COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

ADAM LONDON, a minor, by TRUDIE LONDON, his Guardian ad Litem, Petitioner, vs. SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF MARIN, Respondent.	Civil No. Marin Superior Court No. 118 799 PETITION FOR WRIT OF MANDATE,
MARK GLASSER, an individual, KAISER FOUNDATION HOSPITAL a corporation, PERMANENTE MEDICAL GROUP, a corporation, Real Parties In Interest.	MEMORANDUM OF POINTS AND AUTHORITIES, AND APPENDICES.

From a Decision and Order of the
Superior Court of the State of California,
County of Marin.

The Honorable E. Warren McGuire, Judge.

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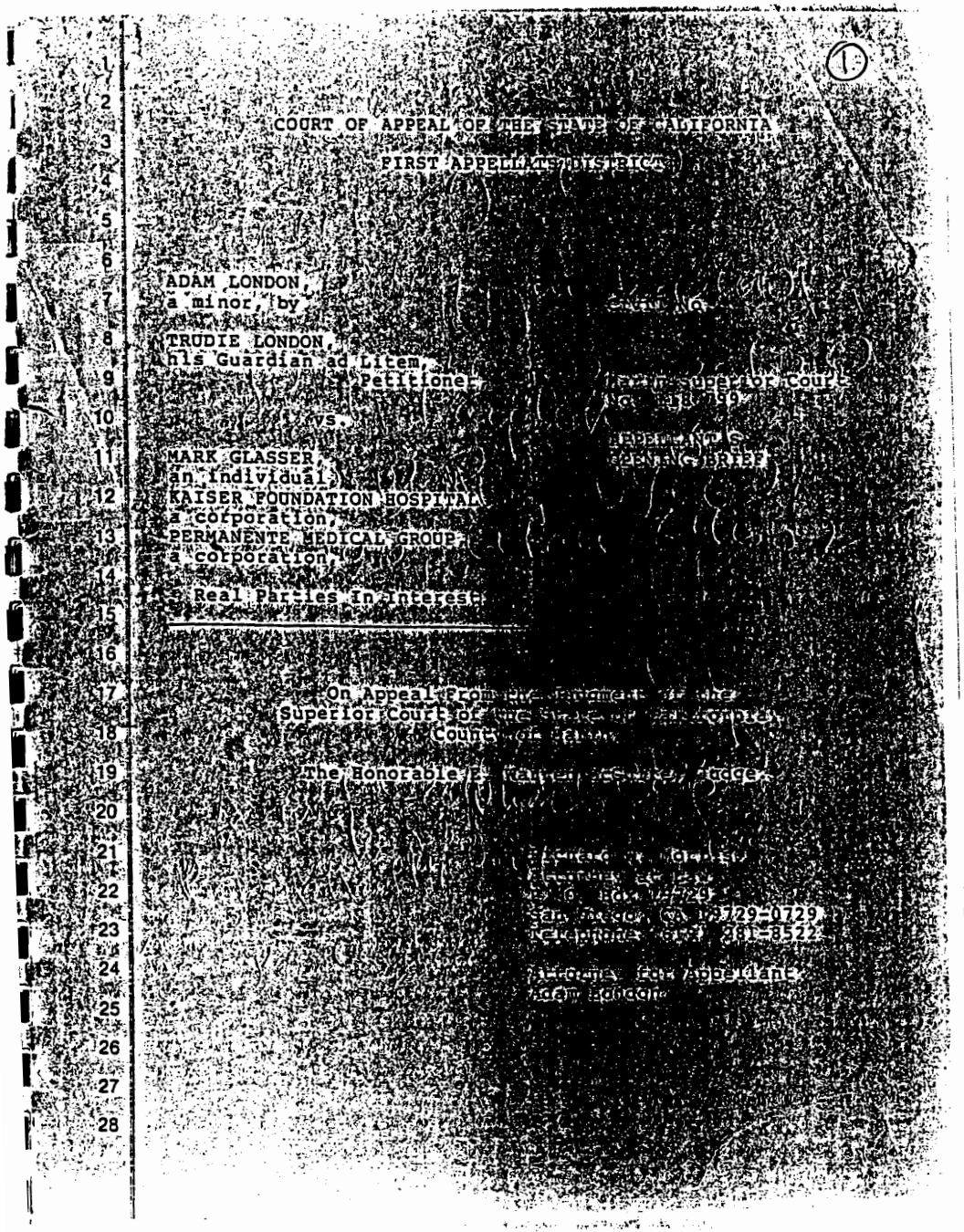

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

ADAM LONDON,
a minor, by
TRUDIE LONDON,
His Guardian ad Litem,
Petitioner,
vs.
MARK GLASSER,
an individual,
KAISER FOUNDATION HOSPITAL,
a corporation,
PERMANENTE MEDICAL GROUP,
a corporation,
Real Parties in Interest.

On Appeal From
Superior Court of
County of
The Honorable
Judge

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TABLE OF CONTENTS

(3)

TABLE OF AUTHORITIES

BRIEF

(4)

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

ADAM LONDON, a minor, by TRUDIE LONDON, his Guardian ad Litem, Petitioner, vs. MARK GLASSER, an individual, KAISER FOUNDATION HOSPITAL a corporation, PERMANENTE MEDICAL GROUP, a corporation, Real Parties In Interest.	)	Civil No. Marin Superior Court No. 118 799 APPELLANT'S OPENING BRIEF

On Appeal From the Judgment of the Superior Court of the State of California, County of Marin.

The Honorable E. Warren McGuire, Judge.

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INTRODUCTION

This appeal presents a question of first impression, not only in the State of California, but as far as is known to Petitioner, it is a question of first impression in the entire world for this specific fact situation.

Appellant Adam London, a minor, by his mother and Guardian ad Litem, Trudie London, appeals to this Court from a Summary Judgment of the Superior Court of the County of Marin. The major issue before the Superior Court was and the issue before this Court is:

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

SUMMARY OF FACTS

On August 5, 1983, Mark Glasser, acting within his scope of employment as an employee of Permanente Medical Group, removed the foreskin from Adam London's penis, without anesthetic, without his consent, and admittedly for no medical purpose. This was done at the Kaiser-Permanente Medical Center in the City of San Rafael, County of Marin.

APPELLANT BROUGHT AN ACTION for assault and battery against the defendants.

THE DEFENDANTS DEFENDED on the sole ground that the parents of Appellant had consented to the circumcision.[1]

APPELLANT ASSERTED THAT, because Appellant's circumcision was NOT medical treatment, Appellant's parents had no power to consent. Therefore, Appellant was circumcised without consent, in violation of his Constitutional Rights.

APPELLANT SPECIFICALLY ASKED THE SUPERIOR COURT: Does a parent have the legal power to consent to a surgical procedure which has no medical purpose?

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1. See Appendix 2, excerpts of the Answer; Appendix 3, excerpts of Appellant's Statement of Undisputed Facts and excerpts of Defendants' response thereto.

THE SUPERIOR COURT RULED THAT:

> "Considering the traditional, cultural, and religious history of circumcision as one of the most widely performed operations in human history . . . and the constitutionally recognized right of raising children and to privacy in the realm of family life . . . parents would appear to have the right to have their male child circumcised. . ." (Emphasis added.)[2]

THE SUPERIOR COURT also ruled:

> "Plaintiff's attempt to restrict such (medical or surgical procedure) to medical procedures which relieve, improve, or correct disease, injury, or abnormality is unduly restrictive. The Court is of the opinion that a more realistic interpretation of the legislative intent in enacting said statute would include parental consent for medical or surgical treatment or procedures elective in nature for purposes of cosmetic improvement, hygienic, prophylactic or preventative reasons. (Emphasis added.)[3]

To be fairly implied from this statement that if there were not to be any "purposes of cosmetic improvement, hygienic, prophylactic or preventative reasons", or if the proposed operation was not to "relieve, improve, or correct disease, injury, or abnormality" of a child, then, and in that event, a parent could not, by law, give consent.

The Superior Court therefore tacitly adopted the rule of law urged by Appellant, to wit: A parent DOES NOT have the legal power to consent to a surgical procedure which has no

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2. See Appendix 4, page 3, line 27 through page 4, line 4.

3. Ibid., page 3, line 3 to 11.

medical purpose.

The Superior Court, however, erred when it went on t decide whether or not this particular circumcision was dor for a medical reason. That issue was not presented to th Superior Court.

All parties agreed there was no medical reason for th circumcision of Appellant.[4] That fact was a "given" an should have been accepted by the Court without furthe discussion.

The Superior Court was in a position either to accep the fact that no medical reason existed, or reject tha fact. That is,

(1) Either the Superior Court could have elected t accept the fact that no medical reason existed, in which case it should have denied the Summary Judgment because, according to its ruling, supra, the parents could not have, by law given consent.

(2) Or the Superior Court could have elected to reject the fact that no medical reason existed, in which case it should have denied the Summary Judgment because this would then be an issue of fact to be determined at trial.

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4. See Appendix 7, Defendant's consent form; See POINTS VII, VIII.

In either event, the Summary Judgment should have been denied. Apparently, the Superior Court elected to reject the fact that no medical reason existed.

A lack of clarity in prior case law has, perhaps, led the Superior Court to the misconception that this case is a departure from existing legal principles. This case does not depart from existing legal principles.

Appellant seeks a clear and precise statement of the public policy of the State of California to protect children from surgical procedures which have no medical purpose, and, of course, to have the Summary Judgment Order reversed and the Judgment vacated.

POINT 1

CONSTITUTIONAL RIGHT OF SAFETY

Article 1, Section 1, of the Constitution of the State of California provides as follows:

> "§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, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

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

> "§43. General personal rights.
>
> Besides the personal rights mentioned or recognized in the Government Code, every person has, subject to the qualifications and restrictions provided by law, the right of protection from bodily restraint or harm, from personal insult, from defamation, and from injury to his personal relations."

Although the Superior Court protects the Constitutional Rights of the family, it ignored the Constitutional Rights of the individual. Appellant's individual Constitutional Right of safety must be paramount to all rights of parents regarding their children. This Court has so ruled. (See POINT II, infra.)

Defendant Glasser's act of removing Adam London's foreskin blatantly violated Appellant's Constitutional Rights of safety and privacy of his person.

In the U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, Public Health Service reprint of the article entitled: "Routine Circumcision of the newborn infant: A reappraisal", from the American Journal of Obstetrics and Gynecology, Vol. 130, No. 2, January 1978, the author David A. Grimes, M.D., states: Circumcision entails,

> ". . . risks of morbidity and death, . . .
>
> "Newborn circumcision is not innocuous. While

the risk of death from neonatal circumcision is small, approximately two deaths per million procedures,[5], the risks of complications range from 0.06 [6] to 55 [7] per cent in different studies, reflecting large differences in patient follow-up and in definitions on complications.

"Immediate complications of circumcision have been classified into three categories: hemorrhage, infection, and surgical trauma.[8] Hemorrhage is the most frequent complication and may require sutures, pressure dressings, or transfusion.[9] In Patel's [10] recent study of 100 patients, 31 had minimal and four had moderate postoperative bleeding. One infant required suturing.

