

1950

Lethea R. Fredrickson v. Dr. E. B. Maw and Dr. Floyd F. Hatch et al : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

LETHEA R. FREDRICKSON,
Plaintiff and Respondent,
vs.

DR. R. B. MAW and DR. FLOYD F.
HATCH, DR. L. E. VIKO, DR. J.
RUSSELL WHERRITT, DR. R. B.
R. B. MAW, DR. T. C. BAUER-
LEIN, and DR. V. A. CHRISTEN-
SEN, doing business under the firm
name and style of INTEMOUN-
TAIN CLINIC, a co-partnership,
Defendants and Appellants.

Case No.
7452

Brief of Respondent

FILED

JUN 30 1950

RICH AND ELTON,
Attorneys for Respondent.

Clerk, Supreme Court, Utah

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7452

Brief of Respondent

Appellants have, in their statement accentuated points which they feel should have influenced the court and jury but did not do so, and have skimmed over or neglected to state evidence which was material to plaintiff's case and which was believed by the jury.

This is a law case and the questions raised by the appeal are as to whether there was any substantial evidence to go to the jury; whether the court erred

in its instruction on the measure of damages; and in ruling on one question relating to the right of cross-examination. The instructions of the court with reference to determining the issues of duty, violation of duty and negligence are not in question. Defendant concedes them to correctly state the law of this case.

In ruling on a motion for non-suit or directed verdict the evidence is considered in the most favorable light to plaintiff's case. After verdict and judgment the facts are presumed to be as claimed by plaintiff. All conflicts are resolved in favor of the verdict unless the plaintiff failed to make a case. This court is, therefore, not interested in determining the weight of the evidence. The sufficiency of the evidence is the question.

Let us therefore take a look at the evidence as it stood at the end of plaintiff's case; and again as it stood at the end of the trial, bearing in mind that all conflicts are resolved in favor of plaintiff by the verdict of the jury and, for the purpose of considering such motions, by the trial court.

STATEMENT OF FACTS

- (a) At the conclusion of plaintiff's case.
- (b) At the conclusion of the case.

(a)

Mrs. Fredrickson testified that prior to the 6th day of July, 1945, she was in good health excepting

that one of her knees was stiff. She had never had any trouble with her throat or sinuses (R. 81). She had consulted Dr. Boucher of Murray about her knee. She went to the Intermountain Clinic by appointment on that date to see about her knee. She had a physical examination and was directed to Dr. Maw. He recommended the removal of her tonsils. He said there was nothing wrong but there was pus in the right tonsil. Dr. Tyndale then told her it might help her arthritis (R. 83). She decided to have her tonsils out, received an appointment with Dr. Maw, and reported on July 17, 1945 for the operation. They put her in bed, it was dark, and the doctor had a light (R. 85). He gave her a local anesthetic and proceeded to take out her tonsils. He used cotton and gauze. The operation took about an hour (R. 86); she was told to return in about three weeks for a check-up (R. 87). During that time her throat was sore, she couldn't swallow anything. She returned as directed; Dr. Maw was on vacation; she saw the nurse who looked at her throat, said it was all right. She told the nurse she was having difficulty in swallowing, and "it feels like there is a lump in my throat" (R. 88). She was not told to come back. She paid the bill for the operation (R. 89). A week or ten days after that her throat was terrific, always sore, so she called on the phone and asked for Dr. Maw, was told that he was busy, was asked what she wanted, and told the nurse her throat was sore and wanted to know what to do. She heard the nurse tell Dr. Maw that it was Mrs. Fredrickson and that she had an ulcer in her throat. She was told to come

in (R. 90), which she did. Dr. Maw looked at her throat, washed out her nose, said there was some drainage from her tonsil area and head, and prescribed a mouth wash. He didn't tell her to come back (R. 91). About every three weeks or every month after that she went to see Dr. Maw for about a year and a half (R. 92). She was in distress and he just gave her sinus treatments. All of this time her throat was sore. She went to the Clinic last on June 29, 1948. During this time she also went to see Dr. Boucher, her family doctor (R. 93), because her throat was sore, and Dr. Maw wasn't doing her any good. He prescribed penicillin. She also went to see her dentist, Dr. Wright. He examined her mouth but did nothing. He referred her to a physician, Dr. Johnson. He examined her mouth and prescribed sulfa and penicillin (R. 95). She then had Dr. Wright take out eighteen front teeth (R. 96). This was in January 1946. He did not take out any rear teeth. They had been taken out years ago. Dr. Wright did not use any packs in her mouth. He did not use any absorbent cotton in her mouth (R. 97). He did not place any fabric materials of any kind in her mouth. He did no work in the rear of her mouth (R. 98). She then went back to Dr. Boucher because her throat was sore and *there was an ulcer right in the hole of the tonsil* (R. 99). Dr. Wright gave her some dentures but they hurt her terribly. Every place in her mouth there were sores and everything. He sent her back to Dr. Boucher for penicillin. Dr. Boucher sent her to Dr. Moorehead. At that time the ulcer was clearing up so he examined for sinus. Dr. Wright

made another set of dentures but they couldn't be used (R. 100). The gums wouldn't heal. She went back to Dr. Moorehead but he did nothing for her. She then went to Dr. Browning (R. 101) to see if he could find out what was the matter. Her mouth was more or less sore all the time. Sometimes it would heal up and then another ulcer would break out. There was no time when she wasn't in pain. Up to this time the only doctor or dentist who did any work in her mouth was Dr. Wright. She went to Dr. Browning in July 1947.

Dr. Browning took x-rays (R. 102), after which he opened up the gums just a little bit to the left of center and cleaned out the infection and three days later made the correction. He did not use any packs, gauze, or cotton in her mouth (R. 103), nor did he do any surgery in the rear of her mouth, or in the throat or on the palate or around the tonsil area. Dr. Sears was also there. Dr. Browning removed the dentures. They hurt. A couple of weeks afterwards ulcers began to show up again. Her mouth was sore. In October 1947 she went back to Dr. Wright. Her mouth and throat were in terrible condition. There were ulcers on sides, down in the throat, in the tonsil area and along side of her tongue (R. 104).

She then saw Dr. Argyle, a physician in Murray. He prescribed penicillin (R. 105). She then went back to Dr. Browning; he did nothing. She went to Dr. Maw again the same day that she saw Dr. Browning. There was an ulcer on her tongue; Dr. Hatch was

also there. He took a sample for a test to be sent to the L.D.S. Hospital. She asked him what he meant, "Is it cancer?" He said, (R. 106) "I wouldn't say it is. It doesn't look good." She went back two or three days later and saw Dr. Maw and Dr. Hatch. Dr. Maw told Dr. Hatch, "Mrs. Fredrickson has complained about her throat ever since she had her tonsils pulled." Dr. Hatch said they should take a biopsy and give her some penicillin (R. 107). He asked if she had seen any other doctors and she said she had seen Dr. Browning that morning. He said, "Don't go around showing everybody your mouth. You come back here and let Dr. Maw take care of it." She went back to Dr. Maw that afternoon and two days later. He medicated the throat, said it looked better and said, "I don't believe it is cancer." She went back to Dr. Argyle for penicillin shots and he sent her to Dr. Cowan and Nielsen as he thought (R. 108) it might be a cancer. They told her it wasn't cancer; that it was purely infection *coming out of the tonsil hole*.

