and locations were suited to the plaintiff’s bodily structure.<sup>155</sup> As the case of L.M. exemplifies, these tests were often based on subjective and aesthetic discretion.<sup>156</sup> In the L.M. case, there was a serious disagreement between the plaintiff and the respondent regarding the question of whether the implants’ sizes put into the plaintiff’s breasts were suitable for her bodily structure.<sup>157</sup> While the respondent argued that the implants’ size were totally reasonable, the plaintiff and her experts thought that the implants put into the plaintiff’s breast were too big.<sup>158</sup> Though Judge Mosek accepted the plaintiff’s standpoint and ruled that “as a reasonable physician, the respondent should have considered whether the large implants put into the plaintiff’s breast fit her relatively small body,”<sup>159</sup> his opinion is neither objective nor grounded in professional expertise. Estimating the match between certain implants’ size and body structure is based on subjective discretion, determined by aesthetic criteria.

153. *Id.* ¶ 16 (translated by author).

154. See File No. 16981/07 Magis. Civ. Ct. (Hi), R.G. v. Shores Med. Serv. (2010), Nevo Legal Database (by subscription, in Hebrew) (discussing the classification of cosmetic breast enlargement surgery as “elective”); File No. 828/02 Magis. Civ. Ct. (TA) A.P. v. Dr. M. Sh. (2003), Nevo Legal Database (by subscription, in Hebrew) (discussing the classification of medical reconstructive surgery as “elective”).

155. James C. Grotting, *Breast*, in 5 PLASTIC SURGERY 124 (4th ed. 2018).

156. File No. 14901/01 Civ. Ct. (JRS) L.M. v. Dr. M.R. (2005), Nevo Legal Database (by subscription, in Hebrew).

157. *Id.*

158. *Id.*

159. *Id.* ¶ 35 (translated by author).

The plastic surgeon who testified in favor of the respondent in the case also clarified this point and argued that breast implant size is not determined by medical need, but rather by fashion dictates and individual preferences.<sup>160</sup> In his cross-examination he testified:

- Q. [W]e agree that the plastic surgery's result is not satisfactory.  
 A. [R]elating to the implants' size, it is an aesthetic question, there is no decisive standard. . . .  
 Q. Could you agree that a prosthesis 375 cc. in size was a mistake?  
 A. I disagree. I would have preferred a smaller prosthesis, but fashion dictates big breast size. . . .  
 Q. [I]sn't it supposed to be proportional between the breast implants' size and the plaintiff's body size?  
 A. The individual's personal taste differentiates between people, or fashions. It is not my personal taste, but unfortunately it is my patients' taste. . . . It seems that 375 cc. in size is a monstrous size, but this is the average size of transplanted breast implants in Israel today.  
 Q. Is the implants' size determined by dictates of fashion or by pure medicine?  
 A. It's not a matter of medical need here, but rather an issue of fashion dictate.<sup>161</sup>

The use of aesthetic judgment tools, described above, also leads unsurprisingly to the weakening of the professional standpoint in personal injury claims following plastic surgery.<sup>162</sup> The imagined objective and scientific nature of the decision-making process related to bodily damages determination is undermined and the expert opinion is subverted.<sup>163</sup>

The main way to weaken professionals is through a total waiver of their services, by classifying the question to be answered as an unprofessional one.<sup>164</sup> Judges in personal injury claims following plastic surgery have ruled, more than once, that aesthetic damages are an issue to be determined by laymen and not by experts.<sup>165</sup> In the A.M.I. case, for instance, Judge Almagor ruled that "based on the attached pictures, one can notice even without being an expert that the plaintiff's bodily deformity was caused by the defected implants."<sup>166</sup>

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160. File No. 14901/01 Civ. Ct. (JRS) L.M. v. Dr. M.R. (2005), Nevo Legal Database (by subscription, in Hebrew) (pp. 8–11 of court manuscript from June 22, 2014).

161. *Id.* (translated by author).

162. *See* File No. 1533/08 Dis. Civ. Ct. (TA), A.M.I. Tech. v. Dr. J.G. ¶ 10 (2008), Nevo Legal Database (by subscription, in Hebrew).

163. *Id.*

164. *See id.*

165. *Id.*

166. *Id.*; *see* File No. 1268-04/14 Magis. Civ. Ct. (TA), A.M. v. Israel (2017), Nevo Legal Database (by subscription, in Hebrew) (translated by author) for an additional example

Weakening the limit between aesthetics and medicine, Judge Almagor states that all one needs in order to evaluate aesthetic damage is a photograph.<sup>167</sup>

Aesthetic criteria is used not only for determining physical disability, but also for estimating the psychiatric state of affairs.<sup>168</sup> In the M.N. case, for example, the plaintiff's beauty was taken into account in the process of evaluating her psychiatric status.<sup>169</sup> In light of the respondent's psychiatrist's impression that the plaintiff is "a very beautiful and attractive woman,"<sup>170</sup> and based on the plaintiff's presumption that bodily damages to beautiful women cause more severe psychiatric damages—compared to women perceived as not being beautiful, the latter argued that the plaintiff suffered grave psychiatric damage.<sup>171</sup> Based on the plaintiff's external appearance, the plaintiff's attorney claimed that the respondent's psychiatrist was wrong and underestimated the plaintiff's psychiatric damages.<sup>172</sup> However, the judge relied on the impressive external appearance of the plaintiff in order to diminish her psychiatric damages.<sup>173</sup> While perceiving the female beauty ideal as an ideal of happiness, Judge Ganot ruled, "the plaintiff is an extremely beautiful woman, well-kept, meticulously dressed, her hair is carefully done, and she is elegantly made-up. It cannot be that a woman with a 25% [sic] psychiatric disability would look like this."<sup>174</sup>

The beautiful external appearance of the plaintiff in the M.N. case was used by the parties and the court for evaluating her psychiatric damages.<sup>175</sup> While her attorney argued that her psychiatric disability should be enlarged, due to her external appearance, the judge ruled that she should have a diminished disability rate, since she found her to be an extremely beautiful woman.<sup>176</sup> The attorney presumes

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of a failed eyebrows' lift, in which the court examined the plaintiff's claim that a botched surgery caused him to suffer from a "Dracula face."

167. *Id.*

168. File No. 8139/01 Magis. Civ. Ct. (Rishon Letzion), M.N. v. Dr. G.F. (2003), Nevo Legal Database (by subscription, in Hebrew).

169. *Id.*

170. *Id.* at 52 of court manuscript from Apr. 13, 2003 (translated by author).

171. *Id.* at 54 of court manuscript from Apr. 13, 2003.

172. *Id.*

173. *Id.* ¶ 4.1.

174. File No. 8139/01 Magis. Civ. Ct. (Rishon Letzion), M.N. v. Dr. G.F. ¶ 4.1 (2003), Nevo Legal Database (by subscription, in Hebrew) (translated by author).

175. *Id.*

176. *Prima facie*, we could have argued that Judge Ganot deduced the perfection of the plaintiff's psychiatric health from her investment in applying makeup and getting dressed up (rather than her beautiful external appearance). *Id.* The idea is that it is unreasonable that someone who has the strength to make herself up as much as the plaintiff did suffers from psychiatric damage. According to this way of thought, the plaintiff's mental health is deduced from her behavior, rather than from her external appearance. Despite the

that beautiful women are more vulnerable to bodily damages than ugly women, and the judge derives the absence of psychiatric damage from the beautiful external appearance of the plaintiff.<sup>177</sup>

In either case, medical expertise is undermined in favor of aesthetic judgment. Furthermore, evaluating the necessity of the surgeries, examining their compatibility to the plaintiffs' bodies, and estimating their damages are all examined, clearly, according to subjective aesthetic criteria that are grounded in current ideals of beauty, and court judges are presumed to be judges in a beauty contest.

### *C. The Third Challenge: Determining the Justified Arsenal of Bodily Modulations*

On one hand, the culture of plastic surgery encourages us to constantly and eternally improve our bodies. On the other hand, we saw that plastic surgery is legally considered to be elective.<sup>178</sup> The cultural pressure to fix the body by legally volunteering to undergo bodily modulations demands that courts determine which surgeries are justified and which ones are negligently performed. Such kinds of determinations were the focus of the John Doe case.<sup>179</sup> In that case, the court was asked to determine whether a penis enlargement in a resting position (rather than in an erectile position) should be included in the justified arsenal of bodily modulations.<sup>180</sup> The plaintiff undermined the rationality and reasonability of the surgery he underwent. Although he signed an informed consent form, according to which, his penis would be enlarged in a resting position, rather than in an erectile position, he still rejected the outcome of the procedure and testified:

I understand what's written, that the penis enlargement will be performed in a resting position, rather than in an erectile position. Who performs enlargements in a resting position? Who needs [the penis—A.Y.] to rest? . . . This is funny; I would have paid 19,000 NIS, for what? This is charlatanism . . . It doesn't seem right to me. I'm not that insane.<sup>181</sup>

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analytical distinction between the two possibilities, they are strongly interrelated and one is derived from the other since the cultural expectation from women is to be both beautiful and made up. See SIMONE DE BEAUVOIR, *THE SECOND SEX* 649–79 (Constance Borde & Sheila Malovany-Chevallier trans., 2011).