"Infection of the wound can lead to scarring, deformity, and phimosis. Seven of the same 100 patients had mild wound infections, and one had a severe infection requiring antibiotics.[11] Exposed to irritation caused by the ammonia of wet diapers, the unprotected glans may develop meatal ulceration or meatitis, predisposing to meatal stenosis.[12] Thirty of 100 patients sustained mild meatal ulcerations while one child had a severe ulceration.

Surgical mishaps continue to occur, particularly in inexperienced hands. A partial

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5. Speert, H.: Circumcision of the newborn: An appraisal of its present status, Obstet. Gynecol. 2:164, 1953.

6. Ibid, Speert, H.

7. Patel, H.: The problem of routine circumcision, Can. Med. Assoc. J. Dis. Child. 106:216, 1966.

8. Preston, E. N.: Whither the foreskin? J. A. M.A. 213 1853, 1970.

9. Ibid. Patel, H.; Preston, op. cit.

10. Patel, op. cit.

11. Patel, op. cit.

12. Committee on Fetus and Newborn: Report of the Ad Hoc Task Force on Circumcision, Pediatrics 56: 610, 1975; Preston, op. cit.

inventory of operative accidents and their sequelae includes denuding of the penile shaft; incomplete circumcision with residual deformity; lacerated scrotum; subglanular fistula; bivalved, grooved, or amputated glans; concealed penis; and cautery burns . . .[13]

"Three neonatal cases of urine retention due to circumcision, with one child presenting with septic shock, have recently been described. In addition, the complication of septicenia has led to osteomyelitis, pulmonary abscesses, and death.

"As outlined by Annas,[14] informed consent for circumcision necessitates an explanation of its hazards. If the incidence of immediate complications were as low as 0.06 per cent,[15] the immediate risk from nontreatment would probably be lower. Delayed complications of circumcision are allegedly more frequent,[16] although their incidence is unknown . . .

". . . If the need for circumcision arises in later life, the procedure can then be done with the full understanding and informed consent of the patient himself, as well as with the benefits of anesthesia and analgesia."

Appellant's safety was at risk for no reason. Appellant's Constitutional Rights of Safety and Privacy were violated.[17]

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13. Preston, op. cit.

14. Annas, G. J.: The Rights of Hospital Patients, New York, 1975, Discus Books, pp. 57-60.

15. Speert, op. cit.

16. Preston, op. cit.

17. See medical commentaries, Appendix 12 page 2; Appendix 13; Appendix 14 pages 2, 3, 7, 8, 13; Appendix 15.

POINT II

PUBLIC POLICY OF THE STATE OF CALIFORNIA IS TO PROTECT CHILDREN FROM HARM

The California Court of Appeal, First District, stated this principle most eloquently:

> "Parental autonomy, however, is not absolute. The state is the guardian of society's basic values. Under the doctrine of parens patriae, the state has a right, indeed, a duty, to protect children. (See e.g., Prince v. Massachusetts, supra, 321 U.S. 158 at p. 166, 64 S.Ct. 438.) State officials may interfere in family matters to safeguard the child's health, educational development and emotional well-being." In Re Phillip B., 92 Cal.App3d 796, 801, 156 Cal. Rptr 48, 51. Certiorari denied as Bothman v. Warren B. 445 U.S. 949, 100 S.Ct. 1597, 63 L.Ed. 784.

Parents are charged with the duty of protecting the Safety of their children. When parents fail to do so, that duty is reverted to the State. No parent has the legal power to either harm his child or to consent to someone else harming his child.

POINT III

SURGERY WITHOUT CONSENT IS A BATTERY

A surgical operation without valid consent constitutes battery, and action for battery can lie even though the surgery or medical treatment is skillfully performed. Rainer

Rainer v Buena Community Memorial Hospital 18 CA3d 240.

Defendants agree that this is the law. Defendants quote, with approval, from Cobbs v Grant (1972) 8 C3d 229, 240-241, in their Memorandum of Points and Authorities in Support of Demurrer, at page 6, lines 1-6. Cobbs made it quite clear that an operation to which a patient has not consented is battery.

A Nobel Laureate, Dr. George Wald, Emeritus Professor of Biology at Harvard wrote:[1]

> "It is a barbarous thing to meet a newly born infant with the knife with a deliberate mutilation."

Michael Katz, M.D., Department of Pediatrics, College of Physicians and Surgeons, Columbia University, NY, offers additional support to Appellant's statement:[2]

> "The Committee on Fetus and The Newborn of the American Academy of Pediatrics . . . declares that there is no medical indication for routine circumcision in the neonatal period. I submit, therefore, that performance of this procedure--an acknowledged hazard to health--constitutes child abuse. Physicians should prevent, not abet, unhealthful practices. (Emphasis added.)

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1. George Wald, "Circumcision", Unpublished manuscript, p. 23. Edward Wallerstein, Circumcision: An American Health Fallacy.

2. The American Journal Diseases of Children, Vol 134, Nov 1980, page 1098.

POINT IV

MINOR CANNOT CONSENT

With some specific statutory exceptions, there is no California statute or case law which grants to a minor the power to consent to medical treatment.

None of the specific statutory exceptions contained in the Civil Code (§25.8 et seq.) apply in this case. Even where exceptions are provided, the minor must have attained the age of 12 or greater, be married, be in the armed services, or relate to pregnancy, before the minor may give his consent to medical treatment.

Appellant Adam London was barely one week old. He simply could not consent. He did not consent.

A healthy, normal, living, sensitive, functional [19] part of his body was forcibly and irreversibly amputated, when he was physically restrained to prevent any resistance, without any anesthetics, at a time of his life when he could not understand what was being done to him, or why, and did not have the legal power to consent to the surgery.

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19. See Appendix 12, page 2, American Academy of Pediatrics information: "The Function of the Foreskin".

POINT V

POWER OF PARENT TO CONSENT IS LIMITED

The power of a parent to consent to surgery upon minor is limited to the power to consent to medical treatment. It is obvious that a child cannot be treated as livestock and cut upon at the whim of the parent.

Actually, Appellant has been unable to find any California statute which specifically authorizes a parent to consent to any medical treatment. This parental authority has been assumed in California case law, but never placed into code.

Interestingly, while California does not specifically permit a parent to directly consent to medical treatment, California Civil Code §25.8 permits a parent to "authorize in writing any adult person into whose care the minor has been entrusted" to consent to specific items.

These specific items are: X-ray examination; anesthetic; medical or surgical or dental diagnosis or treatment; and hospital care by a licensed physician or dentist.

These specific items virtually define "medical treatment" as that term is universally used by the courts.

In The America Journal of Obstetrics and Gynecology, [20] it is stated:

> "Welch [21] has classified surgery as follows: repair of wounds, extirpation of diseased organs or tissue, reconstructice surgery, and physiologic surgery (e.g. sympathectomy). Predictably, routine newborn circumcision eludes classification."

Appellant has been unable to find any statute or any court decision which makes any mention of authorization for parents, for guardians or for courts, to consent to surgery upon the body of a minor other than for medical treatment.

POINT VI

PARENTS POWER TO CONSENT

MUST BE LIMITED TO MEDICAL PURPOSES

A parent's legal power to consent to acts to be done to their children, must and does have limits. Victor Hugo illustrates exactly what it means to have no limitation upon the power of an adult, parent or not, to deal with a child. The comprachicos:

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20. Vol 130, No. 2, January 1978: "Routine circumcision: A reappraisal", by David A. Grimes, M.D., reprinted by the U.S. Department of Health, Education, and Welfare.

21. Welch, L.S: The history of surgery in David,L., editor: Christopher's Textbook of Surgery, ed. 8, Philadelphia, 1964, W. B. Saunders Company, pp.1-23.

> "The comprachicos did not merely remove a child's face, they removed his memory. At least, they removed as much of it as they could. The child was not aware of the mutilation he had suffered. This horrible surgery left traces on his face, not in his mind. He could remember at most that one day he had been seized by some men, then had fallen asleep, and later they had cured him. Cured him of what? He did not know. Of the burning by sulphur and the incisions by iron, he remembered nothing. During the operation, the comprachicos made the little patient unconscious by means of a stupefying powder that passed for magic and suppressed pain. . . .
>
> "In China, since time immemorial, they have achieved refinement in a special art and industry: the molding of a living man. One takes a child two or three years old, one puts him into a porcelain vase, more or less grotesque in shape, without cover or bottom, so that the head and feet protrude. In the daytime, one keeps this vase standing upright; at night, one lays it down, so that the child can sleep. Thus the child expands without growing, slowly filling the contours of the vase with his compressed flesh and twisted bones. This bottled development continues for several years. At a certain point, it becomes irreparable. When one judges that this has occurred and that the monster is made, one breaks the vase, the child comes out, and one has a man in the shape of a pot."[22]

No one would claim that a parent has the legal power in the State of California, to consent to these surgical procedures which had no medical purpose, and to treat a child as did a comprachico.

In a leading Texas Court of Appeals case the mother (and Guardian ad Litem) of a 14 year old mentally incompetent

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22. Victor Hugo, The Man Who Laughs, translated by A. Rand, "The Comprachicos," The Objectivist, Vol 9., No. 8 (August 1970) pp. 1-2.

(19)

daughter applied for an order authorizing the mother to consent to the removal of a kidney from the daughter's body for the purpose of transplanting it into the body of a son who was suffering from endstage renal disease.

The court held: "Significantly, however, for our purposes, this power of parents, managing conservators and guardians to consent to surgical intrusions upon the person of the minor or ward is limited to the power to consent to medical 'treatment'." Little v Little, 576 S.W.2d 493½, p. 495.

In dealing with whether or not a guardian could donate a body organ from a minor, the Louisiana Court of Appeal ruled that the surgery could not take place, and that the court owed "protection to a minor's right to be free in his person from bodily intrusion to the extent of loss of an organ unless such loss be in the best interest of the minor." In Re Richardson 284 So.2d 185, 187 (1973).

There are limits as to what parents may authorize be done to the body of their children.

Appellant Adam London claims that those limits are set by the definition of medical treatment.

Medical treatment. Not "medical" mutilation.

Parents may consent to intrusions upon and excisions

(20)

from the persons of their minor children so long as those intrusions and excisions are for medical treatment. Torture, mutilation, and physical distortion are forbidden.

Forbidden, even if the name given to the torture, mutilation or physical distortion is surgery. Forbidden, even if the torture, mutilation or physical distortion is done by a person licensed by the State as a physician and surgeon. Forbidden, even if the torture, mutilation or physical distortion is done with the consent of a parent. Treatment sets the standard. Not licenses, not "common practice," and not "consent" of a parent "on behalf" of the victim.

A parent cannot consent "on behalf" of a child because that concept requires the parent to be the agent of the minor who is not legally capable of giving consent. If the minor cannot give legal consent, the agent of the minor is within the same disability.

It is the position of Appellant Adam London that a parent cannot "authorize" or "consent" to the removal of normal, healthy, living tissue from the body of his child, unless that action is in the furtherance of medical treatment. This is discussed in greater detail below.

Appellant emphasizes that the "authorization" or "consent" given by a parent is that of the parent, and is not

(21)

"on behalf of" the minor.

Adam London did not consent to his circumcision.

POINT VII

DEFINITION OF MEDICAL TREATMENT

The key to the issue of parental consent lies with the definition of medical treatment. This, therefore, is central to the issues of this case.