Dr. Argyle treated her all that winter for infection of the mouth, gave her hormone shots, penicillin shots and mouth wash (R. 109).

None of these doctors except Dr. Browning did any surgery or cutting in her mouth.

During May 1948 she saw Dr. Sears. She had a big sore in her mouth (R. 110). He and Dr. Browning looked at it and sent her to Dr. Dolowitz, a throat specialist, whom she saw about May 10, 1948. He took

a biopsy to send to the Holy Cross Hospital, gave her some medicine and told her to come back in a couple of days (R. 111). The condition of her throat was terrible. There was a great big ulcer about the size of a dime on the left side just above the tonsil area.

She went back per appointment, but Dr. Dolowitz did nothing more then (R. 112). She went back to Dr. Dolowitz on June 24, 1948 and Dr. Dolowitz took another biopsy.

On June 26, 1948 at about 9:30 A.M. she had a terrible ulcer on the left side just above the tonsil area. She was washing it off with peroxide and water trying to get a little easement of it and it just popped open and she could see something hanging. She took a tweezers and pulled on it and there was this ungodly ragged thing dripping with pus. It was terrible. It was sticking out. She washed it off (R. 113) It looked like a piece of gauze or white material about three-fourths of an inch long and about a quarter of an inch wide. She was frightened. She was hysterical and tried to get it out. She tried with her fingers and the tweezers but couldn't get it out and then went to her neighbors to call her friend Mrs. Matthews and then to her daughter - in - law, Betty Fredrickson, and then to Dr. Dolowitz, accompanied by her daughter-in-law (R. 115). We had to wait about an hour and a half to two hours to see him. He cleaned out the hole with penicillin and sprayed it. She thought the gauze was still there but evidently she had swallowed it, and all that was left was fragments. He picked out some

strings and showed them to her. He prescribed penicillin every eight hours. She returned to Dr. Dolowitz and he would take out threads every time.

When she got home she wondered if she had swallowed the gauze and (R. 117) afterwards recovered it from the stool. She put it in some water in a fruit jar (R. 118) and finally in some alcohol. It has been in her possession ever since until delivered to her attorneys recently.

Dr. Dolowitz put no packs, gauze or cotton in her mouth (R. 119).

Exhibit "A" is a bottle containing some material that came out of an ulcer on the left side of her mouth at her home. The ulcer would break and these pieces and fragments would stick out (R. 120). She put them in alcohol.

(It was stipulated that they have not been disturbed by her attorney and the exhibit was admitted without objection.)

Exhibit "B" contains material that came from the ulcer on the left side of the mouth. (Admitted without objection.)

Exhibit "C" is material from the same ulcer on the left side (R. 122). (Admitted without objection).

Exhibit "D" from the same ulcer (R. 123). (Admitted.)

Exhibit "E" from the same ulcer (R. 124).
(Admitted.)

Exhibit "F" contains material that, on November 8, 1948, appeared in an ulcer on the right side of the throat, at her home. There was a bad ulcer there, about the size of a garden pea; it broke and this material came out; she swallowed it and it was recovered the next day from the stool (R. 125). (Admitted without objection.) There are some other materials in bottles that she recovered in the same way.

Prior to June 17, 1945 she weighed about 160 pounds. She lost weight thereafter, about 60 pounds (R. 126). Her mental condition was terrible; she was nervous; she was sick after her tonsils were taken out; she didn't know what was the matter; nobody else knew what was the matter; she went from doctor to doctor until the family got disgusted with her; they thought it was all imagination and regarded her as off mentally and wouldn't let the grandchildren come to see her; she was humiliated and embarrassed (R. 127); and then these ulcers broke in her mouth and she was ashamed to go around the children because she would stink; she could taste it; when she went any place she would sit by herself and wouldn't go around people; her people ignored her; they figured there was something wrong but didn't know what it was.

When it was suggested that she had cancer she felt that she might just as well commit suicide. After

June 1948 she felt much better. Her (R. 128) mind began to clear.

The material that was recovered on June 29, 1948 was put in the bottle marked Exhibit "A" (R. 130) and then turned over to Mr. Elton, her attorney.

The ulcers that she saw would appear and disappear during the past three years (R. 146). One ulcer on the left side was just above the tonsil area and the other one on the left side was down in the tonsil area (R. 147). The one on the right was near the cheek, right down back of that tonsil (R. 148). It came out of the hole and spread on to the tongue. The one on the left was just above the tonsil.

These strings came out of her mouth from June 28 (1948) until about a month before trial (R. 150).

Dr. Wright has been her dentist since 1935 (R. 156). She doesn't remember what dentists extracted teeth for her before that. Between 1935 and January 1946 she had teeth filled and cleaned but couldn't say if she had any pulled. In January 1946 she had only 18 teeth, 10 at the bottom and 8 on the top; (or vice versa) (R. 157). They were all front teeth. By January 1946 she had lost all of her teeth except her front teeth. She didn't remember whether any teeth were extracted between 1935 and January 1946. Dr. Wright was the only dentist that treated her during that time.

Since 1935 she has just had Dr. Wright as her dentist (R. 159) until Dr. Browning in July 1947. Dr. Sears makes teeth; did no work in her mouth.

From 1935 her doctors have been Dr. Boucher, family doctor, then Dr. Moorehead. She was sent to him by Dr. Boucher; Dr. Maw; Dr. Argyle in October 1946 (R. 160). Dr. Boucher was the only doctor (medical) who treated her between 1935 and July 1945; and then Dr. Johnson of Murray, right after Dr. Boucher; then Dr. Moorehead; and then back to Dr. Boggess who had taken Dr. Boucher's place (R. 161), then Dr. Argyle; then Dr. Nielsen of Cowan & Nielsen; and of course Dr. Dolowitz (R. 162). Dr. Boucher is retired now. He lives in California. She went to Dr. Boggess for her throat (R. 163). Dr. Nielsen limits his practice to cancers and tumors. All of the doctors she mentioned except Dr. Boucher are still in Salt Lake County.

During these four years she has gone from one doctor to another (R. 164). To all of these doctors she complained about her throat following her tonsillectomy in July 1945—nothing but that. She told all of these doctors everything, that she had had a tonsillectomy and had a sore throat ever since.

In her deposition, taken in this case, she testified that she couldn't say how many teeth Dr. Wright had extracted between 1935 and July 5, 1945. She would say two or three at most (R. 166). She didn't know, maybe there weren't any. He didn't extract any of the very front teeth prior to July 5, 1945. The back ones were extracted thirty years ago, more or less (R. 163).

The first time she saw Dr. Maw after the operation was the middle of August (R. 171). She expected to have

a sore throat following the operation. Thereafter she saw Dr. Maw about every three weeks. When her throat got so bad she couldn't stand it she would go back to him (R. 173). She didn't go to see Dr. Argyle until she discontinued seeing Maw. She could get no relief from the Clinic and she had to go somewhere. These doctors gave me penicillin and sulfa. They could see the soreness there and so could she.

Dr. Wright used no sponges, gauze, or packs in her mouth (R. 174). He made some dentures but her gums were so sore she couldn't use them (R. 175). He made two sets. She had these ulcers. Her whole mouth was sore (R. 177); her whole face was sore inside.

