

1977

# Jeannette U. Swan v. Dr. Robert H. Lamb And Dr. Dennis D. Thoen : Brief of Respondent-Thoen

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc2](https://digitalcommons.law.byu.edu/uofu_sc2)

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

W. Eugene Hansen; Attorney for Appellant Ray Christensen; Attorney for Respondent Dr. Lamb Rex Hanson; Attorney for Respondent Dr. Thoen

---

## Recommended Citation

Brief of Respondent, *Swan v. Lamb*, No. 14823 (Utah Supreme Court, 1977).  
[https://digitalcommons.law.byu.edu/uofu\\_sc2/521](https://digitalcommons.law.byu.edu/uofu_sc2/521)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

IN THE SUPREME COURT OF THE

STATE OF UTAH

JEANNETTE U. SWAN,

Plaintiff and  
Appellant,

vs.

DR. ROBERT H. LAMB and  
DR. DENNIS D. THOEN,

Defendants and  
Respondents.

Case No. 14823

BRIEF OF RESPONDENT-THOEN

Appeal from a Judgment of the Third District Court of  
Salt Lake County, Honorable Bryant H. Croft, Judge

REX HANSON, ESQ.  
HANSON, WADSWORTH & RUSSON  
Attorneys for Respondent Dr. Thoen  
702 Kearns Building  
Salt Lake City, Utah

W. EUGENE HANSEN, ESQ.  
HANSEN & ORTON  
Attorneys for Appellant  
2020 Beneficial Life Tower  
36 South State Street  
Salt Lake City, Utah 84111

RAY CHRISTENSEN, ESQ.  
CHRISTENSEN, GARDINER, JENSEN  
& EVANS  
Attorneys for Respondent Dr.  
Lamb  
900 Kearns Building  
Salt Lake City, Utah

FILED

JUL 26 1977

IN THE SUPREME COURT OF THE  
STATE OF UTAH

---

JEANNETTE U. SWAN,	)	
	)	
Plaintiff and	)	
Appellant,	)	
	)	
vs.	)	Case No. 14823
	)	
DR. ROBERT H. LAMB and	)	
DR. DENNIS D. THOEN,	)	
	)	
Defendants and	)	
Respondents.	)	
	)	

---

BRIEF OF RESPONDENT-THOEN

Appeal from a Judgment of the Third District Court of  
Salt Lake County, Honorable Bryant H. Croft, Judge

---

REX HANSON, ESQ.  
HANSON, WADSWORTH & RUSSON  
Attorneys for Respondent Dr. Thoen  
702 Kearns Building  
Salt Lake City, Utah

W. EUGENE HANSEN, ESQ.  
HANSEN & ORTON  
Attorneys for Appellant  
2020 Beneficial Life Tower  
36 South State Street  
Salt Lake City, Utah 84111

RAY CHRISTENSEN, ESQ.  
CHRISTENSEN, GARDINER, JENSEN  
& EVANS  
Attorneys for Respondent Dr.  
Lamb  
900 Kearns Building  
Salt Lake City, Utah

# TABLE OF CONTENTS

	PAGE
CASES CITED . . . . .	iv
AUTHORITIES CITED . . . . .	viii
NATURE OF THE CASE . . . . .	1
DISPOSITION IN LOWER COURT. . . . .	1
RELIEF SOUGHT ON APPEAL . . . . .	2
STATEMENT OF FACTS. . . . .	2
ARGUMENT. . . . .	14
POINT I. THE TRIAL COURT WAS CORRECT IN RULING THAT UTAH CASE LAW EXCLUDED TESTIMONY FROM PLAINTIFF'S OUT-OF-STATE WITNESS WHO WAS NOT FAMILIAR WITH LOCAL STAND- ARDS OF MEDICAL PRACTICE . . . . .	14
POINT II. A LOCALITY STANDARD MUST BE MAINTAINED IN UTAH MEDICAL MALPRACTICE CASES BE- CAUSE OF BOTH POLICY CONSIDERATIONS AND A VARIETY OF LOCALITY FACTORS WHICH NECESSARILY CREATE DIFFERING MEDICAL STANDARDS . . . . .	19
A. The strict locality rule is still viable in Utah today. . . . .	19
1. History and purpose of the rule. . . . .	19
2. Present practice and criticism of the strict locality rule . . . . .	19
B. Assuming arguendo that the strict locality rule is deemed too restrictive by this Court the "similar locality rule" should be adopted and "similarity" standards should be formulated . .	28
1. Historical development of the similar lo- cality rule. . . . .	29

