



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY CAUSE NUMBER 339 OF 2019
(Before Honorable Justice D. Madise)

BETWEEN:

**STEPHEN MULOZA (A Minor suing through
His father and next of friend Mr. Peter Muloza) 1ST CLAIMANT**

**BLESSINGS GONDA (A minor suing through
His mother and next friend Mrs. Mary Gonda) 2ND CLAIMANT**

-AND-

POPULATION SERVICES INTERNATIONAL DEFENDANT

Coram. **Hon Mr. D. Madise**
Mr. Dziwani for the Claimant
Mr. Chazera for the Defendant
Mr. Mathanda Clerk.

Judgment

Madise, J

Introduction

1, In this matter, two minors, Steve Muloza and Blessings Gonda, acting through their respective litigation guardians, are claiming damages for assault and battery, pain and suffering, damages for disfigurement and/ or deformity, damages for violation of the Minor Claimants' right to personal security, self-determination, privacy and bodily integrity. The Claimants' action is founded on the torts of battery/assault, negligence and violation of the Claimant's rights to personal security, self-determination, privacy and bodily integrity.

2, According to the statement of case, in issue is the circumcision of the minors which was performed by the Defendant on or about 24th May, 2018 without first obtaining consent from the parents or guardians of the minors. From the outset, it must be stressed that the circumcision which was performed on the minors was non-therapeutic, non-emergency, non-religious and non-cultural. The circumcision was performed as part of what was coined the Voluntary Male Medial Circumcision (VMMC) campaign. The action is therefore primarily concerned with the Defendant's failure to:

- i. Provide the Claimants with adequate information necessary for them to make or give informed consent permitting the Defendant to carry out circumcision in issue.
- ii. Obtain the informed consent of the guardians of the minors before circumcising them.

3, In defence, the Defendant:

Pleaded that it had obtained consent from the guardians of the minors who were present at that material time. Denied having acted negligently since consent was obtained before circumcising the Claimants. Denied that the Claimants suffered general body pains. Pleaded that the Claimants were given pain medication and the wounds from circumcision healed without any complications.

The Facts

4, The facts giving rise to the action herein are contained in the Claimant's Amended Statement of Case filed on or about 7th April, 2021. That on or about 24th May, 2018 The Defendant was using a public address system fitted to one of its motor vehicles publicizing a voluntary male circumcision service the Defendant was offering on that day at a place called

Pensulo which is located at a distance of around 7 km from Manyowe. The Minor Claimants were on their way to school when the Defendant's said vehicle stopped and took them to Pensulo where they were circumcised by the Defendant's employees or agents without first getting the informed consent of the parents or guardians of the minor claimants.

5, In so far as said circumcision service relates to the Minor Claimants herein the same was non-therapeutic, non-emergency, non-religious and non-cultural. The Defendant's act in carrying out non-therapeutic, non-emergency, non-religious and non-cultural circumcision on the Minor Claimants without first getting informed consent from the parents or guardians of the Minor Claimants amounted to battery and an assault on the Minor Claimants to their rights of personal security, self-determination, privacy and bodily integrity. In relation to the non-therapeutic, non-emergency, non-religious and non-cultural circumcision performed on the Claimants, the Defendant owed the Claimants a duty of care:

6, To provide adequate information pertaining to the risks, permanent nature of the operation and the fact that the Claimants would forever live without a part of their manhood. To obtain informed consent from the Parents or Guardians of Minor Claimants. The Defendant breached its duty of care when it omitted to:

7, Provide the Claimants with adequate information necessary for them to make or give informed consent permitting the Defendant to carry the circumcision in issue. Obtain informed Consent from the parents and/or guardians of the Minor Claimants before proceeding to perform the circumcision in issue on the minor Claimants. As a result of the battery and/or negligence on the part of the Defendant the Minor Claimants: Have had their rights to personal security, self-determination, privacy and bodily integrity violated. Suffered pain after the circumcision for close to 3 days. Have their manhood deformed and disfigured.

8, Based on the pleadings the Claimants alleged that the boys were minors at the time they were circumcised by the Defendant. In fact they are still are minors. By their age, the minor could not on their own give consent that they be circumcised. That it was necessary for the Defendant to first seek consent from the guardians of the Claimants before proceeding to circumcise them.

The Evidence

10, The Claimants called 4 witnesses, namely Steven Muloza (P.W.1), Peter Muloza (P.W.2), Blessings Gonda (P.W.3) and Mary Gonda (P.W.4). On the other hand, the Defendant did

not call any witness. In examination in chief P.W.1 stated that he is a resident of Manyowe Township within the City of Blantyre and his postal address is C/O Manyowe Full Primary School, P.O. Box 235, Blantyre. That he is a Std 8 student at pupil at Manyowe Full Primary School. He was born on 27th December, 2006. Since his birth to date, he has been staying with his parents Mr. Peter Muloza and Mrs. Regina Chibade.

