

1940

John Potter, David B. Potter, Jennie I. Potter, Sarah Potter Gibbs, Nettie Potter Miles, May Potter Stewart, Edith Potter Dewey v. Dr. W. H. Groves Latter-Day Saints Hospital : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)



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.

M. C. Faux; Irvine, Skeen, Thurman & Miner; Attorneys for Appellant;

---

#### Recommended Citation

Brief of Appellant, *Potter et al v. Dr. W. H. Groves Latter-Day Saints Hospital*, No. 6208 (Utah Supreme Court, 1940).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/574](https://digitalcommons.law.byu.edu/uofu_sc1/574)

This Brief of Appellant 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 (pre-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

---

JOHN POTTER., DAVID B. POT-  
TER JENNIE I. POTTER,  
SARAH POTTER GIBBS, NET-  
TIE POTTER MILES, MAY  
POTTER STEWART, EDITH  
POTTER DEWEY,  
*Plaintiffs and Respondents.*

*vs.*

DR. W. H. GROVES LATTER-  
DAY SAINTS HOSPITAL,  
a corporation,  
*Defendant and Appellant.*

No. 6208

---

APPELLANT'S BRIEF

---

M. C. FAUX and  
IRVINE, SKEEN, THURMAN &  
MINER,  
*Attorneys for Appellant.*

FEB 5 1901

# INDEX

	Page
Statement .....	1
Argument .....	15
Authorities:	
88 American State Reports 833.....	21
Burbidge v. Utah Light and Traction Co., 57 Utah 566; 196 Pac. 556 .....	17
Boston and Albany Ore Co. vs. O'Reilley, 158 U. S. 334, 15 S. C. I. 830, 39 L. Ed. 1006.....	49
Canadian Northern Railway Company v. Senske, 201 Fed. Rep. 637 .....	21
Davis v. Midvale City, 56 Utah 1, 189 Pac. 74.....	48
Henderson v. Twin Falls County, 56 Idaho 124, 50 Pac. (2d) 597, 101 A. L. R. 1151.....	38-40
Littledyke v. Wood, 69 Utah 323, 255 Pac. 172.....	49
Louisville N. A. & C. Ry. Co. vs. Bates (Ind), 45 N E. 109	23
Morgan vs Bingham Stage Lines Co., 75 Utah 87, 283 Pac. 160 .....	49
Sessions vs. Thomas Dee Memorial Hospital Assn., 89 Utah 222, 51 Pac. (2d) 229, 94 Utah 460, 78 Pac. (2d) 645..	38
State vs. Cluff, 48 Utah 102, 158 Pac. 701.....	48
White vs. Shipley, 48 Utah 496, 160 Pac. 441.....	45
Wilcox vs. Idaho Falls Latter-day Saint Hospital, 82 Pac. (2d) 849 .....	38-40
Authorities re Immunity of Charitable Institution:	
Arizona: Southern Methodist Hospital v. Wilson, 45 Ariz. 507, 46 Pac. (2d) 118.....	39
California: Hallinan v. Prindle, 17 Cal. App. (2d) 656, 62 Pac. (2d) 1075; Lewis v. Y. M. C. A., 206 Cal. 115, 273 P. 580 .....	39
Colorado: Brown v. St. Luke's Hospital Association, 85 Colo. 167, 274 Pac. 740.....	39
Connecticut: Boardman v. Burlingame, 197 Atl. 761; Cashman v. Meriden Hospital, 117 Conn. 585, 169 Atl. 915; Cohen v. General Hospital Society, 113 Conn. 118, 154 Atl. 435 .....	39

# I N D E X — (Cont'd)

	Page
Georgia: Jackson v. Atlanta Good Will Industries, 46 Ga. App. 425, 167 S. E. 702; Plant System Relief & Hospital Department v. Dickerson, 118 Ga. 647, 45 S. E. 483; Georgia Baptist Hospital v. Smith, 37 Ga. App. 92, 139 S. E. 101; Mitchell v. Executive Committee, 49 Ga. App. 615, 176 S. E. 669; Robertson v. Executive Committee of Baptist Convention, 190 S. E. 432.....	39
Morton v. Savannah Hospital, 148 Ga. 438, 96 S. E. 887, 14 A. L. R. 603.....	40
Indiana: St. Vincent's Hospital v. Stine, 195 Ind. 350, 144 N. E. 537, 33 A. L. R. 1361; Old Folks' & Orphans Children's Home v Roberts, 91 Ind. App. 533, 171 N. E. 10.....	40
Idaho: Wilcox v. Idaho Falls Latter-day Saints Hospital, 82 Pac. (2d) 849, overruling Henderson v. Twin Falls County, 56 Idaho 124, 50 Pac. (2d) 597, 101 A. L. R. 1151 .....	40
Iowa: Eighmy v. Union Pacific R. R. Co., 93 Ia. 538, 61 N. W. 1056; and Andrews v. Y. M. C. A., 284 N. W. 186 .....	40
Louisiana: Foye v. St. Francis' Sanatorium & Training School for Nurses, 2 La. App. 305; and Unser v. Baptist Rescue Mission, 157 So. 298; Bougon v. Volunteers of America, 151 So. 797.....	40
Michigan: Greatrex v. Evangelical Deaconess Hospital, 261 Mich. 327, 246 N. W. 137, 86 A. L. R. 487; and Bruce v. Central M. E. Church, 147 Mich. 230, 110 N. W. 951, 10 L. R. A. (N. S.) 74.....	40
Mississippi: Eastman Gardiner Company v. Permenter, 111 Miss. 813, 72 So. 234; James v. Y. & M. V. R. R. Co., 153 Miss. 776, 121 So. 819; Pace v. Methodist Hospital, 130 So. 468; and Mississippi Baptist Hospital v. Moore, 156 Miss. 676, 126 So. 465, 67 A. L. R. 1106; Rhodes v. Millsaps College, 179 Miss. 596, 176 So. 253 .....	41
Montana: Borgeas v. Oregon Short Line R. R. Co., 73 Mont. 407, 236 Pac. 1069; Simons v. Northern Pacific Railway et al., 94 Mont. 355, 22 Pac. (2d) 609.....	41

# I N D E X — (Cont'd)

	Page
<b>Nebraska:</b> Duncan v. Nebraska Sanitarium Benev. Association, 92 Neb. 162, 137 N. W. 1120; Marble v. Nicholas Senn Hospital Association, 102 Neb. 343, 167 N. W. 208; Sibilia v. Paxton Hospital, 121 Neb. 860, 238 N. W. 751; and Wright v. Salvation Army, 125 Neb. 216, 249 N. W. 549.....	41
<b>Nevada:</b> Bruce v. Y. M. C. A., 51 Nev. 372, 277 Pac. 798....	41
<b>New Jersey:</b> Boeckel v. Orange Memorial Hospital, 158 Atl. 832; and Simmons v. Wiley M. E. Church, 112 N. J. Law 129, 170 Atl. 237.....	41
<b>North Carolina:</b> Cowans v. N. C. Baptist Hospital, 197 N. C. 41, 147 S. E. 672.....	41
<b>Ohio:</b> Walsh v. Sisters of Charity, 47 Ohio App. 228, 191 N. E. 791; Sisters of Charity of Cincinnati v. Duvelius, 123 Ohio St. 52, 173 N. E. 737; and Waddell v. Y. W. C. A., 133 Ohio St. 601, 15 N. E. (2d) 140; Rudy v. Lakeside Hospital, 115 Ohio St. 539, 155 N. E. 126; Taylor v. Flower Deaconess Home & Hospital, 104 Ohio St. 61, 135 N. E. 287, 23 A. L. R. 900.....	42
<b>Texas:</b> Steele v. St. Joseph Hospital, 60 S. W. (2d) 1083; and Baylor University v. Boyd, 18 S. W. (2d) 700.....	42
<b>Virginia:</b> Norfolk Protestant Hospital v. Plunkett, 162 Va. 151, 173 S. E. 363; Bodenheimer v. Confederate Memorial Association, 292 U. S. 629, 78 L. Ed. 1483; Hospital of St. Vincent v. Thompson, 116 Va. 101, 81 S. E. 13.....	42
<b>Washington:</b> Susman v. Y. M. C. A., 101 Wash. 487, 172 Pac. 554; Thurston Chapter v. Department of Labor, 166 Wash. 488, 7 Pac. (2d) 577; Tribble v. Missionary Sisters, etc., 137 Wash. 326, 242 Pac. 372; Bise v. St. Luke's Hospital, 181 Wash. 269, 43 Pac. (2) 4; Miller v. Mohr, 98 Wash. Dec. 543, 89 Pack (2d) 807 (1939) .....	42
<b>West Virginia:</b> Roberts v. Ohio Valley Hospital, 98 W. Va. 476, 127 S. E. 318, 42 A. L. R. 968.....	42
<b>Wyoming:</b> Bishop Randall Hospital v. Hartley, 24 Wyo. 408, 160 Pac. 385.....	42



IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

---

JOHN POTTER., DAVID B. POT-  
TER JENNIE I. POTTER,  
SARAH POTTER GIBBS, NET-  
TIE POTTER MILES, MAY  
POTTER STEWART, EDITH  
POTTER DEWEY,

*Plaintiffs and Respondents.*

*vs.*

DR. W. H. GROVES LATTER-  
DAY SAINTS HOSPITAL,  
a corporation,

*Defendant and Appellant.*

No. 6208

---

STATEMENT

---

The respondent, John Potter, is the surviving husband of Jennie Brown Potter, deceased; the remaining respondents are the surviving children. As the sole heirs of deceased, they commenced the instant action to recover damages for the death of their wife and mother while a patient in the hospital operated by appellant. The jury

returned a verdict in favor of respondents, in the amount of \$1,000.00; from the judgment entered on that verdict appellant appeals.