177. See sources cited *supra* notes 171–73.

178. See *supra* note 127 and accompanying text.

179. File No. 17040/00 Magis. Civ. Ct. (JRS), *John Doe v. Dr. A.B.* (2005), Nevo Legal Database (by subscription, in Hebrew).

180. See *id.*

181. *Id.* at 45 of court transcript from Nov. 17, 2002 (translated by author).

Judge Farkash accepted the plaintiff's argument, according to which, there is no rational need to enlarge a penis in a resting position.<sup>182</sup> Of course, these were personal preferences and social perceptions judicially determining that penis enlargement in an erectile position is more rational than an enlargement in a resting position. The challenge of ruling what kinds of surgeries are justifiable, or which targets accomplished by the surgeries are appropriate, powerfully echoes the tension between the individual's autonomy over his or her body and current culture dictations.<sup>183</sup>

#### *D. The Fourth Challenge: Rephrasing the Relationship Between Body and Mind*

Clearly, courts are called upon to examine the necessity and desirability of plastic surgery.<sup>184</sup> For this purpose, they estimate the intactness of the pre-operated body and determine the justified arsenal of bodily modulations.<sup>185</sup> Essentially, the legal question of plastic surgery is also linked to the relationship between body and mind. Courts are called upon to confirm that the plaintiffs were psychiatrically qualified to undergo plastic surgery and that the cause for the surgery was not a psychiatric problem, which was outside the purview of plastic surgery. While this question should be answered by mental health professionals, courts have determined whether a psychiatric diagnosis was required from the beginning.<sup>186</sup> By doing so, the courts transform the relationship between body and mind and define the situations in which bodily modulations are subjected to psychiatric evaluations.<sup>187</sup> I will now examine the situations in which bodily modulations were found to be subjected to psychiatric evaluation, and critically appraise them.

Though cosmetic surgeries in Israel, in general, have not required a preliminary psychiatric approval for their implementation, repetitive cosmetic surgeries, or cosmetic surgeries on certain bodily

182. *See id.* ¶ 40.

183. For a discussion of the competing motives for conducting plastic surgeries and the connections between plastic surgeries, models of identity construction, and social economic theories, *see supra* note 32 and accompanying text.

184. *See supra* Section IV.A.

185. *See supra* Section IV.C.

186. *See* File No. 14901/01 Civ. Ct. (JRS), L.M. v. Dr. M.R. (2005), Nevo Legal Database (by subscription, in Hebrew); File No. 17040/00 Magis. Civ. Ct. (JRS), John Doe v. Dr. A.B. (2005), Nevo Legal Database (by subscription, in Hebrew).

187. *See id.*; *see also* Mary Devereaux, *Cosmetic Surgery*, in *MEDICAL ENHANCEMENT AND POSTHUMANITY* 159, 171 (Bert Gordijn & Ruth F. Chadwick eds., 2008) (requiring a psychiatric diagnosis before the performance of plastic surgery raises the question of autonomy over the body and the problem of paternalism).

parts, legally obligate a psychiatrist's approval.<sup>188</sup> In the case of John Doe, for instance, the court was asked to determine whether plastic surgery performed on the male penis require a preliminary psychiatric diagnosis.<sup>189</sup> Based on a psychiatric opinion, the plaintiff's attorney in the John Doe case claimed that a patient who wishes to enlarge his penis (as opposed to other body parts) should undergo a preliminary psychiatric diagnosis.<sup>190</sup> The respondent firmly objected to the plaintiff's attorney's argument and asserted that there is no need to distinguish between penis surgeries and other cosmetic surgeries. One of the reasons in favor and against the distinction between penis surgeries and other cosmetic surgeries can be learned from the respondent's psychiatrist's cross-examination:

Q. For the purpose of determining whether a preliminary psychiatric diagnosis is required, don't you think that there is a difference between a person interested in removing a mole or correcting a nose deformity . . . and a person who wishes to enlarge his penis . . . ? Shouldn't this kind of surgery ring warning bells for the physician?

A. Two weeks ago my former secretary told me she decided to enlarge her two breasts . . . and performed the desired surgery a day later. I think there is no difference between breast enlargement surgeries and penis transformation surgeries.

Q. The results of breast enlargement surgeries are evident to eyesight . . . but the male penis is hidden most hours of the day. . . . No one hangs around with his penis exposed and no one can notice whether it is thin or not. . . . This surgery is extremely strange. . . . The strangeness of this surgery or its unusualness should point to the necessity of psychiatric examination. Don't you agree with me?

A. I am truly sorry, but in my opinion . . . there is no need to perform a preliminary psychiatric diagnosis for a person who wishes to undergo this or another kind of surgery . . . the same is true for the female breast of a woman who does not hang around naked most of the day.<sup>191</sup>

The respondent testified that in the 1990s, when he began to perform penis enlargement surgeries that were used in United States in Israel, he sent the potential patients for psychiatric diagnoses.<sup>192</sup> Since penis enlargement was considered a relatively new surgery in

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188. File No. 14901/01 Civ. Ct. (JRS), L.M. v. Dr. M.R. (2005), Nevo Legal Database (by subscription, in Hebrew).

189. File No. 17040/00 Magis. Civ. Ct. (JRS), John Doe v. Dr. A.B. (2005), Nevo Legal Database (by subscription, in Hebrew).

190. *Id.* at 132–33 of court transcript from July 7, 2003.

191. *Id.* (translated by author).

192. *Id.* at 102 of court transcript from May 26, 2003.

Israel, the respondent preferred that a psychiatric diagnosis be conducted before he performed the surgery.<sup>193</sup> As time went by, the respondent ceased sending penis surgery candidates to preliminary psychiatric diagnoses, and adopted the accepted American policy in this context.<sup>194</sup>

Judge Farkash dismissed the respondent's testimony and found him responsible for not sending the plaintiff for a preliminary psychiatric diagnosis.<sup>195</sup> The demand for a preliminary psychiatric diagnosis, as evidenced in the John Doe case, is derived from cultural perceptions and social constructions. Penis surgeries, which do not obligate preliminary psychiatric diagnoses in the United States, require similar diagnoses when imported to Israel. Furthermore, the psychiatric record of a given plastic surgery candidate served as an indication for the necessity of a preliminary psychiatric assessment, and indeed courts have ruled that the psychiatric history requires preliminary psychiatric assessment.<sup>196</sup> In the John Doe case, for instance, the psychiatric history of the plaintiff was derived from the suspicion that he suffered from narcissistic personality disorder and identity conflict, which forced him to undergo a psychiatric assessment before performing the enlargement penis surgery.<sup>197</sup>

The diagnosis of narcissistic personality disorder of the plaintiff was based on two incidents from his past: he was discharged from military reserve duty after he was found wearing too much jewelry and for having two additional cosmetic surgeries correcting the asymmetry between his nipples.<sup>198</sup> The repetitive nipples surgeries were also based on the diagnosis of the plaintiff as suffering from identity conflict.<sup>199</sup> These surgeries, it was argued, point to the undermining of the plaintiff's sexual identity, both because they were performed in female erogenous bodily parts and they expressed the need to beautify, a phenomenon which mostly characterizes women.<sup>200</sup> Apart from being diagnosed as suffering from sexual or gender conflict identity, the plaintiff was also diagnosed with identity conflict based on his sexual orientation since he had sexual relationships with men before marriage, but refused to define himself as homosexual.<sup>201</sup>

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193. *See id.*

194. *Id.*

195. File No. 17040/00 Magis. Civ. Ct. (JRS), John Doe v. Dr. A.B. ¶ 33 (2005), Nevo Legal Database (by subscription, in Hebrew).

196. *See id.*

197. *Id.*

198. *Id.* at 50–52 of court transcript from Nov. 17, 2002.

199. *Id.*

200. *Id.*

201. *See* File No. 17040/00 Magis. Civ. Ct. (JRS), John Doe v. Dr. A.B. ¶ 33 (2005), Nevo Legal Database (by subscription, in Hebrew).

Having sexual relationships with men, on one hand, along with denying his homosexual identity, on the other, led to identifying the plaintiff as suffering from an identity conflict based on sexual orientation.<sup>202</sup> The monosexual presumption was adopted, there was support for denying his bisexuality, and the plaintiff was perceived as someone who could not be clearly defined as being attracted to men or women.

Apart from sex, gender, and sexual orientation, the plaintiff was also diagnosed with age-based identity conflict.<sup>203</sup> During the trial, it turned out that his dismissal from military reserve duty also stemmed from a bedwetting problem and sphincter dyscontrol.<sup>204</sup> Therefore, he was diagnosed as immature, and it was determined he should be sent for preliminary psychiatric assessment before enlarging his penis.<sup>205</sup>

Though Judge Farkash agreed that the plaintiff had a psychiatric history which required preliminary psychiatric assessment,<sup>206</sup> diagnosing the plaintiff as narcissist was well-grounded in social norms, according to which, only women should adorn themselves with jewelry.<sup>207</sup> Diagnosing the plaintiff as suffering from identity conflict, based on sexual orientation, derived from the social premise that men should (steadily and mostly) be attracted to women.<sup>208</sup> It turns out that the relationship between body and mind is rephrased by legally determining the cases in which bodily modulation is subjected to preliminary psychiatric assessment.<sup>209</sup> These determinations are well-grounded, clearly, in social constructions.<sup>210</sup>

### *E. The Fifth Challenge: Putting on Trial the Entire Identity*

As explained above, plastic surgery may affect the entire identity of the patient—be it a sexual, racial, or age identity.<sup>211</sup> The surgery

202. *See id.*

203. *See id.*

204. *Id.*

205. *Id.*

206. File No. 17040/00 Magis. Civ. Ct. (JRS), *John Doe v. Dr. A.B.* ¶ 33 (2005), Nevo Legal Database (by subscription, in Hebrew).