11, That at the time of the incident leading to the action herein his father and mother were working and he was staying with his said parents at Manyowe Township. That on or around 24th May, 2018 he left home at around 8:00am going to school at Manyowe Full Primary School where he was a Standard 5 pupil at that time. Whilst on his way to school he heard some music being played from a vehicle which had stopped close to a certain bottle store which used to be called Pa a Fedo. He and his friend, ***Blessings Smart*** (not the 2nd Claimant), started following the vehicle instead of going to school. When they reached the place where the motor vehicle had stopped, the one who was driving the motor vehicle invited them to board the motor vehicle. The driver did not tell them where the vehicle was going.

12, That they boarded the vehicle because his friends had also boarded the vehicle and he did not want to miss the opportunity of boarding a vehicle as it was rare for him to board a vehicle. He boarded the vehicle unaccompanied by any of his parents or relative. In total there were about 6 school going children on board the vehicle. The vehicle took them to Pensulo Health Centre where upon arrival they were led into a tent. Whilst in the tent a nurse/clinician explained to them that they will be circumcised and that they will be given a bag and soap. The nurse also demonstrated how circumcision is done. However, he did not tell them that they will feel pain and that they will forever have no foreskin. He did not tell them about the risks or dangers associated with circumcision.

13, That the nurse/clinician later gave forms to a certain woman with whom they had boarded the Defendant's motor vehicle and asked her to sign forms for all the children who were not accompanied by a parent. Neither was the form given to him nor were its contents explained to him. In fact at no point in time did he touch the form. As part of the procedure: -A sample of blood was drawn from his arm using a syringe. He felt pain when that was being done. His blood pressure was recorded. When he was about to be injected on his penis, he wanted to leave the room but he was afraid to do so because it would have meant that he would walk a long distance, his friends would laugh at him and he would not receive a bag. He was injected 4 times on his penis during which he felt severe pain because one of the injections pierced the vein on the underside of his penis. He cried for some time.

14, Circumcision was performed on him by a lady nurse/clinician followed by suturing and dressing of the wound. After the above mentioned procedure had been performed on him, he was given a bag containing soap, a pant and 10 packets of Panadol. The vehicle took him back and dropped him at the same place where he had boarded it.

15, That upon arriving home, he took the Panado to reduce the pain he was feeling. On the second and third day he felt severe pain and the Defendant took him to Malmed Clinic in Blantyre. He was accompanied by his parents. He was admitted at Malmed for 3 days where treatment included intravenous therapy. The treatment he received was not recorded in his health passbook. The same was recorded in the hospital file. His father was denied access to the records. All hospital expenses were settled by the Defendant. He did not go to school for close two weeks as the wound took long to heal and he was still feeling pain. Because it was time for examinations, he forced himself to go to school in the third week. There was no any underlying health condition that required him to undergo the circumcision that was done on him neither was there a religious or cultural need that he do so. His faith as a Christian of the C.C.A.P. denomination and his tribe as a Mang'anja does not make it mandatory that one be circumcised.

16, In cross examination, P.W. 1 stated that in 2018, he was 12 years old. On the day of the circumcision he was on his way to school. He stated that he was not forced by the driver and others aboard the motor vehicle to board the defendant's vehicle. There was a lady in the motor vehicle who signed the consent forms at the Pensulo where he was circumcised. He agreed that the Defendant's employees had no way of knowing that the woman in issue was neither his mother nor guardian. At Pensulo he was led into a tent where he was told how circumcision is done. He confirmed that the technician informed him that circumcision involves the removal of the foreskin. He denied having been told that the procedure would be painful. He confirmed: Having been injected before being circumcised. Having been tested for body temperature, blood pressure and also having been measured height and weight. After circumcision the wound was dressed. He was given pain killers after circumcision. Whilst at home he started feeling pain around the penis. The defendant took him to Malmed Clinic. That he did not bring any health passbook or form to tender as part of his evidence in court.

17, In examination in chief, P.W. 2 stated that the 1st Claimant is his biological son. He was born on 27th December, 2006. He has been staying with him since his birth. At the time of the incident leading to the action herein he was staying with the 1st Claimant at Manyowe

Township where he still stays. The 1st Claimant was in Std 5 at Manyowe Full Primary School. The 1st Claimant's classes at Manyowe Full primary school were starting at around 8:30am. Owing to high number of students at the said school, pupils were going in shifts.

18, That on or around 24th May, 2018 he and his wife left home early for work. At that time he was working for Cassim Car Hire where he was working as a driver. He left the 1st Claimant home getting ready to go to school. When he came back from work at around 6:30pm, he noted that the 1st Claimant was not at the sitting room watching television which he likes. When he checked in the room where the 1st Claimant sleeps, he found him asleep covered in blankets. Stephen then narrated to him what had happened. He is not in any way related to the lady who is alleged to have given consent for the 1st Claimant be circumcised. That the said lady is not a legal or factual guardian of the 1st Claimant. At no point in time did he ever left the 1st Claimant under her parental care nor authorized her to give consent on his behalf in relation to any matter.

19, That when he called the Defendant on the same day using the number indicated on the bag the Defendant gave the 1st Claimant, the Defendant's agent who he spoke with confirmed that Stephen was indeed circumcised by the Defendant's agents. That the Defendant's agent with whom he spoke apologized for having not sought his consent and for having relied on consent given to them by the lady mentioned above. The 1st Claimant showed him the bag which the Defendant gave him after being circumcised. That on the following morning Stephen's condition started to deteriorate. He then called the Defendant's office asking for an explanation as to why and how the Defendant had proceeded to circumcise Stephen without his consent. The Defendant's employee he spoke to on the phone apologized and proposed to meet him at his home at around 5:00pm.