Dr. Browning used no gauze (R. 179). She also visited Dr. Calvert (a dentist). He referred her to Dr. Sears.

The contents of the bottle, "Exhibit "I", have been removed now. They were what was recovered in the stool on the first occasion (R. 200).

MRS. VERA MATTHEWS

She is a friend of Mrs. Fredrickson, has seen her often, at frequent intervals (R. 242). Between her tonsil operation and the summer of 1946 she had an extremely sore throat. She went down to one hundred pounds. She also observed Mrs. Fredrickson's mental condition. She was depressed a lot and sick a lot of mental trouble in that way, this sickness was upsetting her health to that extent (R. 243).

On June 26, 1948 she saw Mrs. Fredrickson, at home of witness, looked into her mouth; she saw this cotton or gauze hanging out of her throat, about one-fourth of an inch wide, it looked about half an inch long, that resembled gauze to her (R. 244) on the left side of her throat. From the middle of 1948 her health improved (R. 245), physically and mentally; she is more cheerful. She is acquainted with gauze. Her whole mouth and gums were sore in 1946. She understood that the reason she had her teeth out was because she had this soreness in her throat and it would help her arthritis (R. 250). It is her experience that people have their teeth pulled for things like that.

Mrs. Fredrickson started having trouble with her gums and mouth immediately after having her tonsils out.

MRS. RUPP

She lives in Taylorsville (R. 256), knows Mrs. Fredrickson, is a close and intimate friend. Saw her on June 26, 1948. On that date saw her at home of witness; looked in her mouth; she acted like she was sick. She had a sore in the back of her mouth that was all red and pussy looking (R. 258), and it looked to have a piece of gauze hanging from this hole in her mouth; it looked like an awful bad sore. It looked about a quarter of an inch wide and half an inch long. She knows gauze.

SHERMAN FREDRICKSON

Husband of plaintiff. Talked with Dr. Maw in April or May 1948. Asked Dr. Maw if the condition of her throat was a cancer. He said he didn't think it was. Asked if the trouble in her throat had any chance of affecting her mentally; he said no, he didn't think it would. Asked Dr. Maw what was really the matter of her throat and he couldn't tell me. He said, "She does have a sore throat" (R. 260).

Observed his wife's condition between tonsillectomy and summer of 1948. She was irritable, lost weight; she was practically a nervous wreck.

Has also observed her health from the summer of 1948 to the present. She has gained weight, her nerves are much better; her mental attitude toward life in general is better.

His wife had no trouble with her teeth prior to the tonsillectomy (R. 263). She had had some teeth removed several years ago, twenty years, probably twenty-five years.

Dr. Wright didn't remove any of her teeth that he knew of. He didn't remove any teeth until he took out the eighteen.

She had eighteen teeth removed because of a bad condition in her throat (R. 265).

Dr. Wright did not put any packs or gauze in her mouth (R. 268) or any fabric or other material.

BETTY FREDRICKSON

Daughter-in-law of plaintiff (R. 271). Has known her since 1939, close relationship. After tonsil operation she had sores, ulcers, running sores in her mouth, and showed them to witness from time to time; they were pussy (R. 273). They showed up at various places, around in the throat and around the gums and into the sides. She had arthritis and after the tonsillectomy she got relief from that. During the year 1945 to June 1946 she lost a lot of weight and looked very bad. Her children noticed it (R. 274). We were all concerned about her mental condition. She was in a bad state. She was very nervous and had a horror of being dependent (R. 275) upon anyone to take care of her.

She saw plaintiff on June 26, 1948. Plaintiff drove to her house. Plaintiff opened her mouth and she looked and could see a large pussy spot and what appeared to be a piece of gauze in it (R. 276). She observed some foreign materials, some threads and with a definite loose weave (R. 277), gauze. She was familiar with surgical gauze. It was a small piece, maybe slightly smaller than your finger tip. There was just a small tip showing, maybe around a quarter of an inch or half an inch (R. 278). It was still imbedded in the mouth. It was just above the tonsil area. Dr. Dolowitz brought out some tissue and threads.

Between 1945 and June 1948 there had been an increase in plaintiff's nervousness, perpetual worrying

caused by her condition; wondering what was causing it and if she would ever get better; there was a definite strain in her relations to her husband and she lost weight (R. 282). During that time there was one sore, one infection after another in her throat and in her mouth (R. 283). The sore that she saw on July 26, 1948 was about three-quarters of an inch in diameter (R. 285). It was at the back of the throat. She couldn't remember which side. It was less than an inch from the center (R. 286).

MR. McLACHLIN

City Chemist since 1920 (R. 297). Identified Exhibit "1" as a bottle that he received from attorney for plaintiff to make an analysis of the contents. I found there were small strings or solids or fibers of cotton. There appeared to be a substance similar to catgut, which he didn't have time to definitely determine. He took the fiber out that was in the bottom, boiled it with sodium hydroxide to determine whether there was animal matter other than cellulose and then stirred that with potassium iodide and iodine to get a color reaction for cotton and it showed positive, and he then put it under the microscope and compared it with other pieces of cotton gauze, and the reactions were similar all the way through (R. 298).

His conclusion was that it was cotton and that there was also a substance similar to catgut.

Most of the material in the bottle was used in the examination.

He didn't see any fragments of bony substance.

DR. BROWNING

Knows the plaintiff; treated her July 7, 21 and 25, 1947 (R. 303); took x-rays and on July 21st the lower anterior ridge was opened. There was a very spiney sharp ridge which was removed, making a smooth surface, because she was having difficulty in wearing her dentures. It was from the left bicuspid to the right bicuspid; from the first double tooth to the first double tooth on the opposite (R. 303). She had no other teeth at that time (R. 304).

In doing that work he used no packs of any kind. Used no sponges. He used some sutures of dyed, black silk. No other foreign materials. An aspirator was used to remove the blood and keep the surface clear (R. 305).

On July 25, 1947 he opened up the upper area from the first molar to the first molar and curetted it but it wasn't bad; it wasn't like the lower. Also cleaned out the socket of the first molar. No pack, sponges or gauze were used, no sutures in the upper. X-rays taken show no bone fragments or spicules of bone (R. 306).

He never used any catgut in his work in plaintiff's mouth (R. 307). The silk sutures were removed in three to five days. He did no work in the rear of her mouth. Did no work in the area of the wisdom teeth.

She was in his office many time complaining about a sore mouth, over a period of a year, probably once a month. Her mouth was very inflamed. At one time he saw a lesion near the very back edge of the soft palate (R. 312). The tonsil area was involved in the inflammation that he saw. It extended clear back to the uvula (R. 313). The ulceration that he saw, which caused the inflammation was *not* removed from the tonsil area. The distance is not too much, *you are over the tonsil area* (R. 314). *It was on the left, to the soft palate covering the tonsil area.*

DR. WRIGHT

A dentist of Murray, Utah (R. 329). Mrs. Fredrickson known him since the fifth month of 1939. She has had no molar teeth since he has known her.

