

## SOME THOUGHTS ON LEGAL REMEDIES

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In considering the efficacy of various legal remedies to curtail routine infant male circumcision, particular attention must be given to the psychological and religious issues surrounding it. Many who are opposed to the continued, wide-spread practice of circumcision are hopeful that a quick remedy will entail a few well-brought lawsuits. They contend that a class action on behalf of circumcised men or suits brought by men who have just come of age against their circumcisers will have the effect either of causing the various legislatures to outlaw the procedure or of causing the medical profession to abandon any sanction of it. Unfortunately, the experience in the courts, thus far, does not give much hope to those who would proceed in this manner. Undoubtedly, this is because of the strong emotional issues that surround this ritualised surgery. It has been the author's experience, however, that the emotional biases supporting circumcision can be overcome with factual appeals to the intellect when presented in an emotional manner. Successful damage claims and suits can have a tremendous educational effect upon the general public, as well as upon the medical profession. In the movement against genital mutilation, they can be one of the most effective weapons, if properly brought.

It must be realised that the law almost never exists in a vacuum. The law of a given society, at least in a free society, usually reflects the values and opinions of the majority of its members. Even in Anglo-American jurisprudence, change comes slowly. While change can occur rapidly, it does so generally only when a moral, spiritual, or physical crisis presents the society with cogent reasons for a dramatic shift. Thus, slavery was outlawed in the United States only after the moral issues became clear to the majority. Those moral issues became clear only when a violent internecine war made it plain that the immorality of slavery had split the nation apart. Likewise, racial segregation was finally outlawed only after the brutal beatings of peaceful civil rights marchers in Selma, Alabama, and elsewhere throughout the American South, shocked the majority of the nation with their ferocity and caused most individuals to take a hard look at the inequities that had existed unquestioned for years. Whether the change comes from the courts by way of constitutional or legal interpretation or from the legislature by statutory enactment, it never comes unless the emotional underpinnings of the society have shifted.

The question for the lawyer, then, becomes twofold: how best to shift the

emotional underpinnings away from routine, socially accepted genital mutilation, and how best to use the legal system to accomplish this goal.

## **1. EMOTIONAL FACTORS UNDERLYING THE CONTINUING SUPPORT FOR CIRCUMCISION**

First, it must be recognised that most individuals, particularly men, have extreme difficulty approaching the subject of circumcision rationally. Since the vast majority of judges and legislators are men, this is not an irrelevant factor. It is not, however, only men who cannot think clearly about circumcision. Women, too, are often unable to do so. Furthermore, it seems that doctors, like society in general, are often blinded by their emotions. Likewise, judges and jurors, being only human beings, bring the same emotional baggage to any legal or factual decision they may make.

Men and women are creatures of custom and habit. As a general rule, they are naturally conservative and afraid of change. Old ways die hard. Everyone wants to feel good about his body. No one wants to believe that his parents, religious leaders, or physicians would hurt him. Thus, in a society where circumcision is predominant, there is an innate resistance to abandoning a practice that has permanently altered the appearance and function of the genitals of a majority of its members. This undoubtedly explains why it has proven to be as difficult to eradicate female genital mutilation in Eastern and African societies as it has been to end male circumcision in the United States.

Three factors make it more difficult to approach circumcision rationally in the United States: sanction by the medical establishment; ignorance of normal anatomy; and fear of rejection and ridicule.

### **1.1. "Medicalization" of Circumcision**

First, circumcision has become "medicalised." While the medical profession began circumcising American Gentiles for what are now viewed as specious reasons (the prevention of masturbation being chief among these), those reasons were medical ones. Physicians, not religious leaders, were responsible for the adoption of this surgery. They lent it, and still lend it, an aura of respectability. As one reason for circumcision has been shown to be without scientific validity, another has always arisen to take its place. Therefore, circumcision appears to be rational, if not necessary. After all, who can oppose circumcision when doctors claim it is conducive to good health and long life?

