A Treatise from the Trenches: Why Are Circumcision Lawsuits So Hard to Win?

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Abstract Barriers of many different types make successful circumcision-related lawsuits extremely difficult to bring. Actual cases we and others have brought show that among factors impeding progress are (1) financial risks; (2) procedural difficulties; (3) misconceptions and compassion misallocation among judges, lawyers, jury members, the media, and the general public; (4) constraints unique to circumcision lawsuits that are imposed by statutes of limitation and statutes of repose; (5) need for parental participation in lawsuits; (6) problem of damages not being atrocious enough to justify litigation; and (7) the scarcity of helpful case law. Players whose roles we will be scrutinizing include clients, lawyers, judges, juries, courts and procedures, doctors, media, and fellow activists. We will discuss the many reasons why potential plaintiffs never even make it to the filing stage. We will look at why judges and juries are starting to understand that just having a foreskin is not reason enough to have a circumcision.

Introduction

There is no one answer to why circumcision lawsuits are so hard to win.[1] It is partially related to the difficulty of any sort of litigation and partially related to problems peculiar to this highly specialized area of the law. No global answer can be offered. But approaches to the answer can be glimpsed by reviewing all the many pieces of the puzzle that have to come together in litigation. I will be looking at two cases from the last few years in which I was directly representing the plaintiffs. In one case, brought by infant Dennis Pappas[2] and his parents Cyril and Maria, I represented a wrongfully circumcised infant whose parents did not give proper consent to the procedure. In the other case, brought by lead plaintiff William Anastasian and his wife Laura Anastasian, an Armenian man, identified with a culture within which circumcision is not practiced, went to a physician for a vasectomy and instead was circumcised by mistake.

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[1] Thank you to John Geisheker for his assistance with this article.

[2] All names of parties and witnesses other than foreskin-friendly doctors have been changed.

G. Denniston et al. (eds.), *Circumcision and Human Rights*,

Litigation is performance art with strict, often arcane rules and with real world results. But it is also the art of convincing all the players — willingly or otherwise — to lend their various talents toward the ultimate success of your clients. The cast includes clients, lawyers with whom you are working and on the opposing side, judges, juries, courts and procedures (very real players even though they are not human), doctors (who can appear as "percipient witnesses," i.e., witnesses reporting on examinations of parties, as experts for your side, and/or as experts for the other side), and other groups — media, activists.

Before we get to the players, let's first look at why most circumcision lawsuits go nowhere, and then at why sometimes we may hope for more. I will also discuss what limited case law does exist, helpful and otherwise. Then the stage will be set to meet and learn about the various actors, group by group. We will close with what conclusions we can draw.

Reasons Why Most Circumcision Lawsuits Go Nowhere

Most circumcision lawsuits go nowhere and, indeed, most potential legal actions of any sort do not ultimately reap substantial success. In a moment, I will look at some difficulties more or less unique to activist actions. First, let's consider issues common to all lawsuits.

The barriers to bringing any sort of legal case can be daunting. Indeed, this is the very reason why so many people hire attorneys, often at substantial hourly rates — to avoid having to confront litigation themselves. Costs and expenses are substantial, and some, such as filing fees and lawyers' hourly rates, may have to be paid before a case even begins. Typical retainer agreements require clients to reimburse their lawyers for costs and expenses. In addition, lawyers are compensated either at an hourly rate or else by receiving a percentage of any settlement or court award. Often a retainer fee must be paid up front, and additional money to cover costs and expenses may also be required at the front end. If the clients cannot pay the money, whatever the retainer agreement may say, the buck stops with the lawyer, who ends up having to fund many of his or her cases.

Law is an art, not a science. Even in cases that are much more common than circumcision lawsuits, it is often hard or impossible to gauge the likelihood of success, and/or the probable size of an award or settlement if one is received. This is all the more true in activist litigation given the small amount of precedent and the widely varying results such cases have had. Rules can operate harshly and yet, paradoxically, are often indefinite enough that even the lawyers involved cannot confidently predict ultimate results.

Civil procedure is very complex. Rules vary from state to state, of course, but also from jurisdiction to jurisdiction, according to local rules and even, as discussed below, from court to court. Mistakes can forever prevent certain remedies or rights.

Now, let's consider some matters that are unique in their effects on activist litigation.

Statutes of limitations are procedural bars to bringing cases after a certain period of time has lapsed. The purposes of limitations periods include protection of judicial resources and discouraging potential plaintiffs from "sitting" on claims that, after the passage of time, may be more difficult to resolve due to the death or unavailability of potential witnesses, loss of evidence, and so on. Statutes of limitations typically do not start running until the potential plaintiff has legal capacity, i.e., has reached the age of majority.