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. Kirschner v Equitable Life Assur. Soc. of U.S., 157 Misc. 635, 284 N.Y.S. 506, 510; Hester v Ford, 221 Ala. 592, 130 So. 203, 206." Black's Law Dictionary, (Rev. 4th Ed., St. Paul: West Publishing Co. 1951) p. 1673.

A leading Texas 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." Little v Little, 576 S.W.2d 493, 495 (1979).

(22)

Medical treatment means any medicine or application which puts an end to disease and restores health, or one that relieves but does not necessarily end a marked condition. Mangieri v Spring Tool Co., 161 A.2d 765, 767, 769.

California follows the majority of courts in its definition of medical treatment. Medical treatment is something which will reasonably and seasonably tend to relieve and cure. Los Angeles County v Indust. Acc. Comm., 56 P.2d 577, 579, 13 CA2d 69. Union Iron Works v Industrial Accident Commission, 210 P.2d 410, 413, 190 C. 33.

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." The removal of any normal, healthy, non-diseased, uninjured part of the body is not "treatment." It is mayhem.

To the extent surgery is done to a child, the purpose of which is not the curing of disease, repairing an injury or making an abnormal part of the body normal, it is at best battery, and at worst to force a child to experience, first-hand, life with the comprachicos.

(23)

POINT VIII

NO MEDICAL TREATMENT HERE

To qualify under the definition of medical treatment, there must be some sort of disease or abnormality. In this case, there was no disease. There was no injury. There was no abnormality. There can be no treatment unless there is a disease or abnormality. Just exactly, what was it the Defendants were treating? The answer is: Nothing.

Defendants do not even attempt to claim they were administering any form of medical treatment. On the contrary, they freely state that there was no medical reason to do what they did. Defendant Glasser admitted that Appellant's penis was not diseased.[23] Defendant Glasser admitted that Appellant's penis was not abnormal.[24]

This is not a case involving "mis-treatment" or "malpractice." Appellant was a normal, healthy baby boy when, and more significantly, BEFORE he was attacked.

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23. See Defendant Glasser's Response to Appellant's First Set of Requests for Admissions, Request For Admission Number 7, page 2, line 8.

24. See Defendant Glasser's Response to Appellant's First Set of Requests for Admissions, Request For Admission Number 8, page 2, line 10.

(24)

POINT IX

FACTS RECITED IN WRITTEN INSTRUMENT CONCLUSIVELY PRESUMED TRUE BETWEEN PARTIES

"The facts recited in a written instrument are conclusively presumed to be true as between the parties thereto, or their successors in interest; but this rule does not apply to the recital of a consideration." Evidence Code §622.

Defendants provided a written instrument to one parent of appellant, who signed it. The written instrument recited that there was no medical purpose for circumcision. See Appendix 7. This is now a fact which is conclusively presumed to be true as between the parties.

There is no recognized medical authority in the world which now claims any medical purpose whatsoever for circumcision. All such claims of times past have been scientifically shown to have been in error. Specifically, Defendants here in this case do not claim any medical purpose in performing the circumcision in the case at bar.

(25)

POINT X

SUPERIOR COURT RULING IN ERROR

The Superior Court ruling is in error in the following respects:

ERROR NUMBER ONE. The Superior Court ignored and did not deal with the issue that the public policy of the State of California is to protect children and to prohibit causing or permitting a child to suffer unjustifiable physical pain, as well as unjustifiable risks.

This policy is evident by the many criminal statutes which protect children even beyond the protections afforded adults. A parent has the legal power to consent only to surgical procedures to be done upon the body of their children, and only if those procedures have medical treatment as their purpose.

David A. Grimes, M.D. expressively attests to the pain experienced by an infant being circumcised:[25]

> "That an adult can physically restrain an infant in order to perform genital surgery on him is unquestioned; That to do so is compassionate is less apparent. Physicians apply different standards of pain tolerance to newborn infants, perhaps because these patients cannot articulate their anguish. If the physician were requested to

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25. Grimes, American Journal of Obstetrics and Gynecology, op. cit., p. 127.

(26)

> circumcise a one-year-old child, would he rely on physical restraints in lieu of anesthesia? Operation without anesthesia indeed obviates risks associated with anesthesia but recalls a more primitive era of medicine.
>
> "The rejoinder that the tiny patient does not "feel" the pain defies both experimental evidence and common experience . . .
>
> "Marked flushing frequently occurs during circumcision, and the propensity of newborn infants to vomit under the stress of circumcision is well appreciated by nursery personnel. The alteration in pitch and intensity of cry when the first crushing clamp is applied to the foreskin is unmistakable. Endocrine and other physiologic responses of the infant to the stress of circumcision have not been well documented in the existing literature.[26] Nevertheless, plasma cortisol increased significantly in newborn infants circumcised in the first six hours of life in one study.[27] In addition, newborn circumcision has led to immediate and significant increases in wakefulness and fussy crying of these infants, as well as alterations in sleep patterns, attributed to the stress of operation.
>
> "In contrast to the sometimes dramatic somatic responses of the neonate to operation without anesthesia, the psychological consequences of this trauma are conjectural. Psychoanalyst Erik Erikson has described the first of eight stages of man as the development of basic trust versus basic mistrust. For a baby to be plucked from his bed, strapped in a spread-eagle position on a hard surface, and doused with chilling antiseptic is perhaps consistent with other new-found discomforts of extrauterine existence. The application of crushing clamps and excision of penile tissue, however, probably do little to engender a trusting, congenial relationship with the infant's new surroundings."

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26. Preston, op. cit.

27. Talbert, L. M., Kraybill, F. N., and Potter, H. D.: Adrenal Cortical response to circumcision in the neonate, Obstet. Gynecol. 48: 208, 1976.

The painful and riskful [28] mutilation of a normal, healthy part of the body for no medical purpose is not allowed by law. Any attempt to justify mutilation and deformation of a baby's body only upon the ground that it is "one of the most widely performed operations in human history . . ." has neither medical nor legal basis.

Although Defendant Mark Glasser would not admit [29] that Adam London was in pain, some doctors who circumcise babies now acknowledge that when a baby screams, struggles, vomits, defecates and lapses into coma when his foreskin is clamped, slit, torn, crushed and sliced, he is in pain.

By removing Adam London's foreskin, the Defendants decided to ignore facts and studies which have, for a number of years, led to a formidable array of medical opposition to routine circumcision,[30], and confirmed its blatant obliviousness to Constitutional Rights.

ERROR NUMBER TWO. The Superior Court stated: "It is to be noted that in medical malpractice cases involving circumcision operations it is implied that such operation is

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28. See POINT I

29. Deposition of Defendant Mark Glasser, M.D., February 13, 1985, page 23.

30. See Appendices 13, 14, 15.

a medical or surgical treatment-procedure, and if don negligently, the performing surgeon may be hel responsible."[31] No cases were cited by the Superior Cour to support that statement. Nor was any evidence cited b either Defendants or the Superior Court to support tha Statement. No cases. No evidence.

Unclear is the meaning of the term "surgical treatment-procedure", as used by the Superior Court. There are surgical treatments. That would be one in which surgery was used to treat an illness, injury or abnormality. Surgical procedures could be either for treatment or torture. Merely because a surgical procedure is done by a trained surgeon does not make it treatment. One need go no further in one's research than to review the "surgical procedures" of Hitler's famed surgeon, Dr. Mengele, to fully comprehend the vast difference.

Examining the Superior Court's statement, one would say that certainly the negligent removal of the tonsils, appendix or teeth, subjects the tortfeasor to liability for malpractice if the purpose of the operation in the first place were for a medical purpose. The removal of the foreskin, just like the removal of the appendix or tonsils

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31. See Appendix 4, Order re Motion, page 3, lines 11 through 15.

does occasionally have to be done for medical reasons. It is done when some particular medical reason requires it. Then, if done negligently it would subject the tortfeasor to liability for malpractice. This, however, is not at all related to the issues or facts of this case.

More related to this case would be the removal of healthy tonsils, healthy appendix, or healthy teeth, for no medical reason, without consent, and without an anesthetic. The liability in such event is clearly for battery. In the case at bar, there was a removal of the healthy foreskin for no medical reason, without consent and without an anesthetic. It was not malpractice. It was battery.

If one were to set up the statement by the Superior Court syllogistically, it would be a patent non-sequitur to say: "Some circumcisions done for medical purposes are done negligently, ergo all circumcisions are done for 'medical or surgical treatment-procedure.'"

Even if such epistemological latitude were permitted, there is no question that in this particular case, (as this appeal is about this particular case and not circumcisions in general), the circumcision was admittedly done for no medical reason. Nothing can evade this one fact: No medical reason existed in THIS case.

The Superior Court erred when it explored the issue of

medical reasons for circumcision. Whether or not medical reasons exist in routine circumcision in general, or in this specific case, was not presented to the Superior Court. The only issue presented was that of consent. Everyone in the case admitted that there was no medical reason for the circumcision in this particular case.

ERROR NUMBER THREE. The Superior Court stated that "Section 25.8 Civil Code authorizes a parent to consent to any medical or surgical treatment which in the Court's opinion was intended by the Legislature to include any accepted medical procedure."

No case law was presented by Plaintiff, Defendants or the Superior Court on this point. No case law is believed to exist which interprets this Section 25.8 of the Civil Code.[32]

A mere reading of Civil Code Section 25.8 reveals that it DOES NOT -- by its very words -- permit a parent to consent to medical treatment. This section permits a parent to authorize another adult into whose custody the child may temporarily be, to consent to medical treatment. See Civil Code Section 25.8, quoted by Superior Court, Appendix 4, page 2, lines 13 through 24. Secondly, there is no evidence that

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32. See Appendix 4, page 2 line 28, through page 3, line 3.

(31)

in this case the operation was an "accepted medical procedure", or what the definition of an "accepted medical procedure" might be.[33]

If no medical reasons exist, the procedure certainly cannot be termed a "medical procedure", either "accepted or not. Whatever else the circumcision in this case may be, one thing is certain: "medical" it is not. Therefore, it cannot be an "accepted medical procedure".

Further, "accepted" means accepted by some medical authority. No medical authorities claiming "acceptance" were presented to the Superior Court. None exist. Quite to the contrary, every medical authority from The World Health Organization, The American College of Obstetricians and Gynecologists, The College of Pediatric Urologists to The American Academy of Pediatrics (pediatrics is the branch of medicine dealing with the care of children and the treatment of their diseases), have stated that THERE IS NO VALID MEDICAL REASON FOR ROUTINE CIRCUMCISION, and that circumcision SHOULD NOT be performed routinely.

The American Academy of Pediatrics, explicitly pointing out the paramount importance of the protection provided by the foreskin, states:

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33. See Appendix 4, page 1, line 27.

(32)

> "The Function of the Foreskin: The glans at birth is delicate and easily irritated by urine and feces. The foreskin shields the glans; with circumcision, this protection is lost. In such cases, the glans and especially the urinary opening (meatus) may become irritated or infected, causing ulcers, meatitis (inflammation of the meatus), and meatal stenosis (a narrowing of the urinary opening). Such problems virtually never occur in uncircumcised penises. The foreskin protects the glans throughout life." (Emphasis Added.) [34]

Attesting to the fact that routine circumcision has no medical purpose, The DEPARTMENT OF HEALTH SERVICES, State of California,[35] states:

> "Effective September 1, 1982, Circumcision is generally excluded from coverage by the Medi-Cal program. Exceptions may be allowed if the provider establishes and fully justifies the procedure as medically necessary to protect life, prevent significant disability or prevent serious deterioration of health."

