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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 : Reply Brief of
Appellant

Utah Supreme Court

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M. C. Faux; Irvine, Skeen, Thurman & Miner;

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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 POT-
TER STEWART, EDITH POT-
TER DEWEY,

Plaintiffs and Respondents,

vs.

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

Defendant and Appellant.

No. 6208

APPELLANT'S REPLY BRIEF

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

FILED

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I N D E X

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Certain statements appearing in our opponents' brief—statements which either are in direct conflict with the record itself or reflect but fragmentary portions thereof—call for this reply brief.

Exhibit "A" is the hospital chart of the deceased, Jean Brown Potter. It embraces 21 pages (not 20 pages, as stated in our original brief), some of which contain

data, etc., on both sides. To avoid possible confusion in making reference thereto, we have, since receiving respondents' brief, taken the liberty of numbering the pages. On the obverse side, the number appears in the lower left corner; on the reverse side, in the upper left corner. Lest confusion should arise by reason of the use of both red and blue ink, in making the entries shown in that portion of the chart denominated "Clinical Record" (pages 23 to 40, inclusive), we again observe that the period generally considered as nighttime (7 P. M. to 7 A. M.) is shown in red ink, and that considered as daytime (7 A. M. to 7 P. M.), in blue ink.

ARGUMENT

Counsel first consider (beginning page 2, their brief) the sufficiency of the evidence to support a finding of negligence. (Assignment No. XII and grounds 3, 4, 9 and 10 of Assignment No. XIII.) In an effort to show that deceased's condition was such as to suggest the advisability of using sideboards, reference is made to the hospital chart. But even though it be assumed that at the outset of the hospitalization, the case properly called for sideboards, still we submit there was not one word of evidence to establish that such boards, *at the time of the accident*, could be regarded as a reasonably necessary precaution. Both the hospital chart and the testimony of the several attending nurses, were directly to the contrary.

On page 3 we are told of the critical condition of deceased. To show this, our opponents quote generously from the chart as to the occurrences of February 17, 18, 19 and 20. They abruptly stop, however, with the notation made by the nurse on the early morning (5 A. M.) of Monday, February 20th, that deceased's condition was unchanged, appearing in red ink near the top of page 30 of the chart. Yet, it will be recalled, the accident did not occur until after 12 A. M., on Tuesday, February 21st.

At 10 A. M. on Monday, February 20th, we find deceased sleeping; from that time until the occasion of the accident, an improved condition is observed. To quote from pages 30 and 31 of the chart, giving *all* of the notations made by the nurses for approximately 24 hours before the incident of which complaint is made:

MONDAY

February 20, 1939

8 A. M.....Dr. Richards visited.
 10 A. M.....Sleeping (Ruth Meldrum).
 1 P. M.....Less confused (Florence C. Nelson).
 4 P. M.....Could not void.
 6 P. M.....Resting quietly (Ruth Meldrum).
 8 P. M.....Put to bed and made comfortable as possible.
 9:30 P. M.....Resting quietly (Gerlean Judd).

TUESDAY

February 21, 1939

12:15 A. M.....Awake—not restless.

12:20 A. M.....Talking—pt. 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.). Sideboards placed on one side.

The above portion of the clinical record, covering the entire 24-hour period immediately preceding the accident, contains nothing, we submit, to support the allegation of negligence upon which respondents grounded their cause of action. Furthermore, the only evidence offered in the case, bearing upon what precautions were ordinarily taken, or should be taken, in dealing with a patient such as deceased, was produced by appellant. Several of the attending nurses were called. All were experienced in the care of the sick. All testified that in view of deceased's improved condition, sideboards were not only unnecessary but were definitely inadvisable. This was so because boards, in some instances, gave the patients a shut-in feeling and made them more restless. One of the nurses went so far as to say to deceased's daughter that the condition of her mother made it unnecessary for the family to incur the further expense of

a special nurse; yet she knew that to release the special nurse, meant additional work for herself and the other attendants employed by appellant. The advice was given because the nurse conscientiously thought that deceased's condition had so improved as to make unnecessary the precautions taken at the earlier stages of the hospitalization. We referred to the testimony of the nurses in our original brief. (Neoma Mason—Trans. 189; Abst. 137.) (Rhoda Larson—Trans. 222; Abst. 47.) (Leona Felix—Trans. 246; Abst. 54.)

