



**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

August Term, 2006

(Argued: July 12, 2007)

Decided: January 30, 2009)

Docket Nos. 05-4863-cv (L), 05-6768-cv (CON)

Rabi Abdullahi, individually and as the natural guardian and personal representative of the estate of her daughter Lubabatau Abdullahi, Salisu Abullahi, individually and as the natural guardian and personal representative of the estate of his son Abulliahi {Manufi} Salisu, Alasan Abdullahi, individually and as the natural guardian and personal representative of the estate of his daughter Firdausi Abdullahi, Ali Hashimu, individually and as the natural guardian and personal representative of the estate of his daughter Suleiman, Muhammadu Inuwa, individually and as the natural guardian and personal representative of the estate of his son Abdullahi M. Inuwa, Magaji Alh Laden, individually and as the natural guardian and personal representative of the estate of his son Kabiru Isyaku, Alhaji Mustapha, individually and as the natural guardian and personal representative of the estate of his daughter Asma`u Mustapha, Suleiman Umar, individually and as the natural guardian and personal representative of the estate of his son Buhari Suleiman, Zainab Abdu, a minor, by her mother and natural guardian, Haja Abdullahi, Haji Abdullahi, individually, Firdausi Abdullahi, a minor, by her father and natural guardian Abdullahi Madawaki, Abdullahi Madawaki, individually, Sani Abdullahi, a minor, by his father and natural guardian, Sani Abdullahi, Abdullahi Ado, a minor, by his mother and natural guardian, Aisha Ado, Aisha Ado, individually, Abdumajid Ali, a minor, by his father and natural guardian, Alhaji Yusuf Ali, Nura Muhammad Ali, a minor, by his father and natural guardian, Muhammad Ali, Muhammad Ali, individually, Umar Badamasi, a minor, by his father and natural guardian, malam Badamasi Zubairu, Malam Badamasi Zubairu, individually, Muhammadu Fatahu Danladi, a minor, by his father and natural guardian, Alhaji Danladi Ibrahim, Alhaji Danaldi Ibrahim, individually, Dalha Hamza, a minor, by his father and natural guardian malam Hamza Gwammaja, Malam Gwammaja, individually, Tasiu Haruna, a minor, by his guardian Mukhtar Saleh, Mukhtar Saleh, individually, Muhyiddeen Haasan, a minor, by his father and natural guardian, Tijjani Hassan, Tijjani Hassan, individually, Kawu Adamu Ibrahim, a minor, by his father and natural guardian, Malam Abamus Ibrahim Adamu, Alhaji Ibrahim Haruna, individually, Mallam Idris, individually, Yusuf Idris, a minor, by his father

and natural guardian, Idris Umar, Idris Umar, individually, Hafsat Isa, a minor, by her father and natural guardian,, Isa Muhammed Isa, Isa Muhammed Isa, individually, Taju Isa, a minor, by her father and natural guardian, Malam Isa Usman, Malam Isa Usman, individually, Hadiza Isyaku, a minor, by her father and natural guardian, Isyaki Shuaibu, Isyaku Shuaibu, individually, Zahra`u Jafaru, a minor, by her father and antural guardian, Jafru Baba, Jafaru Baba, individually, Anas Mohammed, a minor, by his father and natural guardian, Malam Mohammed, Malam Mohammed, individually, Nafisatu Muhammed, a minor, by her mother and natural guardian, Yahawasu Muhammed, Yahawasu Muhammed, individually, Muhsinu Tijjani, a minor, by his father and natural guardian, Tijjani Hassan, Alhaji Yusuf Ali, Maryam Idris, a minor, by her father and natural guardian, Malam Idris, Ajudu Ismaila Adamu, individually and as parent and natural guardian of Yahaya Ismaica, minor, Malam Mohammed, individually and as parent and natural guardian of Bashir Mohammed, minor, Malam Yusab Ya`u Amale, individually and as parent and natural guardian of Suyudi Yusals Yu`a, minor, Malasm Haruna Adamu, individually and as parent and natural guardian of Mohammed Tasi`u Haruna, minor, Zangon Kwajalawa, individually and as parent and natural guardian of Nuruddim Dauda, minor, Malam Dahauru Ya`y, individually and as parent and natural guardian of Rabi Dahuru, minor and as parent and natural guardian of Zainab Musa Dahuru, minor, Zangon Marikita, individually and as parent and natural guardian of Ismaila Musa, minor, Arhaji Muihammad Soja, individually and as parent and natural guardian and personal representative of Estate of Hamaza Achaji Muhammad, minor, deceased, Achaji Ibrahim Dankwalba, individually and as parent and natural guardian of Personal Representative of Est of Abdullahi Ibrahim, minor, Mallam Lawan, individually and as parent and natural guardian and personal representative of Est. of Aisha Lawan, minor, deceased, Alhaji Muhammed Tsohon Sojo, individually and as parent and natural guardian and personal representative of Est. of Unni Alhasi Muhammed, minor, Ismaila Zubairui, individually and as parent and natural guardian and personal representative of Est. of Mustapha Zubairu, minor, Deceased, Abubaker Musa, individually and as parent and natural of Sa`adatu Musa, Minor, Mohamed Abdu, individually and as parent and natural guardian of Haruna Abdu, minor, Mallam Hassan, individually and as parent and natural guardian and personal representative of Est. of Sadiya Hassan, minor, deceased, Mallam Yakubu Umar, individually and as parent and natural guardian of, Mallam Samaila, individually and as parent and natural guardian of Adamu Samalia, minor, Musa Yahaya, individually and as parent and natural guardian of Ukhasa Musa, minor, Audu Ismailia Adamu, individually and as parent and natural guardian of Yashaya Samaila, Malam Musa Dahiru, individually and as parent, Malam Musa Zango, individually and as parent and natural guardian os Samaila Musa, minor, Mallam Alhassan Maihula, individually and as a parent and natural guardian of Najib Maihula, minor, Mallam Abdullah Gama, individually and as parent and natural guardian of Dankuma Gama, Minor, Dauda Nuhu, individually and as parent and natural guardian and personal representative of Est. of Hamisu Nuhu, minor, deceased, Mallam Abdullahi, individually and as parent and natural guardian and personal representative of Est. of Najjaratu Adbullahi, minor, deceased, Malam Umaru Mohammed, individually and as parent and