The medical profession usually trivialises the very real risks of circumcision, which are not insignificant.<sup>1</sup> For example, Dr. Terry W. Hensle, director of paediatric urology at Columbia College of Physicians and Surgeons in New York City, in a recent newspaper interview, stated, that the risks are low, and that, if given the choice, "most rational folks would choose to have their infant sons circumcised."<sup>2</sup> The risk of infection, which can have devastating results, is almost uniformly ignored by physicians and parents alike. Moreover, the indisputable physical damage of circumcision is denied. When asked about research that showed that the foreskin is more sexually sensitive than the glans,<sup>3</sup> Dr. Hensle ignorantly exclaimed, "How do they know that? The neuroreceptors are in the glans, not in the hood."<sup>4</sup> Even sex education books for adoles-

cents that deal with circumcision still erroneously assure the reader that there is no difference in function or feeling between a circumcised and an intact penis.

Indeed, the favourable opinion of circumcision is so institutionalised in American medicine, that the editors of an otherwise reputable medical journal published an opinion piece by one physician enthusiastically in favour of universal circumcision,<sup>5</sup> even though one critic found it to be “a rambling melange of facts, opinions, and speculations,” which failed to provide any risk to benefit analysis and which was incomprehensible in part.<sup>6</sup>

## 1.2. Ignorance and Embarrassment

Second, most American men have been circumcised at birth by physicians for non-religious reasons. Because of the prevalence of circumcision in this century, and because of the hesitancy to discuss sexual matters honestly and without lasciviousness or humour, many men are unaware of what circumcision is. Some years ago, when I was a Naval officer, a discussion with another young officer led to a mention of circumcision among the Jews. He abruptly asked me what circumcision was, as he had never seen any difference between himself and his Jewish friends, and he was a Roman Catholic. I had to explain to him that he noticed no difference between his penis and the penises of his Jewish friends because he had been circumcised. Such an experience is not uncommon as shown by a recent article in a well-known American parenting magazine, in which the author, presumably an educated, typical, middle-class American male, related that he had always thought that he was intact until the impending birth of his first son obliged him to consider the circumcision question. A subsequent discussion with his mother led to his discovery that he had, in fact, been circumcised at birth.<sup>7</sup>

This rather astounding ignorance might be hard to understand if it were not for the fact that most sex education books for children in the United States, until recently, did not deal with circumcision at all. In the 1950s, a major American publisher, in its popular (at least with parents) “All About . . .” series, published *All About the Human Body* by Bernard Glemser.<sup>8</sup> While the book was straightforward enough to deal with reproduction and the basic anatomical features of the reproductive organs, the illustration of the male genitalia ended just before the glans and foreskin. By avoiding a complete illustration of the penis, all discussion of circumcision was avoided. Of course, this left the circumcised majority (probably 90 percent at that point in most locations in the United States) with the impression that a boy is born with an exposed glans and that those who are intact are somehow deformed. Other books either showed a circumcised boy without explanation or depicted the penis indistinctly so that the parent could inform the boy or not according to the parents’ preference, knowledge, or ignorance.<sup>9</sup> Even today, notwithstanding the tremendous increase in intact boys and young men in the United States, the dissemination of misinformation continues. Recently, my teenage son’s college-level biology book contained an illustration of a circumcised penis with the foreskin remnant just behind the glans labelled “foreskin.”

Indeed, this ignorance extends even to physicians, who, while learning in medical school that the foreskin exists in infants, are taught that the normal condition of the properly cared for male is to be circumcised. Ann Briggs, who wrote a well-researched book for parents on circumcision in the mid-1980s, found that few anatomy books had clear illustrations of the intact penis. She noted that, when she found a clear picture of an intact infant, it was labelled “phimosis,” despite the fact that the penis was entirely

normal.<sup>10</sup> A major book on men's reproductive health, published by the same publisher of Edward Wallerstein's seminal work, *Circumcision: An American Health Fallacy*,<sup>11</sup> presented a sagittal view of the male genitalia in which the foreskin blends into the urethra, and the penis appears circumcised to all but the trained eye.<sup>12</sup> The same book presents an artist's line-drawing reproduction of photographs of the Tanner stages of male reproductive development with two series of illustrations. Both initial illustrations appear to be circumcised, but one appears to grow a foreskin as the illustrations progress through the stages, although the foreskin is unlabeled as such.<sup>13</sup> My own recent review of a number of the best-known medical and anatomical textbooks has revealed an almost universal unwillingness of American authors to illustrate correctly intact male genitalia. It is no wonder that so few physicians view the foreskin as a normal, healthy structure.