2.	Application and criticism of the similar locality rule. . . . .	31
3.	Formulation of a standard of "similarity" . . . . .	35
C.	Courts which have adopted a national standard have used fallacious assumptions or assumptions inappropriate to Utah medical practice. . . . .	37
1.	Historical development of the national standard . . . . .	38
2.	Present practice and criticism of national standard rule . . . . .	40
D.	A variety of factors in Utah communities dictate retention of local criteria in evaluating medical malpractice. . . . .	49
1.	The geographic, population distribution, weather, and other conditions vary throughout the country and throughout the state of Utah. . . . .	50
2.	The number of physicians in a geographic area is a strong factor in determining the quality of medical care. . . . .	52
3.	Physicians throughout the country have differing opinions as to acceptable medical practices and have varying degrees of expertise . . . . .	55
4.	The availability of specialists in a community affects the quality of medical care . . . . .	57
5.	The number of dentists available in the Utah geographic areas and the availability of continuing education require locality standards as applied to dental care . . . . .	60

6.	The availability of registered and practical nurses in an area affects the quality of medical care. . . . .	61
7.	Drastic differences in hospital facilities throughout Utah and the country create differing standards of medical care . . . . .	62
a.	X-ray facilities. . . . .	64
b.	Laboratory facilities . . . . .	65
c.	Availability of ambulance services . . . . .	66
d.	Emergency room facilities of a hospital also can be an important factor in determining medical care. . . . .	67
e.	The use of recovery room facilities varies throughout the country . . . . .	68
f.	The availability of a good hospital medical library helps to determine the standard of medical practice. . . . .	69
g.	Differences in the ability of hospital administrators affect the quality of medical care in the hospital facility. . . . .	70
8.	General economic considerations also create differences in medical standards. . . . .	71
9.	Considerations concerning communication and transportation also vary from community to community. . . . .	72
	CONCLUSION. . . . .	73
	APPENDIX . . . . .	

# CASES CITED

	PAGE
<u>Acosta v. City of New York</u> , 321 N.Y.S.2d 137 (N.Y. Civ. Ct. 1971) . . . . .	23
<u>Baker v. Wycoff</u> , 95 Utah 199, 79 P.2d 77 (1938) . . . . .	16
<u>Baxter v. Snow</u> , 95 Utah 199, 2 P.2d 257 (1931). . . . .	15
<u>Blair v. Eblen</u> , 461 S.W.2d 370 (Ky. 1970) . . . . .	39, 41
<u>Bly v. Rhoads</u> , 222 S.E.2d 783 (Va. 1976). . . . .	31
<u>Borowski v. Von Solbrig</u> , 303 N.E.2d 146 (Ill. App. 1973) . . . . .	30
<u>Brune v. Belinkoff</u> , 235 N.E.2d 795 (Mass. 1968). . . . .	38, 41, 43
<u>Caldwell v. Parker</u> , 340 So.2d 705 (La. 1977). . . . .	22
<u>Carbone v. Warburton</u> , 94 A.2d 680 (N.J. 1953). . . . .	38
<u>Carrigan v. Roman Catholic Bishop</u> , 178 A.2d 502 (N.H. 1962). . . . .	30
<u>Christier v. Jeter</u> , 445 S.W.2d 51 (Tex. App. 1969). . . . .	39
<u>Christy v. Saliterman</u> , 179 N.W.2d 288 (Minn. 1970). . . . .	40
<u>Coleman v. Garrison</u> , 349 A.2d 8 (Del. 1975) . . . . .	22
<u>Cook v. Lichtblau</u> , 144 S.2d 312 (Fla. App. 1962). . . . .	30, 34
<u>Coon v. Shields</u> , 88 Utah 75, 39 P.2d 348 (1934) . . . . .	16, 44, 45
<u>Copeland v. Robertson</u> , 112 S.2d 236 (Miss. 1959). . . . .	22
<u>Dickens v. Everhart</u> , 199 S.E.2d 440 (N.C. 1973). . . . .	30