Some states also have statutes of repose. Under the assumption that plaintiffs lacking legal capacity can have lawsuits brought on their behalf by parents, guardians, or other agents, statutes of repose require all lawsuits of certain types to be initiated within a certain number of years, even if the potential plaintiff lacks legal capacity. Naturally, a certain tension exists here between, on the one hand, the desire for finality and for lawsuits to be brought within a certain period of time and, on the other hand, concern for minors' rights. Washington, for example, has a statute of repose, while at the same time its supreme court has found the statute of repose unconstitutional and has held that it is without effect for minors due to its violating children's rights.[1] Some states adhere rigorously to statutes of limitation and repose, but interpret notice requirements liberally. Therefore, you can still bring your lawsuit if you can show that the plaintiff did not learn of his injury until recently. The limits of these doctrines vary state to state and, in most cases, have not been determined, certainly not with reference to circumcision litigation.

The uniqueness of this procedure is that, in states with rigidly interpreted statutes of repose and limitation, the possibility of relief may be eliminated by the operation of these statutes. For any other lawsuit due to injury to a child, parents or guardians will have ample opportunity to take action. Due to the nature of circumcision, often it is the boy himself who learns of the harm when he becomes sexually active and/or old enough to perform his own Internet searches and other inquiries.

Cultural factors also play a significant role. Contrary to myths about social change lawyers eradicating racism in the Old South, law tends to follow society, not to lead it. Our puritanical culture reinforces our lack of legal and societal compassion for the screaming boys. Potential clients may be suffering from bad adhesions, from scarring, from a penis that points 90° to the left or to the right. Yet, compassion may be focused on people other than the victims of this unnecessary surgery. In the Pappas case, it surprisingly may have been misdirected to the physician who performed the procedure in the first place, who happened to be very pregnant during trial. In the Anastasian case, jury sympathy may also have been directed to the elderly physician despite the numerous malpractice cases he had lost in the past and despite his other unsavory characteristics.

Circumcision rates are dropping.[2,3] As a culture, and certainly as a legal culture, we are starting to challenge our previous understanding that just having a foreskin was enough reason to have a circumcision. Legal culture is slow to transform, but change is coming, as judges, lawyers, jury members, the media, and the general public show their slowly increasing willingness to endorse the right to genital integrity for males that is so easily acknowledged for females.

Parental involvement as givers of proxy consent provides a buffer zone that the defense bar has in the past exploited. Parents often select the procedure even without the physician suggesting it and, therefore, a bad result can be cast as the regrettable but not legally punishable result of a risk willingly assumed by the parent. Unfortunate physicians can paint themselves as commercially constrained and required by their obligations to patients to perform a procedure even while they argue that it is not well-advised. Beyond that, the natural professional desire exists to make parents happy. Acceptance of activist lawsuits is hampered by social misconceptions and compassion misallocation among judges, lawyers, jury members, the media, and the general public, which in turn are related to society's acceptance of circumcision and our country's puritanical heritage.

Parental participation or cooperation is often needed to initiate a circumcision lawsuit and all too often is unavailable. An 18-year-old boy has limited abilities to buck his parents, and limited abilities to bring a case on his own without their support. One very determined young man, threatened by his parents with their withdrawal of his college support if he persevered in a lawsuit, eventually relented and cancelled his lawsuit.[4]

Sometimes as a lawyer you may feel that your whole profession is a bit twisted. Often the best thing for a case is the worst thing for a client, in that the more problems they have had as a result of an injury, the greater the relief is likely to be. The flip side of this is a sad truth: most circumcisions do not produce atrocious enough results to justify litigation. For many reasons related to all the players we will discuss below, most potential plaintiffs never even make it to the filing stage. It is not an issue of the validity of their complaints or how "good" or "bad" they may be as clients.

For example, in one case with which we are familiar, the client's penis, as a result of a botched circumcision, was buried into his abdomen. It then had to be surgically retrieved, leaving no less than 25% of it as scar tissue. Anesthesia was deemed unusable under then prevailing medical practice, so naturally the corrective procedure (not to mention the initial procedure) caused unspeakable pain to the tiny baby. All physicians would agree this fell well below the standard of care. Yet, damages probably were not high enough to justify a lawsuit. Most foreskin retraction cases fail for the same reason, sympathetic as I always am to the parents' and child's plights and complaints.

One final, serious hurdle that can only be solved by the passage of time and further legal efforts is the scarcity of helpful case law, discussed in more detail below. Overall, the limited precedent that does exist is quite positive.

Reasons Why We Sometimes Hope for More

Litigators tend to have the heart, if not the soul, of a gambler. The possibility of the big win justifies the struggle, the frustration, the time spent on the mundane, and the all too frequent losses. In both cases, we hoped for a substantial victory that would amply compensate the plaintiffs while at the same time providing ARC with a

sizable warchest. Such was not to be. Harm was clear in both cases. Yet, both cases, as is common if not universal with circumcision cases, had valuation problems.