On January 22, 1946 he extracted eighteen teeth for her. They were all anterior (front) teeth. Did not use any gauze or packs in her mouth. They were easy to take out, no dry sockets. Cotton packs or gauze packs are used only in the case of bleeders (R. 331)—not on the day the teeth are taken out but only if they come back as a bleeder. He has gauze in his office; also cotton.

About three months before January 22, 1946 she went to his office and said she was having trouble and wondered if it was from her teeth (R. 339). He told her he didn't figure the teeth were causing her trouble, and then she came in and said she wanted her

teeth out. Her teeth were too bad to leave in and too good to take out so he left it up to her to decide. He told her they might be causing the trouble but didn't think so. There was some pyorrhea, slight (R. 340).

His records show that in 1939 he put in a filling. In 1940 he cleaned her teeth. In 1942 he cleaned her teeth; in 1943 he x-rayed her teeth; in June 1944 he put in two fillings; in August 1944 he put in a filling.

DR. DOLOWITZ

He is a physician specializing in eye, ear, nose and throat (R. 182); met Mrs. Fredrickson on May 10, 1948; the lymphoid tissue in the nasal pharynx was red and angry looking (R. 184); in the mouth there was a small lesion about a c.m. square at the junction of the hard and soft palate on the left side (R. 185); a small ulcer with a pussy exudate. It would be about two-thirds of the way to the tooth from the anterior pillar (R. 186); on the illustration it would be the last upper tooth (R. 187); on May 14, 1948 he made an examination of her throat; there was still a good sized ulcer which seemed to be slightly closer to the gum, because of the biopsy which he took at the previous time to find whether or not cancer was present at the site of the lesion. On May 29, 1948 the ulcer had healed and there was one behind the gum, behind the teeth (R. 188) on the soft palate, about half an inch below the last tooth on the left side (using the exhibit as a reference). On June 24, 1948 the first ulcer was still present and he removed the whole ulcer, at the request

of the pathologist, to take a deep biopsy, very deeply, to be sure no cancer was in the tissue; the ulcer had healed but broke down again (R. 189).

On June 26th Mrs. Fredrickson came with a small abscess opposite the last lower molar. She stated it had ruptured and a sluff of dry blood and cotton came out. She brought a thread with her about an inch long, the sluff was about an inch in diameter with a c.m. deep, slightly less than half an inch (R. 189).

On June 28th she came and stated that a large piece of gauze had started to come out of the hole, she was unable to remove it and had swallowed it. There was a hole with a few pieces of string which she removed. There were three or four strings (R. 190).

On July 1st the socket had healed but not well. He opened it and removed six tiny threads. I saw her off and on at frequent intervals from time to time.

On October 25, 1948 he saw her; there was a slightly granulate, healing formation on the left side, *just lateral to the tonsil fossa, the deep cavity which goes in here where the tonsil rests.*

There were two lesions when he saw her on November 15, 1948; there was a slight healing of the wounds on the right side over the tonsil area (R. 191), midway between the right anterior pillar and the last tooth. There was some granulation at the first site and there was one thread which exuded there.

He saw her the following day, November 16, 1948. The swelling had spread around to the cheek side, just behind the first tooth and I removed a thread from there. She had no natural teeth.

When she first arrived he suspected cancer and took tissue, then a deeper biopsy. When the thread exuded he tried to find what it was. The ulcer healed from the bottom up instead of the top which meant to keep the top open or they would have a pocket again. He prescribed penicillin (R. 193). The anterior pillar of the tonsil area is the front pillar. The tonsil area is about three-quarters of an inch wide (R. 198) at the bottom. Tonsils vary tremendously in size (R. 199). In our average adult tonsils are from one inch and a quarter to three-quarters of an inch wide. They are from three-eighths of an inch to half an inch thick. They are slightly wider and thicker than an almond nut (R. 200). He indicated on Exhibit "1" with a red circle the approximate location of the ulcer that he saw on May 10th. *He said he was guessing at the location and that it was an approximation* (R. 202). The circle which he placed on the diagram is closer to the normal position of the rear molar than the front pillar of the tonsil (R. 206).

He marked on the exhibit the location of the ulcer that he saw on May 14th, slightly closer to the gum (R. 207). It was the same ulcer but larger as he took part of it in the biopsy (R. 208).

When he saw her on May 29th there was another ulcer. He identified it with a "3" on the exhibit. It

was about a half c.m. to a c.m. below the last tooth on the left side (R. 211).

On June 24th the first and second ulcers had reopened and recurred, and he took another biopsy.

On June 26th there was a small abscess interposed between "1" and "2" on the diagram. An abscess is imbedded deeper in the tissue. This abscess was about one c.m. in diameter (R. 213). It had ruptured and she had pulled out a slough of dried blood and cotton. He saw no gauze. He saw a thread that Mrs. Fredrickson had.

On June 28th she told me she had seen a piece of gauze and that she had pulled on it and had lost it (R. 215) and she was extremely frightened. On that occasion he removed a few more pieces of string (R. 216). The abscess was deeper. In July he found six threads. *When he saw the threads he felt it wasn't cancer, something was irritating deeper, foreign pieces, threads* (R. 217).

On July 29th an ulceration broke out on the right side, almost in the same position on the opposite side of the mouth, *a little bit lower* (R. 217). It was marked with a "4" on the exhibit. Mrs. Fredrickson insisted the feeling of gauze but he couldn't see any (R. 219).

September 16th ulcer "4" was still drawing pus (R. 220). On September 23rd a small white hard mass worked out to the surface of the ulcer and it was removed by biopsy forceps under local anesthesia, it

looked like cartilage with a small green core next to it of infected material (R. 221). Cartilage is found in various parts of the body, not around or in the teeth. It is found in the region of ulcer No. 4.

On November 16th the swelling in the mouth had spread to her teeth, where the teeth would normally be found. There was a small ulcerated area coming level with the left buckle surface, a small granulation was removed with a thread in the center (R. 223) right in the area of the teeth. It was marked on Exhibit "1" with a "5".

He never saw threads or gauze excepting as indicated but Mrs. Fredrickson told him some came from No. 4 ulcer and there was an enlarged perforation there (R. 225).

(This is the evidence which should have been and was considered by the trial court in ruling on the motion for non-suit.)

(b)

The following admissions and additional facts favorable to plaintiff appeared by evidence of defendants.

DR. MUIRHEAD

Saw plaintiff on April 5, 1946 (R. 377). *She complained of pain, discomfort and some swelling of her throat from an operation last fall.*

He would be shocked and surprised to find that shortly thereafter there exuded from that area a quantity of cotton and catgut (R. 378). In the light of his examination he would be very much surprised to find that condition existing (R. 379).

DR. MAW

He described a tonsil operation. He opens up the whole *cavity* of the tonsil. When the operation is first done there is of course an indentation, the muscles haven't reacted; *this is all muscle cavity when the tonsil is taken out.*

The patient, the nurse and Dr. Maw were the only ones that were present (R. 388). His recollection is that a sister of Mrs. Fredrickson was at the foot of the bed.

He used gauze sponges in this operation on Mrs. Fredrickson (R. 389). Exhibit "3" is the type. In cases of quite severe hemorrhage he uses that size. If there is just a little oozing he cuts it in smaller pieces and touches the fossa and catches the bleeder and ties it off with catgut (R. 390). In every local there is a certain amount of bleeding. He fastens the sponge to the hemostat and sponges it off.