207. DE BEAUVOIR, *supra* note 176, at 650–51. *See generally* MATTHEW HALL, *METROSEXUAL MASCULINITIES* (Palgrave Macmillian 2015) (offering a critical analysis of toxic masculinity). Metrosexual is a current nickname for a made-up bourgeois male. *Id.* The nickname is a hybridization of the words “heterosexual” and “metropolis” which is grammatically put into a structure for describing sexual orientation (e.g., homosexual or bisexual). *Id.* This structure is intended to criticize heterosexuals who adopt homosexual mannerisms. *Id.*

208. *See generally* BUTLER, *supra* note 42 (explaining this social premise and its subversion).

209. *See id.* at 38.

210. *Id.*

211. *See supra* Part II.

carries a promise that extends far beyond the improvement of external appearance and offer betterment in intimacy relations, the job market, and total happiness.<sup>212</sup> In light of this cultural reality, not only the plaintiff's body, but rather plaintiff's entire identity is brought to trial in personal injury claims following failed plastic surgeries.<sup>213</sup>

Sexual and gender identities are excellent examples of identities brought to trial in personal injury claims following failed plastic surgery.<sup>214</sup> Men and women tend to complain of damaged male or female identity following failed penis or breast surgeries, respectively, and courts are required to rule about compensation for them.<sup>215</sup> In the case of T.F., for example, Judge Amir accepted the plaintiff's complaint about her inability to breast-feed following the negligently performed breast surgery and ruled that she should be awarded compensation for the incapability of fulfilling a gender role.<sup>216</sup>

Apart from the ability to fulfill gender roles, the plaintiffs' ability to have heterosexual relationships after surgeries were examined in the process of evaluating the deconstruction of their sexual identity.<sup>217</sup> Specifically, courts were preoccupied with diagnosing the sexual orientation of the plaintiffs as a result of the failed surgeries.<sup>218</sup> Their proposition was that heterosexuality is the proper sexuality, and that any other sexual orientation following the surgery is deviant and grants compensation; additionally, that having a nonheterosexual (and/or monosexual) orientation before the surgery may deprive the plaintiffs of tort damage recognition and compensation.<sup>219</sup>

The case of I.G. is a representative example for the first side of the coin.<sup>220</sup> The plaintiff argued that ever since she underwent a failed breast surgery, she had abstained from having sexual relationships with men and had begun to have sexual relationships with

212. *See supra* Part II.

213. *See, e.g.*, File No. 1219/06 Magis. Ct. (Kfar Saba), T.F. v. Dr. E.O. (2009), Nevo Legal Database (by subscription, in Hebrew); File No. 846/01 Civ. Ct. (Hi), I.G. v. Dr. R.M. (2005), Nevo Legal Database (by subscription, in Hebrew); File No. 17040/00 Magis. Civ. Ct. (JRS), John Doe v. Dr. A.B. (2005), Nevo Legal Database (by subscription, in Hebrew).

214. *See supra* note 131 and accompanying text.

215. *Id.*

216. File No. 1219/06 Magis. Civ. Ct. (Kfar Saba), T.F. v. Dr. E.O. ¶ 1 (2009), Nevo Legal Database (by subscription, in Hebrew). The loss of the ability to breast-feed is considered one of the most frequent damages following breast surgeries. *See, e.g.*, Vergie Hughes & Janet Owen, *Is Breast-Feeding Possible After Breast Surgery?*, 18 AM. J. MATERNAL/CHILD NURSING 213 (1993).

217. File No. 846/01 Civ. Ct. (Hi), I.G. v. Dr. R. M. (2005), Nevo Legal Database (by subscription, in Hebrew).

218. *Id.*

219. *See id.*; File No. 17040/00 Magis. Civ. Ct. (JRS), John Doe v. Dr. A.B. (2005), Nevo Legal Database (by subscription, in Hebrew).

220. *See* File No. 846/01 Civ. Ct. (Hi), I.G. v. Dr. R. M. (2005), Nevo Legal Database (by subscription, in Hebrew).

women; as a result, she claimed that she deserved compensation.<sup>221</sup> She testified, “after the surgery I had occasional relationships with women since I felt that only a woman can understand what happened to me and not turn me off because of the big scars on my breast and its asymmetry [sic] look.”<sup>222</sup> Judge Gilor found this testimony dishonest since it was proved that the plaintiff wished to have a romantic relationship with an investigator sent to her by the respondent.<sup>223</sup> However, examining the sexual orientation of the plaintiff and the readiness to grant her a remedy in case she turned her desire towards women, demonstrates that the nonheterosexual relationship is perceived as an improper relationship.

The sexual orientation of men was also examined in order to evaluate their damages.<sup>224</sup> In the case of John Doe, the plaintiff argued that the quantity and quality of sexual relationships he used to have with his wife had been severely damaged ever since he underwent penis enlargement.<sup>225</sup> Looking at the second side of the coin, the respondent’s attorney claimed that the plaintiff’s difficulties in having sexual intercourse with his wife did not stem from the penis surgery, but rather from his premarriage attraction to men.<sup>226</sup> In his cross-examination, the plaintiff was required to give details about his “sexual problems,” which led to his release from the army<sup>227</sup> and to “confess” about his sexual orientation and practices:

Q. What did you mean by sexual identity problems?

A. Whether you like to do it both with a girl and a guy.

Q. Did you like to do it with a guy.

A. [S]ometimes yes.<sup>228</sup>

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221. *See id.*

222. *Id.* at 4 of the plaintiff’s affidavit (translated by author).

223. File No. 846/01 Civ. Ct. (Hi), I.G. v. Dr. R.M. (2005), Nevo Legal Database (by subscription, in Hebrew).

224. File No. 17040/00 Magis. Civ. Ct. (JRS), John Doe v. Dr. A.B. (2005), Nevo Legal Database (by subscription, in Hebrew).

225. *Id.* at 6 of the plaintiff’s affidavit.

226. *Id.* at 60 of court manuscript from Nov. 12, 2002.

227. On gay individuals who serve in the Israeli Defense Forces within a comparative legal study, see Aeyal Gross, *Sexuality, Masculinity, Military, and Citizenship: The Service of Gays and Lesbians in the Israeli Army in Comparative Perspective*, in ARMY, SOC’Y, & L. 95 (Daphne Barak-Erez ed., 2002).

228. File No. 17040/00 Magis. Civ. Ct. (JRS), John Doe v. Dr. A.B. (2005), Nevo Legal Database (by subscription, in Hebrew) (p. 60 of court manuscript from Nov. 17, 2002) (translated by author). The plaintiff’s cross-examination illustrates Michel Foucault’s argument, according to which, sex is a privileged theme of confession in the modern era (*Did you like to do it with a guy?*). See FOUCAULT, *supra* note 64, at 56 (arguing “that the truth of sex became something fundamental, useful, or dangerous, precious or formidable: in short, that sex was constituted as a problem of truth.”).

The respondent's attorney strove to prove that the plaintiff's object of attraction had never been stable and the plaintiff himself was not sure whether he preferred to sleep with women or men.<sup>229</sup> Therefore, it was argued, it was impossible to relate the plaintiff's abstention from sexual relationships with his wife to the surgery he underwent.<sup>230</sup> Though Judge Farkash did not refer directly to the sexual orientation of the plaintiff, or classify him as homosexual, he did imply that the plaintiff may also be attracted to men by noting that the relationship between the plaintiff and his wife was not perfect before the surgery.<sup>231</sup>

In addition to determining the sexual orientation of the plaintiffs and their (heterosexual) attraction, courts have also examined the plaintiffs' attractiveness in the eyes of the second sex, for the purpose of granting them compensation.<sup>232</sup> In the case of L.B., for example, Judge Mark-Hornchick examined the attractiveness of the plaintiff after the breast surgery she underwent.<sup>233</sup> The Judge ruled that the plaintiff's look after the failed surgery may deter men from having intimate relationships with her and granted her compensation.<sup>234</sup>

Examining the damages in light of different components of a plaintiffs' sexual and gender identity (e.g., parental gender roles, sexual orientation, or attractiveness in the eyes of the second sex) led to an examination of the damages in terms of the plaintiffs' sexual and gender identity, as a whole. In the case of T.F., for example, Judge Amir ruled for a compensation of 500,000 Israel New Shekel (NIS) for destroying the femininity of the plaintiff in a failed breast surgery.<sup>235</sup> His ruling was based on a plastic surgeon's testimony stating that the plaintiff lost a crucial part of the breast, as a secondary sex

229. See File No. 17040/00 Magis. Civ. Ct. (JRS), *John Doe v. Dr. A.B.* (2005), Nevo Legal Database (by subscription, in Hebrew) (p. 60 of court manuscript from Nov. 17, 2002).