Anastasian's loss was undeniable. By his own estimation, with his foreskin, he lost 95% of the sexual sensation he previously enjoyed. Quantifying the harm would be helpful if we could do it, perhaps by testing the sensitivity in the glans penis relative to those areas still covered in skin. The circumcision directly resulted in the breakup of his marriage, and we therefore filed a claim on his wife's behalf as well. (The two maintained a friendship after filing for divorce.) The causes of action were medical malpractice, battery, breach of contract, negligent infliction of emotional distress (termed "negligence" in California), intentional infliction of emotional distress, and loss of consortium (a cause of action on behalf of his wife due to her deprivation of his family services). The case was valued at over half a million by our expert co-counsel. We thought the Glendale venue was good for us with the high Armenian population.

Dennis' loss was perhaps even greater. The circumcision needlessly caused Dennis substantial pain and suffering and has permanently scarred him. Dennis' circumcision has led to his estrangement from the community and family of his father. The practice is unheard of in both Ecuadorian and Greek cultures. When in Greece, it is a problem for him that he has been circumcised. Naked baths are taken daily.

Dennis was circumcised by a first-year medical resident, Dr. Sarah Bernstein, who was untrained in the procedure (and happened to be Jewish). Defendant Elmhurst Hospital — which is owned by New York City — engaged in systematic discrimination against Spanish-speaking mothers from whom "consents" for circumcision were fraudulently extracted without their understanding what they were signing. Maria specifically refused circumcision in writing. Maria was never given a properly translated form to read and sign. Dates and times were obviously altered. Her "consent" form was not properly translated into Spanish, was incomplete, failed to describe the procedure, and contrary to its own stated requirements, was not properly witnessed or executed. Her "consent" was obtained without her first being informed — as is legally required — of the risks, harms and alleged benefits of male circumcision. The form was signed at the top of page two, evidently without her being shown page one in any language. At no time was the potential circumcision of plaintiffs' newborn ever discussed with Dennis' primary care physicians.

This was probably the first circumcision case brought as a civil rights case. We raised federal claims based on denial of parental rights to make decisions regarding medical procedures performed on children, discrimination on grounds of race and national origin in violation of federal civil rights, as well as the more usual state law claims based on medical malpractice, lack of informed consent, gross negligence, intentional infliction of emotional distress, and parental claims for loss of society of the child. We won a procedural decision permitting us to amend the complaint, originally designed for state court, in order to proceed in federal court based on discrimination in violation of federal civil rights law.[5]

My co-counsels in this case were two litigators experienced in bringing penile tort cases. We knew that a victory would be important to the movement and could have national impact. But the judge would not allow additional victims into the

case, not in their own right (as a class action) and also not even insofar as they affected Pappas' case, to show a "pattern and practice" of discrimination by the hospital.

Scarcity of Helpful Case Law

I am aware of only a handful of reported cases centrally relating to circumcision. Only a fraction of those are favorable and likely to be relevant to other lawsuits. Following is a summary of each known case addressing a circumcision on its merits. Our work is to expand the relevance of each known victory by educating the judiciary, the bar, and the public at large regarding the right to genital integrity.

Courts often search for any conceivable basis, such as a narrow decision regarding a lack of legal standing, which may allow them to avoid addressing the potentially earthshaking (and possibly politically and/or personally treacherous) merits of such cases. At least three times, in 1989, in the Adam London case,[6] then, in 1996, in the Fishbeck v. North Dakota case brought by Zenas Baer,[7] and most recently in Baer's Flatt case,[8] courts have avoided squarely addressing the legality of male circumcision by diverting the discussion into such peripheral, procedural issues as standing. In the Pappas case, as we have seen, the federal district court judge went to extraordinary, monumentally improper lengths to prevent fair consideration of Dennis' complaint regarding his wrongful circumcision.

By contrast, a preliminary, procedural decision in the Anastasian case allowed us to amend our complaint to proceed in federal court with the discrimination claim violated federal civil rights law.[9]

When a court cannot muster any valid reason to skirt the circumcision issue, peanuts may be awarded. In a lack of consent case where the medical resident failed to read the patient's record, nominal actual damages were held available, although punitive damages are unavailable in absence of gross negligence.[10] A $20,000 general damages award was upheld in a medical malpractice action over circumcision that resulted in over two weeks of hospitalization and necessitated two incisions on the penis.[11]

