

Opponents of Circumcision Use the Legal System and Legislatures to Combat It

By Adam Liptak

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Josiah Flatt, like about 60 percent of other newborn American boys, was circumcised soon after he was born here, in the spring of 1997. Two years later, his parents sued the doctor and the hospital.

They did not contend that the circumcision was botched or deny that Josiah's mother, Anita Flatt, had consented to the procedure in writing. They said, instead, that the doctor had failed to tell them enough about the pain, complications and consequences of circumcision, removing the foreskin of the penis.

The suit will be heard by a jury next month. In declining to dismiss the case here before trial, Judge Cynthia Rothe-Seeger acknowledged that the case was unusual in that nothing "went 'wrong' during the procedure." The main harm Josiah seeks compensation for, Judge Rothe-Seeger noted, is "diminished sexual sensation injury."

The suit is but one effort by a small but energetic group of loosely affiliated advocates and lawyers to use the legal system to combat the practice -- most American newborn boys undergo the operation when they are days old -- which they liken to genital cutting in girls.

The advocates have been active in state legislatures, too. Ten states no longer allow Medicaid to pay for circumcision.

"They have reached the ears of legislators and insurance companies," Dr. Thomas Wiswell, a professor of pediatrics at the State University of New York at Stony Brook and a proponent of the procedure, said about the opponents. "They are far more vocal than proponents of circumcision."

J. Steven Svoboda, director of Attorneys for the Rights of the Child, a group devoted to the issue, contends that circumcision is wrong as a matter of law, medicine and philosophy. Children of both sexes, Mr. Svoboda said, should be entitled to "bodily integrity."

Josiah Flatt's case appears to be the first to go to trial based on the theory that the absence of an exhaustive medical briefing about the risks and benefits of circumcision is tantamount to a lack of informed consent.

Among the possible complications in the operation are excess bleeding, infection and ulceration and occasional permanent damage to the penis.

"This could be a very important test case," said Geoffrey P. Miller, a professor of law at New York University who has written about legal and cultural issues of circumcision.

Josiah's father, James, died in 2001 in an automobile accident, but the boy's mother, Anita, 33, decided to proceed with the suit. The family's lawyer, Zenas Baer, said no sensible parent would willingly subject a child to circumcision knowing what it entailed.

"The practice is absolutely barbaric," Mr. Baer said.

The doctor who performed the circumcision, Sunita Kantak, and representatives of the hospital, the MeritCare Medical Center, issued this statement:

"Anita Flatt was given information about circumcision, and she asked to have her son circumcised. The circumcision was done because she requested it."

A hospital spokeswoman, Carrie Johnson, declined to elaborate.

In court papers, the hospital said the suit was part of a crusade.

"This lawsuit is an attempt to abolish circumcision in North Dakota of newborn males with healthy foreskin," the hospital's lawyers wrote. "Plaintiffs want to change public policy so that only a competent male once he reaches adulthood, and not his parent, should be able to consent to circumcision."

Only 3 in 1,000 men not circumcised at birth choose to have the procedure, experts say.

David J. Llewellyn, a Georgia lawyer who represents plaintiffs in circumcision malpractice cases, said the hospital was correct in identifying what would be the next step for opponents of the practice.

"The question of whether or not a parent can consent at all will come rather quickly," Mr. Llewellyn said.

Judge Rothe-Seeger, who will preside over the trial in Cass County District Court, seemed to agree in a pretrial decision. She suggested that Josiah could sue his parents some day if he could show that they failed to act in his best interests.

About 1.2 million newborns are circumcised in the United States every year, at a cost of \$150 million to \$270 million, the American Academy of Pediatrics says.

Circumcision for other than religious reasons is a relatively recent phenomenon in the United States. It began in the late 19th century and peaked in the 1960's at 90 percent of newborns. Circumcision rates vary widely. They are highest in the Midwest, about 80 percent, and lowest in the West, under 40 percent.

The procedure is not common elsewhere. In Canada, the rate is 17 percent and in Britain 5 percent. Elsewhere in Europe, in South America and in non-Muslim Asia, the procedure is rare.

There is powerful evidence, Dr. Wiswell said, that circumcision helps prevent urinary tract infections, penile cancer and sexually transmitted diseases, including H.I.V.

The American Academy of Pediatrics, in a policy statement in 1999, said that the risks of infection and cancer were low even without the procedure and that evidence on sexually transmitted diseases was "complex and conflicting."

The academy noted that the procedure could involve complications, as could any surgery. If performed without adequate anesthesia, it is very painful.

The academy concluded that "existing scientific evidence demonstrates potential medical benefits of newborn male circumcision."

"However," it added, "these data are not sufficient to recommend routine neonatal circumcision."

It added that it was "legitimate for parents to take into account cultural, religious and ethnic traditions, in addition to the medical factors, when making this decision."

Judge Rothe-Seeger wrote, "One of the earliest purposes of circumcision was to limit sexual intercourse and to curb sexual excitement."

It has also been prescribed through the years as a remedy for alcoholism, epilepsy, asthma, gout, hysteria, malnutrition, night terrors, clubfoot, eczema and promiscuity.

"Circumcision is a medical procedure in search of something to cure," said Mr. Baer, the Flatts' lawyer.

In the last year, Arizona, Missouri, Montana and North Carolina joined six other states -- California, Mississippi, Nevada, North Dakota, Oregon and Washington -- that do not offer Medicaid reimbursement for circumcision for any reason, including religious beliefs.

David L. Gollaher, who wrote "Circumcision: A History of the World's Most Controversial Surgery" (Basic Books, 2000), said that trend would "be the bullet that kills this thing."

"If people have to pony up a couple of hundred bucks, at the margin, they won't do it," Mr. Gollaher said. "And insurance coverage signals a certain attitude about medical appropriateness or necessity."

There is little legal scholarship in the area. That is partly attributable, Professor Miller said, to efforts intended to prevent genital cutting in girls, a practice prevalent in Africa that reduces sexual pleasure.

"It's all tied up in the politics of feminism," he said. "Some feminists take offense at the idea that there is any comparison between a highly damaging assault committed by a patriarchal society and male circumcision. It's a dangerous topic to get into."

In an interview, Ms. Flatt, who is a lawyer, said she was told next to nothing about circumcision before she consented to it. Asked what she wished she had been told, she grew animated and her voice rose.

"It's healthy tissue," she said of the foreskin. "It's useful. There's bleeding risk. There's pain. There's infection risk. There's death risk. There's no medical benefit.

"You'd better give me a very good reason why, and it's got to be more than he'll look like dad."