Coupled with ignorance of normal anatomy, there is a tendency among Americans to avoid any public discussion of sexual matters. While this may seem strange, given the obsession of the popular media with all things sexual, the fact is that a serious discussion of sexual matters is rarely had without embarrassment. Indeed, a great stumbling block to the eradication of circumcision is that it constitutes surgery on the penis. Americans are generally terrified of the word "penis," at least if it is uttered publicly. For example, earlier this year I attended a seminar in Atlanta, Georgia, on the law of products liability, that branch of American law dealing with the liability of a manufacturer for harm caused by a defective product. One male speaker, an experienced trial lawyer, was required to discuss a case involving an allegedly defective penile prosthesis, i.e., a device implanted in the penis of an impotent man to enable him to have an artificial erection in order to facilitate sexual intercourse. He could not bring himself to identify the prosthesis or its purpose, but merely referred to it as "the particular prosthesis." When he did so, the speakers at the head table began to titter. Later, a female lawyer, in giving her presentation, referred to the "implant men use," but never identified it further. Finally, another female lawyer noted that the original speaker had been "so nice to you not to talk about penile implants . . ." Thus, it took three seasoned trial lawyers speaking before one had the nerve to use the adjective "penile." No one ever used the word "penis." If the penis cannot be spoken of at all by lawyers without embarrassment and nervous laughter, then it is not surprising that circumcision, which materially alters the appearance and function of that organ, likewise cannot be easily discussed.

### 1.3. Fear of Rejection and Ridicule

Third, fear of female rejection if one or one's son is intact, and a tendency by many circumcised males to ridicule the natural penis compels many men to demand that their newborn sons be circumcised. "Like father, like son" is a potent force. One of the most outspoken proponents of mass neonatal circumcision in the United States, Dr. Edgar J. Schoen, who was the Chairman of the 1989 Task Force on Circumcision of the American Academy of Pediatrics,<sup>14</sup> has often argued that the circumcised penis is more aesthetically pleasing, and that that the intact penis is somehow naturally unpleasant. In 1987, he wrote and published a poem entitled "Ode to the Circumcised Male," in which he suggested that an intact penis was now a matter of what he termed "genital chic," and in which he predicted that the circumcised glans would "rise up in style."<sup>15</sup> Most recently, he has suggested that sex appeal is a valid concern that should enter into the decision to circumcise an infant. In an article published in *Priorities*, a

publication of the American Council on Science and Health, Schoen cited a 1988 Iowa study that found that young, middle-class women in Iowa preferred the circumcised penis over the intact penis.<sup>16</sup> He continued by quoting the author of a popular book, who claimed that, in deciding to circumcise her son, she had considered the fact that the intact penis looked “sort of marsupial, or like little rodents stuck in garden hoses.”<sup>17</sup> Such a slander would not be tolerated by the public or the medical profession if it were made about any other body part. Indeed, he is so passionately in favour of circumcision, that he has, on several occasions, attempted to export mass neonatal circumcision to Europe.<sup>18-19</sup> His most recent effort, published in 1997 in the *Archives of Disease in Childhood*, was followed by a published comment by Rowena Hitchcock, a British physician, who noted that the paper “reflects the influence of culture and habit on the interpretation of medical practice.”<sup>20</sup>

“Like father, like son” and other “fit in the crowd” considerations do much to perpetuate routine circumcision. An exploration of the Internet reveals the extent to which this feeling matters to middle-class Americans. *BabyCenter*, an Internet website for parents of young children, quotes T. Barry Brazelton, a prominent American paediatrician, as saying:

I think a father should make the choice for his son. The choice will be likely to reflect the father's own experiences, and it should. This may be the first time that he experiences a deep possessive feeling about the baby-to-be. . . . I feel this question is of deep significance to a male, and the father's choice needs to be based on his emotional reactions rather than on the fairly inconclusive studies that have been done so far.<sup>21</sup>

Reference is often made to a circumcision “bond.”

I have had my own two sons circumcised. . . . I am very proud of their circumcisions—I suspect they are too. They still walk around the house naked—our circumcision a silent bond between us.<sup>22</sup>

Dr. Alan Greene similarly says:

My boys are circumcised, primarily because I am a product of 1950's [sic] America, and I wanted to share the circumcision bond with my sons.<sup>23</sup>

Likewise, another man refers to those who are circumcised as those “with whom I had this secret bond.”<sup>24</sup>

In sum, these often unspoken, but very powerful emotional factors, outrageous and irrational though they may be, must be recognised and taken into account in determining how best to use the law to end infant male circumcision.