There was, and is, no basis in law or medicine for the finding by Superior Court that routine circumcision is either "accepted" or "medical" in its nature. Even so, such deals with circumcision in general. This particular appeal deals with one particular case. In this particular case there was no medical reason. This particular circumcision was neither "accepted" nor "medical".

ERROR NUMBER FOUR. The Superior court stated: "The Court is of the opinion that a more realistic interpretation of the

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34. See Appendix 12, page 2.

35. See Appendix 11.

(33)

legislative intent in enacting said statute (referring to CC §25.8) would include parental consent for medical or surgical treatment or procedures elective in nature for purposes of cosmetic improvement, hygienic, prophylactic or preventative reasons." No evidence was presented to the court to indicate that circumcision provided any "cosmetic improvement, hygienic, prophylactic or preventative reasons."

"Cosmetic" reasons? Without wishing to imply a pun, beauty is in the eye of the beholder. To some primitives a greatly enlarged lower lip is cosmetically more attractive than a normal, natural lip. But to change it, each person who desires such a lip, changes it him or herself. Even primitive tribesmen are civilized enough not force it upon their children. Whereas, here we see civilized men primitively circumcising their children by force.

Cosmetic improvements cannot be seriously contented to be a valid reason to remove a normal, uninjured, healthy and functional part of Appellant's body.

Further, as previously stated, Defendants never claimed any cosmetic reason for Appellant's circumcision.

(34)

"Hygienic" reasons? The only evidence before the court was that "good personal hygiene and keeping the penis clean offered the same advantages of routine circumcisions." That statement came from the Defendants themselves,[36] and is supported by the American Academy of Pediatrics: "The uncircumcised penis is easy to keep clean. No special care is required! Leave the penis alone."[37] Notably, no "advantages" were stated by Defendants. We shall deal more with this under the heading of "ERROR NUMBER FIVE", infra.

Referring again to the Grimes article [38] from the American Journal of Obstetrics and Gynecology:

> "Circumcision may facilitate cleaning of the distal penis, but is operation a legitimate means of improving hygiene? To advocate newborn circumcision because small boys go camping for three weeks without ever bathing raises other possibilities of operation in lieu of soap, water, and instruction in cleanliness. One author has postulated excision of the external ears to eliminate these reservoirs of dirt. Simple vulvectomies (female circumcision -- RWM) of the newborn female infants might facilitate cleanliness and diminish the risks of vulvitis in young girls as well as carcinoma of the vulva in older women. Fingernails loom as yet another repository of filth and potential disease vector."

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36. See Appendix 7.

37. See Appendix 12, page 2.

38. Grimes, op. cit.

(35)

Hygiene cannot be seriously contented to be a valid reason to remove a normal, uninjured, healthy and functional part of Appellant's body.

Further, as previously stated, Defendants never claimed any hygienic reason for Appellant's circumcision.

"Prophylactic or preventative" reasons? These were the last two reasons given by the Superior Court as "medical" support for its finding. Nothing was said as to just what it was that removing normal, uninjured, healthy tissue prevented. Or, how such removal would be in any way whatsoever prophylactic for whatever it was which was supposed to be prevented.

To the contrary, as noted above by the American Academy of Pediatrics, circumcision causes "problems (which) virtually never occur in uncircumcised penises."

Not only is circumcision not prophylactic, it actually causes problems. Circumcision is contra-indicated.

(36)

Another medical attestation is produced by David F Grimes, M.D.:

> ". . . Contemporary surgery has yet to embrace the philosophy of purely prophylactic surgery. If, however, the scope of surgery broadens to encompass preventive operations, the prepuce of the neonate will likely rank low on a list of bodily parts requiring ablation."[39]

The Defendants did not claim any alleged benefits. Any claim that circumcision provides any "prophylactic or preventative" benefit is utterly baseless.

The Superior Court itself realized as much when the Superior Court stated:

> ". . .(T)he Plaintiff mother signed Defendant Hospitals' standard consent to infant's circumcision form, which on its face stated that it was a surgical procedure, that there were no medical reasons for routine circumcisions, that the reasons for such were traditional, cultural, and religious, and that good personal hygiene and keeping the penis clean offered the same advantages of routine circumcisions." (Emphasis Added.) [40]

The very form quoted by the Superior Court constitutes a writing between the Appellant and Defendant, which states facts which must, by law, be conclusively presumed to be true

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39. Grimes, op. cit., p 128.

40. Appendix 4, Order Re Motion, page 1, line 24 through page 2, line 3.

between the parties. See Point IX, supra.

ERROR NUMBER FIVE. The Superior Court stated the clear California law that consent to be valid must be an "informed consent". However, whether or not the consent in this case was "informed" is an issue which must be resolved by the trier of fact and is not an issue which may be resolved by Summary Judgment.

The Superior Court found, without testimony, declarations, without any evidence, and without any inquiry into the conditions (such as the emotional and physical condition of the parent) surrounding the signing of the "consent" form, that "Plaintiff's mother expressly consented" to the operation.[41]

The very form referred to by the Superior Court to substantiate sufficient disclosure of facts and allow an "informed" consent was defective upon its face.

The form states: "The practice of good personal hygiene and keeping the penis clean appears to offer the same advantages of routine circumcision without any surgical risks."[42]

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41. Appendix 4, Order re Motion, page 3, line 17.

42. See Appendix 7.

The form also states: "There are no medical reasons" for circumcision. If there are no medical reasons, what are the "advantages"? None are given.

(1) The parent is therefore told that there are advantages to circumcision, when in truth there are none, and is mislead into signing the form.

(2) By stating ". . . on the newborn . . . general anesthesia is not necessary", the form leads the parents to erroneously believe that no pain is inflicted to their child during circumcision, and misleads them into signing said form.

(3) Additionally, no disclosure is given relating to the danger of hemorrhage, surgical trauma, possibility of transfusions, pressure dressings, meatal ulceration, meatitis, predisposition of the penis to meatal stenosis, complication of septicenia, osteomylitis, pulmonary abscess, and death.

(4) No disclosure is given relating to the facts that "The foreskin protects the glans throughout life", and that "with circumcision, this protection is lost".[43]

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43. The American Academy of Pediatrics, op. cit.

None of these risks of infant circumcision were told to Appellant's parents either orally or in writing.[44]

Assuming, arguendo, that a parent does have the legal power to consent to a surgical procedure which has no medical purpose, that consent must be an "informed consent". It certainly was not in this case. The Motion for Summary Judgment should not have been granted because this issue should have been tried.

FURTHER,

by ruling that routine circumcision has one or more medical reasons, "cosmetic improvement, hygienic, prophylactic or preventive reasons", the Superior Court could not have ruled that the consent form used "constituted adequate legal advisement for the purpose of informed consent", as these items did not appear on the form.

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44. Appendix 10, "Informed Consent" portion of the papers presented to the Superior Court is incorporated herein.

POINT XI

FURTHER ILLUSTRATION OF LIMIT OF POWER TO CONSENT

If this Appeal dealt with the fact situation describe by Dr. Nawal el Saadawi, Appendix 6, there could be no doub that this court would enforce the public policy of the Stat of California to protect children. There would be n argument that "traditional, cultural, and religious" reason permitted a parent to consent to such mutilation.

No court would stretch Civil Code Section 25.8 in a effort to "cover" such horror. No court would claim tha such mutilation was done to the female for "cosmeti improvement, hygienic, prophylactic or preventativ reasons." No court would state that it is of interest tha in "malpractice cases involving (female) circumcisio operations it is implied that such operation is a medical o surgical treatment-procedure." No court would justify suc an outrage upon the ground that it was, to quote the ruling of the Superior Court, one more time, ". . .(O)ne of the most widely performed operations in human history". Every court in the State of California would find that a parent has nc legal power to consent to such a "surgical" procedure.

There are two differences between the mutilation of the sexual organ of Dr. Nawal el Saadawi in Egypt and the

mutilation of the sexual organ of Adam London in San Rafael: (1) Adam London was one week old, she was 6 years; and (2) Adam London was a male not a female. Both children suffered utterly cruel and outrageously barbarous genital mutilation, without anesthetic, for no medical purpose whatsoever.

POINT XII

RULES OF LAW MUST BE BASED UPON REASON NOT UPON "TRADITION" AND THE CIRCUMCISION MYSTIQUE

The fact that circumcision is, again quoting the Superior Court, ". . .(O)ne of the most widely performed operations in human history" does not justify continuing the practice. Mutilations of an infant's body are justified only and solely by medical purpose, not by tradition. Researcher Edward Wallerstein has pointed out:

> "Long before recorded history, human beings were altering their body structures, and presenting altered representations of the body in their art. European sculptures from the Ice Age, 30,000 years ago, portrayed the human figure in grotesque proportions. In real life, the elongation of lips, necks, earlobes, breasts, and labia as well as the binding of women's feet have been practiced for hundreds, if not thousands of years. Other modifications involved invasion of body tissue, such as ear and nose-piercing, scarification, tattooing, knocking out incisor teeth, and trepanning (skull puncturing). Trepanning is believed to have had a medical benefit, relieving internal skull pressure, The other procedures are believed to have been cosmetic; no one knows for

> sure. Surgery was also employed as punishment--ears, noses, hands, feet, penises, and testicles were amputated. Beheading was the ultimate surgery. Some of these methods of punishment are still in use in parts of the world today." See Appendix 8.

While some of these atrocities are still committed in other parts of the world today, only the atrocity of circumcision, admittedly performed without any medical purpose by the defendants in this case, is done in California. The time has come for routine circumcision to join such other high points of medical history as trepanning, blood letting, and other tortures once practiced in the name of medicine as well as "tradition, culture and religion" but which are not now permitted in civilized societies such as California. Tradition, culture, and religion do not, and cannot, justify surgery upon an infant which has no medical purpose.

Quoting again David A. Grimes, M.D.:[45]

> "No health program should be evaluated in a vacuum; . . .
>
> "With a physician's fee of $25 and an instrument fee of $15 per case, the cost of circumcising 1,287,000 babies (1973 study: number of babies circumcised that year) would be approximately 51 million dollars.

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45. Grimes, op. cit., p 128.

(43)

"Discussing protection of the "medical commons" from "overgrazing" by medical practices of no value or of undetermined value, Hiatt [46] cited numerous procedures once widely practiced in the United States that have now virtually disappeared, Examples include colectomy for epilepsy, gastric freezing for peptic ulcer, wiring of aortic aneurysms, and renal capsule stripping for acute renal failure. Most such practices fell into disuse not because they were supplanted by better procedures but because they were eventually found to be of no value. Because they remained on the "medical commons" too long, valuable health resources were squandered. Mass campaigns, such as wholesale circumcision, draw money and personnel away from other areas of medicine; if these other areas of medicine are more important, then the campaign has a negative effect on the public's health.[47]

"Where else might preventive health resources for newborn infants be directed? Immunization programs are health measures of established cost-effectiveness, yet vaccination rates are far too low. The application each year of the thousands of medical personnel hours and 51 million dollars toward improving immunization rates for children would result in substantial health benefits. Screening newborn infants for phenylketonuria is another health program with a scientific foundation, clear objectives, measurable outcomes, and demonstrated cost-effectiveness. At a time when health care resources are limited and demands are great, investment each decade of half a billion dollars to trim foreskins appears injudicious.