Constant attendance on the part of the hospital nurses, is not to be expected, as the number of nurses is always less than the number of patients. Reasonable care was all that was required of appellant. At 12:15 A. M., the nurse, Miss Felix, attended both deceased and Mrs. Kearney. Deceased, at the time, was awake, but was not restless. Nothing about her called for any special precaution; everything indicated that she was just as free from danger as any other hospital patient. Five minutes later, while the nurse was performing other duties in an adjoining room, she heard deceased and Mrs. Kearney talking. Without one moment's delay, the nurse returned to the room occupied by the two patients, there to find deceased sitting on the edge of the bed, preparatory to going to the bathroom. A special nurse could have given deceased no more careful attention, for even she, in meeting her personal requirements, would for short intervals have been required to absent herself from the patient.

What, then, is there in the record of the proceedings of the trial court to support the acts of negligence charged in the complaint? Surely, in the face of the clinical record, showing a definitely improved condition, and in the face of testimony of competent nurses that sideboards would be inadvisable, it was error to allow the jury to speculate on what was or what was not proper care of a patient in deceased's condition. To hold appellant liable in this case would be tantamount to saying that it was required to keep a nurse in constant attendance. Such, we affirm, is not the law.

Respondents appear to attach some importance to the fact that deceased had tried to get out of bed, and had succeeded in so doing, upon other occasions. But this, we submit, furnishes no reason why sideboards should be kept in place at all times. If a patient were conscious, and, admittedly, such was the condition of deceased, at the time of and prior to the accident, and if she desired to get out of bed, certainly a sideboard, extending, as it was intended to extend, but a few inches above the mattress, would present no obstacle. It is apparent that the sole protection which a sideboard afforded, for such was the only evidence in the case, was to prevent a patient, during unconscious moments, from rolling out of bed.

An attempt is also made to make a point of the fact that, following the accident, a sideboard was placed on the bed occupied by deceased. The evidence shows (Tr. 283) that the bed was in the southwest corner of the

room. Deceased was in a reclining position, facing east. The head of the bed was against the west wall; the right side against the south wall. It was the left leg that had sustained the injury. Following the accident, the sideboard was placed on the south side of the bed, next to one of the windows in the south wall. Just why the board was so placed, is not entirely clear, as the south wall itself, it would seem, should have been sufficient protection for that side of the bed. Such, however, is the state of the record. The important thing about the testimony of Miss Naomi Felix, the nurse in charge at the time of the accident, is that deceased was not restless before the accident but afterward was extremely restless and moved around a great deal. This change of condition, manifestly, prompted the use of the sideboard. Respondents quoted but a small portion of Miss Felix's testimony, bearing upon the point in question. And what they did quote, was misleading. We give the whole of that portion of Miss Felix's testimony relating to the question at hand and appearing both before and after the two questions and answers found in respondents' brief. The questions and answers quoted by our opponents are italicized. (Trans. 284.)

“Q. Now, following the accident, state what her condition was with respect to being restless?

A. After she fell out she was extremely restless and she did move a great deal.

Q. After the accident she did move around a great deal?

A. Yes, and her talk was incoherent at times.

Q. *And why did you put the board on at all?*

A. *Well, it just seems like anything, any nurse would think, after getting out, if they got out once, they would try it again.*

Q. *And that was the reason for putting it on?*

A. Yes.

Q. Was she more restless after the accident than before?

A. A great deal.

Q. Was she restless at all before the accident?

A. No; she was not."

In other words, if restlessness and the moving around on the part of the patient, suggested the use of sideboards, then there was no occasion for their use until after the accident.

Counsel next take up (page 6, their brief) the question of proximate cause. In our original consideration of the matter, we contended that the absence of sideboards contributed nothing to the accident. The only answer of our opponents to this contention, is that "every nurse knows that an irrational person trying to get out of bed is apt to fall and should be restrained." This, we submit, is no answer at all. The clinical record shows that deceased, at the time of the accident, had been resting quietly for nearly 24 hours. There was not

the slightest indication of irrationality. At six o'clock the night before, she was resting quietly. (Page 30, Exhibit A.) This condition continued without change. Every entry in the record, right up to the time of her attempt to go to the bath room, bears evidence of that fact. At 9:30 P. M. (February 20), and again at 12:15 A. M. (February 21), five minutes before the attempt, we find entries showing deceased was "Resting quietly" and "Awake—not restless." (Page 31, Exhibit A.)

