The First Circumcision Case

by Richard W. Morris

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The first case to challenge circumcision anywhere, the United States or any other country, was the Adam London case. The challenge was decided first in the Superior Court of California, Marin County, then heard by the Court of Appeal. A petition to have the California Supreme Court review the rulings of the lower courts was summarily rejected by the Supreme Court. This is the story of the issues and the happenings.

The lawsuit was begun by Adam's mother, as *guardian ad litem* for Adam (the plaintiff). Just before the circumcision, she had signed an "informed consent" form provided by the medical facility. ***On the form it stated that there was no medical purpose for circumcision. She does not remember the form or having signed it. She was upset at the time regarding the circumcision. Adam's father did not sign the form.***

The lawsuit against the physician who performed the circumcision (and the medical facility where it was performed) alleged eight separate causes of action. I will list them with a short explanation.

COMMON LAW BATTERY In that without the knowledge and consent of plaintiff, they forcibly removed the foreskin from plaintiff's penis by cutting the foreskin completely off.

VIOLATION OF WILLFUL CRUELTY STATUTE (Penal Code 273a), in that in doing the circumcision they inflicted unjustifiable physical pain upon plaintiff in violation of California Penal Code Section 273a.

VIOLATION OF INFLICTION OF PAIN STATUTE (Penal Code 273d) in that in doing the circumcision they inflicted unjustifiable physical pain upon plaintiff in violation of California Penal Code Section 273d.

VIOLATION OF WILLFUL CRUELTY STATUTE [Health and Safety Code 11165, Penal Code Section 273a(1) and Penal Code Section 273a(2)] in doing the circumcision they willfully inflicted unjustifiable physical pain upon plaintiff in violation of California Health and Safety Code, Section 11165, subparagraph (c), subsection (2), sub-subsection (d), in violation of Penal Code Section 273a, subsection (1) and Penal Code 273a, subsection (2).

VIOLATION OF CHILD ABUSE STATUTE (Health and Safety Code 11165) that in doing the circumcision they committed a tort of willfully inflicting unjustifiable physical pain upon plaintiff in violation of California Health and Safety Code, Section 11165, subparagraph (g).

VIOLATION OF KIDNAPPING STATUTE (Penal Code 207) in that when they took Adam to the circumcision room they committed a tort of willfully taking and carrying plaintiff from one location in the Medical Center to another location within the Medical Center for the sole purpose of committing mayhem and mutilation of the body of plaintiff in violation of California Penal Code Section 207.

VIOLATION OF MAYHEM STATUTE (Penal Code 203) Defendants, and each of them, committed a tort by willfully, unlawfully and maliciously depriving plaintiff of his foreskin and of permanently disfiguring plaintiff's penis in violation of California Penal Code Section 203.

The defendants brought a motion to have all of these causes of action stricken. The court struck all except the battery and the kidnapping and false imprisonment causes of action. A decision then had to be made as to whether to appeal at that time or go forward on the remaining two causes of action. The decision was made to proceed on the two.

The defendants then brought a motion for summary judgment saying that all of the facts were agreed to and that the mother's consent excused both the charge of battery and of kidnapping and false inprisonment.

The case now revolved around this sole issue: DOES A PARENT HAVE THE LEGAL POWER TO CONSENT TO A SURGICAL PROCEDURE WHICH HAS NO MEDICAL PURPOSE?

The Superior Court ruled in the favor of the defendants without ever really dealing with the only issue in the case. We, of course were faced with how to give an enlightened response to judicial absurdity. The case now had to go to the Court of Appeal. This was strictly an issue of law since the physician's own form stated that circumcision had no medical purpose, all we had to argue about was whether or not a parent can consent to surgical procedures which had no medical purpose.

In the Court of Appeal we fared no better. The brief was extensive. You may obtain a copy of it from Marilyn Milos. During the oral argument one of the Justices of the Court of Appeal asked me if the Court ruled as I argued would it not infringe upon religious freedom. My response was the "Cocker Spaniel" answer.