After alleging deceased's admission into the hospital, and appellant's duty to exercise due care in the treatment and nursing to which she was entitled, the complaint sets forth the acts of negligence on which respondents rely in the following language (paragraphs 6 and 7, Trans. 2-3; Abst. 3-4) :

“6. That contrary to its duty as above set out, defendant, by its agents and servants, carelessly and negligently, as more particularly hereinafter set out, allowed said Jean Brown Potter, deceased, to fall from bed and to suffer a broken hip as the result thereof, which fall and injury was the direct and proximate cause of the said Jean Brown Potter's death; that said fall and injury occurred on or about the 21st day of February, 1939, and that death occurred on or about the 23rd day of February, 1939.

“7. That the said Jean Brown Potter, deceased, prior to said injury on said 21st day of February, 1939, and continuously after her entering and admission into said hospital was nervous and at times irrational, and due and reasonable care required that the bed in which she was kept should be provided with sideboards to prevent said Jean Brown Potter, deceased, from falling out of said bed; and plaintiffs allege that prior to said 21st day of February, 1939, said defendant did so provide and maintain on said bed sideboards for the protection of said Jean Brown



Potter, deceased, but that said defendant on the night of said 21st day of February, 1939, did negligently and carelessly fail to provide for and place in position sideboards on said bed and negligently and carelessly failed to guard such bed and said Jean Brown Potter, deceased, so that by reason of said negligence and carelessness on the part of said defendant the said Jean Brown Potter, deceased did on said 21st day of February, 1939, fall out of the bed in which she was kept by defendant and as a result of said fall did suffer a broken hip and did as a result of said negligence and carelessness and said injury die on the 23rd day of February, 1939.”

Answering the two paragraphs, appellant, in its amended answer (Trans. 18-19; Abst. 6-7), admitted that deceased sustained a fall and suffered injuries, and died on February 23, 1939. Each and all of the remaining allegations were denied.

The affirmative defense of the amended answer (paragraph 9—Trans. 19-22; Abst. 8-12) alleges the relationship existing between the Church of Jesus Christ of Latter-day Saints, the Price First Corporation of the Church of Jesus Christ of Latter-day Saints (the corporation exercising jurisdiction over the “Ecclesiastical Ward” of which deceased was a member), and appellant; the manner in which appellant’s hospital is supported and maintained by the central church and the ecclesiastical wards; and the conditions on which deceased was admitted to the hospital as a patient.

For convenience, we quote the whole of paragraph 9 of the affirmative answer, following each sub-paragraph thereof with the substance of respondents' (plaintiffs') admissions and denials, made in open court, as to all of the matters alleged in the paragraph:

“(a) That at all times mentioned in said complaint, the Church of Jesus Christ of Latter-day Saints has been and now is an unincorporated association, engaged in operating and maintaining hospitals, and, in said hospitals, in caring for and treating, without compensation, the indigent sick and injured members of said Church, and also engaged in promulgating and teaching generally the principles and tenets accepted and adopted by said Church; that in the carrying out of its purpose and object of operating and maintaining hospitals, the members and officers of said Church have caused corporations, similar to the defendant corporation, to be incorporated throughout the State of Utah and elsewhere, and that in the carrying out of its general purposes and objects, said members and officers have also caused other corporations sole, similar to the Price First Corporation of the Church of Jesus Christ of Latter-day Saints, to which reference is hereinafter made, to be incorporated throughout the State of Utah and elsewhere, each of which said other corporations exercises local ecclesiastical jurisdiction over a given territory, commonly known and designated as an ‘Ecclesiastical Ward.’ ” (Trans. 19-20; Abst. 8-9.)

(It was stipulated by plaintiffs that the allegations of sub-paragraph (a) of paragraph 9 of defendant's amended answer, might be deemed admitted, except for the allegation that the care

and treatment afforded by the Church of Jesus Christ of Latter-day Saints, in operating and maintaining hospitals, was “without compensation.” Such allegation, “without compensation,” under plaintiff’s stipulation, was to be deemed denied. Trans. 72-4; Abst. 12-13.)

“(b) That at all times mentioned in said complaint the defendant has been and now is a corporation, organized and existing under and by virtue of the laws of the State of Utah, and engaged in operating and maintaining a general hospital in Salt Lake City, Utah, and that during all of said time, the defendant has been and now is a non-profit and non-stock corporation owned wholly and solely by said Church as an institution and not through any stock ownership, and has been and now is operated and maintained, in part, by contributions, donations and payments made by said Church and by said other corporations sole exercising local jurisdiction, as aforesaid. That all of said contributions, donations and payments have been and now are derived from voluntary gifts made by the individual members of said Church.” (Trans. 20; Abst. 9.)

(It was also stipulated by plaintiffs that the allegations of sub-paragraph (b) of paragraph 9 of defendant’s amended answer, might be deemed admitted. (Trans. 75; Abst. -13.)

“(c) That at all times mentioned in said complaint, the Price First Corporation of the Church of Jesus Christ of Latter-day Saints has been and now is a corporation sole, organized and existing under and by virtue of the laws of the State of Utah, and exercising ecclesiastical jurisdiction

over what has been and now is known as the "First Ward of Price," and that during all of said time said Price First Corporation has been and now is a non-profit and non-stock corporation, owned wholly and solely by said Church as an institution and not through any stock ownership, and among other things, has been and now is engaged, with other similar corporations sole also exercising ecclesiastical jurisdiction in the various localities throughout the State of Utah and elsewhere, in collecting voluntary offerings and gifts from the members of said Church residing in their respective localities, the proceeds of which said offerings and gifts, in part, have been and now are donated to the defendant corporation and used by it in meeting the expense incident to the care and hospitalization of the indigent sick and injured members of said Church in said localities; that in the event said offerings and gifts were insufficient to defray said expense, it has been and now is the practice and custom of said Church to pay, from its central and general fund, the amount of such deficiency, and that in the even said offerings and gifts were in excess of the amount necessary to defray said expense, it has been and now is the practice and custom of said Price First Corporation, and said other corporations sole exercising similar jurisdiction, to pay the amount of said excess into the central and general fund of said Church. That in making said contributions, donations and payments to the defendant corporation, said Church and said Price First Corporation, together with said other similar corporations sole, act only as conduits by and through which the voluntary offerings and gifts of the individual members of said Church are conveyed to the defendant corporation." (Trans. 20-21; Abst. 9-11.)

(It was also stipulated by plaintiffs that the allegations of sub-paragraph (c) of paragraph 9 of defendant's amended answer, might be deemed admitted, with the qualification that the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints may call upon the Bishops of the local wards having patients hospitalized in the defendant hospital, to contribute their pro rata share of the expenses incurred for said hospitalization; that when so called upon the local wards attempt to encourage their members to make sufficient donations for said purposes; and that the Presiding Bishopric of said Church, in the event such funds are insufficient to cover the expenses of said hospital, meets said deficit by drawing on the general funds of said Church. Trans. 75-83; Abst. 13.)

“(d) That on and prior to February 16, 1939, Jean Brown Potter, the deceased named in plaintiff's complaint, was an indigent person and a member of said First Ward of Price; that on February 16, 1939, said deceased, as a charity patient, and not otherwise, was admitted into the hospital maintained and operated by the defendant corporation as aforesaid, and that thereupon said Price First Corporation, in furtherance of its practice and custom to assist in the maintenance of said hospital, assumed to and did contribute to the defendant corporation, from said voluntary offerings and gifts; that thereafter the defendant corporation, without compensation, rendered hospital and medical services for said deceased to and including the date of her death, which occurred on February 23, 1939; that in performing said hospital and medical services, without compensation as aforesaid, the defendant corporation acted as and was a charitable institution and was exempt

from liability for the negligent acts of its employees, agents and servants, and that if said deceased suffered injuries, resulting in her death, as alleged in said complaint, or at all, by reason of the negligent acts of any of its employees, agents or servants, which the defendant corporation denies, the defendant corporation nevertheless is not liable for damages resulting from said alleged negligence and said death.” (Trans. 21-23; Abst. 11-12.)