Occasionally a substantial award comes through. An appellate court upheld a trial court's finding that a third-year surgical resident was negligent in modifying a circumcision technique on child, resulting in burning off of child's penis, and upheld the jury's $2.75 million award. The state was held vicariously liable since the resident was employed by a state agency, was working in a state facility, and was supervised by a state medical school.[12] A trial court's $2.25 million award was reinstated for an adult circumcision that rendered sexual intercourse impossible and reduced penis in size by 4 in.[13] A trial court's $200,000 judgment for a minor was upheld where the Plastibell device used in the circumcision did not fall off after eight days and the child suffered injury.[14]

Sometimes a court employs that rarest commodity, common sense. Despite the absence of expert testimony, an appellate court held that a trial court erred in granting a directed verdict (i.e., in requiring that the jury find for the defendant) to the

defendant physician where a Gomko circumcision clamp slipped when removed, lacerating the baby's penis and causing infection and a cyst. Expert testimony is not necessary, the court held, where a lack of skill is so apparent as to require only common knowledge and experience to understand it.[15]

Nor will procedural errors or delays always knock out a case. One appellate court held that even where patient delayed trying of case until more than five years after filing, genuine issues of fact exist as to skill exercised by physician and purpose of "circumcision" operation that actually cut urethra and excised two large segments of penis.[16]

At least one other circumcision case besides Pappas addresses the destruction of and inadequate maintenance of records. A hospital was held to have violated its duty to maintain and preserve records when it destroyed records pertaining to a circumcised boy who suffered infection, a subsequent seizure and permanent, severe brain damage and disability. Its destruction ("spoliation") of evidence shifted the burden of proof to the defendants, including the hospital, to prove that the boy's injuries were not caused by their negligence. The defendants had to assume the burden of proof on both causation and medical negligence.[17]

The doctrine of res ipsa loquitur (literally, "the facts speak for themselves") was held applicable to a suit against a hospital that neglected to treat an infection, despite a black spot present on the plaintiff's penis prior to his initial release, eventually resulting in the boy losing his glans penis. Roughly speaking, the court held that the facts mean that the hospital must necessarily have been negligent.[18]

In a recent and widely publicized case, the Oregon Supreme Court ruled that a 12-year-old boy's own wishes must be investigated by the district court where a newly converted Jewish father sought to compel the circumcision of his son against the wishes of his ex-wife.[19]

On the defendants' side, summary judgment was granted to a defendant in a federal civil rights case brought under the section 1983 "color of law" principle against a prison for medical care to a prisoner, including circumcision that was not adequately explained to him and that had questionable medical value. The court held that, at most, the plaintiff stated a claim for negligence or medical malpractice for failure to inform.[20]

A triumvirate of cases basically held that in a circumcision case, you have to have expert witnesses. It was held that no action in negligence was available, despite a large scar at a circumcision site, where no evidence was presented regarding the geographic area's standard of care, no expert testimony was provided about the standard method to perform operation, and no evidence was provided showing that the physician had been unskillful in circumcising the boy.[21] Expert testimony has been held to be required on behalf of a plaintiff in an action in negligence regarding his circumcision.[22] A trial court's summary judgment for defendants was affirmed when plaintiffs failed to meet their burden of establishing standard of care and the doctor's failure to conform to it, because they did not offer required expert evidence, instead offering hearsay and the father's layman opinion.[23] Finally, no right of recovery was found where a baby is circumcised by a physician four days prior to an intended bris.[24]

Settlements usually require parties to be silent about their terms. However, we have reason to believe there may have been a settlement for over $20 million in a 1985 case from Georgia. In 1986, a Louisiana family was awarded $2.75 million by a jury after a young boy's penis was severely burned during a circumcision and had to be amputated.[25] We also know of a settlement for 800,000 UK pounds (about $1.5 million in today's dollars) for a circumcision that left an adult "grossly genitally mutilated."[26] In 2001, a Sacramento, California jury awarded $1.42 million to a boy for a botched circumcision.[27] A settlement worth $117,000 was agreed to for a circumcision done without parental permission in 1997 in the Boston area.[28] In 2003, a young man won an undisclosed settlement as compensation for his circumcision. Despite parental authorization for the procedure and its non-exceptional result, legal validity of the mother's assent was questionable as she was debilitated at the time she agreed.[29]

That constitutes every known case on the record centrally addressing circumcision. It is not much to go by, certainly not in the modern era of profligate litigation. Each case can frustratingly seem confined to its facts, yet a general principle is developing whereby courts are grudgingly starting to acknowledge at least the kernel of a right to genital integrity.

Clients

Clients naturally play a major role in the success of any case. In infant circumcision cases, often it is the parents who become the major players. Cyril Pappas loomed very large, ironically overshadowing the biggest victim, his son. Cyril was an interesting character. Born the oldest boy in a poor Greek family, he saw his only hope to improve the family's economics and joined the merchant marine after high school. At age 25, he jumped ship and made his way to the US, becoming a citizen in 1978.