20, That the said Defendant's employee indeed went to his home and met him. During the meeting with her she alleged that they had proceeded to circumcise the 1st Claimant on the strength of the consent purportedly given by one Margret who was alleged to be the guardian of the 1st Claimant. He told her that the lady is not Stephen's parent or guardian or relative and had no authority whatsoever to give consent on his behalf. When he asked her to bring the said lady, she failed to do so but only apologized that what had happened was wrong. He told the lady that had they first approached him before proceeding with the circumcision, he would not have consented because the 1st Claimant had for a long time seriously suffered from inguinal hernia for which he underwent surgery two times. That the Defendant's said employee apologized for whatever had happened.

21, That on the following Monday he went to the Defendant's office then located at Ginnery Corner where he lodged a complaint with one in charge of the circumcision exercise identified as Jofilisi. Jofilisi promised to meet him at his place of work upon inquiring on what happened. Later in the day Jofilisi came to his place of work and confirmed that Stephen had been following the vehicle and was picked and taken to Pensulo. Jofilisi also apologized for not having sought his consent. The 1st Claimant Stephen was having a fever and was complaining that the pain on the wound was severe. He phoned the Defendant's employee he had first contacted advising them of the 1st Claimant's condition. He also asked them to come and take the 1st Claimant to hospital.

22, That the Defendant positively responded to the call and took 1st Claimant to Malmed Clinic in Blantyre. He and his wife accompanied him. The 1st Claimant was admitted at Malmed for 3 days and was given intravenous treatment. He tested negative to malaria. The treatment Stephen received was not recorded in his health passbook which they had carried from home. However, the same was recorded in the hospital file. That Malmed refused him access to the records on the file of Stephen on the ground that such a request had to be routed through the Defendant who paid for the treatment of Stephen.

23, That as a result of the pain the 1st Claimant was feeling and also because his wound was taking long to heal, he ended up not going to school for close two. Because it was time for examinations, he was forced to go to school in the third week. There was no any underlying health condition that required the 1st Claimant to undergo the circumcision that was done on him neither was there a religious or cultural need that he be circumcised. The 1st Claimant's faith and his faith as Christians of the C.C.A.P. denomination and their Mang'anyanja tribe does not make it mandatory that one be circumcised. The 1st Claimant was not sexually active either just as he was not at the moment of his testimony in the herein matter. There was no urgent need that the 1st Claimant be circumcised.

24, In cross examination, P.W. 2 confirmed that after noticing the 1st Claimant's condition he called the Defendant. Personnel from the Defendant only knew at that stage he is the father of the 1st Claimant. He did not bring any document to show that the 1st Claimant once suffered from inguinal hernia having lost the documents as that was a long time ago. When he called the Defendant he was informed that there was someone who had consented that the 1st

Claimant be circumcised. The 1st Claimant initially had a fever. The Defendant took the 1st Claimant to Malmed clinic where he was admitted for 3 days.

25, In examination in chief, P.W. 3 stated that he was born on 29th September, 2008. Since his birth to date, he has been staying with his mother Mary Gonda. At the time of the incident leading to the action herein his mother was working for Blantyre City Council and he was staying with her at Manyowe Township. That on or around 24th May, 2018 he left home at around 8:30 am going to school at Manyowe Full Full Primary School where he was a Standard 3 pupil at that time. Whilst on his way to school he heard some music being played from a vehicle which had stopped at a certain playground located at a place commonly known as pa a Chimimba.

26, That he and his friend, Innocent, started following the vehicle instead of going to school. When they reached the place where the motor vehicle had stopped, the one who was driving the motor vehicle invited them to board the motor vehicle. The driver did not tell them where the vehicle was going. He boarded the vehicle because his friends had also boarded the vehicle and he did not want to miss the opportunity of boarding a vehicle as it was rare for him to board a vehicle. That he boarded the vehicle unaccompanied by any of his parents or relative. In total there were about 6 school going children on board the vehicle. The vehicle took them to Pensulo Health Centre where upon arrival they were led into a tent.

27, That whilst in the tent a nurse/clinician explained to them that they will be circumcised and that they would be given a bag and soap. He also demonstrated how circumcision is done. However, he did not tell them that they will feel pain and that they will forever have no foreskin. He did not tell them about the risks or dangers associated with circumcision. The nurse/clinician later gave forms to a certain woman she found in the vehicle and asked her to sign forms for all the children who were not accompanied by a parent. That was his first time to see that woman. He is not in any way related to her.

28, Neither was the form given to him nor were its contents explained to him. In fact at no point in time did he touch the form. As part of the procedure. A sample of blood was drawn from his finger after puncturing it. He felt pain when that was being done. His blood pressure was recorded. He was injected 4 times on his penis during which he felt severe pain because one of the injections pierced the vein on the underside of his penis. he cried loudly and this caused his friend Innocent to run away. Circumcision which was performed on him by a lady

nurse/clinician. That when he was about to be injected on his penis, he wanted to run away and leave the room but he was restrained by the nurse/clinician who was injecting him and her colleague. The two strongly held his limbs until he was injected. After the above procedure had been performed on him, he was given a bag which had soap, a pant and 4 packets of Panadol. The vehicle took him back and dropped him at place popularly known as pa A Fedo.