(As to the allegations of sub-paragraph (d) of paragraph 9 of defendant’s amended answer, plaintiff also stipulated that when deceased entered the defendant hospital there was no charge entered or made by the hospital to the deceased, or to any member of her immediate family; that no amount has ever been paid to the hospital for deceased’s care and maintenance, and that no amount has been paid by the Price First Ward, which has been earmarked or designated to go to the hospital for deceased’s care and maintenance. Trans. 84-88; Abst. 13-14.)

At the outset of the trial, a stipulation relating to the testimony of Harold Barnes, Superintendent of the defendant hospital, was also entered into. The stipulation is reflected in the abstract as follows:

(It was also stipulated by the parties that if Mr. Harold Barnes, superintendent of the defendant hospital, were present, he would testify as follows: that it is the custom of the defendant hospital, when a patient is received in the hospital, to make a record of the entrance of that patient in the expense records of the hospital; that from day to day, as services are rendered, the customary

charge is made and charged against the patient's record; that the amount of that charge is dependent upon the amount and type of service and the room furnished; that at the end of the service the complete charge is made and that in the instant case the total charge made against the deceased was \$55.30; that since the date of deceased's death the defendant hospital has received a contribution from the Price First Ward, of which Ward deceased was a member, of \$10.00 only; that the hospital record, marked plaintiffs' Exhibit A, is the hospital record of deceased during the period of her hospitalization in the defendant hospital. Trans. 89-90; Abst. 14.)

But one witness (Jennie I. Potter, a daughter—Trans. 95 Abst. 15) was called by respondents. She testified that her mother, Mrs. Potter, suffering from a heart ailment (arterio sclerosis), entered the hospital on the evening of Thursday, February 16, 1939, and was assigned to one of the wards; that no special nurse was engaged the first night, but that a board, about twelve inches wide, was fastened with ropes to one side of the bed and that the other side was against the wall; that she did not see the board in that position thereafter, but that she employed a special nurse for Friday, Saturday and Sunday nights; that on Monday one of the floor nurses expressed the opinion that Mrs. Potter seemed to be doing so well, which fact was noticed by the witness, that they might well obviate the expense of a special nurse, and, being desirous of avoiding that expense, the witness consented to the floor nurse releasing the special nurse. No special nurse was in attendance Monday night.

Miss Potter also testified that she saw her mother daily and that she seemed quite nervous and at times became irrational. (Trans. 106-7; Abst. 17-18.) She was also permitted to give the substance of a conversation between Dr. Gill Richards and Dr. Llewellyn, occurring on February 22nd. The former stated to the latter doctor that one of Mrs. Potter's lungs was filled with pneumonia, which was a direct result of her falling out of bed. Drs. Richards and Llewellyn were members of the hospital staff, and Dr. Richards was assigned by the hospital to Mrs. Potter's case.

The details of what occurred on Monday night are found in the testimony of the night nurse furnished by the hospital, and Mrs. Potter's chart made up by that nurse:

Leona Felix (Trans. 246; Abst. 54) went on duty at eleven o'clock P. M. Monday and remained until seven o'clock A. M. Tuesday. When first seen, around twelve o'clock midnight, Mrs. Potter was sitting in bed at an angle of 45 or 60 degrees. In the same ward with her, Room No. 437, was another patient by the name of Mrs. Kearney, whom Miss Felix attended for some little time about midnight. Mrs. Potter was then awake; she seemed very rational and was not at all restless. (Trans. 257; Abst. 265.) Miss Felix left the two patients and went into the adjoining room, No. 436. Shortly thereafter, both patients began to talk very loud. Miss Felix immediately returned to their room, where she saw Mrs. Potter, in a



sitting posture on the bed, with her legs and feet dangling over the edge. She appeared as if she were getting ready to get off the bed. While Miss Felix was trying to get to her, Mrs. Potter got off the bed and the nurse was only able partially to break the fall. At the instant Mrs. Potter fell, Mrs. Kearney exclaimed, "I told her not to go to the bathroom. She said she was going to the bathroom." In the fall from the bed, the patient sustained a fractured hip and died two days later, February 23.

Mrs. Potter's hospital chart (Exhibit A), consisting of some 20 pages, contains the usual records made and kept by hospitals, including a detailed daily Clinical Record made by the attending nurses. The last page of the chart contains the record of death, and the nine pages, immediately preceding, constitute the Clinical Record. The period from 7 P. M. to 7 A. M. of each day is shown in red ink; the intervening period, in blue ink.

From the first page of the Clinical Record, it will be noted that Mrs. Potter was first assigned to Room 203 at 8:30 P. M. on February 16, 1939. At 10 P. M. there is a notation, "Side board on bed." Between February 16 and February 21, there are notations of "labored respiration;" "mind more clear, and is more cooperative;" "sleeping soundly;" "complains of smothering sensation;" and "sleeping." As heretofore stated, no special nurse was in attendance on Monday night, February 20-21. At 12:15 A. M., February 21, the notation reads "awake—not restless." It was at this time that Miss

Felix stated she was in the room, attending Mrs. Kearney. Following this notation, we find another made at 12:20 A. M.: "Talking—pt. (patient) sitting on edge of bed with legs down, reaching for the floor—fell as nurse entered the room. Complains of left hip pain—helped back to bed, crying and complaining of pain. Visited by Dr. Bourne—exam.—Side boards placed on one side bed."

Neoma Mason, a graduate and experienced nurse, also testified for appellant. (Trans. 189; Abst. 37.) She was one of the two medical supervisors assigned to the ward in which Mrs. Potter was hospitalized. She stated (Trans. 198; Abst. 40) that Mrs. Potter was first put in Room 203, Division 2-a; later, Sunday morning, she was transferred to Room 437, Division 4-b. She was first seen by the witness on Friday morning; was very restless most of the time. On Monday morning, when seen by Miss Mason, Mrs. Potter was more restful and seemed to enjoy the association with Mrs. Kearney. Nothing, the witness stated, either as a result of her observations or of conversations with the other nurses, indicated that sideboards were necessary for Mrs. Potter.

Rhoda Larson, also a graduate nurse (Trans. 222; Abst. 47), held a similar position to Miss Mason. She saw Mrs. Potter daily, except possibly for one day; on Monday afternoon, comparing her observations then with those made on previous days, she noted a marked improvement in the mental condition of Mrs. Potter. The latter was perfectly rational and very well oriented, and

seemed happy at being in the hospital. Side boards, the witness stated, were sometimes put on when patients seemed irrational and restless. When such was not the case, or when they were unconscious, boards were not used. The witness further stated that many patients resented the use of sideboards, as they gave them a shut-in feeling and made them more restless. She expressed the opinion that in Mrs. Potter's case sideboards would not be necessary.

The respondent, John Potter, was 77 years old; his deceased wife, 71 years old. The youngest of the remaining respondents, the surviving children, was 32 years old. All of the children had been married and had lived separate and apart from their parents for many years, ranging from three (Jennie I. Potter) to 31 years (Sarah Potter Gibbs). (Trans. 116-120; Abst. 22-23.) The parents were not assisting, *and for a long period of time had not assisted*, any of the children. On the other hand, some of the children were in the habit of making small contributions to their parents, and those living at Price, Utah, the parental home, assisted their mother at times with her housework. The financial condition of the couple, and the extent of the contributions and assistance rendered by the children, are shown in the testimony of Jennie I. Potter. The abstract reflects the testimony as follows: (Trans. 130; Abst. 25):

“I have tried to help in supporting mother. She has been receiving a pension of \$24.00 a month. I haven't been paying her any definite sum. When

she needed clothes, I bought them for her. During the past year I have not contributed very much; just presents and gifts; I haven't given anything regularly. My father also got a pension of \$17.00 a month. While they were at home they were always saving what they didn't need, and they used that money here in Salt Lake City. When they needed extra money I gave it to them. My brother would also give them a gift when he thought they needed it. My brother didn't contribute very much. Sometimes he would go up there and give them a dollar or two when he thought they needed a little extra money. It wouldn't amount to very much each month. My sister, Sarah Potter Gibbs, did not contribute anything. Neither did my sister, Nettie Potter Miles, contribute to their support. While my parents were in Price Mrs. Miles would help mother around the home. She would help her with her housework. My sister, May Potter Stewart, contributed just about the same as my brother; just a few dollars. My sister Edith Potter Dewey, who lived in Los Angeles, contributed very little. Mrs. Gibbs, my sister living in Price, would also help mother with the housework. During the past year practically all of us children have been contributing some little money to the support and maintenance of our mother. In addition to that the children who were living in the same community with mother would contribute their services in helping her with the housework."