If the patient spits blood, if it should be that he cuts a large vessel, he takes a large sponge pack in her throat, holds it for a few minutes with the instrument, gradually takes it down to see where the bleeding is, ties it with catgut, and if there is another wipes it

off and proceeds the same until all are tied off (R. 392). He doesn't recall whether there was a large amount of bleeding in the operation on Mrs. Fredrickson.

Exhibit "5" is the type of catgut that was used on Mrs. Fredrickson (R. 395).

The tonsil is in a little capsule and when you take the tonsil out *sometimes a piece of the root of the tonsil will be through the capsule into the muscle* and you can't see it, and it may grow. You check to see that all is removed (R. 396).

As many as twelve to fifteen of these little sponges may be used in an operation.

He instructed Mrs. Fredrickson to stay home during the period of convalescence. He did not see her again, she did not call him, and he presumed everything was all right (R. 397). He left Salt Lake on August 1st and returned August 9th. *He saw her on August 18th. It had practically healed* (R. 398).

On September 4th, 1945 she complained of sore throat; pharynx was inflamed. This area is in the back of the throat, behind the back pillar of the tonsil (R. 407-408).

She complained of a sore throat every time she came in, and he saw nothing except that chronic inflamed pharynx (R. 409).

On October 3, 1946 she complained of a dry sore throat, especially on the right side (R. 411). He gave her sulphathiazol.

On October 28, 1947 she complained of pain about her second and third molar tooth on the right side (R. 412). He could see nothing that was causing her discomfort. *He told her to go see her dentist.*

When Mrs. Fredrickson first came to him in July 1945, her sinuses were clear. There was no abscessed sinus in her case. She did not manifest or disclose to him any prior operation in her throat (R. 403). No surgery in her throat. Except for her infected tonsil the throat tissue appeared to be normal.

He was shown Exhibit "F", which one of his witnesses said was a mass of threads, and asked if it was undigested food material.

"I think I remember seeing this; I couldn't say it it thread. *My gauze is a lot larger than this. I was looking for gauze; this looks like cotton to me; cotton threads.*" *Now it looks like cotton threads.*

There is a way by which it can be determined whether this is undigested food. He can check it, surely.

It was his opinion when he gave his deposition that if Mrs. Fredrickson wanted a cure she should go to her dentist; that her troubles were dental (R. 472).

"Q. Yes and had not Dr. Dolowitz taken that deep biopsy during June of 1948 which released that foreign

substance that throat condition would have continued much longer than it did, would it not, Dr. Maw?

“A. You spoke of the tonsil fossa. He never made an opening in the tonsil fossa. He made an opening possibly the third molar tooth—not the tonsil fossa,—if you want me to answer that.

“Q. Doctor, he placed it about half an inch from that spot there, about half of an inch from that, didn't he?

“A. And next to the third molar tooth.

Q. If that extends back there, as one of your witnesses said, some half to $\frac{5}{8}$ ths of an inch, that would be right above the tonsil fossa, wouldn't it?

“A. Above it.

“Q. Laterally?

“A. No, above it, above the tonsil.

“Q. If that is half of an inch from the mouth of the tonsil fossa, and that fossa extended back there from half to $\frac{5}{8}$ ths that would be right above it, wouldn't it?

“A. The tonsil fossa very seldom extends past the anterior pillar there, that is within half of an inch distant from your ulcerated spot there.

“Q. Yes, and had she pursued your advice of going to have her teeth cleaned, and some more bridge work

done, she would still have been an afflicted woman, wouldn't she, Doctor?

"A. I didn't ask her to have the teeth cleaned, there were no teeth to be cleaned.

"Q. Or gums cleaned?

"A. Take any infected area around the gums.

"Q. You said infection area, the whole rear of her mouth.

"A. I never said it was the whole rear of her mouth.

"Q. Haven't you, Doctor?

"A. *It only involved the tonsils, around the third molar tooth*" (R. 473).

At his request (R. 475) Mrs. Fredrickson went to Dr. Kerby for an x-ray. She submitted herself to that x-ray for his own satisfaction and Dr. Kerby took what he was asked to take by Dr. Maw for the purpose of showing source of the bone spicules and to find if there was infection there. *There was no bony involvement at that time.*

(That was in January 1949.)

ALICE EMERY

Formerly named Armour (R. 481), registered nurse at the Clinic, assigned to Dr. Maw. Dr. Maw used a

sponge to tap the blood as it comes from that area; it was a light piece of gauze (R. 487).

“Q. Free and unattached from the hemostat, did Dr. Maw ever use a sponge in the mouth, or tonsil area?

“A. I don't know that he did. No, he usually connects them with the hemostat and taps, and doesn't leave them in.”

She has seen many throats after an operation. *The tonsil fossa after the tonsillectomy is a dark red area, in a sac, just before you see the pillars; you look into the throat and there would be two deep red areas on either side* (R. 488).

DR. DOLOWITZ

He thought it unlikely that gauze and threads left in the tonsil fossa could have migrated that far (to the places where they were exuded).

As a matter of fact in reading the history of cases, practically anything is possible (R. 500). *There are migratory bodies and numerous instances of the most fantastic things. Wierd things happen but usually the migration is downward. His experience is very limited with this; those he has seen have always been downward. It is possible for them to go laterally.*

He removed threads between the 28th of June 1948 and the 16th day of November, 1948. *Long after May and June these ulcers were occurring and recurring* (R.

502). *That has gone on constantly. This ulcerated condition continued to the date he last saw her on September 15, 1949. He never inserted any gauze within the mouth or body of Mrs. Fredrickson nor did he see anyone else do it.*

“Q. (By Mr. Thurman) Now July 1, 1948 you said there was some gauze or threads seen in one of the ulcers, where was that?

“A. *In the same ulcer, is apparently working up from beneath.*

Mr. Rich: Working up from what?

“A. *Working up from the bottom of the ulcer.*

“Q. *Working up?*

“A. *You have a hole— I would like to draw a diagram.*

“Q. Now, in case of an ulcer or abscess if some foreign material were in the bottom of that, what would nature do to expell that thread?

“A. *It would expell it.*

“Q. *And that is when the ulcer works upward?*

“A. *Yes, sir.*

“Q. *In expelling the thread.*

“A. When we say upward it is upward from the ulcer, but it would be lateral.” Not vertically upward.

On November 8th a large mass of material sluffed out of the right side of the throat in the region marked by a 4.

He found some threads on January 11, 1949 in the first ulcers 1 and 2 (R. 506).

During Mrs. Fredrickson's visits to him she may have stated that she removed threads from the tonsil area but he doubts it because there is nothing in his notes (R. 507).

(He was asked to read his note from Nov. 15, 1948, which he did as follows:)

“ ‘Patient comes in reporting that on the 8th of November a large mass of material sluffed out of the right side of the throat at the pole of the tonsil slightly backward,’ that is my way of putting it, slightly behind the pole area, ‘and upward toward the upper teeth. A large pocket was formed and she reported to Dr. Argyle. She brings in some material which she recovered from her stool believing it to be the material she swallowed. I am unable to tell her what it is composed of, and suggested if she really wishes to know to contact a laboratory. The hole is almost healed though there is still some infection. At the site of the granulation that I removed on the first there is one thread that I removed. No other foreign body seen. There was some pus sur-

rounding this. She insists there is still further foreign body deeper in. To continue hot packs and ichthyol packs. Advise against probing for further material at this time.' ''

That is the abscess from which he made the second biopsy.