29, That upon arriving home, he boiled some water and added some salt to it, removed the bandage on the wound and started cleaning the penis. He did that because he had not understood that the wound was to be cleaned with salty water after the Defendant came to remove the bandage. He thought that the bandage had to be removed the same day. As a result of the matters stated above, he bled profusely and felt severe pain. He could not manage to put on his short and only put on the piece of cloth that he was using to wipe out the blood. Despite his mother calling the Defendant and asking them to come and check his condition following what he did as stated above, the defendant did not come or offer any advice. The Defendant only came on the following Saturday to undress the wound.

30 That on the third day he felt severe pain after the defendant's agents came to remove the dressing on his wound. On a number of days, he attempted to remove the stitches as he was feeling uncomfortable and that caused bleeding and resulted in the wound taking longer to heal. To reduce pain his mother was buying diclofenac every day. He stayed home and missed school with the consequence that he failed final examinations and had to repeat standard (Std) 3. In proceeding from Std 2 to Std 3 he passed with Grade 4 marks. There was no any underlying health condition that required him to undergo the circumcision that was done on him neither was there a religious or cultural need that he do so. His faith as a Christian of the Seventh Day Adventist Church denomination and his tribe as a Sena does not make it mandatory that one be circumcised.

31, In cross examination, P.W.3 he denied that in 2018 he was 10 years old. He instead stated that he was 9 years old. He stated that It was correct that he boarded unknown vehicle whilst he was on the way to school. It was not true that he was not told to enter the motor vehicle. He further stated that he was enticed to board the vehicle. To be enticed, he was told that his friends had already boarded and they would be given bags and soap. When he boarded the vehicle he did not see the woman who signed the consent for him. He further stated that there was no woman in the vehicle. That at Pensulo he was informed about how circumcision is done.

32, That circumcision involved the cutting of part of the penis and he was only informed about that after he went into the room where circumcision was being conducted. Before being circumcised he was injected, tested for BP, temperature and weight. The wound was dressed. He was given pain killers. They did not tell him to remove the bandage once home only that he misunderstood the instruction. He denied that there was a woman who signed a consent form in respect of his circumcision.

33, In examination in chief, P.W. 4 stated that the 2nd Claimant is her biological son. He was born on 29th September, 2008. She has been staying with him since his birth. At the time of the incident leading to the action herein. She was staying with the 2nd Claimant at Manyowe Township where she still stays. The 2nd Claimant was in Std 3 at Manyowe Full Primary School. The 2nd Claimant's classes at Manyowe Full primary school were starting at around 9:00am. Owing to high number of students at the said school, pupils were going in shifts. On or around 24th May, 2018 she left home early for work. She left the 2nd Claimant under the care of her mother with whom she stays.

34, That when she came back from work at around 4:00pm, she noted that the 2nd Claimant was not yet within the house. Upon asking her mother, she informed me that the 2nd Claimant had been injured after being circumcised and was hiding behind the house. When she checked behind the house, she found the 2nd Claimant clad in a piece of cloth which was heavily stained with blood. She was not putting on any short. When she called the Defendant on the same day using the number indicated on the bag the Defendant gave the 2nd Claimant, the Defendant's agent who she spoke with confirmed that Blessings was indeed circumcised by the Defendant's agents. The defendant's agent with who she spoke apologized for having not sought her consent and for having relied on consent given to them by the lady mentioned above.

35, The 2nd Claimant showed her the bag which the Defendant gave him after being circumcised. She examined Blessings' penis and found him clad in a blood-stained piece of cloth. On the following morning that is on 25th May, 2018 she called the Defendant's office and informed them that 2nd Claimant was bleeding profusely and was in pain. She asked them to come and examine him. She asked them why they had given the 2nd Claimant only 4 packets of Panadol when he was feeling severe pain. The Defendant did not come or offer any assistance until the following Saturday when they came to remove bandages from the wounds of all the kids who were circumcised that day.

36, That on the third day 2nd Claimant felt severe pain after the Defendant's agents came to remove the dressing on his wound. He could not manage to sleep without her caring for him at night. She had to buy and give him diclofenac. The Defendant did not give the 2nd Claimant any leaflet or letter addressed to her indicating how the wound should be taken care of. On a number of days, the 2nd Claimant attempted to remove the stitches as he was feeling uncomfortable whenever the same touched his clothing. That caused him to bleed and resulted in the wound taking longer to heal. The wound was producing pulse. She assisted him in cleaning the wound with salt which caused him to suffer more pain. He would cry all night long. She had take some days off duty to take care of him. The pain was being managed by giving the 2nd Claimant diclofenac on a daily basis which she was buying from the drug store.