Respondents pleaded special damages in the total amount of \$290.00 and offered evidence as to four items: Casket and other funeral expenses, \$190.00; burial lot,

\$33.00; Wallace Mortuary at Price, Utah, \$15.00; and burial clothing, \$20.00; a total \$258.00. (Trans. 115; Abst. 21-22.)

The mother was not strong, having suffered a heart attack as early as May, 1938. (Abst. 24.) Together with her husband, John Potter, she came to Salt Lake City on October 15, 1938, and resided at the Little Hotel. The object in making the trip was to give Mr. Potter the attention of a Salt Lake City doctor. On January 31, 1939 (Trans. 128; Abst. 25), Mrs. Potter had a further heart attack and was thereafter confined to her bed at the Little Hotel until she was removed to the hospital on February 16. Prior to this last illness, however, there was testimony to the effect that she kept care of her husband's clothes and saw to it that he was fed and dressed. The couple went out for their meals. (Trans. 125; Abst. 24-25.)

Dr. John Bourne, a licensed physician and surgeon, testified that he examined Mrs. Potter upon her admittance into the hospital, and saw her daily thereafter. Her condition was so serious, he stated, that he doubted very much that she would ever recover. (Trans 280; Abst. 60.)

### ARGUMENT

Appellant makes 22 assignments of error. (Abst. 88-95.)

Nos. I to XI, inclusive, are directed to the admission of certain evidence offered by plaintiffs (respondents); No. XII, to the denial of defendant's (appellant's) motion

for a non-suit, and No. XIII, to the denial of defendant's (appellant's motion for a directed verdict; Nos. XIV to XVI, inclusive, to instruction number 2 and to two separate parts thereof; Nos. XVII to XIX, inclusive, to instruction number 9 and to two separate parts thereof; and Nos. XX to XXII, inclusive, to the Court's refusal to give defendant's requests Nos. 6, 13 and 20.

#### ASSIGNMENTS NOS. I to V, Inclusive.

These assignments are waived by appellant.

#### ASSIGNMENTS NOS. VI and VII

These assignments had to do with questions propounded to the witness Jennie I. Potter, wherein she was asked as to what the relationship was between her father and mother, so far as their affection for, and companionship with, each other were concerned. Appellant objected on the grounds of incompetency, irrelevancy and immateriality. (Trans. 113; Abst. 19-20.)

The elements of affection and companionship, existing between John Potter and his deceased wife, were not proper subjects of inquiry. Certainly, it will not be contended that such loss of affection and companionship as the surviving husband sustained, represented any pecuniary loss. To put such matters before the jury, tended to bring into the case elements which the law does not recognize as compensable in an action for damages.

Mrs. Potter had her last heart attack ten days prior to her admission into the hospital. At that time Dr. Bourne gave her a physical examination and thereafter continued to observe her condition. He expressed the opinion that Mrs. Potter would never recover. For her condition the appellant was not responsible. There is no evidence in the record even to suggest the possibility that Mrs. Potter would ever again be able to render any assistance to her husband.

This Court, in the case of *Burbidge v. Utah Light & Traction Company*, 57 Utah 566; 196 Pacific 556, had the following to say on the question of the necessity of showing some pecuniary loss connected with or incident to the loss of companionship and association:

“Under our statute the right to maintain an action for the wrongful death of an adult is in the heirs or the personal representative for the benefit of the heirs. It may be conceded, I think, as a fundamental principle, that any recovery under like or similar statutes to ours must be founded upon a pecuniary loss and the loss must be such that in contemplation of law it amounts to the deprivation of some service, attention, or care that has in it the elements of pecuniary value. That principle was stated by this court in an early case. In *Pool v. Southern Pac. Co.*, 7 Utah 310, 26 Pac. 656, the Court said:

‘If the testimony did not show that there were heirs living who were pecuniarily injured by his death, no recovery should be had, as in that case no one has sustained any pecuniary loss or injury by his death.’ ”

## ASSIGNMENTS NOS. VIII and IX

The first of these assignments was directed to the question put to the witness, Jennie I. Potter, to state what had been the conduct and attitude of her mother toward her children; the second, to the refusal of the Court to strike the answer of the same witness, wherein she stated, in substance, that her mother had been the grandest mother in the world and had always been grand to her children. Appellant's objection and motion to strike were made on the ground of incompetency, irrelevancy and immateriality. (Trans. 113-14; Abst. 20-21.)

What was said under the preceding heading (Assignments Nos. VI and VII) applies even with greater force to the instant matters. Not in years had Mrs. Potter been able to do anything for her children. It was they who were called upon to help their mother. They rendered not only financial assistance, but helped her in and about the housework in the parental home at Price, Utah. What pecuniary loss, then, did they sustain? The record shows none; on the contrary, it discloses that with the death of their mother, they were relieved of making further contributions for her support, and of rendering further assistance in the home. A further discussion of this question will be found under the heading dealing with the Court's instruction No. 9.

## ASSIGNMENT NO. X

This assignment makes complaint of the overruling by the trial court of appellant's (defendant's) objection



to the following question, propounded to the witness, Jennie I. Potter:

Q. What, if anything, did you do by way of special nurse after the injury to your mother?

The objection was grounded on immateriality to any issue involved in the case. (Trans. 115; Abst. 21.)

The fall sustained by Mrs. Potter occurred in the early morning of February 21st; death resulted two days later. Following the accident, the daughters employed a special nurse to care for their mother, and for that service paid the sum of \$15.00. It will not be contended that appellant was in any way obligated to furnish a special nurse. Mrs. Potter was a non-pay and charity patient. But even had she been a pay patient, still there would have been no obligation to provide her with any service except that rendered by the nurses regularly employed. To permit the witness to testify as to what was paid for special nurses, following the accident for which it was charged appellant was responsible, injected something into the case that was not properly there. *If appellant was held to be chargeable with the accident*, then the jury might well conclude that the cost of special nurse service was a legitimate element of damage; and this would be so in spite of the fact that respondents made no such claim for special damages in their complaint. The evidence was not supported by any allegation of the complaint.

## ASSIGNMENT NO. XI

Appellant waives this assignment.

## ASSIGNMENTS NOS. XII and XIII

The first of these assignments is directed to the ruling of the trial court, denying appellant's motion for a non-suit (Trans. 184-6; Abst. 35-37); the second, to the ruling denying appellant's motion for a directed verdict. (Trans. 288-92; Abst. 62-67.)

The motion for a non-suit covers one ground not specifically included in the motion for a directed verdict. We refer to ground 3. We shall first discuss that ground, and then take up the motion for a directed verdict, which includes all other points raised in the earlier motion.

## MOTION FOR NON-SUIT (Assignment No. XII)

Ground 3 of the motion reads:

“3. That there is an utter lack of evidence to establish that the defendant in the exercise of the care and duty which it owed to the deceased, was required to maintain and keep in place sideboards on the hospital bed occupied by the deceased.”

Respondents failed to offer one word of testimony as to what was considered good practice by hospitals, in this or any other community, in the use of sideboards on beds occupied by their patients. They rested their case after calling one witness to show that no sideboard was used by appellant at the time Mrs. Potter attempted to get out of her bed and go to the bathroom.

If the case had been submitted on respondents' evidence alone, the jurors would have been left to determine for themselves whether, under the circumstances of the case, a sideboard should have been used. If in their opinion, *looking retrospectively at the incident*, it was felt that a sideboard would have prevented the injury even though no such precaution, so far as they were aware, had ever before been considered advisable or proper in a case similar to that of Mrs. Potter's, the jurors would have been permitted to find in favor of respondents.

It was incumbent upon respondents to offer some evidence as to the standard of care required by appellant. Failing so to do, it was error for the trial court to deny the motion for a non-suit.

Appellant was no more an insurer of Mrs. Potter, than are employers the insurers of their employees. The liability of the latter is concisely stated in a note found in 88 American State Reports 833:

"They are liable for the consequences, not of danger, but of negligence. And the unbending test of negligence in method, machinery and appliances is the ordinary usage of the business. Moreover, no man is held to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man." (Citing a number of authorities.)