230. *Id.*

231. File No. 17040/00 Magis. Civ. Ct. (JRS), *John Doe v. Dr. A.B.* ¶ 48 (2005). The avoidance of direct, open, and free speech about the plaintiff's sexual orientation, and the hinted-at reference to his sexual orientation characterizes, according to Michel Foucault, the dictum on sex. Foucault argued that "[i]nsofar as possible, nothing was meant to elude this dictum, even if the words it employed had to be carefully neutralized." See FOUCAULT, *supra* note 64, at 21.

232. See File No. 44294/95 Magis. Civ. Ct. (TA), *L.B. v. Dr. D.* (1999), Nevo Legal Database (by subscription, in Hebrew).

233. See *id.*

234. *Id.* ¶ 68. Examining the deterrence of men from having an intimate relationship with the plaintiff strengthens the perception of heterosexual sexuality. This perception endeavors to enable direct sexual access of men to women and is highly connected to the institution of patriarchy. These are the male dominance mechanisms in society which preserve sexual access to women and their turning into sexual objects. See generally Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS 631 (1980) (discussing the connections between heterosexuality and patriarchy).

235. File No. 1219/06 Magis. Civ. Ct. (Kfar Saba), *T.F. v. Dr. E.O.* ¶ 5 (2009), Nevo Legal Database (by subscription, in Hebrew).

characteristic, when her nipple was dropped during the failed surgery.<sup>236</sup> Judge Ganot also ruled that the plaintiff in the case of M.N. should receive compensation since the failed surgery ruined her female identity.<sup>237</sup> She justified her ruling by stating that “the breasts symbolize more than any other organ the woman’s femininity and damaging their shape harm the woman and her femininity.”<sup>238</sup> Not only women, but also men, were granted compensation for the destruction of their male identity.<sup>239</sup> This was so in the John Doe case.<sup>240</sup> In an outstanding judicial opinion, Judge Farkash graphically, and with pathos, described the destruction of the plaintiff’s male identity, which granted him compensation following the failed penis enlargement:

The male penis, its look, length, and size have been always the proof of the masculinity and personality of the man. Penis damage is one of the most severe damages a man can suffer from, and there is no need to elaborate on it. . . . The plaintiff’s personal feelings and the influence of the penis appearance on his entire life, his pain, suffer, sorrow, and shame—all these justify compensation.<sup>241</sup>

The judicial aspiration to compensate the harm caused to the entire identity, and not only to the body and the identity embedded in it, raises serious challenges to the legal system. It forces the legal system to decide which identities should be taken into account in its examination, how these identities are defined, what kinds of damages to identities should be included, and whether to only consider cases of damages to existing identities or also consider loss of chance to improve the identities through the surgeries performed.

#### *F. The Sixth Challenge: Handling the Disempowerment of the Patients in the Clinic*

Regardless of the alleged performance of civil wrongdoing, the plaintiffs are positioned in an inferior and weak position (in comparison to the physicians) in the clinic. Patients almost completely depend on their physicians: the physician is responsible for their good health, the source of medical knowledge, and the one who is in charge

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236. *See id.*

237. File No. 8139/01 Magis. Civ. Ct. (Rishon Letzion), M.N. v. Dr. G.F. ¶ 4.2 (2003), Nevo Legal Database (by subscription, in Hebrew).

238. *See id.* (translated by author).

239. *See* File No. 17040/00 Magis. Civ. Ct. (JRS), John Doe v. Dr. A.B. (2005), Nevo Legal Database (by subscription, in Hebrew).

240. *Id.*

241. *Id.* ¶ 51 (translated by author).

of its implementation; he decides which information will be given to the patients, and he sets up the medical treatment schedule. In the context of plastic surgery, the inferiority and weakness of the patients has additional aspects. By carefully listening to the plaintiffs' stories, it is clear their encounters with the physicians tell an absurd-fantastic story. According to this story, the potential target audience of plastic surgery, mostly women,<sup>242</sup> turn to plastic surgeons, who are mostly males,<sup>243</sup> in order to fulfill their aspirations of reshaping the body.<sup>244</sup> An ideal picture is presented to the target audience concerning plastic surgery, according to which, all its aspirations for the desired body, and even more, will be fulfilled by the surgery. In the case of John Doe, for instance, the plaintiff describes the magical results of the surgery promised to him.<sup>245</sup> According to these promises, the thickening and lengthening of the penis by injecting extra fat pumped from the stomach should have dramatically improved the plaintiff's life in a way that is not summed up by enlarging the penis.<sup>246</sup> The plaintiff testified:

I spoke on the phone with the secretary. . . . She said that there would be a significant improvement in my sex life, that my enjoyment would be improved, in addition to the way the penis looks, that my stomach would disappear, that is to say that I would lose weight, and that during the experience of orgasm I would feel much more satisfied . . . coming, I was told, would be completely different. I asked her what does different mean. Is there a different kind of coming, she said . . . that men tell her amazing things of what they experience.<sup>247</sup>

The person undoubtedly in charge of the implementation of the ideal results described in the plaintiff's testimony is the physician.<sup>248</sup> Immediately when patients enter clinics, their bodies are examined by the plastic surgeons.<sup>249</sup> The purpose of these examinations is to evaluate the surgery's necessity and desirability and to decide which bodily organs require modification.<sup>250</sup> Unfortunately, these examinations

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242. See Youdovich & Cohen, *supra* note 79.

243. See Singer, *supra* note 80.

244. See YUCHT, *supra* note 47, at 236.

245. See File No. 17040/00 Magis. Civ. Ct. (JRS), John Doe v. Dr. A.B. (2005), Nevo Legal Database (by subscription, in Hebrew) (p. 2 of plaintiff's affidavit, p. 39 of the court manuscript from Nov. 11, 2002).

246. *Id.*

247. *Id.* (translated by author).

248. See YUCHT, *supra* note 47, at 236.

249. See, e.g., File No. 8139/01 Magis. Civ. Ct. (Rishon Letzion) M.N. v. Dr. G.F. (2003), Nevo Legal Database (by subscription, in Hebrew) (p. 2 of plaintiff closing statement and p. 30 of court manuscript from Mar. 20, 2003).

250. See *id.*

often encourage the objectification of the plaintiffs' bodies.<sup>251</sup> In order to decide whether to undergo plastic surgery, the plaintiffs are often additionally sent to see other male or female operated bodies, which are also objectified.<sup>252</sup> Presenting other bodies to the objectifying gaze of the plaintiffs implies the future: the plaintiffs look at other bodies the way that others will look at their bodies. The bodies of other men and women are observed as objects, and the plaintiffs' bodies will soon be like the ones they saw. In radical instances, the physicians' bodies that had undergone plastic surgery were also examined by the plaintiffs.<sup>253</sup> One of the plaintiffs reported that in order to persuade him to inject silicone into his penis, "the physician . . . took off his pants and presented his penis, which he described as a victim of impotency that was relieved after a few injections."<sup>254</sup>

Apart from objectifying the plaintiffs' bodies before receiving the cosmetic treatment, the plaintiffs' bodies were also objectified in the medical procedure itself.<sup>255</sup> A good example of such an objectification is the process of marking with a pen on the plaintiffs' body—as if it were a drawing canvas—to mark where the knife would cut.<sup>256</sup> In addition, the anesthetizing procedure and the bodily cut itself, which constitute an integral part of the surgery, objectifies the bodies of the plaintiffs.<sup>257</sup> The plaintiffs lose control over their bodies, which become objects subjected to drawing activities.

The ideal picture promised to the people who come for consultation, the numerous positive aspects of the surgery that would allegedly improve their bodies, recognition of the physicians as the key actors in fulfillment of the patients' dreams, and the objectification of the patients in a reality in which the majority of plastic surgeons are men and most of the patients are women—all these imbue the encounter between the plastic surgeons and the plaintiffs with a

251. See, e.g., File No. 57030/08 Magis. Civ. Ct. (TA), Y.O. v. Dr. A.R. (2010), Nevo Legal Database (by subscription, in Hebrew) (p. 5 of the plaintiff's damage calculation); File No. 8139/01 Magis. Civ. Ct. (Rishon Letzion) M.N. v. Dr. G.F. (2003), Nevo Legal Database (by subscription, in Hebrew) (p. 2 of plaintiff closing statement and p. 30 of court manuscript from Mar. 20, 2003); File No. 162729/02 Magis. Civ. Ct. (TA), R.T. v. Ariel Clinic Ltd. (2003), Nevo Legal Database (by subscription, in Hebrew) (p. 2 of statement of claim).

252. See *supra* note 251.

253. See File No. 1010/94 Dis. Civ. Ct. (JRS), S.G. v. Dr. M.G. (1996).

254. This testimony was released in a newspaper article relating to the case of File No. 1010/94 Dis. Civ. Ct. (JRS), S.G. v. Dr. M.G. (1996) (translated by author); see Bruria Avidan-Brir, *A Small Scale Problem*, LA-ISHA, Nov. 14, 1994, at 15.