37, That as a result of the wound taking longer to heal and the pain the 2nd Claimant was suffering, he could not go to school. He stayed home and missed school with the consequence that he failed final examinations and had to repeat Standard (std) 3. In proceeding from Std 2 to Std 3 the 2nd Claimant passed with Grade 4 marks and his average pass mark has always been above Grade 3. Standard 3 is the only class that he has repeated. There was no any underlying health condition that required the 2nd Claimant to undergo the circumcision that was done on him neither was there a religious or cultural need that he be circumcised. The 2nd Claimant's faith and her faith as Christians of the Seventh Day Adventist Church denomination and their Sena tribe as does not make it mandatory that one be circumcised. There was no urgent need that he be circumcised. The 2nd Claimant was not sexually active either just as he is not at the moment. There was no urgent need that he be circumcised.

38, In cross examination, P.W.4 Confirmed that she called the Defendant because the 2nd Claimant was bleeding and feeling pain. She confirmed that before calling the Defendant, she did not know that someone had consented that her the 2nd Claimant be circumcised. The Defendant visited her after lodging her complaint. She did not tender school report for the 2nd Claimant to show that she failed as a result of the circumcision. She denied having been given details of the person who gave consent for the 2nd Claimant to be circumcised.

Issues for determination

- 39, a) Whether or not the Defendant owed a duty of care to the Claimants?
- b) Whether or not the Defendant breached its duty of care?
- c) Whether or not the Claimants' injuries were due to the Defendant's breach of duty of care?

- d) Whether or not the Defendant's agents' conduct amounted to assault and battery?
- e) Whether or not the Defendant violated the Claimants rights?
- f) Whether or not the Defendant is liable to pay the Claimants damages for negligence, battery and breach of the Claimants' rights?

The Law

40, The burden of proof rests on the one who wants the court to believe a set of given facts. He who alleges must prove. The standard is on the scales of probabilities. The law demands, that the tribunal must say we think it more probable than not then the burden is discharged, but where the probabilities are evenly balanced, the burden is not discharged. See judgment of Denning J in **Miller vs. Minister of Pension** [1947] All ER 372. see also **Tembo and another v Shire bus lines Limited** 2004 MLR 405.

What is negligence?

41, The best definition of negligence was given by Baron Alderson in **Blyth vs. Birmingham water works** (1856) 1 ECh 781 at 784.

"Negligence is the omission to do something which a reasonable man would, guided upon those circumstances which ordinarily regulate the conduct of human affairs do or doing something that a prudent man would not do"

42, The tort demands that a defendant must owe the claimant a duty of care and there must be a breach of such a duty which result in the claimant suffering damage. See **Banda vs. Southern Bottlers Ltd** Civil

Cause No. 558 of 2010 (High Court) (unreported). For a better understanding of the tort of negligence read **Winfield and Jolwicz** on tort 14d page 78.

43, On duty of care Lord Atkin stated in **Donoghue vs. Stevenson** (1932) AC, 562 as follows:-
"A person's neighbors are those persons who are closely and directly affected by any act that I ought reasonably to have them in contemplation as being affected when in directing my mind to the acts or omissions which are called in question".

The maxim *res Ipsa loquitur* sums up the law on negligence"

Claimants' Submissions

44, The Claimants submitted that the Defendant owed the Claimants a duty of care and The Defendant breached that duty of care. As a result of breaching that duty of care the Claimants suffered pain, loss and damage. That under the tort of battery, the Claimants bear the burden

of proving that the Defendant circumcised them without consent. That the Claimants also have to prove that the Defendant violated their rights. That **Section 30** of the **Child Care, Protection and Justice Act** also lays down a statutory duty to first obtain consent in relation to medical examination, treatment or surgery for unaccompanied children. They cited **Blyth –vs- Birmingham Waterworks Company** 1856 11EX 781, it was held that one breaches a duty of care or is negligent when he omits to do something which a reasonable man guided upon those considerations which ordinarily regulates the conduct of human affairs, would do or does something which a prudent and reasonable person would not do. That in the case at hand failure to obtain informed consent would amount to a breach of duty of care a health provider owes a patient/client.

Assault and battery

45, The Claimant argued that an assault is an act which causes another person to apprehend the immediate, unlawful force on his person; a battery is the actual infliction of unlawful force on another person”. The two distinctive features of the trespass were that they are actionable *per se* and that the interference with the claimant’s interest has to be a “direct” consequence of the defendant’s act. **Clerk and Lindsell on Torts Nineteenth Edition**; page 878 paragraph 15-01

46, That in the case of **Wilson vs. Pringle** [1987] QB 237 the court stated that; Battery requires Physical touching, whether with hand, weapon or missile. The act itself must be intentional but intent to injure is not an essential element of the tort. That an act does not constitute trespass to the person unless it is done deliberately or negligently. See the case of National **Coal Board v Evance** [1951] 2 K.B 861. That in the case of **Freeman vs. The Home Office** [1984] QB 524; stated the law regarding battery as follows:

“It is a battery or trespass to the person for a Medical Practitioner to perform an operation to which the Plaintiff has not consented. The burden of proving the absence of consent is on the Plaintiff. For consent to be a defence to an allegation of battery it is sufficient if the Plaintiff knew in broad terms to what he was consenting so as to establish that his consent was real: question of “informed consent” are not relevant in battery, but only in negligence.”