In the case of *Canadian Northern Railway Company v. Senske*, 201 Fed. Rep. 637 (1912), we find an unusually full and complete discussion of the question of standard

of care to be applied in actions grounded upon negligence. The opinion was written by Mr. Justice Sanborn, Circuit Judge, and is frequently cited in negligence cases. While the plaintiff, an employee of the railroad company, was climbing upon a foreign freight car, a handhold on the roof pulled off, throwing plaintiff to the ground. In the action plaintiff sought to recover damages for the resulting injuries. On the question of the measure of care required, the Court said (p. 643):

“The validity of the general abstract rule that the measure of care required of an employer is that degree of care which an ordinarily prudent man, engaged in the same kind of business, would have exercised under similar circumstances, is conceded. In cases like *Texas & Pacific Ry. Co. v. Behymer*, 189 U. S. 468, 23 Sup. Ct. 622, 47 L. Ed. 905, and *Chicago, Milwaukee & St. Paul Ry. Co. v. Moore*, 166 Fed. 663, 92 C. C. A. 357, 23 L. R. A. (N. S.) 962, in which there is no proof of the degree of care which other ordinarily prudent persons engaged in the same kind of business commonly use, juries may measure the care required of a defendant by the application of this rule to other facts and circumstances in evidence before them. But the best evidence of the degree of care which ordinarily prudent persons would have exercised under given circumstances is the degree of care which ordinarily prudent persons, engaged in the same kind of business customarily have exercised and commonly do exercise under similar circumstances. And when the evidence of this degree of care is substantial or undisputed it furnishes the true and the best standard of ordinary care by which that actually used should be measured in all debatable cases.

“What the true standard of ordinary care is in cases of this character is an exceedingly grave and important practical question to all employers and employes. It is very important that this standard should be as fixed, certain, and well known as possible, so that employers can know before the events whether or not they are exercising the requisite care and faithfully discharging their duties. The degree of care commonly exercised by other persons engaged in the same kind of business under similar circumstances presents such a standard. *The opinions and verdicts of juries, no two of which would probably agree, fixing the standard by which to measure the employer's care after the events have happened, would necessarily be variant, uncertain, and speculative, and would furnish no reasonably certain standard of measurement whatever.*” (Italics ours.)

Another case, involving the question of standard of care, is that of Louisville N. A. & C. Ry. Co. v. Bates (Ind.), 45 N. E. 109. The same general rule of law was announced by the Court in that case, namely, that one is held to no higher degree of skill or care than a fair average of one's trade or profession, and that the yardstick to be used in determining negligence is that degree of care which an ordinarily prudent man, engaged in the same kind of business, would have exercised under similar circumstances.

Certainly, to say the least, the instant case comes within the class of those in which the sufficiency of the degree of care exercised by the appellant was, in the ab-

sence of evidence, debatable. If the care exercised by appellant was equal to or greater than the standard announced in the authorities from which we have heretofore quoted, then appellant cannot be held to have been negligent.

When and when not, we ask, should sideboards be used in the hospital room? No attempt whatever had been made to answer that question when the trial court was asked to pass upon the motion for a non-suit.

### **MOTION FOR DIRECTED VERDICT**

To facilitate its consideration, we quote the motion in its entirety:

“1. That there is a total want of evidence to show that the deceased fell out of bed.

“2. That the evidence shows without dispute that the deceased herself got out of bed, and while in the act of so doing fell to the floor and sustained the injuries of which complaint is made.

“3. That the evidence shows without dispute, and there being no evidence to the contrary, that there was no reasonable ground to believe, that there was no reasonable grounds for the defendant to believe—no, put it this way: there were no reasonable grounds to believe, on the part of those charged with caring for deceased in defendant's hospital, that the condition of deceased required or suggested the advisability of the use of sideboards.

“4. That the evidence shows without dispute, there being no evidence to the contrary, that there were no reasonable grounds to believe, on the part of those charged with caring for the deceased in defendant’s hospital, that the condition of the deceased required or suggested the advisability of deceased being guarded by a nurse, or otherwise, or at all.

“5. That there is no evidence to show that the accident sustained by deceased would have been prevented or was likely to have been prevented had sideboards been placed to the side of defendant’s bed.

“6. That the evidence shows without dispute that the deceased herself got out of bed, that her act was voluntary, and that even though sideboards had been in position or in place on the bed of the deceased, still the deceased was in a condition and able to get out of bed or to crawl over the sideboards and get out of bed.

“7. That the evidence wholly fails to show that the injuries sustained by deceased were proximately caused by defendant’s failure to maintain sideboards on deceased’s bed or by defendant’s failure to do for deceased that which defendant was required to do under the law.

“8. That the evidence wholly fails to show that the death of deceased was proximately caused by defendant’s failure to maintain sideboards on deceased’s bed or by defendant’s failure to do for deceased that which defendant was required to do under the law.

“9. That the evidence shows without dispute that defendant, in caring for the deceased, used that degree of care usually and customarily exercised by hospitals in caring for the sick who are in the condition in which the evidence shows the deceased to have been.

“10. That the evidence shows without dispute that for a number of hours before the accident the deceased was free from restlessness and that five minutes before the accident she was still free from restlessness; also that she was awake five minutes before the accident and was talking and was rational, and that there was nothing about the condition of the deceased which required the defendant, in the exercise of reasonable care, and in the exercise of that degree of care required of defendant by the law, to provide sideboards for the bed of the deceased.

“11. That the evidence at this stage conclusively shows that the deceased entered the hospital on the night of February 16, 1939, in a very poor condition, and that her condition was such that in all probability she would not recover from the ailment with which she was suffering.

“12. That the evidence affirmatively shows that the breaking of the femur, fracture of the femur of the deceased was not a contributing cause to the death of deceased. The evidence shows the deceased was in such condition that she would have died by reason of the ailment from which she was suffering at the time of her admittance into the hospital on February 16, 1939.

“13. That the evidence shows without dispute that the deceased, in her relationship to the defendant hospital, was a non-paying patient, that



she was a charity case; also that the hospital was a charitable institution, and that the evidence wholly fails to show that the hospital, the defendant, was negligent or did not use reasonable care in the selection of its employees and servants who attended the deceased.

“14. That the evidence shows the deceased was a non-paying patient, a charity patient, and that the hospital, the defendant, was a charitable institution and that the hospital under the circumstances was exempt from liability for the negligent acts of its employees, agents and servants, who were called upon to care for and who did care for the deceased during her illness.

“15. That the evidence shows without dispute that irrespective of the defendant’s negligence in caring for deceased, if any negligence has been shown, the defendant, by reason of its status as a charitable institution and by reason of the relations of the deceased to the defendant hospital, that of a non-paying and charitable patient, the defendant would be exempt from liability for any of the negligent acts of its servants and employees of which complaint is made by the plaintiffs in this case.”

#### GROUNDS 1 AND 2—MOTION FOR DIRECTED VERDICT

Under these grounds it is contended that there is no evidence that the deceased fell out of bed; also, that the evidence shows without dispute that the deceased herself got out of bed for the purpose of going to the bathroom, and, while so doing, fell to the floor.

There can be no question as to the state of the record on these two matters. In considering them one should keep in mind the allegations of negligence found in the complaint. Appellant is charged (Paragraphs 6 and 7) with carelessly and negligently allowing Mrs. Potter to fall from her bed. This was brought about, the complaint further alleges, by reason of appellant's failure to provide sideboards and to guard the bed.

The nurse, Leona Felix, was the only witness called in the case who saw just what happened. Mrs. Kearney and Mrs. Potter were in room No. 437. After attending Mrs. Kearney, the nurse went into room No. 436, and immediately thereafter heard a conversation between the two patients. She went back to their room and, by the use of a flashlight, saw Mrs. Potter sitting on the side of the bed, with her feet dangling over the edge. To quote from her testimony (Trans. 261; Abst. 56.):

Q. And she was sitting on the bed?

A. Yes.

Q. On the edge of the bed?

A. Yes, with her hands down, it looked to me like she was getting ready to get off in that position.

Q. And was she in an upright sitting posture?

A. Yes, she was.

Q. In other words, she had left the back rest then?

A. She had left the back rest, yes.

Q. Now, the portion of the bed where she was sitting, what was that with respect to being horizontal, I mean level?

A. It was level, the lower part of the bed.

Q. The lower part was level?

A. Yes.

Q. And with respect to that lower part, where was she sitting?

A. Well, I would say she would be sitting about one-third of the way down on the bed.

Q. And on the level part?

A. Yes; Well, in taking the bed as a whole it would be one-third of the bed and dividing it in thirds.

Q. Dividing it into three, she would be sitting commencing with the lower third?

A. Yes.

Q. In other words, just below the break in the bed?

A. Yes.

\* \* \*

Q. Now, at that time what did Mrs. Potter do?

A. Well, Mrs. Potter—it happened so rapidly—she must have, at the time I was trying to get to her, got off from the bed but I broke the upper half of her fall.

Q. You broke it, you say?

A. Yes, before her shoulders reached the floor I was there holding her.

Q. At the instant she fell did Mrs. Kearney say anything?

A. Yes, she did.

Q. What did she say?

A. She said, "I told her not to go to the bathroom. She said she was going to the bathroom." She said, "I told her not to go."