"Hiatt [48] lamented that once a medical practice has been adopted and disseminated it is not quickly abandoned, even when shown to be of no benefit. When asked to comment on a medical

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46. Hiatt, H. H. : Protecting the medical Commons: Who is responsible? N. Engl. J. Med. 293: 235, 1975.

47. Horwitz, O.: Long range evaluation of a mass screening program, Am. J. Epidemiol. 100: 20, 1974.

48. Hiatt, op. cit.

(44)

practice of questionable benefit, however, Pritchard and associates [49] responded emphatically that clinicians ought to use techniques only when certain that they do good; in clinical practice physicians should not have to prove that techniques are not dangerous. Commenting on the Australian Paediatric Society's 1971 resolution that newborn male infants should not routinely be circumcised, an editor [50] observed that some subjects die hard, and of all the hardy perennials routine newborn circumcision is among the most stubborn. . . . Lying outside the province of modern surgery, however, the (circumcision) procedure frequently features illogical bases for patient selection, neglect of the requirement to obtain informed consent, an inappropriate operator, needlessly radical technique, disregard for pain, dubious objectives, and unknown cost-effectiveness."

If an adult wishes to alter his own body by elongating his lips, cracking his skull, or cutting off his foreskin, let him do it. Babies have a constitutional right to remain intact.

The Court has a duty to protect the Constitutional right of safety and freedom from harm until each person decides what to do with his own body at such time as he attains the age of majority and discretion. See Appendix 8, "The Circumcision Mystique."

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49. Pritchard, J. A., Cunningham, F. G., and Mason, R. A.: Coagulation changes in eclampsia: Their frequency and pathogenesis, Am. J. Obstet. Gynecol. 124: 855, 1976.

50. Editorial: Circumcision as a hygiene measure, Med. J. Aust. 2: 175, 1971.

POINT XIII

FURTHER ILLUSTRATION

HYPOTHETICAL CASE NUMBER ONE

In order to have a full perspective of the situation, it is necessary to view the situation of a prospective surgical act from two slightly different hypothetical positions.

Not wishing to risk giving consent without a court order, a parent or guardian petitions this court for an order to circumcise.

The child is healthy and normal in all respects. The circumcision is to be a "routine" circumcision. That is to say, no medical reason exists for the circumcision. Could this court, sitting in parens patriae, order such an operation? The answer is no.

In a 1984 case, the reasoning of the California Court of Appeal, dealing with a request by a Conservator to have the Conservatee sterilized, came close to dealing directly with the rule of law which Appellant urges should be stated more explicitly, when the Court stated:

> "Because competent and incompetent persons differ significantly in their ability to give informed consent, a classification based on the difference is reasonable. The state has a duty to take reasonable steps to protect an incompetent person's rights to privacy, which--as we have seen--include the right to bear children or not. (See Roe v. Wade, supra, 410 U.S. 113 at pp. 152-154, 93 S.Ct. 705 at pp. 726-727, 35 L.Ed.2d

> 147; People v. Belous, supra, 71 Cal.2d 954 at pp. 963-964, 80 Cal. Rptr. 354, 458 P.2d 194.) Sterilization is generally an irreversible procedure. (See Guardianship of Tulley, supra, 83 Cal.App.3d 698 at p. 701, 146 Cal.Rptr. 266; Matter of A.W. [Colo.1981] 637 P.2d 366, 369 fn 4.) As the present record shows, there are many types of birth control which will prevent conception. Alternatives short of sterilization are thus available which will permit exercise of the right not to bear children." Conservatorship of Nieto, 199 Cal.Rptr. 478, 485-486.

The court, in Nieto said: "The state has a duty to take reasonable steps to protect an incompetent person's rights to privacy." A minor, and certainly a one week old infant, is, by definition, legally incompetent. Certainly the right to remain as one is born rather than have his organs of sexual reproduction mutilated or altered for no medical reason is within those rights of privacy which must be protected by this court.

The court in Nieto said: "Sterilization is generally an irreversible procedure." So is circumcision.

The court in Nieto said: "Alternatives short of sterilization are thus available." The same is true of circumcision.

Appellant submits that if the parents of Appellant requested this court to issue an order to have Appellant circumcised, under the conditions in which the penis or foreskin was not abnormal, not injured and not diseased, that this Court would not and could not, issue an order that

Appellant be circumcised.

"It is likewise beyond dispute that when, as here, the deprivation of rights comprises a serious invasion of one's privacy and well being, the state is not entitled, but also mandated to provide adequate procedural safeguards to ensure the avoidance of potential abuses (cf. Wyatt v. Aderhold [M.D. Ala.N.D. 1974] 368 F. Supp. 1393)." Guardianship of Tulley, 83 CA3d 698, 146 Cal.Rptr. 266, 271.

POINT XIV

FURTHER ILLUSTRATION

HYPOTHETICAL CASE NUMBER TWO

A 10 year old boy is not circumcised. His penis and foreskin are normal, uninjured, and not diseased. However, for non-medical reasons his parents decide that he should be circumcised before attaining the age of 11.

The boy objects. He does not want to be circumcised. Through a Guardian Ad Litem, he brings an action to enjoin any and all persons from removing his foreskin.

The 10 year old petitioner, while not legally competent, is not livestock or a piece of furniture to be abused. As such, the court, in parens patriae, has the duty to protect the child.

Can this court refuse to protect the child from surgical procedure which has not medical purpose?

The answer is no. Again, the court is "mandated t provide adequate procedural safeguards to ensure th avoidance of potential abuses." Guardianship of Tulley supra.

CONCLUSION

The facts are clear and admitted by the defendants: Ada London was bodily restrained and the foreskin removed fro his penis. There was no medical reason to remove th foreskin. In subjecting Appellant to the circumcision, Appellant's safety, even his very life, was needlessly place at risk. He suffered pain, surgical trauma, permanent scarring and deformity, and has permanently lost th protection of the foreskin which had been provided by nature.

Appellant will have an exposed, scarred, deformed, unnatural and unattractive penis, for life.

The only question is whether or not Defendant Glasser did so with a legally recognized consent.

Appellant's Constitutional and statutory personal rights

(49)

were violated, and there can be no legally recognized consent given by anyone to bodily restrain an infant, and forcibly remove a normal, healthy and functional part of his body for no medical purpose.

Regardless of the reasons offered to justify cutting off a baby's foreskin (traditional, cultural or religious), the fact remains that the circumcision of Appellant was amputation by force -- deliberate, premeditated violence, against a helpless, unwilling victim for the sole purpose of altering his sexual organ.

Such act was battery at best, and a case of demented sexual perversion and child abuse at worst. There was no legally valid consent for this act. There can be no consent.

(50)

WHEREFORE, Appellant Adam London requests:

1. That this court reverse and vacate the judgment from which this appeal was taken.

2. That this court specifically state in the opinion of this Court that: A Parent does not have the legal power to consent to a surgical procedure which has no medical purpose;

3. Costs of this proceeding.

4. Such other and further relief as the court deems just and proper.

Dated: July 31, 1985

Richard W. Morris
Attorney for Appellant

(51)

VERIFICATION

I, Richard W. Morris, Declare:

1. I am the Attorney for Appellant Adam London.

2. The Guardian ad Litem, Trudie London, is absent from the County of San Diego, California, where I have my offices and I make this verification for and on behalf of the parties for that reason; I have read the above Appellant's Opening Brief, and I am informed and believe that the matters therein are true and on that ground I allege the matters stated therein are true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 1, 1985, at San Diego, California.

Richard W. Morris

(52)

PROOF OF SERVICE AND DELIVERY

I, Marilyn Milos, declare that:

I am, and was at the time of the service hereinafter mentioned, at least 18 years of age and not a party to the above entitle action. My mailing address is P. O. Box 493, Forest Knolls, CA 94933; I am a resident of Marin County, California.

I served the foregoing APPELLANT'S OPENING BRIEF on this date, by depositing a copy thereof in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Forest Knolls, California, addressed as follows: ROPERS, MAJESKI, KOHN, BENTLY & WAGNER, Suite 1600, 655 Montgomery Street, San Francisco, California 94111.

I also deposited one copy with the clerk of the Superior Court of California, County of Marin on this date.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on August 2, 1985, at Forest Knolls, California.

MARILYN MILOS

TABLE OF APPENDICES

TABS

FIRST CAUSE OF ACTION

COMMON LAW BATTERY

1. Plaintiff Adam London is a minor, residing in the County o Marin, State of California.

2. TRUDIE LONDON is the Guardian ad Litem for Adam London.

3. Mark Glasser is an individual, residing in the County o Marin, State of California, hereinafter referred to a "Glasser," and is an employee of Pemanente Medical Group.

4. The Kaiser Foundation Hospitals, hereinafter referred to a "Kaiser," and The Permanente Medical Group, hereinafte referred to as "Permanente," are corporations doing busines in the County of Marin, State of California, specifically a the location commonly known as the Kaiser-Permanente Medica Center, 99 Montecillo Road, San Rafael, California.

5. All of the acts, occurrences and transactions herei mentioned took place within the County of Marin.

6. Plaintiff is ignorant of the true names and capacities o defendants sued herein as DOES 1-50, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this Complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and thereon alleges that each of the fictitiously

named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's injuries as herein alleged were proximately caused by their conduct. (55)

7. Defendants Doe 1 through Doe 50, and each of them, were acting in concert and at all times herein mentioned were the agents and employees of their codefendants Glasser, Kaiser and Permanente.

8. The Guardian ad Litem is informed and believes and thereon alleges that on or about August 5, 1983, each of the fictitiously named defendants, together with Glasser, Kaiser and Permanente, acting in concert with each other and individually, jointly and concurrently, without the knowledge and consent of plaintiff, forcibly removed the foreskin from plaintiff's penis by cutting the foreskin completely off.

10. By reason of the wrongful and malicious acts of defendants, and each of them, and of the fright caused plaintiff, plaintiff has suffered extreme and severe mental anguish and physical pain and has been injured in mind and body, all to plaintiff's damage in an amount which the law of the State of California prohibits Plaintiff from stating unless defendants, or any of them, request Plaintiff to so state, in that Plaintiff was:

(a) Was temporarily unable to eat normally.

(b) Was temporarily unable to sleep normally. (56)

(c) Bled from the penis at the time of the unmerciful attack and thereafter.

(d) Does now, and always in the future will, suffer a permanent mutilation of the penis.

(e) Does now, and always in the future will, suffer from the removal of the natural protection afforded by the foreskin.

(f) Does now, and always in the future will, suffer permanent scarring of the penis.

(g) Does now, and always in the future will, suffer cosmetically because plaintiff's penis is abnormal in appearance when compared with persons who have not had their sexual organs altered.

(h) Does now, and always in the future will, suffer a permanently disfigured penis.

(i) Does now, and always in the future will, suffer permanent loss of sensitivity resulting from defendants cutting away nerve endings which were a part of the foreskin.