Controlling Cyril in court became a big problem that we never fully solved. He was clearly emotionally damaged. Whether it was actually due to his son's circumcision was frankly unclear to us, though clearly the father thought it was, and who were we to argue with him? The possibility of physical violence against us or others could never be completely ruled out from someone who, while still on medication, had sent me no fewer than 29 letters, usually handwritten and running to 10–20 pages each, and left well over 300 voicemail messages on my answering machine, typically at three in the morning and often 10–14 messages at a time, one right after the other. We also feared a more common form of aggression, a malpractice suit. Cyril was a man who was critical of everything and everyone, a man for whom nothing was ever good enough. He mailed scathing attacks to the city's examining psychiatrist, as well as to his own, admitted imperfect medical expert. One problem for us was that given the way he played his role, instead of coming across as the victim that in fact he was, he appeared aggressive and unsympathetic.

Cyril's wife, Maria, also a fascinating individual, was a Roman Catholic from Ecuador with a Master's degree in clinical psychology. She worked as a bilingual Spanish/English teacher. Her speaking some English complicated matters, as our claim was partly based on the inadequacy of the Spanish-language consent forms she signed. Clearly, despite her education, she did not understand what she was signing. Just as clearly, she would be a good witness. We counseled her not to speak in English inside or within shouting distance of the courtroom.

Starting at age four or five, son Dennis had noticed that he was different from other Greek boys and from his father, and he was somewhat distressed by this fact. We discussed the possibility of putting him on the witness stand. His mother blocked this plan, as she felt it would signal to him that something is wrong with him. It also would be risky strategically, as it could offer an opportunity to the other side to lead him down a path toward admitting that nothing is wrong with him.

William Anastasian was also headstrong. That seems to be a trait of any client or parent whose convictions are strong enough to lead them to be willing to weather the various difficulties attendant on bringing litigation. But, he would not admit the strength of his own opinions, adopting a sort of Colombo-esque pose that he was only a client and was untrained in legal matters, while at the same time freely substituting his judgment for ours. At one point, he wanted us to try introducing a pornographic videotape as evidence of the harm caused by circumcision. Common sense would tell you what the correct response should be; this is a textbook example of evidence that would be excluded from trial as being far more prejudicial to a case than any probative value it might have. Anastasian was ostensibly an activist, though at times I wondered if this was primarily a ruse to ingratiate himself with his lawyers.

William proved his own worst enemy when, as discussed above, he refused to allow our legal expert co-counsel into the case. Ironically, William proved an unsympathetic player and not a great witness. He was too argumentative and opinionated to come across to the jury as likable, credible, and rational.

On the eve of trial, William unburdened himself to me, stating that he thought I had an "aggressive, abusive" side. He added that my approach to relationships is totally different from his, and that he has been frustrated by our relationship. Well, he is not the only one who felt that way! He was a remarkably unappreciative client. William also made some unwise decisions stemming from his headstrong personality, rejecting two settlement offers, each for $100,000, the second made the month before we went to trial. Everyone Joseph spoke to urged him to accept this offer, but he steadfastly refused it.

Lawyers

The discovery process requires each side to share with the opponents prior to trial, all evidence it intends to introduce at trial that is properly requested during discovery. Discovery entails such specific processes as oral depositions in which a witness'

answers to questions from the opposing attorney are recorded by a court reporter, interrogatories or sets of written questions that the other side must answer, and requests that the other side produce all documents it intends to introduce. Discovery was initially created with the goal of simplifying litigation and making it more transparent, but of course that is not exactly how things have played out.

Perceptions of one's opponents and their likely reactions to events can play a substantial role in how a case evolves. Typically, each side tries to overwhelm and bluff the other. In the cases in which I have been involved, there have been obvious differences. In one case, our principal opponents were the State of New York and its government-employed lawyers working in a nice air-conditioned skyscraper. In the other case, we faced even fancier firm lawyers in an even nicer building. Meanwhile, we were more or less fanatics sending faxes in our pajamas. The other side had a lot of other cases and did not have any particular concern with this one above the others, whereas we had few other cases and a strong interest in protecting and defending genital integrity. Each side knew the other side fairly well. I am not sure that our status hurt us in the case, as the defendants never knew for sure what we would do next, with our seemingly unlimited resources being plowed into the case, not to mention potential assistance from other activists where appropriate.

In the Anastasian case, I tried to bring in some very skilled co-counsel with strong expertise. Before they would enter the case, they required a certain change in the fee agreement. On the one hand, changing the fee agreement midstream was arguably not the nicest thing for them to ask from the clients. On the other hand, Anastasian was very unwise to turn them down.