From this testimony, it is obvious that Mrs. Potter herself got partly out of her bed, as she was sitting on the side when first seen by the nurse. Nowhere is there anything in the record to justify the allegation of the complaint that Mrs. Potter was *allowed to fall* out of the bed provided for her. By her own act she put herself in a sitting posture on the edge of the bed, and then, while attempting to get out and go to the bathroom, fell to the floor.

There was a substantial variance and departure between allegations of the complaint and what actually occurred immediately preceding the injury.

### GROUND 3 AND 4—MOTION FOR DIRECTED VERDICT

The matter coming under this heading all relates to the use of sideboards on the bed—whether there were rea-

sonable grounds to believe that sideboards were advisable.

Respondents offered no testimony whatever as to when the use of sideboards in hospital cases were considered advisable. They rested their case with the testimony that appellant failed to use sideboards, and then concluded that by reason thereof Mrs. Potter fell out of bed and sustained her injuries. Not a question was put to the single witness called by respondents which would tend to elicit information as to whether, in the case of Mrs. Potter, sideboards would be regarded as proper treatment. On the other hand, several of the witnesses called by appellant testified as to long experience in hospitals, both in the State of Utah and elsewhere, and gave it as their opinion that sideboards were not only not necessary in Mrs. Potter's case, but would have even tended to aggravate the situation.

Neoma Mason (Trans. 189; Abst. 37) graduated as a nurse in 1923 and since that time has followed that profession. On the question of sideboards, her testimony is reflected in the abstract, page 39, as follows:

“The sideboards are fastened to the bed by means of a rope. The board protrudes above the mattress, I would say a foot. I have seen cases where sideboards were used and where the patient had gone over the top and out of bed. This happens quite frequently. We use sideboards in cases where the patients are unconscious and where they might become restless. Where a patient is not

restless and where the patient is awake and not unconscious, we ordinarily do not use sideboards. Sideboards are not used in all hospital cases for the reason that to do so would make the patient very uncomfortable. They would object to that sort of therapy. We have had patients object very much to the use of sideboards. A great many of them feel as they do in oxygen tents, that they are crowded; some complain like they would in a dark closet and they want to get out, and it makes them more restless. It is our duty to try and relieve patients from restlessness and to do so promotes the healing process.

\* \* \* "I also saw her (Mrs. Potter) on Monday morning and was required to be in her room on that day frequently in order to help with Mrs. Kearney, who was a very sick patient, suffering from rheumatism of the joints. I observed Mrs. Potter particularly on Monday because she seemed more restful and to enjoy the association with Mrs. Kearney. Mrs. Potter was conscious. I left the hospital on Monday around four or five o'clock. In the afternoon of that day, I made my rounds and observed that Mrs. Potter was resting. When I saw Mrs. Potter she was sitting up in bed at a forty-five degree angle."

Rhoda Larsen (Trans. 223; Abst. 47), another graduate nurse, also testified, among other things, as to the use of sideboards. Her testimony is reflected in the abstract at page 49:

"We have a great many patients who resent sideboards. They give them a shut-in feeling and they become more restless than without the boards.

It is our purpose to relieve patients or to reduce the degree of restlessness. I observed Mrs. Potter on the afternoon of February 20. At that time I could see no reason for the use of sideboards. I left the hospital about midnight and at no time prior to my departure did I feel that there was any occasion for the use of sideboards. We had been much concerned about Mrs. Potter's condition and I always looked in at her. On that occasion (Monday night) she and the other patient (Mrs. Kearney) seemed to be resting very quietly.

\* \* \* "For a patient (Abst. 51) in the condition Mrs. Potter was in Monday night, I would say there was no need of sideboards. It is my experience that if the patient is determined to get out of the hospital bed, sideboards constitute no obstruction. Mrs. Potter appeared to be entirely rational."

In the light of this record and testimony, although the burden was not upon appellant so to prove, nevertheless, it proved the opposite of that which respondents were required to prove, namely, that appellant allowed Mrs. Potter to fall from her bed, and failed to provide for and place sideboards on her bed when, in the exercise of due care and treatment, sideboards were necessary. Respondents wholly failed to show either proposition: (1) That through any neglect of appellant, or at all, Mrs. Potter fell out of bed; or (2) that appellant, in the exercise of the care required by law, should have used sideboards.

### GROUND 5, 6, 7, AND 8—MOTION FOR DIRECTED VERDICT

These grounds go to the question of proximate cause—that there was no evidence to show that the accident would have been prevented had sideboards been placed on Mrs. Potter's bed; that even though sideboards had been in position, still the deceased was in a condition and able to get out of bed or to crawl over the sideboards; that the injuries sustained by Mrs. Potter were not caused by appellant's failure to maintain sideboards or by appellant's failure to do anything required of it under the law.

We assert that there is nothing in the entire record to establish proximate cause. On the contrary, everything therein points to an absence of any causal connection between that which the evidence established appellant failed to do and the injuries received by Mrs. Potter. The testimony heretofore quoted, amply bears out this contention.

### GROUND 9 AND 10—MOTION FOR DIRECTED VERDICT

These go to the care accorded Mrs. Potter and the absence of anything about Mrs. Potter's condition to suggest the advisability of using sideboards. The testimony of Leona Felix (Trans. 246; Abst. 54), the only witness who saw what actually happened when Mrs. Potter fell



and sustained a broken hip, clearly establishes that appellant did everything reasonably required of it in the care and treatment of Mrs. Potter. She was placed in a ward with one other patient. As to that, no complaint is made. On the early morning of February 21st, Miss Felix remained with the patient for some little time. Mrs. Potter was then resting quietly. There was nothing about her condition to show irrationality or that she was likely to make any attempt to get out of bed. In fact, this had been the situation for a considerable time. The other witnesses, on duty during the preceding evening and afternoon, gave the same testimony as to the patient's condition. Miss Felix had left the room in which Mrs. Potter and Mrs. Kearney were located, for but a moment or two, when she heard them talking in a loud voice. She immediately returned to the room and found Mrs. Potter sitting on the edge of the bed. What happened thereafter was beyond the power of Miss Felix to prevent. We do not believe that in this record of events there can be found any neglect chargeable to appellant. Appellant was not a guarantor that no injury would befall any of its patients. All it was required to do was use reasonable care in their treatment.

What Miss Felix testified to, as to the occurrences on the early morning of February 21, is fully borne out by the Clinical Record heretofore referred to in this brief.

## GROUND 11 AND 12—MOTION FOR DIRECTED VERDICT

These grounds have to do with the physical condition of Mrs. Potter when she entered the hospital and the contention that the breaking of her hip was not a contributing cause to her death. Dr. John Bourne, the only medical expert who testified in the case, made an examination of Mrs. Potter at the time of her admittance and also observed her condition from day to day thereafter. It was his opinion that the condition of Mrs. Potter was so serious that he doubted very much that she would ever recover. (Trans. 280; Abst. 60.) There was no evidence to the contrary.

## GROUND 13, 14 AND 15—MOTION FOR DIRECTED VERDICT

Under these grounds, the trial court was required to pass upon the question of the liability of the appellant to a non-paying or charity patient.

From appellant's affirmative defense, and respondents' stipulated admissions of the allegations therein contained, it will appear that appellant is a non-profit and non-stock corporation, owned wholly by the Church of Jesus Christ of Latter-day Saints as an institution and not through any stock ownership; that it is engaged in operating a hospital, maintained, in part, by contributions and donations made by said Church and by the local ecclesiastical wards thereof, and that all of said contri-

butions and donations are derived from voluntary gifts made by the individual members of said Church, which church acts as a conduit in the distribution thereof. (Trans. 20 and 75; Abst. 9 and 13.) It will also appear that on February 16, 1939, Mrs. Potter was a member of the First Ward of Price, one of the said ecclesiastical wards, and that on said day entered the hospital; that upon her entrance no charge was made or entered by appellant against her or against any member of her family; that no amount has ever been paid to the hospital for the care and maintenance of Mrs. Potter and that no amount has been paid by the Price First Ward which has been earmarked or designated to go to the hospital for said purpose. (Trans. 21-23 and 84-88; Abst. 11-12 and 13-14.)

The record will support the contention that Mrs. Potter was a non-paying or charity patient. Neither she nor any member of her family paid, or agreed to pay, any amount toward her hospitalization. During the time she was in the hospital, or sometime thereafter, the Price First Ward made a contribution to the hospital in the amount of \$10.00, but, under respondents' stipulation as to the allegations of sub-paragraph (d) of paragraph 9 of appellant's affirmative answer, it was admitted that no amount was ever paid to the hospital for Mrs. Potter's care and maintenance, and that no amount received from the Price First Ward was earmarked or designated for said purpose.