11. The inhuman acts aforementioned committed by defendants

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(57)

ATTORNEYS FOR
DEFENDANTS MARK GLASSER, M.D.
KAISER FOUNDATION HOSPITALS,
a non-profit corporation,
PERMANENTE MEDICAL GROUP,
A Professional corporation

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MARIN

ADAM LONDON, etc.,

Plaintiff,

-vs-

MARK GLASSER, an individual, KAISER FOUNDATION HOSPITALS, a corporation, THE PERMANENTE MEDICAL GROUP, a corporation and DOES 1 through 50,

Defendants.
_____/

NO: 118799

ANSWER TO COMPLAINT FOR DAMAGES FOR WILLFUL TORTS OF BATTERY AND FALSE IMPRISONMENT

COME NOW defendants MARK GLASSER, M.D., an individual, KAISER FOUNDATION HOSPITALS, a non-profit corporation, PERMANENTE MEDICAL GROUP, a Professional corporation and in answer to plaintiff's verified Complaint for Damages for Willful Torts, First Cause of Action for Battery and Sixth Cause of Action for False Imprisonment on file herein, respond as follows:

I

Answering the allegations contained in paragraph 4 commencing at line 14 ". . . are corporations . . .," these answering defendants deny each and every, all and singularly generally and specifically the allegations therein contained.

(58)

II

Answering the allegations contained in paragraphs 5, 6 and 7, these answering defendants lack sufficient information or belief to answer the allegations therein contained and basing their denial on that ground, deny each and every allegation therein stated.

III

Answering the allegations contained in paragraph 8, the answering defendants lack sufficient information or belief answer the allegations therein contained and basing their denial that ground, deny each and every allegation therein state Defendants admit that the foreskin of plaintiff was removed circumcision, a recognized surgical procedure. Said circumcisi was fully understood by plaintiff's parents, who consented there on behalf of plaintiff.

IV

Answering the allegations contained in paragraph 10 and 11 these answering defendants deny each and every, all and singularly generally and specifically, the allegations therein contained.

V

Answering the allegations contained in paragraph 24, thes answering defendants incorporate by reference each and ever admission and denial above set forth.

VI

Answering the allegations contained in paragraphs 25 an 26, these answering defendants deny each and every, all an singularly, generally and specifically, the allegations there

contained. Defendants admit that plaintiff's foreskin was remove by circumcision, a recognized surgical procedure. Sai circumcision was understood by plaintiff's parents, who consente thereto on behalf of plaintiff.

AS A FURTHER, SEPARATE AND AFFIRMATIVE DEFENSE TO TH COMPLAINT FOR WILLFUL TORTS (BATTERY AND FALSE IMPRISONMENT) C FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION CONTAINED THEREIN these answering defendants allege that the complaint fails to stat facts sufficient to constitute a cause of action against thes answering defendants.

AS A SECOND, SEPARATE AND AFFIRMATIVE DEFENSE TO TH COMPLAINT FOR WILLFUL TORTS (BATTERY AND FALSE IMPRISONMENT) C FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION CONTAINED THEREIN these answering defendants allege that plaintiff consented to th alleged acts complained of and by virtue of said consent has waive and is estopped and barred from alleging the matters set forth i: the complaint.

AS A THIRD, SEPARATE AND AFFIRMATIVE DEFENSE TO THE COMPLAINT FOR WILLFUL TORTS (BATTERY AND FALSE IMPRISONMENT) O: FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION CONTAINED THEREIN, these answering defendants allege that the averred acts by defendants which formed the basis of plaintiff's complaint herein, were performed without the intent to batter or imprison plaintiff and without malice. Hence, plaintiff is barred from recovery herein.

AS A FOURTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE COMPLAINT FOR WILLFUL TORTS (BATTERY AND FALSE IMPRISONMENT) ON FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION CONTAINED THEREIN, these answering defendants allege they had reasonable, good cause to believe plaintiff had consented to the circumc procedure, by virtue of discussions with one or both of plaint: natural parents and by virtue of the express consent to i: circumcision signed by Trudie London. See Exhibit "A" atta hereto.

WHEREFORE, defendants pray that plaintiff take not against them by said complaint; that defendants have judgment their costs of suit herein incurred together with such other further relief as may be proper in the premises.

DATED: October 17, 1984

ROPERS, MAJESKI, KOHN, BENTLEY AND WAGNER

By _____
JEFFREY W. ALLEN
Attorneys for Said Defendant

(61)

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DEFENDANTS MARK GLASSER, M.D.
KAISER FOUNDATION HOSPITALS,
a non-profit corporation,
PERMANENTE MEDICAL GROUP,
A Professional corporation

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MARIN

ADAM LONDON, etc.,

Plaintiff,

-vs-

MARK GLASSER, an individual, KAISER FOUNDATION HOSPITALS, a non-profit corporation, THE PERMANENTE MEDICAL GROUP, a professional corporation and DOES 1 through 50,

Defendants.

/

NO. 118799

DEFENDANTS' RESPONSE TO PLAINTIFFS' SEPARATE STATEMENT OF UNDISPUTED FACTS (C.C.P. §437c(b)

Defendants herein respond to plaintiff's Separate Statement of Undisputed Material Facts and Reference To Supporting Evidence pursuant to C.C.P. §437c(b) as follows:

(62)

9.	Kaiser Foundation Hospital is (sic) doing business in the County of Marin, specifically at 99 Montecillo Road, San Rafael. Plaintiff offers no evidence in support of this contention. PROOF: See Plaintiff's Separate Statement Of Undisputed Material Facts In Reference To Support Evidence pages 5-6.	Dispute
10.	Permanente Medical Group is doing business in the County of Marin, specifically at 99 Montecillo Road, San Rafael.	Agree
11.	The acts complained of took place within the County of Marin.	Agree
12.	Defendant Glasser removed the foreskin from plaintiff.	Agree
13.	Defendant Mark Glasser was acting as an employee of defendant Permanente Medical Group, a professional corporation, when he removed the foreskin of plaintiff.	Agree
14.	Plaintiff's foreskin was removed at 99 Montecillo Road, San Rafael, California.	Agree
15.	Defendant Glasser immobilized plaintiff by restraining plaintiff's leg and arms.	Agree
16.	Plaintiff did not consent to the removal of his foreskin. Both parents of minor plaintiff Adam London expressly and impliedly consented to the circumcision procedure, exercising their statutory, common law and constitutional power to so consent.	Dispute

(63)

Admissions and Interrogatories, attached hereto marked Exhibit "9," Answer to Interrogatory Number 7, page 3, lines 6 through 8.

ISSUE NUMBER SIXTEEN: PLAINTIFF DID NOT CONSENT TO THE REMOVAL OF HIS FORESKIN.

ALLEGED: Complaint, paragraph 8, page 3, lines 12 through 15.

PROOF: Admitted by each Defendant. See failure to deny in Answer to Complaint. Defendants claim that parents consented and do not claim that Plaintiff consented.

PROOF: Admitted by Defendant Glasser. See Responses to First Set of Requests For Admission of Facts, attached hereto marked Exhibit "8," answer to Interrogatory Number 7, page 2, line 23 through page 3, line 3. See also deposition of Glasser, dated February 13, 1985, attached hereto marked Exhibit "7," at page 21, lines 6 through 13.

PROOF: Admitted by implication by Defendant Permanente Medical Group. See Permanent's Answers to Plaintiff's Interrogatories, attached hereto marked Exhibit "9," answer to Interrogatory Number 7, page 4, line 6-7.

PROOF: Admitted by implication by Defendant Kaiser. See Kaiser's Answers to Plaintiff's Interrogatories, attached hereto marked Exhibit "10," answer to

(64)

Interrogatory Number 7, page 4, lines 20-22.

Respectfully submitted,

Richard W. Morris and
Jeannette Edell

By: Richard W. Morris
Richard W. Morris
Attorneys for Plaintiff

(65)

FILED
June 10, 1985
HOWARD HANSON
[illegible] COUNTY CLERK
by L. [illegible], Deputy

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MARIN

ADAM LONDON, etc.,

Plaintiff,

vs.

MARK GLASSER, an individual, KAISER FOUNDATION HOSPITALS, a non-profit corporation, THE PERMANENTE MEDICAL GROUP, a professional corporation and DOES 1 through 50,

Defendants.

No. 118799

ORDER RE MOTION FOR SUMMARY JUDGMENT/ ADJUDICATION OF ISSUES WITHOUT SUBSTANTIAL CONTROVERSY

This litigation arises out of a complaint filed by Plaintiff mother on behalf of her minor son, alleging that the minor was the victim of a battery and false imprisonment arising out of the circumcision of the minor son approximately one week after birth. The father of the minor, a medical doctor, orally consented to the circumcision, and the Plaintiff mother signed Defendant hospitals' standard consent to infant's circumcision form, which on its face stated that it was a surgical procedure, that there were no medical reasons for routine circumcisions, that the reasons for such were

(66)

traditional, cultural, and religious, and that good personal hygiene and keeping the penis clean offered the same advantag of routine circumcision. The surgical procedure on the minor was routine and without complication.

On March 20, 1985, Plaintiff filed its motion for summary adjudication of certain issues, and on the same day, Defendants (operating doctor in the hospital) filed its motion for summary judgment and/or summary adjudication of issues. Beneath all the rhetoric in the legal documents that have been filed in these motions is the issue whether or not a parent may legally consent to circumcision pursuant to the provisions of Section 25.8 Civil Code, which provides as follows: "Either parent, if both parents have legal custody, or the parent person having legal custody or the legal guardian of a minor may authorize in writing any adult person into whose care the minor has been entrusted to consent to any X-ray examination, anesthetic, medical or surgical diagnosis or treatment and hospital care to be rendered to the minor under the general or special supervision and upon the advice of a physician and surgeon licensed under the provisions of the Medical Practice Act, or to consent to an X-ray examinatio anesthetic, dental or surgical diagnosis or treatment and hospital care to be rendered to the minor by a dentist licensed under the provisions of the Dental Practice Act" and if a parent legally may give such consent whether there is a factual issue as to whether Plaintiff mother's consent was "informed consent" within the meaning of the law.

Section 25.8 Civil Code authorizes a parent to consent

to any medical or surgical treatment which in the Court's opinion was intended by the Legislature to include any accepted medical procedure. Plaintiff's attempt to restrict such to medical procedures which relieve, improve, or correct disease, injury, or abnormality is unduly restrictive. The Court is of the opinion that a more realistic interpretation of the legislative intent in enacting said statute would include parental consent for medical or surgical treatment or procedures elective in nature for purposes of cosmetic improvement, hygienic, prophylactic or preventative reasons. It is to be noted that in medical malpractice cases involving circumcision operations, it is implied that such operation is a medical or surgical treatment-procedure, and if done negligently, the performing surgeon may be held responsible (Bates vs. Newman 121 CA(2) 800; Valentine vs. Kaiser Foundation Hospital 194 CA(2) 282).

Not only did Petitioner's mother expressly consent to the circumcision operation by executing the Defendant Hospitals standard consent form, which form, considering the nature of the surgical procedures involved, constituted adequate legal advisement for the purposes of informed consent (Valentine vs. Kaiser Hospital 194 CA(2) 282, 287-288) but she also impliedly consented thereto by taking said minor child from its home to the Defendant doctor and hospital for the circumcision after being advised of the arrangements made for said operation (Kritzer vs. Citron 101 CA(2) 33, 39).