natural guardian and personal representative of Est. of Sule Mohammed, minor, deceased, Mallam Nasiru, individually and as parent and natural guardian and personal representative of Est. of Yusuf Nasiru, minor, deceased, Yusuf Musa, individually and as parent and natural guardian and personal representative of Est. of Nafisatu Musa, minor, deceased, Mallam Muritala, individually and as parent and natural guardian and personal representative of Est. of Umaru Muritala, minor, deceased, Mallam Tanko, individually and as parent and natural guardian and personal representative of Est. of madina Tankol, minor deceased, Mallam Sheu, individually and as parent and natural guardian and personal representative of Est. of Madina Tankol, minor, deceased, Malam Kabiru Mohamed, individually and as parent and natural guardian and personal representative of Est. of Kabiru Mohamed, minor, deceased, Mallam Sule Abubakar, individually and as parent and natural guardian and personal representative of Est. of Fatima Abubaker, minor, deceased, Mallam Idris, individually and as parent and natural guardian and personal representative of Est. of Baba Idris, minor, deceased, Mallam Mohamed Bashir, individually and as parent and natural guardian and personal representative of Est. of Sani Bashir, minor, deceased, Ibrahim, individually and as parent and natural guardian and personal representative of Est. Hassan Ibrahim, minor, deceased, Alhaji Shuaibu, individually and as parent and natural guardian and personal representative of Est. of Masjbatu Shuaibu, minor, deceased, Mallam Abdullahi Sale, individually and as parent and natural guardian and personal representative of Est. of Shamisiya Sale, minor, deceased, Mallam Ibrahim Amyarawa, individually and as parent and natural guardian and personal representative of Est. of Yahaya Ibrahim, minor, deceased, Mallam Abdu Abubaker, individually and as parent and natural guardian and personal representative of Est. of Nasitu Abubaker, minor, deceased, Mallam Yusuf, individually and as parent and natural guardian and personal representative of Est. of Hodiza Yusuf, minor, deceased, Mallam Dauda Yusuf, individually and as parent and natural guardian and personal representative of Est. of Abubaker Sheu, minor, deceased, Mallam Mohammed Sheu, individually and as parent and natural guardian and personal representative of Est. of Mustapha Yakubu, minor, deceased, Alhaji Ubah, individually and as parent and natural guardian and personal representative of Est. of Maryam Ubah, minor, deceased, Mallam Mohamadu Jabbo, individually and as parent and natural guardian of Auwalu Mohamadu, Mallam Abdullah Adamu, individually and as parent and natural guardian and personal representative of Est. of Abdullah Adamu, minor,

Plaintiffs-Appellants,

v

Pfizer, Inc.,

Defendant-Appellee.