If he hadn't cut that deep biopsy the gauze wouldn't have been able to work out (R. 515).

DR. SNOW

The normal tonsil in an adult is over one inch, one half inch thick by $\frac{5}{8}$ of an inch wide (R. 423). Thick is depth. *It becomes enlarged with disease.*

The cavity, after the tonsil is removed is called the fossa (R. 425). It is exactly the size of the tonsil. It is of varying depths, occasionally very shallow and the tonsil protrudes; sometimes the tonsils look small and upon taking them out we discover they are very deep, from half to three quarters of an inch deep.

After the tonsil is removed the area between the pillars fills with scar tissue (R. 429) and is skinned over with mucous membrane, the lining of the throat. When the tonsil is removed scar tissue commences to form (R. 430).

It is not the practice in this locality to sew the pillars together (R. 433). If it were sewed in the gauze would stay five or six days (R. 434). At the end of that

time the sutures or the stitches would sluff away. The gauze would then be expelled (R. 435).

There are various methods of taking care of excessive bleeding (R. 439).

He has heard of the method of controlling bleeding by putting a packing in the tonsil and suturing it. It is described in the literature. He has never seen it done. It is described and damned (R. 440).

He did not consider it good practice in this area to do that.

It would not be a good practice in this area to leave a piece of sponge dressing, gauze in the throat.

If a tonsillectomy is properly performed food or any other foreign substance should not accumulate in the tonsil fossa; or in the area circled (on Exhibit 1).

If a piece of gauze were to become imbedded in the tonsil area and then covered over by scar tissue it could develop a foreign body reaction and the sponge would be expelled by an abscess (R. 441). Eventually it would be expelled. It would accumulate pus. Pus is the result of breaking down of the tissue. Infection would cause bone to disintegrate (R. 442). Bacteria from the diseased area. Infection means the presence of bacteria. If the infection extends to the bony area it could cause disintegration of the bony area.

In order to bury a piece of gauze in the tonsil fossa you would have to make an incision through the muscle and bury it deep in that muscle (R. 444).

If gauze came out of the area marked 1 and 2 on Exhibit 1, on the anterior surface of the pillar, outside the pillar, presumably that gauze had been in there thirty days previously (R. 451). *Gauze a quarter of an inch thick, half an inch long, would certainly form an abscess within a few weeks, certainly within a month would be the length of time. It might have remained a little longer than thirty days—not sixty days (R. 452).*

“Q. So if a piece of gauze came out of that area marked 1 and 2 on Exhibit “1” it was placed there within sixty days?

“A. Surely.”

Exhibit F was handed to the witness and he was asked if that was a small piece.

“A. No, those are large pieces of thread.

“Q. Those are large pieces of thread.

“A. It is a large mass of thread.

“Q. It is a large mass of thread, no question about that at all, is there doctor?

“A. No.”

According to his opinion, to his professional opinion, if those came out of an individual's body at the place indicated with a 4 on Exhibit 1 that had to have been placed in that body within thirty or sixty days of that time.

“A. Correct.”

“Q. No question about that?

“A. No.”

His professional opinion was (R. 453) that masses of thread that size placed in those areas in the muscle would be shown evidently as exuding from the body within thirty to sixty days.

“Q. And then conversely it had to be placed in there within that time?

“A. Yes.”

DR. CLEARY:

In his opinion a foreign body that manifests itself on the 28th day of June, 1948 had to have been placed in there within a few days before that date.

The balance of the evidence of defendant and his witnesses was in conflict with the evidence of plaintiff and the conflict was resolved by the jury in favor of plaintiff.

Therefore, in considering the motion for directed verdict, the foregoing admissions were before the trial court in addition to the evidence of plaintiff and her witnesses.

ARGUMENT

Points 1 and 2

Counsel argues these points together. They are, of course, different. At the close of plaintiff's case the following basic facts were established: That prior to Dr. Maw's operation she had never had any operation in her throat where gauze or sponges were used; that after the operation no doctor or dentist had done any work in her throat or mouth where gauze or sponges were used; that not doctor or dentist other than Dr. Maw had ever performed any surgery in her throat; that Dr. Maw made an incision in her throat and used gauze sponges in connection therewith; that the operation took about an hour; that immediately following the operation she felt like there was a lump in her throat; that this lump continued to exist until the gauze came out; that immediately following the operation and practically to the date of trial her throat, including the tonsil area and right in the hole of the tonsil became ulcerated, abscessed, diseased and infected; and that there was finally exuded from her throat, immediately near each tonsil, two pieces of gauze sponge — one on either side — which were the source and cause of her physical and mental suffering and damage; that thereafter her health improved; that in the meantime she had been unable to ascertain the cause of her trouble, although she had told defendant, his nurse, Dr. Muirhead and her family about the lump in her throat following the operation. All other possible sources of the malpractice, excepting Dr. Maw, were excluded by the evidence.

At the conclusion of the case there was to be considered by the trial court Dr. Maw's denial plus the opinion of fellow members of his profession, that it couldn't occur. This created a conflict in the evidence, and the jury saw fit to believe the circumstantial evidence of plaintiff and to disbelieve the evidence of defendants.

In addition there were certain admissions and additional evidence gained from defendant's witnesses which strengthened plaintiff's case.

Counsel quotes at length from the evidence of his witnesses, ignoring the fact that such evidence did no more than create a conflict and is not to be considered as against the verdict of the jury and the ruling of the trial court.

Dr. Maw stands before this court the same as any other individual who, operating alone without witnesses, was the only one who actually knew what occurred but whose word is in conflict with the proven facts from which inferences may be drawn at variance with his evidence.

Expert witnesses need not be believed if their opinions are not believable in the light of the evidence.

Mrs. Fredrickson had a tonsillectomy to aid her arthritis. Dr. Maw performed the operation. He made an incision on each side of her throat; used several gauze sponges and catgut sutures to stop the bleeding. Whether he had to go beyond the tonsil area because they

were imbedded and then forgot that he had done so, or whether he packed the area and sutured it in, intending later to remove it, or whether some other incident arose which caused him to leave these two pieces of gauze sponged there — one on either side — is known only by Dr. Maw. He denied that he did it. He admitted, however, that he did not follow his usual practice in this case. Usually he has his patients return the following day for a checkup. In this case he did not do so. Dr. Maw did not see her again until over a month after the operation. In the meantime scar tissue covered the tonsil cavity. Immediately she felt a lump in her throat. She told him and his nurse about it. He thought it was sinus and kept on treating her for that and she kept going back. Her throat was sore, ulcers broke out, she told him it felt like a lump in her throat. For a year and a half he treated her for sinus, getting no results.

She had never had sinus trouble. She had never had any prior surgery in her throat. The only man who ever worked there was Dr. Maw.