It is contended by our opponents (page 7, their brief) that deceased's critical condition, upon admission to the hospital, increased rather than diminished the degree of care required of appellant. This contention, presumably, comes by way of answer to the point raised by appellant under grounds 11 and 12 (Motion for directed verdict) of Assignment of Error No. XIII. What we urged there, was that deceased was in such condition before the accident, that the breaking of her hip did not contribute to her death. In the light of Dr. Bourne's testimony—and no other expert was called as a witness—we submit that there is no escape from this conclusion. We quote from his testimony, pages 277-281 of the transcript:

"Q. What did you discover with respect to the patient's condition, the patient Mrs. Potter?

A. My findings are recorded in my own handwriting on the chart.

Q. You have reference to the chart which has been heretofore in the court room?

A. Yes, sir.

Q. Which I now hand to you. Do you have an independent recollection of the condition of the patient as you found it at the time of this examination?

A. *I have a recollection of her general condition, which was poor.*

Q. Would you care to refresh your recollection from the notes that you refer to and then tell me what you found as to the condition of the patient following your examination?

A. I was told by those who brought her to the hospital she had suffered a fainting spell, sinking spell of some kind, a stroke, about three weeks before her entrance; that she had been seen by a doctor and put on digitalis and strichnine; that she was very rational in her mind but she was forgetful. Then I examined the patient and found that it was necessary for her comfort to sit up in bed partially.

Q. You say necessary for her comfort. To what do you have reference?

A. I mean by that if she were to lie flat on her back she could scarcely get her breath.

Q. What further did you observe?

A. Well, I observed, the main thing I observed was the fact—I examined her chest. That is where her complaint seemed to be, with her breathing and her heart. Her heart was enlarged, had murmurs, but it seemed to be functioning fairly well. Her liver was slightly enlarged and there was some rales in her lungs showing partial congestion or decompensation of the heart, mild failure.

Q. Mild failure of the heart as disclosed by a condition in the lungs you describe as rales?

A. Lungs and the liver, yes, sir.

Q. Can you better describe to us the meaning of rales?

A. Rales are produced by moisture in the air spaces in the lungs, which produces a little bubbling sound.

Q. Bubbling is what you have reference to when you use the term rales?

A. Yes, sir.

Q. And that indicated to you a congestion in the lungs?

A. Yes, sir.

Q. Was there anything further that you observed?

A. Well, there was some dullness, disease and diminished sounds in the base of the right lung.

Q. What do you mean by diminished sounds, that the breathing was not getting to the bottom of the lung?

A. Yes, sir; there was some pathology and congestion of some kind in the lung.

Q. That was preventing the air from getting to the bottom of that lobe?

A. Yes, sir. Her heart was enlarged; her blood pressure was 200 over 90, and outside of a few minor findings, her respirations were such as to be described by the term cheyne stokes, which means they have a period that they don't

breathe for a portion of a minute or may be two or three minutes and then they will begin to breathe and they breathe slightly at first and then the respiration finally becomes quite deep, and then they will taper off into this period of no respiration at all and they cease breathing and lie as though dead, and then they begin to breathe again. When they begin to breathe again—I should say when they are in this period of apnea—that means no respiration—they doze into a coma and then as they begin to breathe they wake up and feel suffocated, frightened, or feel like they are short of breath.

Q. Generally then you would describe it as a period of breathing and then a cessation of breathing for another period?

A. Yes, sir; alternating.

* * *

Q. Is it your custom, after making an examination of a patient, to make a prognosis or statement as to their future development or probable development from the condition that you observe?

A. We summarize our findings and put down a tentative diagnosis.

Q. Did you do that in this case?

A. Yes, sir.

Q. What was your tentative diagnosis for her?

A. I may have written it down. I don't remember exactly what I wrote. Sometimes when we are not sure we leave it until the next day. I put down Aortic regurgitation, which is a heart condition.