In the case of *Sessions vs. Thomas Dee Memorial Hospital Association*, 89 Ut. 222, 51 P. (2nd) 229; also, on second appeal, 94 Ut. 460, 78 P. (2nd) 645, this Court held, in a three to two decision, that a hospital, in the case of a paying patient, was liable for the death of the patient resulting from the negligent act of one of the hospital nurses. This was a departure from the general rule of non-liability prevailing in this country and from what had theretofore been recognized as the law of this state. In an elaborate dissenting opinion by the then Chief Justice, Mr. Justice Folland, with Associate Justice Hanson, concurring, decisions from practically three-fourths of the states were cited in support of the rule that charitable hospitals, even as to paying patients, were immune from liability. The majority opinion, it will be observed, relied largely on the Idaho case of *Henderson vs. Twin Falls County*, 56 Idaho 124, 50 Pac. (2d) 597, 101 A. L. R. 1151, and at this time it is interesting to note that within two months after the decision in the *Henderson* case, the Idaho Court, finding a distinction between that case and the case then before it (*Wilcox vs. Idaho Falls Latter-day Saint Hospital*, 82 P. (2nd) 849), arrived at an exactly opposite conclusion from the Utah court and extended the rule of immunity to a paying patient.

In the instant case respondents did not allege that appellant had not used reasonable care in the selection of its nurses; no attempt was made, either in the pleadings or by the testimony, to ground their case upon that theory. By reason of this fact, we submit that the great

weight of authority followed by the courts of this country sustain the doctrine of immunity to a charitable institution rendering service to a non-paying patient. We cite the following authorities, upholding this rule of law :

Arizona: *Southern Methodist Hospital v. Wilson*, 45 Ariz. 507, 46 Pac. (2d) 118.

California: *Hallinan v. Prindle*, 17 Cal. App. (2d) 656, 62 Pac. (2d) 1075; *Lewis v. Y. M. C. A.*, 206 Cal. 115, 273 P. 580. (Liability sustained because of absence of showing of reasonable care in selecting employees.)

Colorado: *Brown v. St. Luke's Hospital Association*, 85 Colo. 167, 274 Pac. 740.

Connecticut: *Boardman v. Burlingame*, 197 Atl. 761; *Cashman v. Meriden Hospital*, 117 Conn. 585, 169 Atl. 915; *Cohen v. General Hospital Society*, 113 Conn. 118, 154 Atl. 435 (liable to invitee).

Georgia: *Jackson v. Atlanta Good Will Industries*, 46 Ga. App. 425, 167 S. E. 702 (liability denied stranger injured by a truck operated by servant of charity); *Plant System Relief & Hospital Department v. Dickerson*, 118 Ga. 647, 45 S. E. 483; *Georgia Baptist Hospital v. Smith*, 37 Ga. App. 92, 139 S. E. 101; *Mitchell v. Executive Committee*, 49 Ga. App. 615, 176 S. E. 669; *Robertson v. Executive Committee of Baptist Convention*, 190 S. E. 432. The rule of immunity applies to stranger and beneficiary alike, qualified always by exercise of due care in selection

of employees, but repudiates rule of exemption to extent recovery may be had from income "derived from patients who paid for services." *Morton v. Savannah Hospital*, 148 Ga. 438, 96 S. E. 887, 14 A. L. R. 603.

Indiana: *St. Vincent's Hospital v. Stine*, 195 Ind. 350, 144 N. E. 537, 33 A. L. R. 1361 (patient denied recovery); *Old Folks' & Orphans Children's Home v. Roberts*, 91 Ind. App. 533, 171 N. E. 10 (recovery allowed account incompetence manager known to trustees).

Idaho: *Wilcox v. Idaho Falls Latter-day Saints Hospital*, 82 Pac. (2d) 849 (immunity regardless of presence or absence of care in selection), overruling *Henderson v. Twin Falls County*, 56 Idaho 124, 50 Pac. (2d) 597, 101 A. L. R. 1151.

Iowa: *Eighmy v. Union Pacific R. R. Co.*, 93 Ia. 538, 61 N. W. 1056; and *Andrews v. Y. M. C. A.*, 284 N. W. 186 (limiting the rule to beneficiaries and sustaining judgment for plaintiff, an employee).

Louisiana: *Foye v. St. Francis' Sanatorium & Training School for Nurses*, 2 La. App. 305; and *Unser v. Baptist Rescue Mission*, 157 So. 298 (liability sustained as to third party); *Bougon v. Volunteers of America*, 151 So. 797.

Michigan: *Greatrex v. Evangelical Deaconess Hospital*, 261 Mich. 327, 246 N. W. 137, 86 A. L. R. 487; and *Bruce v. Central M. E. Church*, 147 Mich. 230, 110 N. W. 951, 10 L. R. A. (N. S.) 74.

Mississippi: Eastman Gardiner Company v. Permenter, 111 Miss. 813, 72 So. 234; James v. Y. & M. V. R. Co., 153 Miss. 776, 121 So. 819; Pace v. Methodist Hospital, 130 So. 468; and Mississippi Baptist Hospital v. Moore, 156 Miss. 676, 126 So. 465, 67 A. L. R. 1106; Rhodes v. Millsaps College, 179 Miss. 596, 176 So. 253 (liability sustained where injury to stranger from operation of office building elevator, disconnected with direct work of charity—a college).

Montana: Borgeas v. Oregon Short Line R. R. Co., 73 Mont. 407, 236 Pac. 1069; Simons v. Northern Pacific Railway et al., 94 Mont. 355, 22 Pac. (2d) 609 (Question presented but case decided on other issues).

Nebraska: Duncan v. Nebraska Sanitarium Benev. Association, 92 Neb. 162, 137 N. W. 1120; Marble v. Nicholas Senn Hospital Association, 102 Neb. 343, 167 N. W. 208; Sibia v. Paxton Hospital, 121 Neb. 860, 238 N. W. 751; and Wright v. Salvation Army, 125 Neb. 216, 249 N. W. 549 (sustaining liability for injury to invitee).

Nevada: Bruce v. Y. M. C. A., 51 Nev. 372, 277 Pac. 798.

New Jersey: Boeckel v. Orange Memorial Hospital, 158 Atl. 832; and Simmons v. Wiley M. E. Church, 112 N. J. Law 129, 170 Atl. 237 (sustaining liability as to stranger).

North Carolina: Cowans v. N. C. Baptist Hospital, 197 N. C. 41, 147 S. E. 672.

Ohio: *Walsh v. Sisters of Charity*, 47 Ohio App. 228, 191 N. E. 791; *Sisters of Charity of Cincinnati v. Duvelius*, 123 Ohio St. 52, 173 N. E. 737; holding rule of immunity applicable only to beneficiaries; and *Waddell v. Y. W. C. A.*, 133 Ohio St. 601, 15 N. E. (2d) 140; *Rudy v. Lakeside Hospital*, 115 Ohio St. 539, 155 N. E. 126; *Taylor v. Flower Deaconess Home & Hospital*, 104 Ohio St. 61, 135 N. E. 287, 23 A. L. R. 900.

Texas: *Steele v. St. Joseph Hospital*, 60 S. W. (2d) 1083; and *Baylor University v. Boyd*, 18 S. W. (2d) 700.

Virginia: *Norfolk Protestant Hospital v. Plunkett*, 162 Va. 151, 173 S. E. 363; *Bodenheimer v. Confederate Memorial Association*, 292 U. S. 629, 78 L. Ed. 1483; *Hospital of St. Vincent v. Thompson*, 116 Va. 101, 81 S. E. 13.

Washington: *Susman v. Y. M. C. A.*, 101 Wash. 487, 172 Pac. 554; *Thurston Chapter v. Department of Labor*, 166 Wash. 488, 7 Pac. (2d) 577; *Tribble v. Missionary Sisters, etc.*, 137 Wash. 326, 242 Pac. 372; *Bise v. St. Luke's Hospital*, 181 Wash. 269, 43 Pac. (2d) 4; *Miller v. Mohr*, 98 Wash. Dec. 543, 89 Pac. (2d) 807 (1939).

West Virginia: *Roberts v. Ohio Valley Hospital*, 98 W. Va. 476, 127 S. E. 318, 42 A. L. R. 968.

Wyoming: *Bishop Randall Hospital v. Hartley*, 24 Wyo. 408, 160 Pac. 385.



## ASSIGNMENTS NOS. XIV TO XVI, INCLUSIVE

These assignments relate to the court's Instruction No. 2, and are waived by appellant.

## ASSIGNMENTS NOS. XVII TO XIX, INCLUSIVE

The foregoing assignments are directed to Instruction No. 9, as given by the trial court. The instruction reads:

“The court instructs the jury that if you believe from a preponderance of the evidence that the plaintiffs are entitled to recover, in estimating the damage the jury have the right to consider the amount, if any, incurred by the plaintiffs, or any of them, for funeral and burial expenses by reason of the death of the deceased; also the pecuniary value, if any, of the loss of the society and companionship of the deceased to the plaintiffs or any of them and the pecuniary value, if any, to the husband of the loss of the services of the deceased to him; and when considering all of the evidence and the instructions given you by the court, you should render such a verdict as under all the circumstances of the case you find to be just.”