Her whole mouth became sore, inflamed and ulcerated. In her desperation she finally thought she might have bad teeth and that they were causing the infection in her mouth. She had eighteen front teeth. She had them out. When that failed to cure the trouble she went back to Dr. Maw. He gave her penicillin. She went to Dr. Boucher, her family physician. He gave her sulfa and penicillin. She went to his successors, Dr. Johnson and Dr. Boggess. They gave her penicillin. She went to Dr. Muirhead (Moorehead) referred there by Dr.

Boucher, told him she had a lump in her throat, following a tonsillectomy, and had had a sore throat and mouth ever since. He could see nothing and referred her back to Dr. Boucher for more penicillin. For three years this continued.

In the meantime, in her terror at being unable to get cured of this throat condition, she continued to consult Dr. Maw. On one of those occasions he suggested the possibility of cancer. He said it didn't look good. They took a biopsy. She then consulted cancer experts. Dr. Maw was the first one to put the thought in her mind—and there it remained until Dr. Dolowitz uncovered the two gauze sponges imbedded in her throat.

In May 1948, nearly three years after the operation, she was sent to Dr. Dolowitz by Drs. Browning and Sears, who still suspected cancer. He took several biopsies, one of them deep, which released the gauze, and out came a quantity of gauze and thread, on each side, right near the place of the operation performed by Dr. Maw.

Who, other than Dr. Maw, had ever performed surgery in her throat? No one. She said so. Dr. Maw said so.

This made a case for the jury.

The fact that plaintiff's case rest upon circumstantial evidence in the face of defendant's denial does not defeat her case. The fact that no eye-witness other than the defendant, either alone or corroborated by others, testifies to what he claims did not occur has never yet

saved a defendant from the convicting effect of circumstantial evidence if believed by the jury to be more convincing as to its truthfulness. Plaintiff made a case for the jury under the following authorities:

Carruthers v. Phillips, 169 Ore. 636, 131 Pac. 2d 193.

Plaintiff had an operation for prolapsed uterus. Nearly two years later a gauze sponge was discovered in her bladder. Defendant testified that he never cut the bladder, inserted no gauze into her bladder, and never at any time put gauze in her body, hence couldn't have left any. The operation for removal of the gauze sponge was by another surgeon. Plaintiff testified *that she never had any operation prior to the repair of her uterus by defendant and that she never at any time put any gauze into her body.* Plaintiff's evidence further showed that the bladder was exposed, a new bladder wall built up, *cutting was done, gauze sponges were used by defendant, and a gauze sponge was removed twenty-one months later.* The Supreme Court of Oregon held this sufficient to present a jury question.

“ * * Plaintiff was entitled to show that the defendant had opportunity to do the act charged. This she did show. She was entitled to go further and show that the defendant was the only one who could have done the act charged. This, too, she supported by her testimony. If the jury believed the evidence which she introduced, it was entitled to find that the defendant had inserted the gauze in her bladder and permitted it to remain there. When the doing of an act by the defendant is charged, evidence is admissible to show that the defendant had opportunity to do it, even*

though his opportunity be not shown to be exclusive, but 'Since the showing of opportunity leaves open all the hypotheses of other person's equal opportunity, it is proper for the proponent of the evidence to strengthen it by cutting off, so far as possible these other hypotheses, i.e., by showing that the person charged was one of a few only, or the sole person, having the opportunity. In other words, while the proponent need not, he may always show exclusive opportunity.'

1 Wigmore on Evidence, 2nd Ed., sec. 131. In the case at bar the evidence for the plaintiff, if believed, was sufficient to warrant the jury in finding that gauze was placed and remained in plaintiff's bladder and that the defendant had opportunity and was the only one who did have opportunity to place it there and therefore that the defendant did the act charged. See *Moore v. Ivey*, Tex. Civ. App., 264 S.W. 283.

"Furthermore, there was ample evidence concerning proximate causation and damage. If gauze was inserted in the bladder and allowed to remain there, it resulted in the condition described by Dr. Hunter, causing infection and pain and requiring operative removal. The evidence of negligence is likewise substantial. *No question of liability for mistake of professional judgment was involved. No one claimed that the gauze should have been inserted in the bladder. No one claimed that if so inserted its removal at the time of the operation would involve any exercise of professional judgment. Compare Rayburn v. Day, 1928, 126 Or. 135, at page 148, 268 P. 1002, 59 A.L.R. 1062. No one claimed that any incision of the bladder wall should have been made. The whole defense was that no incision was made, no gauze inserted and none left in.* * *

“Upon presentation of evidence that a physician inserted gauze in and failed to remove it from an incision, it has been frequently held that he became guilty of negligence as a matter of law. *McCormick v. Jones*, 1929, 152 Wash. 508, 278 P. 181, 65 A.L.R. 1019; *Moore v. Ivey*, *supra* (citing 21 R.C.L. 388); *Ruth v. Johnson*, 8 Cir., 172 F. 191, *Wynne v. Harvey*, 1917, 96 Wash. 379, 165 P. 67.

“Instances may perhaps arise in which such a conclusion would be proper, but it cannot be asserted as a general rule. In the case of *Rayburn v. Day*, *supra*, where the propriety of inserting the gauze in the operative field was unquestioned, the evidence disclosed an emergency situation in which the propriety of removing or not removing the gauze became one of professional judgment. In such a case it could not be said that the closing of an incision without removing the sponge was negligence as a matter of law. But even in *Rayburn v. Day*, the question was one for the jury. The standard of skill and care which the law imposes upon the surgeon in the performance of an operation is not limited in its application to the use of the knife. He must also use skill in the removal of surgical sponges. *Rayburn v. Day*, *supra*; 41 Am. Jur., p. 213, sec. 97. While the failure to remove sponges may not in all instances constitute a breach of the surgeon's duty to use the required care and skill, still it is generally held to require the submission of the question of negligence to the jury. It is *prima facie* negligence for an operating surgeon to leave a surgical sponge in a wound after the incision is closed. 41 Am. Jur., p. 213, sec. 97.

* * * * *

“We are referred by the defendant to an opinion by Judge Jaggard in *Staloch v. Holm*,

100 Minn. 276, 111 N.W. 264, 266, 9 L.R.A., N.S., 712, wherein a distinction is made between the standard of care in ordinary negligence cases and in actions for malpractice. In the former the test is the conduct of the ordinary prudent man under the circumstances, and 'that a man has acted according to his best judgment is no defense', whereas in a malpractice actions, the fact that the want of success was due to an error of judgment may sometimes be a defense. Assuming the distinction to have been accurately stated, the answer is that in the case at bar there was no question concerning the exercise of professional judgment, mistaken or otherwise, so far as the placing or removal of a sponge was concerned. The defendant cannot now claim that he made a mere error of judgment in failing to remove a sponge which he swears he never inserted. It follows that if the instruction of the court applied to this case the standard of care applicable to ordinary negligence cases, then the instruction was unduly favorable to the defendant who was under obligation to exercise that degree of skill, care, diligence and knowledge which is ordinarily possessed by the average of the members of his profession in good standing in similar localities. * * *

In malpractice the circumstances are peculiar, and so the general rule is peculiarly adapted to meet them. Among the circumstances are the skill and training of the physician, the inherent difficulties of operative treatment, the impossibility of certainty in diagnosis and cure, and the frequent necessity for the exercise of professional judgment, together with the advanced condition of the medical science on the community. Judge Haggard, in the case cited supra, after explaining that a surgeon is not liable for a mere error in judgment, makes the following distinction:

*'When the physician is actually operating he is employing surgery as an art, and if, for example, he * * * sew up a sponge in an abdomen has been opened, * * * his wrong concerns physical facts, and has fairly been held to be governed by ordinary principles of negligence.' ''*

Winchester v. Chabut, Mich., 32 N.W. 2d 358.