<u>Douglas v. Bussabarger</u> , 438 P.2d 829 (Wash. 1968) . . . . .	34, 46
<u>Eckles v. Traverse</u> , 362 P.2d 680 (Okla. 1961) . . . . .	23
<u>Edwards v. Clark</u> , 96 Utah 121, 83 P.2d 1021 (1938) . . . . .	17
<u>Ficklin v. Macfarlane</u> , 550 P.2d 1295 (Utah 1976) . . . . .	18
<u>Fitzmaurice v. Flynn</u> , 356 A.2d 887 (Conn. 1975) . . . . .	22
<u>Flock v. J.C. Palumbo Fruit Company</u> , 118 P.2d 707 (Idaho 1941) . . . . .	30
<u>Foreman v. Ver Brugghen</u> , 398 P.2d 993 (Nev. 1965) . . . . .	23
<u>Forrest v. Eason</u> , 123 Utah 610, 261 P.2d 178 (1953) . . . . .	17
<u>Fredrickson v. Maw</u> , 119 Utah 385, 227 P.2d 772 (1951) . . . . .	17
<u>Gambill v. Stroud</u> , 531 S.W.2d 945 (Ark. 1976) . . . . .	30, 32, 33, 43, 48
<u>Gandara v. Wilson</u> , 509 P.2d 1356 (N.M. App. 1973) . . . . .	23
<u>Getchell v. Mansfield</u> , 489 P.2d 953 (Ore. 1971) . . . . .	23
<u>Hansen v. Isaak</u> , 19 N.W.2d 521 (S.D. 1945) . . . . .	23
<u>Huggins v. Hickens</u> , 6 U.2d 233, 310 P.2d 523 (1957) . . . . .	17
<u>Hundley v. Martinez</u> , 158 S.E.2d 169 (W. Va. 1967) . . . . .	31
<u>Kronke v. Danielson</u> , 499 P.2d 156 (Ariz. 1972) . . . . .	30, 40
<u>Larsen v. Yelle</u> , 246 N.W.2d 841 (Minn. 1976) . . . . .	30



<u>Leighton v. Sargent</u> , 27 N.H. 460 (1853) . . . . .	19
<u>Little Cottonwood Water Company v. Kimball</u> , 76 Utah 243, 289 (1955). . . . .	49
<u>Llera v. Wisner</u> , 557 P.2d 805 (Mont. 1976). . . . .	22
<u>Lockart v. Maclean</u> , 361 P.2d 670 (Nev. 1961). . . . .	2
<u>Malone v. University of Kansas Medical Center</u> , 552 P.2d 885 (Kansas 1976) . . . . .	30
<u>Mann v. Sanders</u> , 173 N.E.2d 12 (App. Ill. 1961). . . . .	22
<u>Marsh v. Pemberton</u> , 10 U.2d 40, 347 P.2d 1108 (1959) . . . . .	17
<u>McCay v. Mitchell</u> , 463 S.W.2d 710 (Tenn. App. 1970) . . . . .	23
<u>McGulpin v. Bessmer</u> , 43 N.W.2d 121 (Iowa 1950). . . . .	30
<u>Mecham v. McLeay</u> , 227 N.W.2d 829 (Neb. 1975). . . . .	30
<u>Murphy v. Dyer</u> , 409 F.2d 747 (10th Cir. 1969). . . . .	30, 36
<u>Naccarato v. Grob</u> , 180 N.W.2d 788 (Mich. 1970). . . . .	30, 40
<u>Orange v. Shannon</u> , 224 S.2d 236 (Ala. 1969) . . . . .	22
<u>Paull v. Zion's First National Bank</u> , 18 U.2d 183, 417 P.2d 759 (1966) . . . . .	18
<u>Pederson v. Dumouchel</u> , 431 P.2d 973 (Wash. 1967). . . . .	32, 39
<u>Pelky v. Palmer</u> , 67 N.W. 561 (Mich. 1896) . . . . .	21
<u>Pepin v. Averill</u> , 32 A.2d 665 (Vt. 1943). . . . .	23