## 2. THREE LEGS ARE NECESSARY TO HOLD UP A STOOL

The emotional factors just discussed are relevant to a decision of the best means to employ in a legal attack upon circumcision. Routine infant male circumcision cannot occur without the concurrence of three parties: the parents; the physician; and the hospital. Each party may be imagined to be one leg of a three legged stool. If one party refuses to participate, then the entire stool—i.e., circumcision—must collapse.

## 2.1. Parents Must Be Persuaded

Parents are amenable to persuasion and education. While the task is a daunting one, the educational efforts made in the last seventeen years, starting with Wallerstein's book, and continuing with the work of the National Organization of Circumcision Information Resource Centers (NOCIRC), the National Organization to Halt the Abuse and Routine Mutilation of Males (NOHARMM), and similar organizations, have had a measurable effect.<sup>25</sup> Indeed, the International Symposia that NOCIRC has sponsored have been extremely effective. I was greatly encouraged to become involved in the movement against neonatal circumcision after having read of the Second International Symposium on Circumcision in a popular magazine and after discovering NOCIRC's existence as a result.<sup>26</sup> These efforts should continue, because a review of the popular literature and news media reveals that the public is beginning to discuss, critically examine, and reject routine neonatal circumcision.

Any attempt to coerce parents, or physicians for that matter, to abandon neonatal circumcision by outlawing its performance is likely to be unsuccessful. It will not be until the vast majority of people in the United States have turned against circumcision that any legislature will even consider such legislation. While the intellectual framework certainly exists to allow such legislation,<sup>27-30</sup> the emotional factors previously discussed make its passage unlikely in the near term.

Furthermore, in the United States, First Amendment guarantees that protect the free exercise of religion make it even more difficult to craft legislation that would outlaw all circumcisions. While recent case law makes it clear that the federal constitution does not forbid laws that burden some religious practices if they are laws of general applicability,<sup>31</sup> it is not at all clear that a statute that would proscribe religious circumcisions on infant males would withstand constitutional scrutiny. Such a statute might well be successfully attacked as a discriminatory attack upon at least two major religions (Judaism and Islam) that commonly practice male circumcision as a religious ritual. Moreover, given the peculiarities of the United States federal system, a federal law outlawing infant male circumcision in federal territory would have little effect upon the states. Indeed, state constitutions often provide even more protection for individual conduct than does the federal constitution. At least one state court has suggested that religious circumcision may be protected by that state's constitution.<sup>32</sup> A proposed amendment to the Alabama constitution would make any state or local law burdening a religious practice unconstitutional unless it furthers a "compelling governmental interest" and the law is the least restrictive means to accomplish the end.<sup>33</sup> Therefore, any attempt to prohibit religious circumcision is bound to be met with heated legal arguments and significant constitutional obstacles. At any rate, an attempt at total proscription would create an emotional whirlwind that would, more than likely, be counter-productive in the short run and possibly fatal in the long run.

For these same reasons, direct attacks upon parental consent are unlikely to be successful. While it may well be questioned whether any parent can legally consent to non-therapeutic, cosmetically and functionally scarring surgery upon their son's genitals, the courts have not been receptive to such challenges. For example, in *London v. Glasser*,<sup>34</sup> a child sued the physician circumciser for battery and other torts despite the fact that parental permission had been given for the circumcision. The court rejected the plaintiff's contentions that the parental consent was ineffective. As Billy Ray Boyd has observed regarding American courts, "They have been reluctant to rule in favour

of male infants' fundamental right to their genitals, for to do so would be to make criminals out of doctors."<sup>35</sup>

Ironically, dogs and horses in many states have more legal protection from painful, disfiguring surgery than do human children. New York, Washington, and California prohibit the docking of horses tails,<sup>36</sup> while New York, and New Hampshire prohibit the cropping of a dog's ears without anesthetic.<sup>37</sup> Children have no such protection from the pain and disfigurement of circumcision.

## 2.2. Doctors Must Be Persuaded

Physicians, on the other hand, must not only be persuaded, but they also must be educated. While much progress has been made in persuading parents, the progress with physicians has been less than might have been expected. Since doctors are trained to think logically, to search for the truth, and to act ethically, one might have expected that they would readily have rejected a painful, dangerous, and damaging procedure immediately upon discovering the facts. It is unfortunate that this has not occurred.