255. See YOUCHT, *supra* note 47, at 251–52.

256. *Id.*

257. See *Why We Draw on You Before Plastic Surgery*, ANDERSON SOBEL COSM. SURGERY (Oct. 26, 2017), <https://www.andersonsobelcosmetic.com/blog/why-cosmetic-surgeons-draw-on-patients> [<https://perma.cc/8B24-9RSS>].

narrative structure that is almost legendary.<sup>258</sup> It is reminiscent of sleeping beauties who are saved by knights in white dressing gowns. In other words, the wishes of the woman client are fulfilled by anesthetizing her and by operating on her. When the surgery is over, the woman will wake up to a different reality, in which the picture is perfect and her external appearance is beautiful, as if she were the sleeping beauty.<sup>259</sup>

Glorifying the plastic surgeon's abilities and skills in a way that extended far beyond the medical field, while untruthful, strengthened and justified this image as a white knight.<sup>260</sup> In the case of E.N., for instance, the plaintiff was convinced that the surgeon was her key to achieving an extremely happy and satisfying life, after his false abilities and skills were presented to her.<sup>261</sup> In her testimony, the plaintiff recounted the alleged achievements of the surgeon, which caused her to believe that his superpowers would change her destiny.<sup>262</sup> Not only were false professional successes related to the respondent, but also non-medical achievements and false status symbols were attached to him.<sup>263</sup> The plaintiff testified that she was told that the respondent served as a pilot in the Israeli Air Force.<sup>264</sup> This information, which turned out to be a fabrication, had made the plaintiff confident that she was given to a highly qualified man who would dramatically change her life.<sup>265</sup>

The absurd-fantastic story and the encounter between a plaintiff and a plastic surgeon emphasize the power differentials between the sides—the plaintiffs are weaker than the plastic surgeons. According to this story, the patients are perceived as passive women/men

258. See HEYES, *supra* note 32, at 102.

259. Furthermore, TV series which recommend to their participants to perform plastic surgeries use legendary images and adopt fantastic-absurd narrative structures. See *id.* Cressida Heyes shows how the American TV series, *Extreme Makeover*, sharpens the patients' suffering before the plastic surgery and empowers their happiness after the surgery. *Id.* It turns out, Heyes states, that the plastic surgeon provides a complete victory to the patient, which cannot be summarized in an upgraded external appearance. *Id.* The surgeon fulfills all the patients' wishes, including finding a spouse or being promoted at work. *Id.* at 104. Heyes shows how the series constructs the surgeon's character as Prince Charming who comes to rescue the patient. *Id.* She focuses on filming the recovering moments from the surgery when the surgeon stands next to the patient, softly holds her hand, and confirms that the procedure ended successfully. HEYES, *supra* note 32, at 104. The viewer, Heyes argues, can almost wish that the surgeon would kiss the patient for waking her up from sleep. *Id.* at 102–04.

260. *Id.*

261. See File No. 1114/06 Magis. Civ. Ct. (TA), E.N. v. G.G.L.S.P.A. (2007), Nevo Legal Database (by subscription, in Hebrew).

262. *Id.* at 2 of the plaintiff's affidavit.

263. *Id.*

264. *Id.*

265. See *id.*

who do not control their lives and who leave their fate in the hands of the surgeons. The patients' weakness becomes clearer due to the market nature of plastic surgery.<sup>266</sup> The plastic surgery field runs into millions of NIS each year.<sup>267</sup> It advances aesthetic (rather than health) treatments by private (rather than public) services, which imbue it with market characteristics in addition to its medical nature.<sup>268</sup> As the former head of the Israeli Association for Plastic Surgeries, Professor Yaron Ben-Yishay, stated, "the aesthetic issue . . . runs into millions in the world and businessmen and not physicians are responsible for this."<sup>269</sup> And indeed, many plaintiffs report that they received medical advice from sales representatives, who lack medical education.<sup>270</sup>

Positioning the plaintiffs in an inferior and weak position in the clinic and in the market of the plastic surgery field, which fosters this position, invites a new challenge to the legal system. It encourages the legal system to return to the plaintiffs their voice, to empower them, to confirm their subjectivity, and to develop new tools for handling medical malpractice lawsuits in cases where physicians also serve as businessmen.<sup>271</sup>

## VI. THE INFLUENCE OF LAW ON CULTURE: THE DESIGNATION OF THE CULTURE OF PLASTIC SURGERIES BY THE LEGAL DISCOURSE

I have so far discussed the influence of the culture of plastic surgery on law and described the challenges this culture raises for the legal area of personal injury claims.<sup>272</sup> Now I turn to an examination of the influence of law on culture and inquire how plastic surgery

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266. One of the legal tools used to deal with the patients' weakness, due to the market nature of plastic surgery, is the imposing of an increased duty of disclosure regarding elective surgeries.

267. Aviva Lori, Cut and Paste, HAARETZ (May 17, 2007, 12:00 AM), <https://www.haaretz.com/1.4821202> [<https://perma.cc/GM29-EH2B>].

268. *Id.*

269. Meeting Protocol No. 138 of the Labor, Welfare, and Health Committee of the 16th Israeli Parliament from Mar. 3, 2004 (translated by author).

270. *See, e.g.*, File No. 3764/02 Magis. Civ. Ct. (TA), R.T. v. Ariel Clinic Ltd. ¶ 2, 8.2 (2003), Nevo Legal Database (by subscription, in Hebrew); File No. 57030/08 Magis. Civ. Ct. (TA), Y.O. v. Dr. A.R. (2010), Nevo Legal Database (by subscription, in Hebrew) (p. 2 of statement of claim); File No. 1565/05 Magis. Civ. Ct. (TA), B.Sh.O. v. Dr. G.F. (2009), Nevo Legal Database (by subscription, in Hebrew) (pp. 2–3 of statement of claim); File No. 17040 Magis. Civ. Ct. (JRS), John Doe v. Dr. A.B. (2005), Nevo Legal Database (by subscription, in Hebrew) (p. 3 of the plaintiff's affidavit).

271. On the empowering effects of tortious tools, *see* Bender, *supra* note 60, at 853; Ronen Perry, *Empowerment and Tort Law*, 76 TENN. L. REV. 959, 966 (2009); Rebecca E. Zietlow, *Giving Substance to Process: Countering the Due Process Counterrevolution*, 75 DENV. U. L. REV. 9, 10 (1997).

272. *See supra* Part V.

culture is designated by the legal area of personal injury claims. I claim that the law is a full participant in the cultural designation of the value of the “body,” which, of course, influences the plastic surgery industry. I found a subtle and fragile dialectic in the law between revealing the artificial nature of the body and concealing it. On the one hand, the law fully participates in camouflaging the socially constructed nature of the body. It presumes a given body, verifies that the artificial construction of the body appears real by judicially critiquing it, and may grant tort remedies in order to correct the damaged body and convert it into an assumed-to-be-natural proper body. Furthermore, in defamation and privacy claims, Israeli courts tend to prohibit public disclosure of artificial bodily constructions (e.g., plastic surgeries) and defend the plaintiff’s right to keep bodily modifications a secret.<sup>273</sup>

On the other hand, this camouflaging of the artificial nature of the body embedded in personal injury claims is also the source of the cultural strength and potential of these claims. While the law enables, criticizes, and initiates the artificial construction of the body, presumed to be real, it also reveals the social practices exercised on the body, and discloses how social power is transformed into nature. In other words, the most successful artificial construction of the body imagined by law is also simultaneously its colossal failure, since it is not real. External intervention was required for the person in order to obtain the perfect, proper body. Just like a seemingly perfect body retouched by Photoshop cannot be considered perfect, because it is not real,<sup>274</sup> so too the operated bodies discussed in law. For that reason, not only is the distinction between

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273. See File No. 19574/02 Magis. Civ. Ct. (Hi), *H.M. v. Maariv Group Ltd.* (2007), Nevo Legal Database (by subscription, in Hebrew); File No. 19300/96 Magis. Civ. Ct. (TA), *Jane Doe v. Anat Med. Ctr. Ltd.* (2002), Nevo Legal Database (by subscription, in Hebrew); File No. 10080/97 Dist. Civ. Ct. (Hi), *Jane Doe v. John Doe* (1997), Nevo Legal Database (by subscription, in Hebrew); File No. 160771/02 Magis. Civ. Ct. (TA), *Jane Doe v. Dr. H.A.* (2003), Nevo Legal Database (by subscription, in Hebrew); File No. 24002/06 Magis. Civ. Ct. (TA), *V.T. v. Dr. D.K.* (2006), Nevo Legal Database (by subscription, in Hebrew).

274. See JEAN BAUDRILLARD, *SIMULACRA AND SIMULATION* 30 (Sheila Faria Glaser trans., Univ. of Mich. Press, 1994). Photoshop technology significantly expresses Jean Baudrillard’s argument which states that the images representing reality are the reality itself. *Id.* This is not because these images are highly loyal to reality, but rather since the distinction between signifier and signified has been cancelled in the postmodern era. See *id.* The State of Israel aspired to fight the deceit embedded in Photoshop technology by legislating a statute forcing publishers to add a clarification that graphical editing software was used. See *LAW FOR RESTRICTING WEIGHT IN THE MODELING INDUSTRY* 2012 (Isr.). This goal of the clarification was to expose the fact that the presentation of the image’s sizes are not natural. See *id.* For more on this statute, see *Model Law World Precedent: ‘Incentive’ for More Countries*, YNET (Mar. 21, 2012, 1:06 AM), <https://www.ynet.co.il/articles/0,7340,L-4205688,00.html> [<https://perma.cc/KJ6T-U6CE>].

the reparable body and the permanently ruined body not stable,<sup>275</sup> but also the repaired and meant-to-be-proper body is not corrected. In other words, the irreparable body is not necessarily uncorrectable, and the meant-to-be-repaired body—so it turns out in law—is not actually proper. Neither the irreparable body nor the meant-to-be-repaired body are as they appear to be, and the law operates in the range between revealing the artificial nature of the body and concealing it. This disclosure may affect the culture of plastic surgery in two opposite ways. On the one hand, the law fosters the practice of plastic surgery in order to enable infinite bodily correction (e.g., tortious remedies for funding plastic surgeries).<sup>276</sup> On the other hand, the above-mentioned disclosure discourages the practice of plastic surgery, since it reveals their inability to turn bodies into real, corrected ones.