A cocker spaniel is born a cocker spaniel and will remain a cocker spaniel all of its life. ***A human being is not born as a Christian, a Moslem, a Jew, or any other religion. The fact that the child is born from parents of a particular religion does not make the child a member of that religion by choice.*** Yet it is by choice that a person selects either the religion of the child's parents, some other religion, or no religion at all. The issue then, is not the religious freedom of the **parents** as presented by the Court but the religious freedom of the **child.**

Keeping in mind the religious freedom of the child, some religions (such as Hindu) ostracize or prohibit a male who is circumcised to become a member of the religion. However, if

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the child (for example) was born of Jewish parents and elected at the age of majority to become a member of the Jewish religion, he could then cut off his foreskin to join.

As far as the religious freedom of the parents is concerned, they could do a symbolic ritual of circumcision rather than the actual circumcision (as they do for other religious ceremonies). This would leave the child free to choose which religion, if any, the child would like to choose when the child became of the age to do so.

The three Justices of the Court merely chuckled, looked at each other, and moved on. We received a ruling from the Court that the lower court's Summary Judgment was sustained, and an opinion that a parent could do whatever the parent wanted to do to the child.

We then moved onward, and upward, to the California Supreme Court. Here is what we argued to the Supreme Court.

To the Honorable Chief Justice, and to the
Honorable Associate Justices of the
Supreme Court of the State of California:

1. STATEMENT OF ISSUE PRESENTED FOR REVIEW

Does a parent have the legal power to consent to a surgical procedure which has no medical purpose?

2. PETITION FOR REVIEW

Appellant London hereby petitions for review of the decision of the Court of Appeal of the State of California, First Appellate District, Division Four, filed in this action on May 20, 1987, affirming the judgment of the Superior Court of the State of California in favor of Respondents.

A copy of the decision of the Court of Appeal showing the date of its filing is set forth herein as Appendix 1.

Review by this Court is necessary on the ground that the decision of the Court of Appeal is not in line with the authorities cited herein and this Court's ruling is necessary because an important question of law is at issue herein requiring settlement by this Court.

A MAN'S MIND STRETCHED BY A NEW IDEA CAN NEVER GO BACK TO ITS ORIGINAL DIMENSIONS.

OLIVER WENDELL HOLMES
(1841-1935)
U.S. SUPREME COURT JUSTICE

QUOTED by ROBERT M. HUTCHINS

3. INTRODUCTION

Both the Superior Court and the Court of Appeal apparently understood the case of Appellant to be that of arguing the merits of circumcision. That is not, and was not the issue, presented.

The relative merits of the surgical procedure are to be argued at the trial court after the presentation of evidence.

The issue here deals only with the limitation placed upon the legal power of parents to consent to surgical procedures to be conducted upon their children.

Section 25.8, however, permits parents to consent to any surgical procedure, regardless of purpose.

Appellant here desires only a statement on the law of the State of California by petitioning this Court to answer one question:

DOES A PARENT HAVE THE LEGAL POWER TO CONSENT TO A SURGICAL PROCEDURE WHICH HAS NO MEDICAL PURPOSE?

4. SUMMARY OF FACTS

Respondent Mark Glasser, acting within his scope of employment as an employee of Permanente Medical Group, removed the foreskin from Appellant Adam London's penis.

Appellant brought an action for assault and battery, among other causes of action, against Respondents.

Respondents defended on the sole ground that the parents of Appellant consented to the removal of the foreskin.

The Superior Court granted a motion for Summary Judgment based upon the consent of the parents.

It is the position of Appellant, that to grant a parent the legal power to consent to a surgical procedure which has no medical purpose is to grant a parent an unlimited license to abuse their children.