One co-counsel, with whom we had previously worked well, abruptly departed from his senses, showing up for a pair of depositions dressed in shorts and a Hawaiian shirt. "I'm on va-cay," he helpfully explained, acting like a player who had forgotten his lines and was improvising. Badly. He was apparently drinking in the law office's bathroom in between deposition questions. What should have been a two-hour deposition stretched out to four times that length. ARC and our co-counsel were stuck with the bill. The court stenographer, who has 25 years of experience, said the lawyer must be crazy or on drugs, as he did not ask any questions that advanced the case, and was rude at times. After the deposition, he followed the stenographer out to the elevator, asking for her opinion as to how he had done.

The hired gun on whom we eventually settled in this case, though very experienced, resembled the other side in that he was not personally committed to the issue. After doing a great job in his opening statement, he gave a lackluster closing argument. In his defense, his performance may have been impacted by confrontations Anastasian was having with him in the halls, practically firing him on the spot.

As if the quirks of your own real or ostensible "friends" are not enough, you also have to deal with the attorneys for the opposing side. In the Pappas case, they completely flouted the discovery process by withholding from us until the third day of trial a critical item we had requested, the hospital's policy manual. Yet the judge did not see fit to sanction them in any way, despite our rightful pleas that he

do so. In the Anastasian case, at a mandatory arbitration hearing, at which we were supposed to try to settle our case, the opposing attorney was actually cracking jokes about our client and ridiculing him for the penile damage he had sustained!

Offers were extended shortly before trial in both cases. The Pappases received an insulting, token low-four-digit offer. I am not sure what the purpose of such offers is; surely the attorneys did not entertain the thought that the offer would actually be accepted. In the Anastasian case, the clients received a reasonable offer of $30,000, which they rejected, in a decision that seemed correct at the time. Later an offer of $100,000 was made as our opponents tempted us to avoid the bulk of discovery. The $100,000 offer was renewed the month before trial.

Judges

Each judge is different, and you ignore the differences at your peril. Local rules, sometimes set by the individual judge, render such idiosyncrasies into rules of the court. It is almost as if you were a chess player finding slight differences in the rules in each city: in Seattle, knights can also move diagonally, in Tacoma, you cannot castle on the queen's side of the board, and so on.

In the Pappas case, Judge Friedman (real name) was no less than the case's fourth judge. Judge Nickerson, the case's first judge and an excellent one, sadly passed away. The case was reassigned to a female judge, then reassigned to a visiting judge from Iowa, before finally being reassigned to Friedman. He was the case's second visiting judge, a conservative from Michigan who was given the case under the practice of the Eastern District of New York (New York City) of bringing in visiting judges to help with that district's huge caseload. He was in town for just a couple weeks and was charged with clearing up the oldest cases on the court's calendar, which included the Pappas case. Judge Friedman clearly did not like the case. Judge Nickerson had held that our case belonged in federal court, but Judge Friedman attempted to tell us, four whole years later after countless discovery conferences had been conducted, that there might be no federal jurisdiction. We were forced to write a legal brief stating why federal courts should be able to hear the case. Evidently, Judge Freidman eventually resigned himself to hearing the case and, "based on the court's own research," lifted his previous queries regarding federal jurisdiction.

Judge Friedman used his full power to orchestrate a favorable result in this case for the defendants. He telegraphed to the jurors his views of the case by yawning and closing his eyes during our arguments and, conversely, by leaning forward with interest and smiling and nodding his head during the state's presentations. He set up the verdict sheet sent to the jurors so that a finding for the defendant necessitated only a single quick "no" response, while a finding for the plaintiffs would require the jurors to answer each of a long series of questions a specific way. He then sent the jury out to deliberate at 5 PM on a Friday, with the highly disingenuous words, "Stay as late as you want, and if you don't finish, come back Monday." The judge

thereby effectively ensured the jury would take the quick way out by finding in favor of the defendants.

The judge refused us the usual rebuttal time during closing arguments. He excluded the other Spanish-speaking parents of boys also circumcised at Elmhurst Hospital, who would show a pattern and practice of discrimination by the hospital. Judge Friedman thereby effectively made it impossible for us to prove our federal claims, which is why we were in federal court in the first place.

The judge barred Doctors Cold and Van Howe from testifying. In Cold's case, it was because he does not perform circumcisions, and has no training in ethics or law. Bob Van Howe actually showed up at the courthouse, but still was not allowed to testify. Judge Friedman accepted the defense's contention that his statistical evidence relating to circumcision would be prejudicial (even though he has a Masters degree in statistics, along with medical expertise), yet refused to delay trial due to extremely prejudicial testimony of pregnant doctor. He also refused to sign an order denying us a stay, thereby effectively barring us from appealing his decision. Cases hang on such fine points. Van Howe was not even allowed to testify to impeach Dr. Bernstein's evasive, lying testimony.

The judge in the Anastasian case ran a tight ship. She was fair, but not willing to make exceptions.