Considering the traditional, cultural, and religious history of circumcision as one of the most widely performed

operations in human history (Valentine vs. Kaiser Foundation Hospital 194 CA(2) 282, 288) and the constitutionally recognized right of raising children ~~my~~ to privacy in the realm of family life (City of Carmel by the Sea vs. Young 2C(3) 259, 266-267; Lois R. vs. Superior Court 19 CA(3) 895, 901-902) parents would appear to have the right to have their male child circumcised without the need for governmental intervention or permission such as the enactment of Section 25.8 Civil Code.

For the reasons noted herein, the Defendant's motions for summary judgment are granted, and Plaintiff's motion for summary adjudication of issues without substantial controversy and for discovery are denied.

DATED: June 7, 1985

E. Warren McGuire

E. WARREN MCGUIRE
JUDGE OF THE SUPERIOR COURT

(69)

STATE OF CALIFORNIA)
COUNTY OF MARIN) ss

London vs. Glasser, et al

ACTION No. 118799

(PROOF OF SERVICE BY MAIL - 1013A, 2015.5 C.C.P.)

I AM A CITIZEN OF THE UNITED STATES AND A RESIDENT OF THE COUNTY AFORESAID; I AM OVER THE AGE OF EIGHTEEN YEARS AND NOT A PARTY TO THE WITHIN ABOVE ENTITLED ACTION; MY ~~RESIDENCE~~ BUSINESS ADDRESS IS:

Marin County Clerk, P.O. Box E, San Rafael, CA 94913

ON June 12, 1985, I SERVED THE WITHIN Order re Motion for Summary Judgment/Adjudication of Issues without Substantial Controversy

ON THE parties IN SAID ACTION, BY PLACING A TRUE COPY THEREOF ENCLOSED IN A SEALED ENVELOPE WITH POSTAGE THEREON FULLY PREPAID, IN THE UNITED STATES POST OFFICE MAIL BOX AT San Rafael, ADDRESSED AS FOLLOWS:

RICHARD W. MORRIS, ESQ.
P.O. Box 19729
San Diego, CA 92119-0729

JEANNETTE EDELL, ESQ.
555 Iron Springs Road
Fairfax, CA 94930

ROPERS, MAJESKI, KOHN, BENTLEY & WAGNER
655 Montgomery St., Suite 1600
San Francisco, CA 94111

I CERTIFY (OR DECLARE), UNDER PENALTY OF PERJURY * THAT THE FOREGOING IS TRUE AND CORRECT.

DATE JUN 11 1985

[signature]

* NOTARIZATION NOT REQUIRED

JUDICIAL COUNCIL FORM 982(a)(5) (1-1-68)

(70)

Chapter 11

THE ISSUE OF CONSENT

11.1 General Background

Plaintiff is well aware that there is, and properly so, an almost universal respect for the sanctity of the family, and there is a proper reluctance of the courts to become involved in internal family matters. Dr. Nicholas Putnum introduces the background of the parent-child relationship:

> "For centuries children were considered the possession of their parents, much like livestock or furniture, to do with as they pleased. There were even times when infanticide was condoned in order to limit family size. Only relatively recently has society as a whole enacted laws to protect its children." [1]

Children are not pieces of furniture. They are little people. The California Legislature has recognized this fact

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1. Nicholas Putnam, M.D., "Emotional Abuse," Parents Magazine, Vol. 59, No. 9 (September 1984), p. 77.

and passed special legislation to protect these 'little people. Statutes such as Penal Code §§273a and 273d reflect the policy of the State of California that no person, parent or not, shall cause or permit a child to suffer unjustifiable physical pain.

As civilized people, we all recognize that parents have a duty to do more than merely refrain from inflicting unjustifiable physical pain. Parents have the affirmative duty and obligation to provide support for their children.

Without question, this duty of support includes the duty to provide medical treatment when needed. Indeed, parents have been tried criminally for failure to provide medical treatment.

This duty of parent to provide medical treatment does not grant a license to the parent to do with the child's body as the parent desires. Children are people. People with rights.

11.2 Parents Power Limited

A parents legal power to consent to acts to be done to their children must and does have limits. Victor Hugo

illustrates exactly what it means to have no limitation upon the power of an adult, parent or not, to deal with a child. The comprachicos:

> "The comprachicos did not merely remove a child's face, they removed his memory. At least, they removed as much of it as they could. The child was not aware of the mutilation he had suffered. This horrible surgery left traces on his face, not in his mind. He could remember at most that one day he had been seized by some men, then had fallen asleep, and later they had cured him. Cured him of what? He did not know. Of the burning by sulphur and the incisions by iron, he remembered nothing. During the operation, the comprachicos made the little patient unconscious by means of a stupefying powder that passed for magic and suppressed pain. . . .
>
> "In China, since time immemorial, they have achieved refinement in a special art and industry: the molding of a living man. One takes a child two or three years old, one puts him into a porcelain vase, more or less grotesque in shape, without cover or bottom, so that the head and feet protrude. In the daytime, one keeps this vase standing upright; at night, one lays it down, so that the child can sleep. Thus the child expands without growing, slowly filling the contours of the vase with his compressed flesh and twisted bones. This bottled development continues for several years. At a certain point, it becomes irreparable. When one judges that this has occurred and that the monster is made, one breaks the vase, the child comes out, and one has a man in the shape of a pot." [2]

No one would claim that a parent has the legal power in the State of California to treat a child as did a comprachico. There are limits to what a parent may

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2. Victor Hugo, The Man Who Laughs, translated by A. Rand, "The Comprachicos," The Objectivist, Vol 9., No. 8 (August 1970) pp. 1-2.

(73)

authorize.

Plaintiff Adam London claims that those limits are set by the definition medical treatment.

Treatment. Not mutilation.

Parents may consent to intrusions upon and excisions from the persons of their minor children so long as those actions are for medical treatment. Torture, mutilation, and physical distortion are forbidden.

Forbidden. Even if the name given to the torture, mutilation or physical distortion is surgery. Forbidden even if the torture, mutilation or physical distortion is done by a person licensed by the State as a physician and surgeon. Forbidden even if the torture, mutilation or physical distortion is done with the consent of a parent. Treatment is the standard, not licenses, not "common practice," and not "consent" of a parent "on behalf" of a minor.

A parent cannot consent "on behalf" of a child because that concept requires that the parent be the agent of the minor who is not legally capable of giving consent. If the minor cannot give legal consent, the agent of the minor is within the same disability.

It is the position of Plaintiff Adam London that a

(74)

parent can only "authorize" or "consent" to the removal of healthy, living tissue from the body of a child unless that action is in the furtherance of medical treatment. This is discussed in greater detail below.

Plaintiff emphasizes that the "authorization" or "consent" given by a parent is that of the parent and is not "on behalf of" the minor.

Adam London did not consent to the circumcision.

11.3 Medical Treatment

The key to the issue of parental consent lies with medical treatment. This, therefore, is central of the issues of this case.

11.3.1 Medical Treatment Defined

"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. Kirschner v Equitable Life Assur. Soc. of U.S., 157 Misc. 635, 284 N.Y.S. 506, 510; Hester v Ford, 221 Ala.

(75)

592, 130 So. 203, 206." Black's Law Dictionary, (Rev. 4th Ed., St. Paul: West Publishing Co. 1951) p. 1673.

A leading Texas 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." Little v Little, 576 S.W.2d 493, 495 (1979).

Medical treatment means any medicine or application which puts an end to disease and restores health or one that relieves but does not necessarily end a marked condition. Mangieri v Spring Tool Co., 161 A.2d 765, 767, 769.

11.3.2 Defined in California

California follows the majority of courts in its definition of medical treatment. Medical treatment is something which will reasonably and seasonably tend to relieve and cure. Los Angeles County v Indust. Acc. Comm., 56 P.2d 577, 579, 13 CA2d 69. Union Iron Works v Industrial Accident Commission, 210 P.2d 410, 413, 190 C. 33.

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

(76)

correction is "treatment." The removal of any normal, healthy, non-diseased, uninjured part of the body is not "treatment." It is mayhem.

To repeat, surgery done without the consent of the person being subjected to the surgery is a battery. Weinstock v Eissler, supra; Rainer v Buena Community Memorial Hospital, supra; Cobbs v Grant, supra.

To the extent surgery is done to a child, the purpose of which is not the curing of a disease, repairing an injury or making an abnormal part of the body normal, is at best battery, and at worst to force a child to experience, first-hand, life with the comprachicos.

11.4 No Treatment Here

To qualify under the definition of treatment, there must be some sort of disease or abnormality. There was no disease. There was no abnormality. There can be no treatment unless there is a disease or abnormality.

Defendants do not even attempt to claim they were administering any form of medical treatment. On the contrary, they freely state that there was no medical reason

(77)

to do what they did. This is not a case involving "mis-treatment" or "malpractice." Plaintiff was normal, healthy baby boy when he was attacked.

11.4.1 Admission of All Defendants

Defendants Kaiser, Permanente and Glasser have made the following statement to this court on two occassions. The first when they attached it to their Demurrer to the Complaint as Exhibit A. The second when they attached it to their Answer to the Complaint as Exhibit A.

> "Circumcision is a surgical procedure for removing the foreskin from the penis. There are no medical reasons for the performance of routine circumcision of the newborn male."

11.4.2 Admission of Glasser

There can be no treatment unless there is a disease or abnormality.

Defendant Glass admitted that Plaintiff's penis was not diseased. See Defendant Glasser's Response to Plaintiff's First Set of Requests for Admissions, Request For Admission Number 7, page 2, line 8.

(78)

Defendant Glass admitted that Plaintiff's penis was not abnormal. See Defendant Glasser's Response to Plaintiff's First Set of Requests for Admissions, Request For Admission Number 8, page 2, line 10.

11.5 Minor Cannot Consent

With some specific exceptions, there is no California statute granting to a minor the power to consent to medical treatment.

None of the specific statutory exceptions contained in the Civil Code apply in this case. Even where exceptions are provided, the minor must have attained the age of 12 or greater, be married, be in the armed services, or relate to pregnancy.

Plaintiff Adam London was barely one week old. He simply could not consent. He did not consent.

(79)

11.6 Power of Parent To Consent

The power of a parent to consent to surgery upon minor is limited to the power to consent to medical treatment.

Plaintiff has been unable to find any California statute which authorizes a parent to consent to any medical treatment. This parental authority has been assumed in California law, but never placed into code.

Interestingly, while California does not specifically permit a parent to directly consent to medical treatment, California Civil Code §25.8 permits a parent to "authorize in writing any adult person into whose care the minor has been entrusted" to consent to specific items.

These specific items are: X-ray examination, anesthetic, medical or surgical or dental diagnosis or treatment and hospital care by a licensed physician or dentist.

These specific items virtually define "medical treatment" as that term is universally used by the courts.

Plaintiff has been unable to find any statute or any

(80)

court decision which makes any mention of authorization for parents, for guardians or for courts, to consent to surgery upon the body of a minor other than for medical treatment.

11.7 Medical Treatment Sets the Limits

Medical treatment sets the limits of the legal power of parents to authorize or consent to intrusions upon the bodies of their children.

"Significantly, however, for our purposes, this power of parents, managing conservators and guardians to consent to surgical intrusions upon the person of the minor or ward is limited to the power to consent to medical 'treatment'." Little v Little, supra, p. 495.