47, That if a person’s consent to medical treatment has been obtained by fraud or misrepresentation, then it is not a valid consent. In the case of **Chatterton vs. Gerson** [1981] QB 432 at 443, Bristow J, stated that;

“Of course, if information is withheld in bad faith, the consent will be vitiated by fraud.”

Judge Benjamin Cardozo said: 'Every human being of adult years and sound mind has a right to determine what can be done with his own body; and a surgeon who continues to operate without his patient's consent commits an assault for which he is liable for damages.' **Schloendorff v. Society of N.Y. Hosp.**, 105 N.E. 92 (N.Y. 1914) (holding that surgery without proper consent constitutes the trespassory tort of assault). If there is no consent at all, the tort is battery. See, e.g., **McNeil v. Brewer**, 710 N.E.2d 1285, 1288-89 (Ill. App. Ct. 1999)

Children, Guardianship and Consent to Health services

48, That a child has been defined as meaning a person below the age of sixteen years per **Section 11 of the Constitution** and **Section 2** of the **Child Care, Protection and Justice Act**. In Malawi the law governing minors and consent to medical treatment is contained in **Child Care, Protection and Justice Act – Act No. 22 of 2010**. **Section 30** of the **Child Care, Protection and Justice Act** highlights situations in which the following category of people may give consent in relation to medical examination, treatment or surgery for unaccompanied children:

- i. *Social Welfare Officer* in case of a minor illness, injury or condition.
- ii. *Parent or guardian or any person* having the authority to consent in case of serious condition or condition which requires surgery.

49, That **Section 38 (1)** of the **Child Care, Protection and Justice Act** provides that a guardian may be appointed by (a) the testamentary will or choice of a parent; (b) an order of the court; and (c) the family of the child. That in Malawi the issue of consent has largely been dealt with in the arena of criminal law particularly in sexual assault case. For example, in **Republic vs. Goliati** 971-72 ALR, a case in which a girl aged 10 was defiled by two men, it was held that a girl who is under the age of 13 is not capable of giving that consent. That in **Gillick v West Norfolk and Wisbech AHA** [1985] 3 WLR 830; [1985] 3 All ER 402 the House of Lords dealt with the issue of minor's capacity to give consent. One of the issues in that case was whether or not a 16-year-old can give valid consent to medical treatment without the knowledge or consent of their parents?

The House of Lords held that a child is capable of giving valid consent to medical treatment if they possess the intelligence and maturity required to understand the nature and effects of the

treatment. This includes a proper understanding of any moral or family issues involved in the decision. This has come to be known as ‘Gillick competence’.

50, Lord Fraser also set out the following guidelines when a doctor can give an under-age girl contraceptive advice/treatment without her parents’ knowledge or permission. The doctor must be satisfied that:

- a. The child will understand the advice or treatment;
- b. The doctor is unable to persuade the child to inform her parents or let them inform her parents on her behalf;
- c. The child is likely to begin or continue sexual activity regardless of whether she receives advice or contraception;
- d. Her physical or mental health are likely to suffer if she does not receive proper advice or contraception; and
- e. It is in her best interests to receive advice or treatment without her parents’ consent.

51, That consent to treatment means a person must give permission before they can receive any type of medical treatment, test or examination. The Claimants submitted that consent must be given by a person capable in law to give consent. This means the person must have legal capacity to consent (for example the person has reached the required age of consent as specified in the law). Consent must be informed. This requires the patient to understand the information supplied and to comprehend the consequences of acting on the information. That consent must be clear, unequivocal and comprehensive. This means the patient and health provider must be absolutely clear about what is being consented to in the process before and after the treatment. Consent must be given freely. Consent must not be induced in any way. The cited **Montgomery v Lanarkshire Health Board** [2015] UKSC 11 and **Bolam v Friern Hospital Management Committee** [1957]2All E.R. 118 in which the traditional test was laid down as follows:

“A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art” or, as alternatively

put by the same Judge, “putting it the other way round, a doctor is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion which takes a contrary view”.

Assault on Claimants Rights.

52, That under the **Constitution of the Republic**, the Claimants are guaranteed the rights to dignity and privacy and health – **Sections 19, 21**. The Claimants are also guaranteed the right to health as provided in the **International Covenant on Civil and Political Rights (ICCPR)** and the **International Covenant on Economic, Social, and Cultural Rights (ICESCR)**. That everyone, including children, has *the right to autonomy and self-determination over their own body, and the only person with the right to make a decision about one’s body is oneself—no one else*. This is the principle of *bodily integrity*, which upholds everyone’s right to be free from acts against their body which they did not consent to. That all persons enjoy a general right to bodily integrity. It has been affirmed by the United States Supreme Court in **Union Pacific Railway Company v. Botsford**, 141 U.S. 250 (1891), and reaffirmed in **Planned Parenthood v. Casey**, 505 U.S. 833 (1992). Male neonatal non-therapeutic circumcision removes healthy functional tissue and is viewed by many as an infringement upon the right to bodily integrity.