Appellant excepted to the instruction as a whole; also, separately, to the following parts:

(a) “also the pecuniary value, if any, of the loss of the society and companionship of the deceased to the plaintiffs or any of them,”

(b) “and the pecuniary value, if any, to the husband of the loss of services of the deceased to him;”

Both (a) and (b), we submit, have no application to the facts of the case and were improperly given.

There is not a scintilla of evidence in the entire record to establish that the loss of the society and companionship was founded, in the least, upon any pecuniary loss. As we have heretofore pointed out, under Assignments Nos. VIII and IX, the death of Mrs. Potter relieved respondents of making contributions for her support and maintenance and of rendering assistance to her in the household work in and about her home. Our law is such that any recovery to which respondents are entitled must be founded upon a pecuniary loss; in other words, respondents must show that they have been deprived of something that has in it the element of pecuniary value. We again state that the record is clear in establishing that Mrs. Potter had not been able to do anything for her children for a number of years, and that even prior to the injury which she sustained in the hospital, her condition was such as to cause Dr. Bourne to testify that in his opinion she would never recover. And in this connection we should keep in mind that Dr. Bourne was the only medical expert to offer any testimony bearing upon the physical condition of deceased. The patient's chart (Exhibit A) lends support to his opinion. Furthermore, all of the other witnesses, including the sole witness called by respondents, Jennie I. Potter, gave testimony as to the grave condition of Mrs. Potter. Her last heart attack antedated her admittance into the hos-

pital by ten days, and, following that attack, she was at all times bedridden.

This Court passed upon a similar question in the case of *White vs. Shipley*, 48 Ut. 496, 160 P. 441. The action was brought to recover damages for alleged negligence causing the death of plaintiff's intestate. The facts are so strikingly similar that we feel justified in quoting at some length from the Court's opinion, beginning on page 499 of the Utah report:

"The only beneficiary alleged in the complaint is the administratrix, the widow of the deceased. The defendants, however, on cross-examination of the widow, showed that the deceased left children, but that they were all adults and married, and for a long time prior to the death of the deceased had lived separate and apart from him, who, at the time of his death, was seventy-two years of age. Among other things the court, on damages, charged:

'In determining the amount to be awarded to the plaintiff, in case you find a verdict in her favor, you may also take into consideration the loss of comfort, society, and companionship of said deceased, if any, which the plaintiff, his widow and his children have sustained by reason of his death.'

"Complaint is made of this. It is conceded that as an abstract proposition the charge is not a misstatement of the law.

"It, however, is contended that it is here erroneous because it was not alleged in the complaint

that the deceased left any children, and, further, because not applicable to the evidence. It was indisputably shown that the children, two sons, one forty, the other forty-six, years of age, and five daughters, the youngest thirty-one, and the eldest forty-eight years of age, were all married and had lived separate and apart from the deceased, some in Los Angeles, Cal., some in Salt Lake City, and some in Ogden City where the deceased resided. In an action brought by an administrator to recover damages for the wrongful death of another it is essential to aver that there are beneficiaries or persons entitled under the statute to the benefit of the recovery. Such a person (the widow) was alleged. Since, without objection and by the defendants themselves, it was shown that the deceased also left children, it is not necessary now to decide where some such beneficiaries are alleged whether others not alleged may, without an amendment to the complaint, also be shown and their loss considered and damages awarded for it. So, in determining the damages which the administratrix in her representative capacity was entitled to recover, we, under the circumstances, shall assume that she was entitled to recover for all of the beneficiaries shown by the evidence to have sustained pecuniary loss. But in so considering the matter we are of the opinion error was committed in directing the jury, as was done, that in determining the loss or damage which the children sustained the jury could consider the loss of comfort, society, and companionship. There is no doubt that under the holdings of this court such a charge is proper in a case where there is evidence to show such loss. But here there is no evidence, so far as the children are concerned, to show it. As already shown, the children were all

adults from thirty-one to forty-eight years of age, married and maintaining separate homes, and for a long time had lived separate and apart from the deceased. The law awards damages for loss of comfort, society, and companionship only in a pecuniary sense and not as a solatium. Under the circumstances such pecuniary loss sustained by the children at most was but nominal. Indeed, except mere nominal, it is not made to appear that the children sustained any pecuniary loss whatsoever. They received none of the deceased's earnings, nor did he otherwise maintain them or in any way contribute towards their support. Nor is there anything made to appear that, had he lived his expectancy, they would have received any enhanced inheritance. As to them the court ought to have directed the jury that nothing but nominal damages could be awarded. The charge permitted the jury to award them actual damages. That was wrong. *St. Louis & San Francisco Ry. Co. v. Townsend*, 69 Ark. 380, 63 S. W. 994; *North Chicago Street Ry. Co. v. Irwin*, 202 Ill. 345, 66 N. E. 1077; *Portsmouth Street Ry. Co. v. Peed's Administrator*, 102 Va. 662, 47 S. E. 850; *In re California Nav. & Imp. Co. (D. C.)*, 110 Fed. 670. This is but applying the familiar rule that an element of damage upon which there is no evidence to support it should not be submitted to the jury. *Candland v. Mellen*, 46 Utah 519, 151 Pac. 341."

In the instant case, while the allegations of the complaint were sufficient to justify Instruction No. 9, there was nothing in the evidence to support those allegations. And it is elementary that instructions must be based upon,

not only the pleadings, but also the evidence. *Davis vs. Midvale City*, 56 Ut. 1, 189 P. 74; *Littledyke vs. Wood*, 69 Ut. 323, 255 P. 172.

Whether anything was allowed by the jury for loss of society and companionship, obviously cannot be determined. But whether one dollar or the full amount of the verdict, there was no evidence to support any award for that element of damage. The charge was error and was calculated to do harm, and in such case prejudice will be presumed until by the record it is shown that the error could not have been harmful. *Boston and Albany Ore Company vs. O'Reilley*, 158 U. S. 334, 15 S. C. I. 830, 39 L. Ed. 1006; *State vs. Cluff*, 48 Ut. 102, 158 P. 701.

### ASSIGNMENT NO. XX.

This assignment went to the Court's refusal to instruct the jury in accordance with appellant's request No. 6, reading as follows:

"If you find from a preponderance of the evidence, as that term is elsewhere defined in these instructions, that on February 21, 1939, the deceased, while a patient in defendant's hospital fell out of bed, receiving a fracture to the femur, which fracture is admitted in this case, but that in the care and treatment which defendant rendered to said deceased, defendant was not guilty of any carelessness or negligence, then your verdict should be against plaintiffs and in favor of defendant, no cause of action."

The case covered one contention made by appellant throughout the trial of the case, namely, that irrespective of the fall which Mrs. Potter sustained there was no evidence to establish that appellant was guilty of any carelessness or negligence. It constituted at least a part of appellant's theory of the case, and in no other instruction was the matter adequately covered. The appellant, we submit, was entitled to have its theory submitted to the jury. *Morgan vs. Bingham Stage Lines Company*, 75 Ut. 87, 283 P. 160.

#### ASSIGNMENT NO. XXI.

Appellant claims nothing for this Assignment.

#### ASSIGNMENT NO. XXII.

Under this assignment it is claimed that the Court erred in refusing to give appellant's request No. 14, reading as follows:

"You are instructed that there is no evidence in this case that the deceased fell out of bed while a patient in defendant's hospital."

As we have heretofore argued, respondents grounded their case upon the proposition that *appellant allowed Mrs. Potter to fall out of bed*. There is no evidence in the case to support that proposition. Again, we repeat, the nurse, Miss Felix, was the only one to testify as to what actually happened. Mrs. Potter, according to her testimony, did not fall out of bed. When the nurse re-

turned to the room, Mrs. Potter was sitting on the edge of the bed. The fall occurred when Mrs. Potter herself attempted to get from the bed to the floor. This in no sense can be regarded the same as "falling out of bed." The latter carries with it the implication of the absence of any voluntary and intentional act upon the part of the patient. Such, we earnestly urge, the record does not support. She even went so far as to tell Mrs. Kearney that she was going to the bath room. It being conclusively established that there was "no evidence in this case that the deceased fell out of bed," it was error for the trial court to refuse to charge the jury in accordance with defendant's request No. 14.

For the reasons herein set forth, we earnestly urge that appellant is entitled to a new trial.

Respectfully submitted,

M. C. FAUX and  
IRVINE, SKEEN, THURMAN &  
MINER,

*Attorneys for Appellant.*

Dated February 5, 1940.