In dealing whether or not a guardian could donate a body organ from a minor, the Louisiana Court of Appeal ruled that the surgery could not take place, and that "protection to a minor's right to be free in his person from bodily intrusion to the extent of loss of an organ unless such loss be in the best interest of the minor." In Re Richardson 284 So.2d 185, 187 (1973).

(81)

11.8 Hypothetical Illustrations

In order to have a full perspective of the situation, it is necessary to view the situation of a prospective surgical act from two slightly different hypothetical positions.

11.8.1 Hypothetical Case Number One

Not wishing to risk giving consent without a court order, a parent or guardian petitions this court for an order to circumcise.

The child is healthy and normal in all respects. The circumcision is to be a "routine" circumcision. That is to say, no medical reason exists for the circumcision. Could this court, sitting in parens patriae, order such an operation?

In a 1984 case, the California Court of Appeal, dealing with a request by a Conservator to have the Conservatee sterilized, stated:

"Because competent and incompetent persons

(82)

differ significantly in their ability to give informed consent, a classification based on th.: difference is reasonable. The state has a duty to take reasonable steps to protect an incompetent person's rights to privacy, which--as we have seen--include the right to bear children or not. (See Roe v. Wade, supra, 410 U.S. 113 at pp. 152-154, 93 S.Ct. 705 at pp. 726-727, 35 L.Ed.2d 147; People v. Belous, supra, 71 Cal.2d 954 at pp. 963-964, 80 Cal. Rptr. 354, 458 P.2d 194.) Sterilization is generally an irreversible procedure. (See Guardianship of Tulley, supra, 83 Cal.App.3d 698 at p. 701, 146 Cal.Rptr. 266; Matter of A.W. [Colo.1981] 637 P.2d 366, 369 fn 4.) As the present record shows, there are many types of birth control which will prevent conception. Alternatives short of sterilization are thus available which will permit exercise of the right not to bear children." Conservatorship of Nieto, 199 Cal.Rptr. 478, 485-486.

The court, in Nieto said: "The state has a duty to take reasonable steps to protect an incompetent person's rights to privacy." A minor, and certainly a one week old infant, is, by definition, legally incompetent. Certainly the right to remain as one is born rather than have his organs of sexual reproduction mutilated or altered for no medical reason is within those rights of privacy which must be protected by this court.

The court in Nieto said: "Sterilization is generally an irreversible procedure." So is circumcision.

The court in Nieto said: "Alternatives short of sterilization are thus available." The same is true of circumcision.

Plaintiff submits that if the parents of Plaintiff

requested this court to issue an order to have Plaintiff circumcised, under the conditions in which the penis or foreskin was not abnormal, not injured and not diseased, that this Court would not and could not, issue an order that Plaintiff be circumcised.

"It is likewise beyond dispute that when, as here, the deprivation of rights comprises a serious invasion of one's privacy and well being, the state is not entitled, but also mandated to provide adequate procedural safeguards to ensure the avoidance of potential abuses (cf. Wyatt v. Aderhold [M.D. Ala.N.D. 1974] 368 F. Supp. 1393)." Guardianship of Tulley, 83 CA3d 698, 146 Cal.Rptr. 266, 271.

11.8.2 Hypothetical Case Number Two

A 10 year old boy is not circumcised. His penis and foreskin are normal, uninjured, and not diseased. However, for non-medical reasons his parents decide that he should be circumcised before attaining the age of 11.

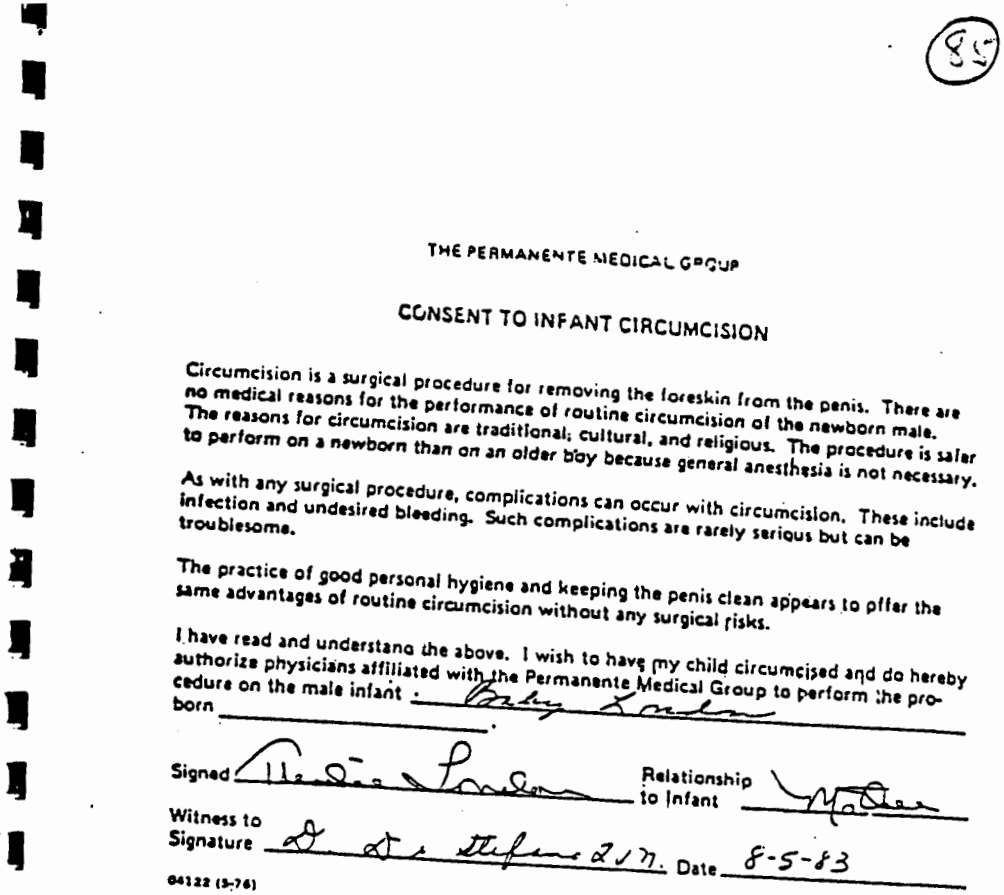
The boy objects. He does not want to be circumcised. Through a Guardian Ad Litem, he brings an action to enjoin any and all persons from removing his foreskin.

The 10 year old petitioner, while not legally competent, is not livestock or a piece of furniture to be

abused. As such, the court, in parens patriae, has the duty to protect the child.

Can this court refuse to protect the child from a surgical procedure which has not medical purpose?

The answer is no. This court is "mandated to provide adequate procedural safeguards to ensure the avoidance of potential abuses." Guardianship of Tulley, supra.



THE PERMANENTE MEDICAL GROUP

CONSENT TO INFANT CIRCUMCISION

Circumcision is a surgical procedure for removing the foreskin from the penis. There are no medical reasons for the performance of routine circumcision of the newborn male. The reasons for circumcision are traditional; cultural, and religious. The procedure is safer to perform on a newborn than on an older boy because general anesthesia is not necessary.

As with any surgical procedure, complications can occur with circumcision. These include infection and undesired bleeding. Such complications are rarely serious but can be troublesome.

The practice of good personal hygiene and keeping the penis clean appears to offer the same advantages of routine circumcision without any surgical risks.

I have read and understand the above. I wish to have my child circumcised and do hereby authorize physicians affiliated with the Permanente Medical Group to perform the procedure on the male infant Baby London born _____.

Signed Nadine London Relationship to Infant Mother

Witness to Signature D. A. Stephens RN. Date 8-5-83

64122 (5-76)

elective as well as emergency, to be performed on minor children." (Defendants' Points and Authorities, page 10, lines 5 through 6.)

Civil Code §25.8 does not say that. Section 25.8 deals only with authority to give a non-parent the right to consent to treatment. Not the right to consent to "any" medical or surgical procedure, but only for treatment. In fact, nothing in the section even hints at purely elective procedures. This section does not support Defendants' contention.

The Defendants conclude from a case dealing with parental consent to surgery needed for treatment (Rainer) and a case in which there was no consent due to an emergency (Farber), that California "explicitly allows . . .elective" procedures to be performed. Such a conclusion is not supported by the authorities cited.

INFORMED CONSENT

Simply as a matter of logic, if a patient's consent is not sufficiently informed as to be an intelligent, knowing, free and voluntary act, it would be no consent at all, just as an involuntary criminal confession is, in legal theory,

(87)

no confession at all.

An operation performed without "informed" consent would thus be one without any consent legally significant, and would therefore be a battery.

The Duty to Disclose

The cases cited by Defendants, Rainer and Farber, when read together, stand for the proposition that in the absence of an emergency which necessitates immediate medical action, and where the patient is competent and in possession of his faculties, a physician who proposes to perform a medical or surgical procedure is under an obligation to explain the procedure to the patient and to disclose the dangers incident to it, so that the patient may make an intelligent and informed choice as to whether to consent.

These cases, and many others, outline the specific duty of the physician who is about to perform a surgical operation, where circumstances permit as they do so permit in the case at bar, to disclose the following items to the patient (or, in Defendants' theory in the instant matter this would be a duty to disclose to the parent):

(88)

(1) The diagnosis;

(2) The general nature of the contemplated procedure;

(3) The risks involved;

(4) The prospects of success;

(5) The prognosis if the procedure is not performed; and

(6) Alternative methods of treatment, if any.

Failure to Disclose

Defendant Glasser could not have disclosed a diagnosis. He admits there was nothing wrong with Plaintiff.

The general nature of the contemplated procedure was not discussed by Defendant Glasser with either parent of Plaintiff.

The risks involved were not discussed by Defendant Glasser with either parent of Plaintiff. In fact, all of the testimony of both parents was to the effect that they did not know enough about the procedure at the time the surgery

(89)

was done.

The prospects of success were assumed, but never discussed.

The prognosis if the procedure is not performed. Since Plaintiff was normal before the surgery, the only prognosis which could have been given would have been that he would not be the same after the surgery. That is to say, he would be abnormal. This was not disclosed to either parent.

Alternative methods of treatment, if any, were not disclosed. It is difficult to imagine what Defendants would suggest as to alternative methods of treatment in this situation since treatment was not what they intended to do. The choice was not one sort of treatment versus another, it was mutilation versus normality.

For purposes of Defendants' Motion for Summary Judgment, it is enough that the issue of "informed" nature of any alleged consent has not been dealt with previously during discovery by either party and remains, now, to be decided at trial.

The Basic Issue

(90)

The basic issue of this case is not whether or not the parents of Plaintiff gave an informed consent. The issue is whether or not they had the right to give any consent whatsoever, informed or not informed.

The examination of the issue of "informed consent" distracts attention from the basic issue and need only be examined in the event the court rules that a parent does have the right to consent to a surgical procedure which has no medical purpose and is not for the treatment of any disease or abnormality.

CONCLUSION

A parent does not have the right to consent to a surgical procedure which has no medical purpose or is not for the treatment of a disease, injury, or abnormality.

Richard W. Morris and
Jeannette Edell

By: Richard W. Morris
RICHARD W. MORRIS
Attorneys for Plaintiff