## VII. A NEW PARADIGM FOR DEFINING PERSONAL INJURIES

After presenting the challenges faced by personal injury claims following failed plastic surgeries (i.e., the influence of culture on law), I now examine the way these challenges can be handled in light of the designation of plastic surgery culture by legal discourse (i.e., the influence of law on culture).

The challenges faced by personal injury claims concern, to a large extent, the definition or conceptualization of the proper body. The infinite bodily corrections that are enabled by plastic surgery alter the distinction between the proper and the improper body and raise the question of what body is considered proper (the first challenge). The culture of plastic surgery questions whether the proper body should be defined by medical or aesthetic criteria (the second challenge), and also what should be included in the justified arsenal of bodily modulations, is derived from the definition of the proper body (the third challenge).<sup>277</sup> Therefore, I introduce a new definition of the body and offer a new paradigm for conceptualization of the body and the identities derived from it in personal injury claims. I

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275. Procedures of plastic surgeries enable infinite bodily corrections which undermine the distinction between the reparable and the permanently ruined body. *See supra* Section V.A.

276. File No. 19574/02 Magis. Civ. Ct. (Hi), H.M. v. Maariv Group Ltd. (2007), Nevo Legal Database (by subscription, in Hebrew); File No. 19300/96 Magis. Civ. Ct. (TA), Jane Doe v. Anat Med. Ctr. Ltd. (2002), Nevo Legal Database (by subscription, in Hebrew); File No. 10080/97 Dist. Civ. Ct. (Hi), Jane Doe v. John Doe (1997), Nevo Legal Database (by subscription, in Hebrew); File No. 160771/02 Magis. Civ. Ct. (TA), Jane Doe v. Dr. H.A. (2003), Nevo Legal Database (by subscription, in Hebrew); File No. 24002/06 Magis. Civ. Ct. (TA), V.T. v. Dr. D.K. (2006), Nevo Legal Database (by subscription, in Hebrew).

277. *See supra* Part V.

propose enabling personal injury claims that are not necessarily organized around the body (or at least not the universally given one), since the definition of the proper body is unclear. Furthermore, it is uncertain what is considered to be bodily injury, which body should be repaired, and how it should be repaired.<sup>278</sup> Lastly, we need to consider the exposure of the artificial nature of the body, which is embedded in personal injury claims.<sup>279</sup> Instead of presupposing a given natural, stable, and majority-shared body, I suggest adopting a social understanding of the body.

Adopting a social understanding of the body is required in light, and as a result, of the body's complex relationships with the social, cultural, technological,<sup>280</sup> or ecological environment. The rigid distinction between the body and its environment is repeatedly undermined and they regularly blend into one another.<sup>281</sup> As Gowri Ramachandran states, "[t]he body and the world around it have begun to bleed into each other: extreme body modification is on a more visible rise, [and] clothes and other objects seem more and more like parts of our bodies and extensions of ourselves . . . ."<sup>282</sup>

In the context of the field, there are many examples of bodily modifications that demonstrate the expanding of the body morphology and its merging with the environment. The silicone transplanted into the female breasts or the male penis is only one example of the hybrid character of the body and its unification with the environment.<sup>283</sup>

In light of undermining the limits between the body and the environment, and following their unification, Ramachandran argues that the only bodies important to our well-being are the social bodies.<sup>284</sup> These are the bodies existing in a complex framework of

278. *See id.*

279. *See supra* Part VI.

280. In the context of Disabilities Studies, Myriam Winance showed how technological developments construct the disabled body and affect its designation. *See* Myriam Winance, *Trying Out the Wheelchair: The Mutual Shaping of People and Devices Through Adjustment*, 31 *SCI., TECH., & HUM. VALUES* 52, 53 (2006).

281. Gowri Ramachandran, *Against the Right to Bodily Integrity: Of Cyborgs and Human Rights*, 87 *DEN. U. L. REV.* 1, 34–35 (2009).

282. *Id.* at 35.

283. There are countless additional examples that come from outside the research field concerning the complex relationship between the body and its environment and their merging with each other. *Id.* at 11. Inter alia, these examples include techno-medical instruments, upon which we are dependent, and that are implanted into our bodies (e.g., pacemakers, prosthetic arms, or legs) or externally attached to it (e.g., wheelchairs, glasses, contact lenses, hearing aids, or canes), and common cultural practices soldered into the body (e.g., hair dye, tattoos, or piercings). *Id.* at 12, 34. In another study, Ramachandran examines to what extent we can extend the body's borders. *See* Gowri Ramachandran, *Assault and Battery on Property*, 44 *LOY. L.A. L. REV.* 253, 262 (2010) (asking whether we can consider cars or smartphones, which are already nicknamed our legs or exo-brains, respectively, as part of our body).

284. Ramachandran, *supra* note 283, at 261.

medical standards, cultural practices, technological arrangements, and legal norms. Therefore, Ramachandran argues that the only bodies that deserve special legal protection are the social bodies.<sup>285</sup> In her words:

[I]f there is a “body” that . . . law ought to be protecting, it is not the “human body,” as defined to mean an organic, physically continuous being distinct and isolated from the surrounding world, but rather the “posthuman body,” defined as constructed by and situated within a social and technological context. Protecting this “posthuman body” can’t be done by carving it off for special legal status because it can’t be carved off at all.<sup>286</sup>

If we agree with Ramachandran’s argument that the only body that deserves legal protection is the “posthuman body” (as distinct from the “human body”), it does not mean that we should abandon the possibility of filing a tortious lawsuit following personal injury. Rather, we should say that there is no full correspondence between the physical borders of the body and the limit for claiming bodily damage. Instead of presuming that there is only one universally given body from which any deviation is considered to be bodily damage, we should acknowledge a pluralism of configurations of bodily existence. This suggestion replaces the negative approach towards bodily damages with a positive approach. The meaning of the adjectives negative/positive in this context is profusion/lack and not good/bad. Instead of an approach that estimates how much the damaged body is lacking, based on the presumption that all bodies are uniform, I suggest adopting an approach that encourages profusion and diversity of configurations of bodily existence for the basis of the practice of personal injury claims.

However, we cannot know which configurations of bodily existence can serve as the basis for a personal injury claim if the physical boundaries of the body are deconstructed and a social understanding of the body is adopted. I suggest adopting a phenomenological approach and defining personal injury as a severe, bad influence on one’s lived experience.<sup>287</sup> Using the valve idiom “one’s lived experience” is

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285. Ramachandran, *supra* note 281, at 38–39.

286. *Id.*

287. See MAURICE MERLEAU-PONTY, PHENOMENOLOGY OF PERCEPTION 475 (Colin Smith trans., 2002). Phenomenology studies how personal experience impacts the ways the phenomenon is perceived in consciousness. *Id.* The French philosopher Maurice Merleau-Ponty emphasized the centrality and significance of the body in our personal experience and noted that our thinking is mediated through our body. *Id.* at 235. In his words:

In so far [sic] as, when I reflect on the essence of subjectivity, I find it bound up with that of the body and that of the world, this is because my existence

meant to enable flexibility and acknowledgment of pluralism of configurations of bodily existence.<sup>288</sup> This suggestion supports the latest initiatives of scholars in different areas of law to acknowledge the profusion and diversity of configurations of bodily existence, and it aspires to implement these initiatives in another area of law, tort law.<sup>289</sup>

Constituting a phenomenological definition of personal injuries, alongside adoption of a social understanding of the body, acknowledges the existence of personal injuries, which has been doubted in the research field.<sup>290</sup> A remarkable example of such damages is lack of success to achieve the desired body (as distinct from worsening an existent body). In the above-mentioned case of R.G., the plaintiff's lived experience was severely worsened during the years she lived with one enlarged breast and one natural-sized breast as a result of a failed breast surgery.<sup>291</sup> According to the suggested paradigm which gives serious weight to one's lived experience and adopts a social understanding of the body, the plastic body with silicone breasts should be referred to as the baseline for the evaluation of the plaintiff's damages. According to this approach, lack of one enlarged breast should grant bodily disability and appropriate compensation.<sup>292</sup> It

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as [consciousness] is merely one with my existence as a body and with the existence of the world, and because the subject that I am, when taken concretely, is inseparable from this body and this world.

*Id.* at 475.

288. Of course, not every severe bad influence on one's lived experience should justify personal injury recognition. Public policy reasons may deprive personal injury recognition. A woman's complaint that she changed her sexual orientation from man to woman, for instance, should not justify tortious remedies due to public policy reasons even if it was proved that the surgery had a severe bad influence on her lived experience. *See supra* Section V.E for a discussion of such a complaint.