53, That in **Glass v United Kingdom**, ECHR 9 Mar 2004 doctors treated a severely mentally and physically disabled boy against his mother’s wishes. (In the UK, parents can consent on behalf of children and young people). The Court found that the doctors’ decision to override the mother’s objection to the treatment had breached Article 8. That to be valid, consent must be informed. So, if a patient consents to treatment on the basis of misleading information, or where information was withheld from them, it could be argued that treatment breached Article 8. This doesn’t mean that doctors must tell patients about every possible complication of the treatment, but they must be able to show that they have taken into account the patient’s Article 8 (ECHR) rights and be able to justify withholding information.

Conclusion and prayer

54, They submitted that the Claimants have shown that: That the Defendant owed the Minor Claimants a duty of care. That the Defendant breached its duty of care. The Claimants suffered pain, injury and damage owing to the Defendant’s breach of duty. That in addition to physical injury, the defendant’s negligence also resulted in the Claimants human rights being violated. The Claimant have also shown that: The Defendant circumcised them without first obtaining valid consent. In the circumstances, the Defendant committed a battery against the Claimants.

In view of the wrongs committed by the Defendant, it is the humble prayer of the Claimants that the Defendant: Be found liable for having committed the tort of negligence, battery and having violated the rights of the Claimants. Be ordered to compensate the Claimants as pleaded in the re-amended Statement of case.

Defendant's submissions

Consent in matters involving minors

55, The Defendant submitted that Section 2 of The Child Care, Protection and Justice Act defines a child as a “*person below the age of sixteen years.*” Section 30 of the Child Care, Protection and Justice Act provides for the situation in which a social welfare officer or parent/guardian or any person may give consent in relation to medical examination, treatment or surgery for unaccompanied children. It provides that a social welfare officer may give consent in case of a minor illness, injury or condition. It further provides that a parent or guardian or any person having the authority to consent in case of serious condition or condition which requires surgery. Section 38 of the Child Care, Protection and Justice Act provides that a guardian may be appointed by the testamentary will or choice of a parent; an order of the Court and the family of the child.

56, That in the case of **Gillick v West Norfolk and Wisbech Area Health Authority**¹ the Plaintiff sought a declaration that any medical treatment, in particular, contraceptive treatment of a child less than 16 years of age was unlawful, unless authorised by parental consent. It was contended by the Plaintiff that at common law a child less than 16 years of age lacked any capacity to consent to medical treatment. The house of the Lords rejected the claim and held that a child below 16 years of age can give a valid consent to treatment generally, providing that the individual child has attained the necessary degree of maturity, intelligence and understanding to comprehend the nature of the treatment proposed. That in **Yachuk v Oliver Blais**² it was held that if evidence is shown that the child in a particular case had in fact greater knowledge than one would normally ipute to a child of his age, a more debatable question of the liability of negligence would arise.

The law on negligence

57, That according to **A.M. DUNGDALE in Clerk and Lindsell On torts (London Sweet and Maxwell 2000) p. 30**, a defendant will be liable in negligence if he falls below the standard of care demanded by the duty of care which he owes to the plaintiff. And what constitutes that

1 [1986] AC 151

2

standard of care can be said to be the degree of care, competence and skill to be expected from the person engaging in the activity or function undertaken by the defendant. Negligence itself is the omission to do something which a reasonable man would, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do or doing something that a prudent and reasonable man would not do³. The question of what is reasonable is determined by looking at the circumstances in which the defendant acted. Further, the losses for which compensation is claimed must be caused by the Defendant's tort⁴. That in Donoghue v Stevenson⁵ Lord Atexim it was held that;

"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour, who, then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

58, That in Deyong v Shenbum⁶ the Court held that;

"...there has to be a breach of duty which the law recognises and to ascertain what must be had to the decisions of the court."

That in summary, for a claim under negligence to succeed a Claimant has to show that;

there was a duty of care owed to him or her;

the duty of care has been breached;

as a result of the breach, he or she has suffered damages and loss.

The law on assault and battery

59, That it is settled law that if a person applies force to the person of another, without lawful justification, then that amounts to a civil wrong of battery. A Classical definition of battery was given in the United States case by Cardozo J in the matter of Schloendorff v Society of New York Hospitals⁷ held that;

3 See Blyth v Birmingham Waterworks Co. (1856) 11 Exch 781 at 784, per Alderson B.

4 See A. Burrows in Clark and Lindsell On Tort p.1560

5 (1932) AC 562

6 (1946) 1 All ER 226

7 105 NE 92 (NY 1914)

“Every human being of adult years and sound mind has a right to determine what shall be done with his own body; a surgeon who performs an operation without the patients consent commits an assault.”

60, That an assault is an act which causes another person to apprehend the immediate, unlawful force on his person; a battery is the actual infliction of unlawful force of another person⁸. That there is no requirement for the Defendant to cause any actual damage to the Claimant. Assault. Like all forms of trespass, is actionable *per se*⁹. Battery requires physical touching, whether with hand, weapon or missile as stated in the case of **Wilson v Pringle**¹⁰. The act itself must be intentional but intent to injure is not an essential element of the tort. For an act to constitute a trespass to a person there is need for it to be done with an intention¹¹.