<u>Poulin v. Zartman</u> , 542 P.2d 251 (Alaska 1975) . . . . .	30
<u>Richardson v. Doe</u> , 199 N.E.2d 878 (Ohio 1964) . . . . .	30
<u>Riley v. Layton</u> , 329 F.2d 53 (10th Cir. 1964) . . . . .	37
<u>Runyon v. Reid</u> , 510 P.2d 943 (Okla. 1973) . . . . .	30, 31
<u>Shier v. Freedman</u> , 206 N.W.2d 166 (Wis. 1973) . . . . .	39
<u>Shilkret v. Annapolis Emergency Hospital Association</u> , 349 A.2d 245 (Md. 1975) . . . . .	22, 32, 39
<u>Shirey v. Schlemmer</u> , 223 N.E.2d 759 (Ind. 1967) . . . . .	22
<u>Sinz v. Owens</u> , 205 P.2d 3 (Cal. 1949) . . . . .	30, 31, 36
<u>Small v. Howard</u> , 120 Mass. 131 (1880) . . . . .	29, 43
<u>Smothers v. Hanks</u> , 34 Iowa 286 (1872) . . . . .	32
<u>Staples v. Washington</u> , 125 A.2d 322 (D.C. App. 1956) . . . . .	22
<u>Stundon v. Stadnik</u> , 469 P.2d 16 (Wyo. 1970) . . . . .	23
<u>Swope v. Printz</u> , 468 S.W.2d 34 (Mo. 1971) . . . . .	30
<u>Tefft v. Wilcox</u> , 6 Kan. 46 (1870) . . . . .	20
<u>Viita v. Fleming</u> , 155 N.W. 1077 (1916) . . . . .	33
<u>Walkenhorst v. Kesler</u> , 92 Utah 312, 67 P.2d 654 (1936) . . . . .	46
<u>Whitesell v. Hill</u> , 37 L.R.A. 830 (1897) . . . . .	29

# STATUTES CITED

	PAGE
<u>Utah Code Annotated</u> , §78-25-1 (1953) . . . . .	49
<u>Utah Code Annotated</u> , §78-25-6 (1953) . . . . .	50

## AUTHORITIES CITED

<u>AMA, Profile of Medical Practice</u> , (1975-1976) . . . .	46, 47
41 <u>Am.Jur.</u> , Physicians and Surgeons, Section 87 (1942) . . . . .	21
Annotation, 37 <u>A.L.R.3d</u> 420, 426. . . . .	22, 36, 46
Comment, 60 <u>Kentucky L. J.</u> 209 (1971) . . . . .	23
Dunne, John, "The Rural Health Care Crisis--Why Rural Doctors Are Missing", <u>Current Magazine</u> (June 1976). . . . .	54, 55, 65
Fein, R., <u>The Doctor Shortage: An Economic Diag- nosis</u> , (1967). . . . .	59
Gibson, L., "Rural Health Care: Problems and Prospects", 72 <u>Texas Medicine</u> 74 (March 1976). .	60
King and Coe, "The Wisdom of the Strict Locality Rule", 3 <u>Balt. L. Rev.</u> 221, 223 (1974) . . .	24, 44, 47, 56
Nations and Surgent, "Medical Malpractice and the Locality Rule", 14 <u>South Texas Law Journal</u> , 129, 137 (1974). . . . .	43
Note, 18 <u>DePaul L. Rev.</u> 328 (1968). . . . .	23
Note, 40 <u>Fordham L. Rev.</u> , 435, 438, 439 (1971). . . .	21, 23, 35
Note, "Medical Malpractice--Expert Testimony" 60 <u>N.W. U. L. Rev.</u> 834 (1966). . . . .	25, 35
Note, "Medical Specialties and the Locality Rule", 14 <u>Stan. L. Rev.</u> 884, 890 (1962) . . . . .	23, 35

	PAGE
Note, 46 <u>N.C. L. Rev.</u> 680 (1968) . . . . .	23
Note, "Overcoming the 'Conspiracy of Silence': Statutory and Common Law Innovations", 45 <u>Minn. L. Rev.</u> , 1019, 1045-58 (1961). . . . .	25, 26
Prosser, W., <u>Handbook of the Law of Torts</u> (4th ed. 1971). . . . .	25
"Rural Health Care: In Dire Straits", <u>Science Digest</u> (Sept. 1976). . . . .	61
Rushing, W. A., <u>Community, Physicians, and Ine- quality--A Sociological Study of the Mal- distribution of Physicians</u> (1975). . . . .	52, 53, 54, 59, 71
"The Medical Malpractice Threat: A Study of Defensive Medicine", 1971 <u>Duke L.J.</u> 939. . . . .	48
U.S. Department of Health, Education and Welfare, <u>Report of the Secretary's Commission on Medi- cal Malpractice</u> , 37 (1973) . . . . .	25
Waller, J., "Urban-Oriented Methods, Failure to Solve Rural Emergency Care Problems", <u>J.A.M.A.</u> , Vol. 226, No. 12 (Dec. 1973) . . . . .	36, 64, 67, 68, 70
Waltz, "The Rise and Gradual Fall of the Locality Rule in Medical Malpractice Litigation," 18 <u>DePaul L. Rev.</u> 408 (1969). . . . .	23