289. Supporting the acknowledgment of a pluralism of bodily existence configurations, some legal scholars undermine the physical borders of the body. *See* Ramachandran, *supra* note 281, at 2. In the context of constitutional law, for instance, Ramachandran argued that the right to bodily integrity is not subject to the body's physical borders and that there should not necessarily be compatibility between the organic borders of the body and the legal rights derived from them. *Id.* at 34–35. Similar arguments were heard also in the context of property law. *See* Ramachandran, *supra* note 283, at 253. Regarding this area of law, Ramachandran undermined the distinction between human organs and other objects. *Id.* She suggested considering damage to the medical instrument upon which one is dependent (e.g., a prosthetic leg) as bodily damage. *See id.* at 253, 262.

290. *See, e.g.*, File No. 16981/07 Magis. Civ. Ct. (Hi), R.G. v. Shoresh Med. Serv. (2010), Nevo Legal Database (by subscription, in Hebrew).

291. *See id.*

292. Common Law unexpectedly and astonishingly adopts a similar approach and expands the physical borders of the body. YIZHAK ENGLARD, COMPENSATION TO ROAD ACCIDENT VICTIMS 177 (2005). It perceives damage to an object close to the body (e.g., glasses on the nose, prosthetic teeth, or hearing aids) as damage to the body itself. *Id.* The Israeli Road Accident Victims Compensation Law has adopted this idea, and also includes in the definition of "bodily damage" a device required for the operation of one of the body parts, which was attached to the injured person's body at the time of the road accident. *See* The Israeli Road Accident Victims Compensation Law, 1975 § 1. Though

is only a positive approach toward personal injury, which encourages pluralism of bodily existence configurations (including plastic bodies, hybridity between the natural and artificial material), that could be a base for disability for failure to attain an enlarged breast. A negative approach to personal injuries, which presumes that the body is universally given to us and which estimates how much the damaged body is lacking will not grant disability for preservation of the body (breast) in its natural state. It turns out that the positive approach toward personal injuries offers compensation for failed attempts to achieve the desired body, while the negative approach toward personal injuries denies these attempts when it wrongfully presumes that the body is universally given to us.<sup>293</sup>

The suggested paradigm could also be implemented on other surgical (or other) damages, apart from damages following plastic surgery. Another example of damage that a negative approach toward bodily damages does not acknowledge—while disability and compensation would be granted if the positive approach was adopted—is the case of foreskin left on a newborn’s penis during a negligently performed circumcision. An uncircumcised body could not be found “lacking” according to the negative approach. However, a positive approach toward personal injuries, which acknowledges a profusion of bodily configurations, could base disability on the presence of extra foreskin on a male’s body, as long as the lived experience of its owner was severely worsened. As in the case of failure to achieve the desired body through plastic surgery, or leaving extra foreskin in a negligently performed circumcision, damages stemming from failed sterilization procedures are another example of the potential contribution of the proposed paradigm. The fertile body may be found

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the law refers to devices attached to the body, the requirement for attachment has been liberally interpreted in the Israeli legal literature, and damages to glasses that were in the pocket were included in the definition. *See* ENGLARD, *supra* note 292, at 177. Additional amazing examples of Israeli law that abandon the physical borders of the body and use the artificial body as baseline for ruling disability is the Disabled Persons Regulations, 1969, § 10(g). According to this regulation, if either an organic or artificial organ was transplanted into one’s body, the disability level is determined based on the functionality of the transplanted organ and not based on the lack of the organ. *Id.*

293. *Prima facie*, the contracts area of law is the classic legal domain for granting compensation following failure to achieve the promised and wished-for body. Bloom, *supra* note 11, at 782. Indeed, Anne Bloom mentions the option to file a contract lawsuit in cases of damages following failed plastic surgery in order to avoid the difficulties the tortious domain raises. *Id.* However, since the legal area of personal injury claims is highly preoccupied with the definition of the proper body, on the one hand, and undermines, as the study’s findings expose, the essential understanding of the body, on the other, I believe that the tort area of law is the most suitable for handling cases of unsuccessful attempts to achieve the promised and desired body. Moreover, it is almost impossible to file contract lawsuits in the cases discussed here since the plastic surgeons defend themselves from these types of lawsuits in the signed pre-surgery contracts.

“lacking” only when a positive approach to personal injuries, which deconstructs the acknowledged boundaries of the body and positions the infertile body as a baseline for estimating the plaintiffs’ damages, is used.<sup>294</sup>

The suggested paradigm has obvious effects on not only the understanding of personal injuries but on the conceptualization of identities defined by bodily attributes. Deconstructing the body morphology forces us to abandon the presumption that certain identities (e.g., sexual identities) are embedded in the body.<sup>295</sup> If we adopt a social understanding of the body, suppose that the body and the environment bleed into each other, and that various configurations of bodily existence are enabled, it also means that identities, allegedly embedded in our body, are a construction of social perceptions and cultural practices. Therefore, failure to adopt a certain body or identity should be recognized and compensated for, according to the suggested paradigm. For instance, since the female identity of the plaintiff in the case of R.G. is constituted inter alia through enlargement of her breasts, the failure of the breast surgery, which left her with one breast in its natural size, hinders her efforts to be constituted as a woman and should grant her compensation.<sup>296</sup>

The suggested paradigm for defining personal injury claims has personal and political significance. The personal significance of the paradigm stems from the weight it gives to the phenomenological experience of the plaintiffs and the way they experience their bodies and identities in order to estimate their damages. Furthermore,

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294. The suggested paradigm advances the profusion and diversity of bodily configurations. It celebrates the freedom to adopt all forms of bodily existence. However, this freedom should not be understood as rejection of any attempt to alienate certain configurations of bodily existence. Willingness to infinitely enlarge the breast, for instance, should not necessarily be embraced if it is strongly suspected that it would be performed under no conditions to choose and as a result of victimizing social dictates.

295. Many scholarly works in the area of jurisprudence of identities aspire to disconnect the allegedly unavoidable ties between the body and identities and subvert the essential understanding of the body. *See, e.g.*, Ramachandran, *supra* note 281, at 35. In the context of gender studies, Judith Butler argued that the gendered body is performative. *See generally* BUTLER, *supra* note 42. Furthermore, in the context of disabilities studies, a performative understanding of the disabled body was adopted. *See, e.g.*, Bradley A. Areheart, *Disability Trouble*, 29 *YALE L. & POLY’Y REV.* 347, 355 (2011); *see generally* LENNARD J. DAVIS, *BENDING OVER BACKWARDS: DISABILITY, DISMODERNISM & OTHER DIFFICULT POSITIONS* (2003). In the context of race or age, it was suggested to abandon the essential understanding of the body. *See generally* JASON L. POWELL, *SOCIAL THEORY AND AGING* (2006); *RACE AND RACISM IN THEORY AND PRACTICE* (Berel Lang ed., 2000).

296. Subverting the physical borders of the body also characterizes the lived experience of disabled people who frequently describe how external aids (e.g., wheelchairs, hearing aids, or seeing-eye dogs) become part of their bodies. *See* Ramachandran, *supra* note 281, at 10. Feminists also elaborately describe the ways in which cultural practices design women’s physical lived experiences. They express women’s right to be freely dressed, not only in terms of sexual freedom, but also in terms of bodily freedom. *See* Ramachandran, *supra* note 283, at 266.

deconstructing the physical boundaries of the body and adopting a social understanding of the body impacts the way the plaintiffs perceive and experience the world. Our perceptions and experiences of the world are enabled through our bodies and, therefore, adopting a new definition of the body may change our perceptions and experiences.<sup>297</sup> The political significance of the suggested paradigm is evident in its recognition of pluralism of bodily existence configurations and in its ability to be based on a cultural profusion of identities.<sup>298</sup>

An important question is: to what extent does the suggested paradigm celebrate a festival of configurations of bodily existence and identities. After all, the plaintiffs' phenomenological experience—the one that should be the basis for a personal injury claim—is conceptualized and experienced through social norms that presume a given bodily existence and that supports an essential perception of bodily identities.<sup>299</sup> Indeed, we can presume that most plaintiffs will refuse to deconstruct the body morphology and refrain from adopting competing identities performances. Nevertheless, replacing the paradigm creates a new legal horizon and stops the automatic channeling of personal injury claims to dictated-in-advance structures of *body* and *identity*. It enables alternative possibilities of existence and a new position of knowledge which could create a social change (even if only in rare cases).<sup>300</sup>

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297. In order to illustrate how our perceptions and experiences are enabled through our bodies, Gowri Ramachandran offers us the following example: Imagine that artificial eyes for improving vision contain a filter, blocking us from seeing images that are deemed to undermine the interests of the company that sold us the eyes. We can easily see how this physical change would alter our perception and experience of the world. See Ramachandran, *supra* note 281, at 36.

298. See Ramachandran, *supra* note 281, at 20–24. Furthermore, scholars in disabilities studies have expressed similar worry, and claimed that aspiring to correct every bodily impairment will ruin the cultural richness of society. *Id.* at 23. A significant example in this context is the ways sign language culturally enriches society. See Swain & French, *supra* note 129, at 576.