Juries

Juries are an interesting relic of our legal culture's evolution from its British roots. In both the Pappas and Anastasian cases, juries did not give our clients what we felt they were due. There are understandable reasons why juries withhold their compassion.

In the Pappas case, visiting Judge Friedman hamstrung our ability to screen the jurors by barring us from directly interviewing the jurors. All questions for the jurors had to be passed through him and his magistrate despite the fact that other visiting judges allow direct juror questioning. Talking to the jurors directly allows development of a rapport, a relationship. This inevitably assists plaintiffs in educating a jury regarding their loss.

Judge Friedman evidenced a breathtaking willingness to prejudice the jury against us. He prevented the jury from even seeing critical evidence, excluded crucial expert witnesses from testifying, and pressured the jury by setting up the verdict sheet and timing events so that jurors were in a position where they could only avoid missing more days of work by quickly deciding against the Pappas boy. Perhaps most damagingly of all, he vividly telegraphed to the jurors how they should decide the case. In a virtually inevitable result, the jury decided against the Pappases at the trial court level.

In the Anastasian case, our jury had a lower Armenian representation than we expected. We did win $20,000, obviously a substantial sum of money and a sign the jury appreciated the harm William had endured. Yet this amount was

too low to cover costs and expenses. Moreover, the jurors gave nothing to Laura. A juror we spoke with after trial stated that they had trouble with William's lifestyle, presumably meaning his mistress (even though Laura knew and agreed). Also, it may have been hard for them to reconcile the client's arguably conflicting statements of 95% sexual sensitivity loss and that sex was still very good. Since the Anastasians never reimbursed us after trial, as they were required to do by our representation agreement, my co-counsel and I ended up out several thousand dollars each.

Courts and Procedures

We made an early decision to try the Pappas case in federal court and start to build a federal record regarding genital integrity. Ultimately equal protection of the right to genital integrity for males and females will have to be adjudicated by a federal court. Federal courts tend to be advantageous to plaintiffs, with more sophisticated judges and juries, less subject to local pressures and prejudices. Naturally, we knew we would not be staying in federal court with just a medical malpractice claim. The Fourteenth Amendment of the Constitution has been held in past cases to protect parents' right to make decisions about the care, custody, and control of their children. We, therefore, sued under the Fourteenth Amendment. This approach enabled us to deftly sidestep one common roadblock in circumcision cases — peoples' prejudices and vested interests regarding circumcision. This case was based on the Constitution of the United States of America. On the other hand, a unanimous jury is required in federal court.

We were elated when we survived the defendants' Motion to Dismiss with the late Judge Nickerson. Judge Friedman forced us to brief the issue of whether there was federal jurisdiction, then reaffirmed the previous order regarding federal jurisdiction, "based on the court's own research." Mysteriously, the judge never specified what constitutional issues formed the precise basis for jurisdiction. Friedman may have been trying to help us to reach a settlement, or may have been planning his upcoming hatchet job in advance.

A second major procedural issue was the possibility we seriously explored of transforming the case into a class action. We managed to obtain information on total circumcisions at Elmhurst Hospital over a 13-year period, including 1997, the year of Dennis' circumcision. We interviewed fourteen other potential plaintiffs in detail, usually talking to them in Spanish. We compiled evidence that Elmhurst was targeting Latino boys for circumcision based on their parents' surnames, and also that the circumcisions were being performed without informed "consent." Elmhurst showed a higher incidence of circumcisions of Latino boys than would be expected. For example, in 1997, 26% of Latino boys born at Elmhurst were circumcised. This compares with a baseline circumcision rate for Latino boys in the US of no more than 5–15%.

As mentioned above, Judge Friedman did not allow our other witnesses to testify, holding that their participation would require "mini-trials" to be held regarding their cases. We argued that no mini-trials would be needed, as the issues are streamlined and essentially the same in the different cases, basically with only dates and names varying. We found some authority from case law supporting our interest in bringing in other similar cases. But the judge maintained his position, ironically implying that, if we had fewer witnesses, he might have considered it. And yet, we lacked sufficient witnesses to bring the matters all together in one class action. We were whipsawed between having too few cases and too many. In a sane world, given the concerns and harms common to all, a class action would have had a chance to proceed in some format, in some venue. One usual problem with class actions is the plaintiffs do not have so-called typicality of damages. If a plane crashes, some will die, some will suffer head injuries, and others will suffer internal injuries. Even in an asbestos lawsuit, the level of illness tends to vary. But here we did have typicality, as all potential plaintiffs have essentially the same harm — a lost foreskin.

We wanted to appeal the Pappas case but the clients stopped paying for expenses and then later stopped communicating civilly with us. We still considered footing the considerable costs of appealing ourselves but eventually were regretfully forced to decide against this highly risky and uncertain course.