Before: POOLER, B.D. PARKER, and WESLEY, *Circuit Judges*.

Plaintiffs-Appellants appeal from judgments of the United States District Court for the Southern District of New York (Pauley, *J.*) dismissing complaints for lack of subject matter jurisdiction and on the ground of *forum non conveniens*. REVERSED and REMANDED.

Judge Wesley dissents in a separate opinion.

PETER SAFIRSTEIN (Elaine S. Kusel, Ann M. Lipton, Andrew Wilmar, and Tatiana Rodriguez, *on the brief*), MILBERG WEISS BERSHAD & SCHULMAN LLP, New York, NY, *for Plaintiffs-Appellants Rabi Abdullahi, et al.*

RICHARD ALTSCHULER (Ali Ahmad, Cheverly, MD, *on the brief*), ALTSCHULER & ALTSCHULER, West Haven, CT, *for Plaintiffs-Appellants Ajudu Ismaila Adamu, et al.*

STEVEN GLICKSTEIN (David Klingsberg, Maris Veidemanis, James D. Herschlein, and Julie B. du Pont, *on the brief*), KAYE SCHOLER LLP, New York, NY, *for Defendant-Appellee Pfizer, Inc.*

BARRINGTON D. PARKER, *Circuit Judge*:

This consolidated appeal is from the judgments of the United States District Court for the Southern District of New York (Pauley, *J.*) dismissing two complaints for lack of subject matter jurisdiction under the Alien Tort Statute, 28 U.S.C. § 1350 (“ATS”), and in the alternative, on the ground of *forum non conveniens*. Plaintiffs-Appellants Rabi Abdullahi and other Nigerian children and their guardians sued Defendant-Appellee Pfizer, Inc. under the ATS (“the *Abdullahi* action”). They alleged that Pfizer violated a customary international law norm prohibiting involuntary medical experimentation on humans when it tested an experimental antibiotic on children in Nigeria, including themselves, without their consent or knowledge. Plaintiffs-

Appellants Ajudu Ismaila Adamu and others, also children and their guardians who were part of Pfizer's Nigerian drug experiment, brought a similar action against Pfizer, alleging violations of the ATS, the Connecticut Unfair Trade Practices Act ("CUTPA"), and the Connecticut Products Liability Act ("CPLA") ("the *Adamu* action"). Pfizer moved to dismiss both actions for lack of subject matter jurisdiction and on the basis of *forum non conveniens*. The district court granted the motions and both sets of plaintiffs have appealed.

As explained below, we conclude: (1) that the district court incorrectly determined that the prohibition in customary international law against nonconsensual human medical experimentation cannot be enforced through the ATS; (2) that changed circumstances in Nigeria since the filing of this appeal require re-examination of the appropriate forum, albeit on the basis of a legal analysis different from that employed by the district court; and (3) that the district court incorrectly applied Connecticut's choice of law rules in the *Adamu* action. Consequently, we reverse and remand the cases to the district court for further proceedings.

BACKGROUND

A. Pfizer's Trovan Test in Nigeria

On review of a district court's grant of a motion to dismiss, we assume as true the facts alleged in the complaints, construing them in the light most favorable to the appellants. *See Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 115 (2d Cir. 2008). The central events at issue in these cases took place in 1996, during an epidemic of bacterial

meningitis in northern Nigeria.¹ The appellants allege that at that time, Pfizer, the world's largest pharmaceutical corporation, sought to gain the approval of the U.S. Food and Drug Administration ("FDA") for the use on children of its new antibiotic, Trovafloxacin Mesylate, marketed as "Trovan." They contend that in April 1996, Pfizer, dispatched three of its American physicians to work with four Nigerian doctors to experiment with Trovan on children who were patients in Nigeria's Infectious Disease Hospital ("IDH") in Kano, Nigeria. Working in concert with Nigerian government officials, the team allegedly recruited two hundred sick children who sought treatment at the IDH and gave half of the children Trovan and the other half Ceftriaxone, an FDA-approved antibiotic the safety and efficacy of which was well-established. Appellants contend that Pfizer knew that Trovan had never previously been tested on children in the form being used and that animal tests showed that Trovan had life-threatening side effects, including joint disease, abnormal cartilage growth, liver damage, and a degenerative bone condition. Pfizer purportedly gave the children who were in the Ceftriaxone control group a deliberately low dose in order to misrepresent the effectiveness of Trovan in relation to Ceftriaxone. After approximately two weeks, Pfizer allegedly concluded the experiment and left without administering follow-up care. According to the appellants, the tests caused the deaths of eleven children, five of whom had taken Trovan and six of whom had taken the lowered dose of

¹ Bacterial meningitis is a serious and sometimes fatal infection of the fluids surrounding the spinal cord and the brain. Centers for Disease Control and Prevention, Meningococcal Disease: Frequently Asked Questions (May 28, 2008), <http://www.cdc.gov/meningitis/bacterial/faqs.htm>.