Q. And did you put down your prognosis?

A. I did.

Q. *What was your prognosis or statement as to the probable outcome of the case?*

A. *My prognosis was poor.*

Q. *And what did you mean by that?*

A. *I meant by that that her chances of recovery were poor; the outlook in her case was unfavorable.*

Q. And that was shortly after she entered the hospital?

A. Yes.

Q. *From your observations and the conditions you observed did you form an opinion as to whether the patient likely would recover, or not recover, from the illness from which she was suffering at that time?*

A. I did. I thought her condition might be improved inasmuch as she was suffering at the time from lack of food and water. Her tongue was very dry, and the history indicated they had not been able to get her to take much nourishment. I knew we could improve the state of her nutrition, which might improve her sense of well being, *but her condition was, seemed to me to be so serious that I doubted very much that she would ever recover.*

Q. And that is the conclusion you reached from the condition you observed and the history you had received?

A. Yes, sir; when we see that cheyne stokes respiration, that is always a grave prognostic sign.

Q. And you mean by prognostic sign—

A. It indicates a grave prognosis.

Q. Something as to the future development of the case?

A. Yes, sir.”

This testimony, we earnestly contend, made it incumbent upon respondents to show affirmatively a causal connection between the injury to the leg and deceased's death.

Respondents assert (page 8, their brief) that “The evidence is overwhelming that the deceased fell out of bed.” This matter was considered by appellant in its original brief, beginning on page 27. There, we quoted at length from the testimony of Miss Felix, the only living eye witness to the occurrences on the early morning of February 21. What the deceased herself said at the time in question, together with what the nurse saw, removes all doubt as to just what happened. Deceased told Mrs. Kearney, another patient in the same room, that she was going to go to the bathroom, and then proceeded to get out of bed. When Miss Felix entered the room, deceased was sitting on the edge of the bed, with her legs down. It was in attempting to step to the floor from that position, that deceased fell and sustained her injury.

Counsel quote from the entry made in the hospital chart by Dr. Bourne (page 1, Exhibit A) and from the statement claimed to have been made by Drs. Richards

and Llewellyn to deceased's daughter. The entry and statement were to the effect that deceased fell out of bed. None of these persons, however, was present when the accident occurred. Any entry or statement made by them, would of course be hearsay. In making such an entry or statement, it is not to be expected that one, unless specifically called upon to do so, would give a detailed description of the particular occurrence, even though it be assumed that all of the facts were within one's knowledge. Deceased had been in her bed; she fell to the floor and sustained injuries. To say that she "fell out of bed," was a convenient and short way of referring to the incident. But from this it does not follow that such language, under the circumstances, is determinative of the issue involved. We must look both to the clinical record and also to the oral testimony of Miss Felix; she alone witnessed the misfortune. Judged from her written record, made immediately following the accident and at a time when no controversy could have been anticipated, deceased did not fall out of bed.

Beginning on page 10, counsel give consideration to the question of damages. Appellant's assignments of error on this question (Nos. XVII, XVIII and XIX) went to the Court's instruction No. 9, and, separately, to two of its parts. In view of the evidence, it was error, we contended, for the trial judge to tell the jury that they might take into consideration, in estimating damages,

(1) The pecuniary damages, if any, of the loss of the society and companionship of the deceased to the plaintiffs or any of them; and

(2) The pecuniary value, if any, to the husband of the loss of services of the deceased to him.

On the second point, our opponents rest their case on the testimony of the daughter (Jennie I. Potter—Trans. 125) as to what her mother did for her father after October, 1938. “She kept care of his clothes,” was the testimony, “seing that he was fed and dressed, and he is quite a care.”

It will be recalled that the last heart attack of deceased antedated her admittance into the hospital by more than two weeks. That attack occurred on the night of January 31, 1939. We quote from pages 128-9 of the transcript:

“Q. When did your mother have an attack that put her in the condition she was in when she went to the hospital?

A. The night of January 31st.

Q. The night of January 31st?

A. Yes, sir.

Q. That was a recurrence of this heart condition?

A. Yes, sir.

Q. And that was while she was living at the Hotel?

A. Yes, sir.

Q. And she was thereafter confined to her bed in the Little Hotel?

A. Yes, sir.

Q. And during that period of time of course she had to be waited on.

A. You bet.

Q. She didn't get out of her bed during that period?

A. No, sir."

For at least two weeks before her hospitalization, deceased had been wholly unable to render any service to her husband. And no evidence whatever was offered by respondents to show the likelihood of her ever again being able to do so. Respondents failed to discharge that burden of proof. Appellant, on the other hand, as has heretofore been shown, established through Dr. Bourne that deceased's condition, shortly after she entered the hospital, was poor (Trans. 277); that, likewise, the "prognosis was poor," that deceased's "chances of recovery were poor, the outlook in her case was unfavorable" (Trans. 280), and that while "I knew we could improve the state of her nutrition, which might improve her sense of wellbeing, but her condition was, seemed to me to be, so serious that I doubted very much that she would ever recover" (Trans. 281).