Even to get the Anastasian case started, several barriers had to be overcome. First, to avoid the one-year statute of limitations, we needed a copy of a letter from Anastasian's prior lawyer to the defendant, advising him of the lawsuit. Obtaining this letter was not as easy as it might have been, though eventually we did get it. Secondly, at that point in time, I was living with my wife in the US territory of Guam, many thousands of miles from California. I had to find a local co-counsel, get him on board with the case, and orchestrate a meeting between him and the Anastasians.

One interesting discussion involved that state's so-called "998 offers," referring to offers to settle a case that can tie the other side's hands. Pursuant to Section 998 of the California Civil Procedure Code, if one side rejects a 998 offer, and the ultimate court award is better for the offering side than the amount of the 998 offer, then the losing side has to pay most of the winning side's expenses and court costs incurred from the offer date on, plus interest. Strategically, therefore, one tries to choose an amount for a 998 offer that is high enough that the plaintiff can live with it if the other side accepts the offer, but still low enough that we should be able to exceed it at trial, thereby making us eligible for the often very significant expenses and costs under Section 998. Our offer to the defendants was in the low six figures, a region we could live with if they paid it and yet that we believed (incorrectly, as it turned out) we could probably exceed at trial. We hoped for punitive damages due to the battery and knew that according to a well-known California Supreme Court case that was still good law,[30] California's $250,000 cap on medical malpractice cases,[31] therefore, was inapplicable. This was medical negligence, not medical malpractice. Of course, the defendants refused our offer. Ultimately William won a somewhat pyrrhic victory at trial, receiving $20,000,

though due to the high cost of legal actions, this failed to cover expenses and costs. Laura's claim was denied outright.

Doctors

The Armenian doctor who had circumcised William Anastasian, Dr. Dostourian, was a piece of work himself, having faced over two dozen malpractice lawsuits against him. At first, he blamed the nurse for his own mistake, then eventually recanted. Circumcised while in the Army, he clearly lacked compassion for Anastasian. As a distinguished man of advanced years who spoke softly and was a physician, he probably also obtained sympathy from the jury, despite his history of harming patients and, in this case, blaming subordinates for his own errors.

We briefly contacted and then had to extricate ourselves from an overeager Armenian doctor who was a potential medical expert. He clearly was not too knowledgeable and would not have played well with the jury. We also had to refrain from hiring another medical expert who had liabilities we thought would not play well with a jury, including a criminal history.

One physician, entitled only to a nominal ordinary witness fee, attempted to extract thousands of dollars from us as an "expert witness," which of course he would not be as a percipient witness.

In the Pappas case, Dr. Bernstein was allowed to testify while over eight months pregnant. She demonstrated a remarkable ability not to give us any information at all, while not directly refusing to answer our questions. She managed, at the same time, to manipulate her condition by playing the role of the nice, ostensibly cooperative professional who was also an expectant mother. This performance evidently swayed jurors toward sympathy for her and, by extension, the defendant hospital and city. We objected to the obvious prejudice created by having her testifying in her condition, but Judge Friedman refused us a continuance.

Other Groups — Media, Activists

As an activist who happens to be a lawyer, I am inevitably wearing multiple hats in any such case, and will be working with other activists and often with media, though my primary duty, of course, is to my clients. In the Pappas case, with authorization from the clients, I worked with activists from the National Organization of Circumcision Information Resource Centers (NOCIRC) to prepare a press release.[32] In this case, we also worked closely with a very sympathetic member of the Spanish-language media, whose newspaper featured daily stories about the trial, sometimes on the front page. Television coverage also took place, and I was interviewed in Spanish.

William Anastasian was ostensibly also a strong activist, though, for various reasons, we did not work directly with the media or other activists on his case.

Conclusion

Each case shares the difficulties faced by all litigation, and each also has its own particular pitfalls and strong points. The outcomes of lawsuits hang on the details: a very pregnant circumcising doctor getting the jury's compassion, expert doctors not allowed on the witness stand, pattern and practice witnesses excluded, a judge telegraphing to a jury how to decide a case. Unfavorable jury perceptions no doubt affected the result in the Anastasian case.

General difficulties in bringing circumcision lawsuits include (1) financial risks; (2) procedural difficulties; (3) misconceptions and compassion misallocation among judges, lawyers, jury members, the media, and the general public; (4) constraints unique to circumcision lawsuits that are imposed by statutes of limitation and statutes of repose; (5) need for parental participation in lawsuits; (6) problem of damages not being atrocious enough to justify litigation; and (7) the scarcity of helpful case law. Players whose roles we have explored include clients, lawyers, judges, juries, courts and procedures, doctors, media, and fellow activists. All are important. Cases are always decided holistically. Yet, each is the sum of the parts.

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