Ceftriaxone, and left many others blind, deaf, paralyzed, or brain-damaged.

Appellants claim that Pfizer, working in partnership with the Nigerian government, failed to secure the informed consent of either the children or their guardians and specifically failed to disclose or explain the experimental nature of the study or the serious risks involved. Although the treatment protocol required the researchers to offer or read the subjects documents requesting and facilitating their informed consent, this was allegedly not done in either English or the subjects' native language of Hausa. The appellants also contend that Pfizer deviated from its treatment protocol by not alerting the children or their guardians to the side effects of Trovan or other risks of the experiment, not providing them with the option of choosing alternative treatment, and not informing them that the non-governmental organization Médecins Sans Frontières (Doctors Without Borders) was providing a conventional and effective treatment for bacterial meningitis, free of charge, at the same site.²

The appellants allege that, in an effort to rapidly secure FDA approval, Pfizer hastily assembled its test protocol at its research headquarters in Groton, Connecticut, and requested and

² The appellants further allege that Pfizer failed to follow its protocol in ways that might have mitigated the harm suffered by the children. They contend that Pfizer violated the protocol by administering Trovan orally even though oral absorption is difficult for sick children; conducting no testing prior to administering the drug to determine whether Nigeria's strain of meningitis might be responsive to Trovan; failing to determine that the children in the test had meningitis; and failing to either exclude from the experiment children with liver or joint problems or to test for such problems, even though Trovan was known to exacerbate them. Although Pfizer's protocol called for children receiving Trovan to be switched to Ceftriaxone if they did not respond well to Trovan, Pfizer allegedly did not conduct regular blood tests of the children or switch those who suffered from Trovan-related side effects to Ceftriaxone.

received permission to proceed from the Nigerian government in March 1996. At the time, Pfizer also claimed to have secured approval from an IDH ethics committee. Appellants allege, however, that the March 1996 approval letter was backdated by Nigerian officials working at the government hospital well after the experiments had taken place and that at the time the letter was purportedly written, the IDH had no ethics committee.³ Appellants also contend that the experiments were condemned by doctors, including one on Pfizer's staff at the time of the Kano trial.

In 1998, the FDA approved Trovan for use on adult patients only. After reports of liver failure in patients who took Trovan, its use in America was eventually restricted to adult emergency care. In 1999, the European Union banned its use.

B. The Proceedings Below

In August 2001, the *Abdullahi* plaintiffs sued Pfizer under the ATS, alleging that the experiments violated international law. In September 2002, the district court granted Pfizer's motion to dismiss the *Abdullahi* claims on the ground of *forum non conveniens*, conditioned on Pfizer's consent to litigation in Nigeria. *Abdullahi v. Pfizer, Inc.*, No. 01 Civ. 8118 (WHP), 2002 WL 31082956, at *12 (S.D.N.Y. Sept. 17, 2002) ("*Abdullahi P*"). It found that Nigeria was an adequate alternative forum despite plaintiffs' contentions about corruption in the Nigerian court

³ A Nigerian physician who was the principal investigator for the test allegedly admitted that his office created the backdated approval letter when the FDA conducted an audit of the experiment in 1997.

system. *Id.* at *8-10. The district court denied Pfizer's motion to dismiss under Rule 12(b)(6), Fed. R. Civ. P., concluding that the plaintiffs adequately alleged that Pfizer's collusion with the Nigerian government made it a state actor. *Id.* at *5-6.

Meanwhile, another group of children and guardians involved in the Trovan experiment sued in the Federal High Court in Kano, alleging claims under Nigerian law. That case, *Zango v. Pfizer International, Inc.*, [2001] Suit No. FHC/K/CS/204/2001 (Nigeria), was dismissed in 2003 after plaintiffs voluntarily discontinued the suit following the removal from the bench of the first judge assigned to the action and the second judge's decision to decline jurisdiction for personal reasons. *Abdullahi v. Pfizer, Inc.*, No. 01 Civ. 8118 (WHP), 2005 WL 1870811, at *5 (S.D.N.Y. Aug. 9, 2005) ("*Abdullahi III*"). On appeal to this Court from the district court's dismissal in *Abdullahi I*, the *Abdullahi* appellants argued that the dismissal of the *Zango* litigation was a result of rampant corruption, which indicated that the Nigerian judicial system could not provide an adequate alternative forum for their action. Given an inconclusive record regarding the events leading to the dismissal of the *Zango* lawsuit, we vacated the judgment and remanded for further fact-finding on *forum non conveniens*. See *Abdullahi v. Pfizer, Inc.*, 77 F. App'x 48, 53 (2d Cir. 2003) (summary order) ("*Abdullahi II*").