First, many physicians seem to be unaware of the facts. To date, I have represented, or am representing, five infants who were circumcised against their parents' wishes, one adult who was circumcised against his instructions while undergoing other surgery, and three individuals who sustained circumcision damage beyond that caused by a "properly performed" circumcision. In addition, I have represented or advised numerous parents of infants whose foreskins were wrongly retracted by force by ignorant healthcare providers. In none of these cases have I met a defendant physician or a defendant's expert witness who was truly knowledgeable about the penis and circumcision. The defendants I have deposed have uniformly either denied that the foreskin has any function or have minimised it. None have been aware of the new discoveries of Dr. John R. Taylor, documenting the structure and functions of the foreskin.<sup>38</sup> At times, their ignorance has seemed to me to be almost deliberate.

Second, most physicians claim that they circumcise because the parents demand it. Ronald Goldman has observed, "To defend against moral culpability and guilt, physicians have convinced themselves that they are not responsible for circumcision. They claim that they simply defer to parental requests and act as if they have no choice in the matter."<sup>39</sup> Of course, this does not explain the frequency with which children are circumcised against their parent's wishes. Indeed, whether motivated by habit, greed, or compulsion, American doctors seem unable to resist circumcising.

It has become axiomatic, however, that physicians fear lawsuits. Whether rightly or wrongly, the lawsuit has become one of the primary means by which behaviour is changed for the better in the United States. Perhaps the best illustration of this is that, after the trial of a wrongful circumcision case, the defendant doctor admitted to me that he had learned a great deal about circumcision from the facts presented at the trial and was willing to rethink his theretofore favourable opinion regarding it. Therefore, it is important that every time a child is circumcised without permission, and every time a child is damaged by a negligently performed circumcision, a suit be filed against the offending physician.

## 2.3. Hospitals Must Be Coerced

Even more so than physicians, hospitals in the United States are driven by money. Reimbursement by insurance companies or the government is essential to the finan-

cial health of hospitals. Every penny counts. Therefore, it perhaps should not be surprising that, in one wrongful circumcision case, I discovered that the hospital used a preprinted form to record all neonatal circumcisions. The preoperative diagnosis was preprinted as "congenital phimosis."<sup>40</sup> The procedure prescribed was preprinted as "circumcision," and the postoperative diagnosis was preprinted as "congenital phimosis." The preprinted "Description of Findings & Procedure" read, "There was a congenial [sic] phimosis present. Circumcision was performed." Such a diagnosis was deceptive at best, as the inability of the newborn foreskin to be retracted is a normal, non-pathologic condition. Many payers, however, are willing to pay for a circumcision that is necessitated by "phimosis." I do not doubt that the desire for reimbursement was a factor in the creation of this form.

Reimbursement may also be a factor behind many wrongful circumcision cases. Most of the cases I have handled have either been for Medicaid patients (Medicaid is a federally funded, state administered, health insurance plan for the poor) or for immigrants. This speaks for itself. The poor rarely complain, and immigrants are often reticent about complaining about a wrong inflicted in the name of modern medicine and the "American way."

Finally, the monetary incentive presented by selling the discarded foreskins to bioengineering firms and other enterprises for a profit may be another factor in hospitals' continuing to seek to circumcise all male babies born there.

In short, hospitals are unlikely to change their policies until their "bottom line" is affected or until pressure is brought to bear upon them by either physicians or their customers, the public. As physicians have much in common, financially, with the hospitals, and as the public rarely complains, lawsuits would seem to have the best chance of effecting a change in the behaviour of hospitals.

### **3. LAWSUITS CAN BE AN EFFECTIVE WEAPON AGAINST CIRCUMCISION**

While the emotional aspects of circumcision may seem to make a successful lawsuit unlikely, I have found that, not only are wrongful circumcision lawsuits capable of being won, they can provide a sufficient monetary award to encourage both parents and lawyers to bring them. The key to a good result is twofold: a reasonable claim well-grounded in long-established law; and a succinct presentation by a lawyer, with the assistance of a knowledgeable expert, who is well-versed in the medical literature and the issues surrounding circumcision.