61, That lastly, the case of **Freeman v The Home Office**¹² it was held that;

“It is battery or trespass to the person for a Medical Practitioner to perform an operation to which the Plaintiff has not consented. The burden of proving the absence of consent is on the Plaintiff. For consent to be a defence to an allegation of battery it is sufficient if the Plaintiff knew in broad terms to what he was consenting so as to establish that his consent was real; question of ‘informed consent’ are not relevant, but only in negligence.”

Submissions

62, That children under the age of 16 need the consent of the parent or legal guardian. However, Children under the age of 16 can give consent to medical consent provided that they understand the nature of the treatment, in the instance case, it has to be established whether the minor had considerable understanding of the procedure that he was going to undergo with the Defendant herein. In this matter, the 1st Claimant and the 3rd Claimant admitted that they boarded the motor vehicle without being forced since it was a rare opportunity for them to ride one.

63, That it was also admitted by the 1st Claimant that he saw the woman that signed her consent form in the motor vehicle and the defendant did not know if they were related and had no way of confirming whether she was the parent or legal guardian. It is not in dispute that the same woman is the one that signed the consent forms for both the Claimants. It is also not disputed that the Defendant had no way of verifying whether the woman that sign the consent forms was a parent or legal guardian of the Claimants since the woman and the Claimants were also

8 Clerk and Lindsell on Torts 19th Edition; page 878

9 Same as above

10 [1987] QB 237

11 National Coal Board v Evans [1951] 2 K.B. 861

12 [1984] QB 524

together in the same motor vehicle that brought them to Pensulo Health Centre. As such, the Defendant obtained consent for the Claimants to get circumcised.

64, That the Defendant owed a duty of care when conducting the circumcision of the Claimants. In order not to breach the duty of care the Defendants explained to the Claimants what circumcision is and how it was to be carried out and made sure that both Claimants were fit to be circumcised by testing the Claimant's blood pressure, weight, and height and body temperature. That Defendant injected the Claimants before carrying out the circumcision for them not to feel the pain and later dressed the wounds after the circumcision. Finally the Claimants were given painkillers. In conclusion the Defendant submitted that from the above the Defendant did not breach the duty of care that they owed to the Claimants since the circumcision was done following all the procedures and there were no complications.

65, That as confirmed by both the Claimants, the 1st Claimant did not disclose to the Defendant that he suffers from inguinal hernia and the 2nd Claimant took off the bandage on his own, both these factors contributed to the Claimants to bleed or get sick after the circumcision hence the Claimants' own negligence led to the injuries/damage suffered if there is any at all. Since both Claimants consented to the circumcision they cannot claim to have been assaulted. The Defendant submitted that the Claimants' claims should be dismissed since the Defendant obtained consent to have them circumcised and the Defendant did not breach the duty of care they owed the Claimants.

The Finding

66, I'm always inspired by Donoghue v Stevenson¹³ Lord Atkin held that;

"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour, who, then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

67, This is one of those sad days I have encountered in the many years have been on the bench in the court below and in this court. This a typical case where the Defendant has abused the legal process. The Defendant could have settled this matter outside court. The Defendant should be ashamed that they defended this matter. Why do I say so? There is clear evidence which has not been challenged that the boys jumped into this motor not knowing where they were going. They arrived at the health Center without their parents or legal guardian. The

13 (1932) AC 562

nurses proceed to start the process of circumcision without seeking consent from the parents or legal guardian.

68, I find it insulting to the administration of justice that the Defendant has stated in their defence that the woman who was also in the vehicle gave consent. Who was this woman? She did not come to give evidence. The Defendant claims he had no way of knowing that the woman was not a parent or legal guardian. It is settled law that a child has been defined as meaning a person below the age of sixteen years per **Section 11 of the Constitution** and **Section 2 of the Child Care, Protection and Justice Act**. In Malawi the law governing minors and consent to medical treatment is contained in the Child **Care, Protection and Justice Act – Act No. 22 of 2010**. **Section 30** of the **Child Care, Protection and Justice Act** highlights situations in which the following category of people may give consent in relation to medical examination, treatment or surgery for unaccompanied children:

- A) *Social Welfare Officer* in case of a minor illness, injury or condition.
- B) *Parent or guardian or any person* having the authority to consent in case of serious condition or condition which requires surgery.

69, For this court to be writing this judgment is surely a waste of the precious time of the court. As per the law and the various cases that have been cited, I need not investigate this matter any further. On a balance of probabilities, I'm in agreement with the Claimants that the circumcision service relating to the minor Claimants herein was non-therapeutic, non-emergency, non-religious and non-cultural. The Defendant's act in carrying out the circumcision on the minor Claimants without first getting informed consent from the parents or guardians of the Minor Claimants was unlawful.

70, I find that there was no consent before the circumcision was performed and therefore there was assault and battery. The tort demands that a defendant must owe the claimant a duty of care and there must be a breach of such a duty which result in the claimant suffering damage. The fact that the Defendant positively responded to the call and took 1st Claimant to Malmed Clinic in Blantyre that in itself does not cure the tortious acts. The Claimants must succeed in all claims as per the statement of case with costs. The Claimants must take out summons for assessment of damages within 14 days.

I so order

Pronounced in open Court at Blantyre in the Republic on 2 December 2022.



Dingiswayo Madise

Judge