The Court of Appeal affirmed the Superior Court, stating the "Plaintiff's public policy argument — that children should be protected from suffering unjustifiable pain or risks — is based on the premise that parents cannot consent to surgical procedures which have no medical purpose. Section 25.8, however, permits parents to consent to any surgical procedure, regardless of purpose."[1]

Appellant disagrees with the Court of Appeal, and contends that parents do not have the legal power to consent to any surgical procedure **regardless** of purpose, and that the purpose sets the limit upon the parental authority.

5. THE ONLY ISSUE:

DOES A PARENT HAVE THE LEGAL POWER TO CONSENT TO SURGICAL PROCEDURES WHICH HAVE NO MEDICAL PURPOSE?

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The First Circumcision Case (Continued)

The Court of Appeal holds that Civil Code Section 25.8 grants to a parent the legal power to consent to surgical procedure upon their children "regardless of purpose."

It is the position of Appellant, that to grant a parent the legal power to consent to a surgical procedure which has no medical purpose is to grant a parent an unlimited license to abuse their children.

For example, amputation is a surgical procedure. Appellant finds it impossible to believe that any court would grant to a parent the legal power to consent to the amputation of all the healthy limbs of a child, making a healthy, normal, child into a quadriplegic.

In other words, Appellant contends that there are limits upon the power to consent to surgical procedures, and that the limit should be the power to consent to surgical procedure only for medical purpose.

6. BRIEF IN SUPPORT OF REQUEST FOR REVIEW

POINT 1

APPELLANT HAS SUFFERED A LOSS OF HIS CONSTITUTIONAL RIGHT OF SAFETY AND PRIVACY

The Constitution of the State of California, Article 1, Section 1, provides:

> 1. Inalienable rights.
>
> Section 1. All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possession, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

This constitutional principle has been implemented in Civil Code Section 43:

> 43. General personal rights.

The right of safety and privacy must necessarily limit the power of parents to consent to surgical procedures which have a medical purpose.

Appellant's individual constitutional right of safety must be paramount to all rights of parents regarding their children. Parental autonomy is not absolute. The Court of Appeal of the State of California has so ruled.[2]

"However, the constitutional guarantees of freedom of religion do not sanction harming another person in the practice of one's religion, and they do not allow religion to be a legal defense when one harms another."

Committee on Bioethics
American Academy of Pedicatrics
"Pediatrics," January 1988

Since parental autonomy is not absolute, what defines the limit?

Appellant's position is that the limit must be defined by the definition of medical **treatment**, not mere "procedures." Appellant's safety was placed at risk, and Appellant was permanently deformed, by the circumcision in violation of the Constitution of the State of California, Article 1, Section 1, and in violation of the Civil Code, Section 43.

POINT 2

IF IT AIN'T BROKE, DON'T FIX IT

A parent's legal power to consent to acts to be done to their children must have limits. The limits have been defined by other courts as being limited to the power to consent to medical treatment.

The Texas Court of Appeal faced this very same issue in the context of a kidney transplant. A 14 year old, mentally incompetent but otherwise perfectly healthy, daughter applied (through a guardian ad litem) for an order authorizing the mother to consent to the removal of a kidney from the daughter's body, for the purpose of transplanting the kidney to the body of a son who was suffering from endstage renal disease.

The Texas court held: **NO**. The court, in so ruling, stated: "Significantly, however, for our purposes, this power of parents . . . to consent to surgical intrusions upon the person of the minor . . . is limited to the power to consent to medical 'treatment.'" **Little v Little**, 576 S.W.2d 493, at page 495.

This is the very same rule Appellant asked the Court of Appeal, and now asks this court to rule. This Review of the Court of Appeal is not concerned with arguing the merits of the particular surgical procedure involved in Appellant's case: that is an issue for the trial court.

Appellant contends that the error of both the Trial Court and the Court of Appeal is they concerned themselves with the merits of the surgical procedure itself and not with the rule of law which must first be addressed before the evidence regarding the merits of the surgical procedure can be considered.