Moreover, every successful suit over circumcision results in not only a monetary recovery to the plaintiff, but in a monetary loss to the defendant. Each claim that is successfully brought heightens the awareness of others that mistakes mean less money. This should result in greater care and concern about following the parents' wishes. Further, payment by an insurer generally results in an increased awareness by the insurer and its employees of the risks of circumcision and the lack of necessity for it. If enough successful suits are brought for circumcision, the insurance industry will put pressure on doctors and hospitals alike to cease and desist from such a costly course of action. While suits alone will not end circumcision, the heightened awareness of the facts that they bring, not only to the participants in the litigation, but also to the general public through media coverage of the trials, can only have a beneficial effect for the effort to end circumcision.



### 3.1. The Causes of Action Must Be Reasonable

In order to be effective, the causes of action set forth in any complaint regarding circumcision must be reasonable and within the realm of traditional tort concepts. If kept within these confines, an acceptable result can be obtained even from those who otherwise support circumcision. For example, virtually everyone would agree that it is wrong to disobey parents' wishes and inflict unnecessary, elective surgery upon a child. Virtually everyone would agree that some damages should be awarded in such a case. If the suit is couched in those terms, then the real hurdle is faced when it comes to convincing others that the child has suffered real damage.

Thus, in a case of wrongful circumcision, where the parents had specifically refused the surgery, a claim for medical malpractice against both the hospital and the doctor has obvious merit. Likewise, a claim for assault and battery (battery being an offensive, unconsented touching that causes harm) logically follows. If the parents have consented without being properly informed of the risks and disadvantages of circumcision, and would not have consented if they had been properly informed, a claim for lack of informed consent would make sense. To a great extent, this depends upon the particulars of the law of the state or jurisdiction where the circumcision took place. Most, but not all, American jurisdictions recognise a cause of action for failure to give informed consent, but the parameters of that cause of action vary widely. If parents have consented to the surgery after being told indisputable lies to induce them to consent (e.g., "He'll have to have it done anyway by the time he's twenty-one;" "It doesn't hurt the baby a bit, he can't feel any pain until he's older," etc.), then an action for fraud may be possible. If the circumcision is intentionally against the instructions of the parent, an action for the intentional infliction of emotional distress on the parent may be successful.

In cases of surgical damage beyond that caused by a "properly performed" circumcision, or in cases of gross surgical damage, the cause of action is obvious, as is the likelihood of a substantial recovery. When a physician tears an infant's foreskin from his glans by prematurely forcibly retracting it, however, the damage is less clear. Nevertheless, such an event gives rise to a claim for assault and battery, as well as for medical malpractice. Such a case must be presented carefully and logically in order to convince a judge or jury that damages should be awarded.

Injunctive relief may be available to a parent opposed to circumcision who is faced with a threat by the other parent to circumcise the child. Such a case may arise in several contexts. I have known of this type of disagreement to arise when a relationship has ended and a child is soon to be born, when the parents cannot agree on religious matters, and when an ex-spouse wishes to "punish" the other by circumcising the child against the other's wishes. An injunction is an appropriate remedy to protect the child in these circumstances because of the irreparable harm the child will experience if the circumcision takes place.

Effective advocacy is rarely, if ever, far fetched. It is always reasonable and logical. It must be grounded upon right. It causes everyone to agree. It educates judges and juries. It places judges and juries in the position of having to award substantial damages. Effective advocacy against circumcision gives those of us who are opposed to it positive publicity. Successes build upon themselves. Substantial verdicts cause those who read about them to ponder their basis. They can convince where a hundred medical articles cannot.

### 3.2. The Case Must Be Presented Clearly and with Emotion

Until recently, only cases of severe damage caused by negligently performed circumcision seemed to be worth pursuing. Nevertheless, my experience has shown that lesser cases have value and should be pursued. Cases in which the damage was catastrophic or otherwise severe include those of total ablation or sloughing off of the penis such as *Felice v. Valleylab, Inc.* in which the penis of a 2-year-old boy sloughed off following circumcision performed with an electrosurgical unit (ESU).<sup>41</sup> The final award was \$2,750,000. In 1985, similar injuries were sustained by two boys at one hospital on the same day in Atlanta, Georgia. One boy received \$22,800,000 in settlement.<sup>42-43</sup> Indeed, after the rejection of the plaintiff's claims in *London v. Glasser*, the *National Law Journal*, a weekly newspaper for United States lawyers, ran a story entitled "Circumcision Suits Risky to Pursue."<sup>44</sup>