The question of deceased's recovery was a matter calling for expert testimony. But no witness—either expert or layman—even ventured to contradict Dr. Bourne. With no conflict in the record, it was error to submit to the jury the question of the pecuniary value to the husband of the loss of deceased's services to him.

Now, as to the first point, that the jury might award the pecuniary value, if any, of the loss of the society and companionship of the deceased to the plaintiffs or any of them:

Prior to her last illness, deceased and her husband were living together. This was not so, however, as to deceased and her children. All of the latter had been married for many years; all had long since left the parental home and were maintaining separate domiciles for themselves. Their names, places of residence and ages are as follows:

Jennie I. Potter, Salt Lake City, Utah, aged 32 years.

David B. Potter, Salt Lake City, Utah, aged 41 years.

Sarah Potter Gibbs, Price, Utah, aged 49 years.

Nettie Potter Miles, Price, Utah, aged 36 years.

May Potter Stewart, Brigham City, Utah, aged 47 years.

Edith Potter Dewey, Los Angeles, California, aged 45 years.

The dates when the children last left their parental home are as hereinafter indicated; except in the case of Jennie I. Potter, the dates coincide with marriage; Jennie I. Potter was divorced two years after her marriage, and since 1936, has lived separate and apart from her parents; David B. Potter, 1922; Jennie I. Potter, 1936 (Tr.

47-48); Sarah Potter Gibbs, 1906; Nettie Potter Miles, 1923; May Potter Stewart, 1913; and Edith Potter Dewey, 1917 (Tr. 117-121).

Deceased and her husband, until October 15, 1938, maintained their residence in Price, Utah. Between October, 1938, and until deceased was taken to appellant's hospital, they resided at the Little Hotel, in Salt Lake City, Utah. (Tr. 121-122.)

As pointed out in our original brief (pages 45-47), the law awards damages for loss of comfort, society and companionship only in a pecuniary sense; not as a solatium. In the instant case, all of the children had maintained domiciles separate and apart from their parents for periods of time ranging from 3 to 33 years. Under the circumstances, except for mere nominal damages, it was not made to appear that the children sustained any pecuniary loss whatsoever. In fact, the contrary is definitely shown. For a long period of time, deceased and her husband had been unable to render any financial assistance at all to their children. On the other hand, some of the children were being called upon to assist their parents, both of whom were receiving old age pensions from one of the counties of this state.

These matters, together with the supporting evidence, were discussed (pages 13-15) in our first brief.

On pages 45-47 (our brief) we quoted at length from the case of *White vs. Shipley*, 48 Utah 496, 160 Pac. 441.

This case, our opponents tell us, is clearly distinguishable from the case at bar. In the White case, counsel say, "the children of the deceased were not named in the complaint, as beneficiaries, were not parties to the action, and the only mention of them in the entire proceeding came upon cross-examination and consisted only of the children's names, ages and addresses," while in the instant case "the children of Mrs. Potter are named as beneficiaries, are parties plaintiff in the action, and their relationship with their mother was very carefully brought out for the jury's consideration." This difference, it is contended, distinguishes the two cases.

We respectfully submit that respondents have failed to understand the holding of the White case. There, this Court definitely held that the question of the correctness of the trial court's instruction was to be considered *as though the plaintiff was entitled to recover, both for herself and the children of deceased*, provided, of course, all or any of them had sustained a pecuniary loss. In the White case, plaintiff commenced the action as administrator. The following language (page 500 of the Utah Report) shows its clear applicability to the case at bar:

"* * * 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.”

It has seldom come within our experience to find two cases—the White case and the case at bar—so identical as to all of the pertinent facts involved. In both cases, even the ages, places of residence and marital status of the children, were strikingly similar. Nowhere in the instant case can a word of evidence be found tending to establish that the children sustained any pecuniary loss whatsoever. Instruction No. 9, however, permitted the jury to award them actual damages.

The concluding portion of respondents’ brief is devoted to a discussion of the liability of a hospital to a non-paying patient. This matter, we feel, was fully covered in our original brief.

We submit, on the showing made on this appeal, that
appellant is entitled to a new trial.

Respectfully submitted,

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

Dated April 3, 1940.