In November 2002, following the dismissal of the *Zango* lawsuit, a number of the *Zango* plaintiffs filed the *Adamu* action. They alleged that in planning the Trovan experiment in Connecticut and in conducting the tests in Nigeria without informed consent, Pfizer violated the CUTPA, the CPLA, and the ATS. Eventually, the *Adamu* action was transferred to the Southern

District of New York and consolidated with the *Abdullahi* action. Pfizer then moved to dismiss both cases for failure to state a claim under the ATS and on the basis of *forum non conveniens*. It also moved to dismiss in *Adamu* on the ground that Connecticut choice of law principles require the application of Nigerian law, which bars suit under CUTPA and the CPLA.

The district court granted the motions. *See Abdullahi III*, 2005 WL 1870811; *Adamu v. Pfizer, Inc.*, 399 F. Supp. 2d 495 (S.D.N.Y. 2005). In *Abdullahi III*, Judge Pauley held that while “[p]laintiffs correctly state that non-consensual medical experimentation violates the law of nations and, therefore, the laws of the United States,” they failed to identify a source of international law that “provide[s] a proper predicate for jurisdiction under the ATS.” 2005 WL 1870811, at *9, 14. Noting that “a decision to create a private right of action is one better left to legislative judgment in the great majority of cases,” he concluded that “[a] cause of action for Pfizer’s failure to get any consent, informed or otherwise, before performing medical experiments on the subject children would expand customary international law far beyond that contemplated by the ATS.” *Id.* at *13-14 (internal quotation marks omitted).

With regard to the *forum non conveniens* analysis, the district court declined to accept plaintiffs’ submissions concerning Pfizer’s alleged bribery of Nigerian officials on the ground that they were not based on personal knowledge. *Id.* at *16-17. Finding that the plaintiffs had failed to submit specific evidence that the Nigerian judiciary would be biased against its own citizens in an action against Pfizer, the district court alternatively held that Nigeria was an adequate alternate forum. *Id.* at *16, 18.

Several months later, the district court also granted Pfizer's motion to dismiss the *Adamu* case. *Adamu*, 399 F. Supp. 2d 495. It relied on its *Abdullahi III* decision to hold that the plaintiffs could not establish jurisdiction under the ATS. *Id.* at 501. The district court also incorporated the *forum non conveniens* analysis from *Abdullahi III* to find that Nigeria is an adequate forum. *Id.* at 504. Applying the public and private interest factors set forth in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947), *superseded by statute on other grounds as recognized in Cowan v. Ford Motor Co.*, 713 F.2d 100, 103 (5th Cir. 1983), the court found that while public interest factors did not support either forum, private interest factors weighed in favor of dismissal. *Adamu*, 339 F. Supp. 2d. at 505-06. The district court also dismissed the *Adamu* plaintiffs' Connecticut law claims, concluding that, under Connecticut choice of law principles, the action was governed and barred by Nigerian law. *Id.* at 503.

The *Abdullahi* and *Adamu* plaintiffs appealed. Since then, a tectonic change has altered the relevant political landscape. In May 2007, the state of Kano brought criminal charges and civil claims against Pfizer, seeking over \$2 billion in damages and restitution.⁴ Around the same time, the federal government of Nigeria sued Pfizer and several of its employees, seeking \$7 billion in damages.⁵ None of these cases seek compensation for the subjects of the tests, who are

⁴ Tina Akannam, *Nigeria: Pfizer—Case Adjourned Till May 27*, Vanguard, April 30, 2008, <http://allafrica.com/stories/200804300470.html>; Joe Stephens, *Pfizer Faces Criminal Charges in Nigeria*, The Washington Post, May 30, 2007, at A10, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/29/AR2007052902107.html>.

⁵ Jonathan Clayton, *Pfizer Under Fire After Drug Trial*, TimesOnline, June 27, 2007, http://business.timesonline.co.uk/tol/business/industry_sectors/health/article1990908.ece;