In 1995, together with Hugh V. Smith, Jr., I tried the case of *Brown v. Jackson Hospital & Clinic* in the Circuit Court for Montgomery County, Alabama.<sup>45</sup> The infant, J. T. Brown, had been circumcised shortly after birth despite his mother's instructions to the contrary. The case was tried to a jury with Marilyn F. Milos, RN, and James L. Snyder, MD, appearing as expert witnesses to explain the anatomical loss, and the physical and psychological damage. The jury awarded the child \$10,000 for past damages and \$55,000 for future damages, for a total of \$65,000. This compared favourably to a \$60,000 award obtained for a child by Charles A. Bonner in California a few years earlier.<sup>46</sup>

Since 1995, I have assisted in recovering \$50,275.50 for a Hindu baby who was circumcised in Mobile, Alabama, shortly after birth against his parents wishes.<sup>47</sup> I have also settled a similar case for a North Carolina boy. Furthermore, I reached a confidential settlement for a young man who had been circumcised against his express instructions while undergoing a chordee repair.<sup>48</sup>

In each of these cases, I was able to obtain a favourable result because the causes of action were expressed in the usual terms. I was familiar enough with the subject to sound intelligent about it; I had superior expert witnesses; and I approached the presentation with passion while, at the same time, trying not to alienate those who were deciding the facts.

It is important to remember that, whether one is trying to convince a judge or a jury or an insurance adjuster, one must give some emotional "breathing room" to allow for the all-important emotional issues. You must never attack all circumcisions. You must assure all involved that circumcision is not on trial and that, if he or she still believes in it for his child, that is fine. In other words, one should heed Ronald Goldman's advice that "for a maximum change of attitude in others, it is best to have a message that deviates only moderately from the listener's viewpoint."<sup>49</sup>

In the presentation of the facts and the science, however, one must be blunt, thorough, and unafraid. Through the witnesses, as well as through the cross examination of the defendant doctor, one must indicate the truth about the pain of circumcision, the loss resulting from it, and the expenses involved in restoration, surgical or otherwise. The decision maker must cringe at the description of the surgery, the technique of which you must relate in detail. He or she must be given photographs which show an intact penis. It is helpful to show a videotape of a circumcision and to illustrate important points with diagrams, drawings, charts, and other visual aids.<sup>50</sup> The realisation that the foreskin is something desirable, which should not have been wrongfully taken, must be forced upon the court, although forced with tact.

The argument, whether in writing to an insurance adjuster or orally to a judge or jury, must be detailed and chilling. One must draw a verbal picture of a baby nursing or sleeping who is suddenly taken from its mother, strapped down naked on a cold plastic board, and operated upon without anaesthetic for at least five minutes. Then one must educate the decider. The purpose of the foreskin, its numerous nerves and sensory bodies, must all be explained. Keratinisation of the glans with subsequent loss of sensitivity must be shown convincingly. The cost of surgical restoration must be proven. Finally, an appeal must be made to basic fairness and justice.

In short, the lawyer who wishes to win a wrongful circumcision case must speak not only on the rational level but also on the emotional level. As one experienced trial lawyer has observed, feelings win out over thinking every time.<sup>51</sup> The emotional impact, however, must be such as to cause the judge or jury to empathise with the circumcised boy, and to feel that basic justice requires a substantial award of damages.

#### 4. CONCLUSION

Circumcision is an extremely emotional issue. The emotional ties that many Americans have to circumcision are irrational and strong. They can, however, be overcome in the trial of a wrongful circumcision case. By pleading causes of action with which everyone can agree, by not attacking all circumcisions, and by educating the jury with both facts and emotion, the skilful trial lawyer can obtain favourable results for his clients. Favourable results for his clients, however, have the added benefit of putting monetary pressure on the medical and insurance industries to reconsider their dedication to this harmful, disfiguring, and unnecessary surgery. When enough suits have been brought and successfully concluded, the economic disadvantages of circumcision will outweigh the perceived economic advantages and the practice will be abandoned. In addition, an increasing number of suits may raise public awareness of the harm of circumcision to that critical level necessary to effect a shift in the emotional underpinnings that support routine circumcision. As a consequence, circumcision will be rejected as a relic of an uneducated and oppressive past.

#### REFERENCES

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