Other than the **Little** case in Texas, only one other appellate level court has, to the knowledge of Appellant, even considered the issue of defining the limits of parental power to consent to surgical procedures. That other court was the Louisiana Court of Appeal.

Again, the Court was dealing with whether or not a guardian could consent to a surgical procedure to remove an organ from a healthy child and have that organ transplanted to an ill child. The surgical procedure had no medical treatment value for the healthy child.

The Louisiana Court ruled that the surgery could not take place, and that the Court owed "protection to a minor's right

All courts have held that the surgical removal of any normal, healthy, non-diseased, uninjured part of the body is not treatment.

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1. Opinion of the court of Appeal, page 42
2. **In Re Phillip B.**, 92 Cal.App.3d 796, 801. Cert. Denied as **Bothman v. Warren B., 445 U.S. 949.**

to be free in his person from bodily intrusion to the extent of the loss of an organ unless such loss be in the best interest of the minor." In re Richardson ***284So.2d 185, at page 187.***

This, again, is the same rule Appellant asks this Court to Rule. Medical treatment defines the limits of a parents power to consent. **Black's Law Dictionary.** (Rev. 4th Ed., St. Paul: West Publishing Co. 1951) p. 1673, citing cases.

Medical treatment is universally defined as: "A broad term covering all the steps taken to effect a cure of any injury or disease; the word including examination and diagnosis as well as application of remedies."[3]

The **Little** case adopted this very definition, saying: "Even ascribing to the word 'treatment' its broadest definition, it is, nevertheless, limited to the steps taken to effect a cure of an injury or disease . . . including examination and diagnosis as well as application of remedies." [4]

To be termed "treatment," all courts require that there be a disease, an injury, or an abnormality of some sort which is sought to be corrected. The process of that correction is "treatment."

All courts have held that the surgical removal of any normal, healthy, non-diseased, uninjured part of the body is not "treatment."

Whether or not the circumcision in Appellant's particular case was or was not "treatment" is an issue for the court to determine after hearing evidence.

It was the function of the Court of Appeal to set forth a clear rule defining the limit of the legal power of parents to consent to surgical procedures by setting the limit at medical treatment.

The error of the Court of Appeal is that it specifically ruled that a parent has the power "to consent to any surgical procedure, regardless of purpose." Even if there is no medical treatment connected with the purpose of the surgical procedure.

Appellant contends that this is not, and should not be, the law of the State of California. That a parent has the legal power to consent only to surgical procedures which have a medical purpose, and that the standard is, and should be: "If it ain't broke, don't fix it."

The California Supreme Court denied our Petition for Review. This was done without comment as to why it was denied. There is now only one place to go: The United States Supreme Court. The only problem was that there was no money left to pay for the filing fees and the printing of the brief. We had come to the end of the line.

3. **Black's Law Dictionary,** (Rev. 4th Ed., St. Paul: West Publishing Co. 1951) p. 1673, citing cases.
4. **Little v Little,** supra.

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Newborn Circumcision: Medical Necessity Or Useless Mutilation?

— *Resolution* —

WHEREAS The California Medical Association is looked to by Californians for authoritative medical advice and

WHEREAS the responsibility of the CMA is to give the public the most enlightened, factual, evidence-supported modern medical advice available and

WHEREAS newborn male circumcision is a procedure without factual, demonstrable, supportable medical indications in the overwhelming majority of cases and

WHEREAS newborn male circumcision has many complications rarely communicated to the parents and

WHEREAS most medical authorities worldwide feel that newborn males have a right to remain "intact" except in rare instances,

RESOLVED: That the CMA withdraw its 1988 endorsement (305-88) of newborn circumcision as an effective public health measure and state that newborn circumcision is mostly unnecessary and contraindicated, and wherever done be accompanied by a parents' informational brochure or video and an informed consent.

Resolution submitted by
John W. Hardebeck, M.D.
March 4-8, 1989