299. The belief that a social matter should be perceived and understood as essential has already been termed by Michael Herzfeld as “strategic essentialism.” See MICHAEL HERZFELD, *CULTURAL INTIMACY: SOCIAL POETICS AND THE REAL LIFE OF STATES, SOCIETIES, AND INSTITUTIONS* 37 (3d ed. 2005). Herzfeld endeavored to explain the ways in which normalcy discourse works. *Id.*

300. My political-analytical move ends with an invitation to acknowledge alternative possibilities of existence based on the exposure of the performative nature of the body and bodily identities. However, I do not discuss the question when and under what circumstances the plaintiffs will demand acknowledgment of alternative possibilities of existence, though a full political theory should clarify the process which grants the plaintiffs agency to oppose social norms, which is derived from their aspiration for a better life. For a critical discussion of Butlerian theory for not giving an account of one's agency to oppose social norms, see generally Seyla Benhabib, *Feminism and Postmodernism: An Uneasy Alliance*, in *FEMINIST CONTENTIONS—A PHILOSOPHICAL EXCHANGE* 17 (Seyla Benhabib et al. eds., 1994). For a possible answer to this difficulty, see Miri Rozmarin, *Individuality and Political Existence*, 8 *RESLING* 25 (2001).

It is worthwhile mentioning that examining the proposed paradigm in light of political arrangements shows that it is neither right-wing nor left-wing. Deconstructing the familiar body morphology contradicts the conservative right-wing standpoint, which refuses to undermine world orders, acts against the law of nature, and challenges the laws of creation. Insistence on preserving the well-known boundaries of the body is also shared by the humanistic left-wing individuals who refuse to blur the distinction between the human and the inhuman, due to their devotion to human dignity, bodily integrity, and sanctity of life.

By examining current law in light of the suggested paradigm, and studying the ways it will be generally affected by this paradigm, and how the suggested paradigm deals with the challenges reviewed above, in particular, we can recognize several central influences of the new paradigm on current law and its responses to the discussed challenges.<sup>301</sup>

Firstly, the distinction between the proper and the improper body is made more flexible by the adopted social approach towards the body, according to which, the negative perception of bodily damages is replaced by a positive one and phenomenological definition is promoted.<sup>302</sup> Instead of a universal and constant definition of a proper body, distinct from all other configurations of bodily existence, the suggested paradigm embraces the recognition of a multitude of changing configurations of proper bodily existence and fosters the definition of bodily damage based on (subjective) personal experience. In addition, the distinction between the human and the inhuman is blurred by the adopted social perception of the body that acknowledges its complex relationships with the environment. Deconstructing the presumption that the body is organized around its physical borders also undermines the differences between human tissue and inhuman material. If removing a silicone implant is perceived as a mastectomy, according to the suggested paradigm, then the distinction between human breast tissue and chemical silicone is subverted.

An additional influence of the new paradigm on the current law is its reinforcement of the subjective foundations of torts.<sup>303</sup> Since the new paradigm adopts a phenomenological definition of personal

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301. *See supra* Part V.

302. *See supra* Section V.A.

303. While the suggested paradigm reinforces the subjective foundations of torts, it paradoxically also undermines the distinction between the human subject and the inhuman object. In order to presume subjectivity, a separated-from-surrounding subject is required. However, since the distinction between the human subject and the inhuman object is blurred, according to the new paradigm, it is also difficult to predicate the damage as subjective.

injuries and examines if/how the plaintiff's concrete physical lived experience worsened,<sup>304</sup> the unique idiosyncratic characters of the damage are strengthened and emphasized.<sup>305</sup>

While strengthening the subjective character of the damage and adopting a social approach towards the body, the medical professionals' standpoint is becoming diminished in personal injury claims. In light of the abandonment of the perception of one universally given body, the professional discourse leaves its place to an idiosyncratic evaluation of bodily damages according to the suggested paradigm. The subversion of the medical professional standpoint, in light of the culture of plastic surgery, is internalized by the new paradigm which fosters this subversion.

Reinforcing the unique, subjective, and idiosyncratic characters of the damage along with a weakening of the medical professional standpoint, also affects judicial opinions concerning the justified arsenal of bodily modulations and the plaintiffs' psychiatric fitness to undergo plastic surgery. If the medical standpoint concerning bodily intactness and mental fitness is weakened, and the subjective character of the damage is reinforced together with the adoption of a social approach toward the body, individual preferences and personal aspirations (dictated, inter alia, by social forces) should be significantly taken into account in the course of determining the justified arsenal of bodily modulations and the plaintiff's psychiatric fitness to undergo the surgery.

The idea behind the idiosyncratic estimation of bodily damages is the commitment to corrective justice without aspiring to correct *the Body*. This is an attempt to imagine a tort system that does not aspire to cure the body and instead enables a pluralism of configurations of bodily existence. Subverting the aspiration to cure the body and adopting a phenomenological definition to bodily injuries should lead to taking into account the plaintiff's subjective readiness to undergo corrective surgery in the course of determining his duty to

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304. There is relatively little legal work concerning the human phenomenological experience. For criticism of the textualization of the body, and neglecting its phenomenological aspects, see Helen Marshall, *Our Bodies, Ourselves: Why We Should Add Old Fashioned Empirical Phenomenology to the New Theories of the Body*, in *FEMINIST THEORY AND THE BODY* 65 (Janet Price & Margrit Shildrick eds., 1999). Elizabeth Grosz remarks that while bodily representations are extensively discussed, the materiality of the body has not been addressed. See generally ELIZABETH GROSZ, *SPACE, TIME, AND PERVERSION: ESSAYS ON THE POLITICS OF BODIES* (1995). Judith Butler attempted to treat this criticism in her advanced work. See generally JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF 'SEX'* (Routledge 1993).

305. Though phenomenological thought refrains from subjecting us to a preliminary set of rules, and suggests that we take into account the concrete and unmediated experience, this experience cannot be a fully idiosyncratic one since it should be told in a universal language fitted to the legal context.

mitigate damages. Furthermore, adopting a phenomenological definition of personal injuries, idiosyncratically estimating the body's damages, and reinforcing the subjective character of the damages address the above discussed disempowerment of the plaintiffs in the clinic. The definition gives the plaintiffs back their voice that was stolen from them in the clinic, empowers them, and confirms their subjectivity.

The proposed paradigm also saves the plaintiffs from paying the price for adherence to the essentialist approach toward the body, which could harm their identities. Since the new paradigm is not subjected to a given, fixed, and ultimate definition of body, the plaintiffs should neither pretend to be abnormal, nor own an abnormal body in order to prove their bodily damages.<sup>306</sup> Deconstructing the essential approach towards identities and adopting a performative understanding of them, by the suggested paradigm, enables courts to acknowledge different identities and grant compensation both for ruined identities and for not-accomplished identities.<sup>307</sup>

In conclusion, making more flexible the differences between the proper and the improper body, undermining the distinction between the human and the inhuman, reinforcing the subjective foundations of torts, weakening the professional discourse, seriously taking into account the personal preferences for determining the justified arsenal of bodily modulations and estimating the psychiatric health to perform them, undermining the aspiration to cure *the Body*, empowering the plaintiffs, acknowledging a variety of identities and the failures to achieve them (as distinct from ruining existent identities)—are all manifestations of the proposed paradigm's influence on current law and its response to the challenges discussed above.

## CONCLUSION

This Article described and critically analyzed the encounter between law, culture, science, and identity through the accidental incident of personal injury in the era of plastic surgery. The Article re-evaluates the practice of personal injury claims in light of the cultural blossoming of plastic surgery in order to understand, on the one hand, how innovative techno-medical advancements reconstruct the legal area of personal injury claims, and on the other hand, the role of a central legal locus in the current constructing of the body

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306. See generally Bloom & Miller, *supra* note 60 (discussing the problem of turning the plaintiffs' bodies into abnormal bodies for gaining compensation).

307. The possibility to compensate those who did not achieve the identity they desired provides an answer to Anne Bloom's criticism of not recognizing a "failure to pass" as legal injury in plastic surgery cases. See Bloom, *supra* note 11, at 760.

and bodily identities.<sup>308</sup> In other words, the Article discusses the legal challenges of personal injury claims following failed plastic surgeries and the cultural significance of these claims.<sup>309</sup> These challenges and their significance were examined in relation to the specific research field of Israeli personal injury claims following plastic surgeries, and shed light on the reconceptualization of the terms body, identity, bodily damage, disability, aesthetic, and health.

The Article also offered a new paradigm for defining the body in torts, in order to face the legal challenges discussed, and in light of the cultural significance mentioned. Enabling personal injury claims without a “body” is, in a nutshell, the horizon outlined by the suggested paradigm. The new paradigm aspires to subvert the definition of a body that is universally given and the essential understanding of identities grounded in this body.<sup>310</sup> Though this paradigm is proposed as an answer to legal challenges of plastic surgery litigation, it is not limited to the context of tortious lawsuits following failed plastic surgeries. Furthermore, some of the above-mentioned legal challenges do not characterize only plastic surgery litigation.<sup>311</sup> However, litigation after plastic surgery more forcefully raises these challenges and sharpens the necessity for a new paradigm for defining bodily damages.

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308. *See supra* Parts V, VI.

309. *See supra* Parts V, VI.

310. *See supra* Part VII.

311. *See supra* Part V.