Plaintiff sued for malpractice in leaving a gauze sponge in an incision after an open operation for reduction of comminuted fracture of the femur. Defendant denied that a sponge was left and contended that the abscesses were caused by bone spicules working out. There was no direct evidence that a sponge had been left. Plaintiff testified that pieces of cotton gauze worked out and were discharged from the abscesses after they had been lanced. Defendant in turn testified that such pieces of gauze were some that he inserted in the abscesses for drainage. Plaintiff denied this. A motion for directed verdict was made; it was denied and the jury returned a verdict for plaintiff. We quote the following from the opinion of the Michigan Supreme Court sustaining the verdict:

“Defendant contends that the court should have directed a verdict for him because there was neither direct nor medical nor scientific evidence establishing or tending to establish the leaving of a sponge in the wound and no evidence of malpractice. *Lack of direct evidence of the alleged act of negligence is not fatal to plaintiff's case when there is evidence from which an inference to that effect may legitimately be drawn.* LeFaive v. Asselin, 262 Mich. 443. Defendant insists that the extrusion of several pieces of cotton gauze

from different abscesses is not evidence from which it may be inferred that a gauze sponge was left in the wound because testimony of doctors sworn for the defense was that the physical reaction and natural processes in extruding such sponge, consisting of one piece of gauze about 15 inches square and folded and refolded into a 3 inch square, would be to encapaulate it and extrude it in one mass at one opening and that nature in this process does not unfold, separate and twist it in strands and extrude them separately in various places in the manner in which extrusion of gauze is alleged to have occurred in this case. However, the testimony of one of defendant's expert witnesses was that it might conceivably be erupted through one or more abscesses. *There was thus a question of fact for the jury and testimony from which an inference might legitimately be drawn that the extrusion of bits of gauze from the several abscesses was occasioned by leaving a gauze sponge in the wound at the time of the operation. That this did not constitute good medical practice need not have been (LeFaive v. Asselin, supra), but was, shown by the testimony of expert witnesses. As said in Ballance v. Dunnington, 241 Mich. 383, even the merest tyro would know this was improper.* A doctor sworn for the plaintiff testified that, under the history of the case, after the abscesses occurred good practice required more than mere lancing, as was done by defendant in this case, but rather, exploratory surgery to discover the cause of the abscesses. The question of defendant's negligence or malpractice in this connection was one for the jury.

“Defendant also contends that the verdict is against the great weight of the evidence because his experts testified that the presence of a sponge in the wound after suturing would cause

certain reactions which did not occur in this case; but the doctor sworn for plaintiff testified that the reactions could be such as plaintiff claims did occur in this case. The doctors testifying for defendant and plaintiff agreed that plaintiff had not enjoyed the normal recovery to be expected in the absence of untoward occurrences at or after the operation; that x-ray pictures show malunion of the bone and that this could result from infection caused by leaving a surgical sponge in the wound. There is competent evidence to support plaintiff's theories in this case and we cannot say that the verdict is against the great weight of the evidence."

Aderhold v. Stewart, 172 Okla. 72, 46 Pac. 2d 340.

Plaintiff sued for malpractice in leaving a surgical gauze sponge in her body following an appendectomy. During the operation the surgeon (defendant) discovered that she had gallstones, made a second incision and removed the gallstones, placed a drainage in the lower (appendix) incision, removed the tube and gauze used for drainage about two weeks later, and then permitted her to go home. Thereafter the upper incision for gallstones healed but the lower one continued to discharge pus and did not heal. She went back to defendant, who probed for foreign matter, found none and sent her home where she consulted her local physician. She then returned to defendant, six months after the original operation and he removed a piece of gauze. She asked the doctor how that happened and he said, "It was left in there."

Defendant testified that he did not leave any sponge in plaintiff's body; that he did not find any sponge on

the occasion of his examination when he probed for foreign objects; that the sponge that he removed in December was not the kind of sponge that he used in the operation; that he and the nurse counted the sponges that were used and that there were none missing; that none were left. The nurses testified to the same effect.

Plaintiff testified that neither she nor her husband nor anyone else had placed any sponge or gauze in the wound between the date of the operation and the date of its removal.

The Supreme Court of Oklahoma said this made a case for the jury, and used the following language in sustaining the verdict for plaintiff:

“In the case before us we have a direct conflict of testimony as to the basic fact in this case. The defendant’s testimony is to the effect that he used about 41 sponges in the body of plaintiff during the operation; that he did not leave any of these sponges in the plaintiff’s body, but that he did remove a sponge from her wound on December 30. *The plaintiff’s testimony was to the effect that no one else ever placed any sponge in her body at any time.* Under these circumstances two questions arise:

“(1) Did the defendant leave a sponge in the body of plaintiff from June 19 to December 30?

“(2) If he did so, was this negligence on his part?

“*We believe these are properly jury questions and that the trial court committed no error in submitting these questions to the jury.*”

Jackson v. Hansard, 45 Wyo. 201, 17 Pac. 2d 659:

Plaintiff claimed defendant left a large sponge in his abdomen following an appendectomy. A sponge was discharged through the rectum three months and ten days following the operation.

Plaintiff testified that he commenced having severe pains in his abdomen shortly after the operation; that he complained to defendant of the condition; that he was given medicine; that he went to other doctors and hospitals, including Mayo Brothers and the Veterans Hospital; that he got no relief until the sponge was discharged.

Defendant testified that he did the operation; that large and small sponges were used; that all sponges were counted and checked and none were left in plaintiff's body; that hemostats were attached to all large sponges used and that it was impossible for sponges to become lost.

Plaintiff further testified that he never placed the gauze in his rectum and did not swallow it.

At the conclusion of the evidence the trial court granted a motion for judgment for defendant notwithstanding a verdict for plaintiff. In reversing this ruling of the trial court, the following is said:

“In view of the conflict in the testimony, the question as to the size and character of the gauze or sponge removed from plaintiff, and as to whether it was or was not the same kind of gauze as used in the operation, was for the jury.

“Counsel for the defendant argue that it is improbable, if not impossible, that a sponge or gauze of the size claimed by the plaintiff to have been removed from him should have penetrated into and passed through the large intestines. Dr. Geis stated that he did not think that during three months and ten days a piece of gauze of the size claimed by the plaintiff would ulcerate into the intestinal tube; that if it had been left in the abdomen, peritonitis would have followed; that plaintiff would have died or would have been at death’s door. Dr. Riach testified that if such sponge had been left as claimed, general or local peritonitis would have followed; that it it had ulcerated into the intestines it would not have been expelled through the rectum; that it could in part have gained entrance to the intestinal tract, but that it could not have traveled through the large intestines, issuing out of the rectum. Defendant’s testimony was similar in effect.

* * *

“Considering the testimony as a whole, and without attempting to state any further details, we think that it was a question for the jury to determine as to whether or not the sponge or gauze was left in plaintiff’s abdominal cavity as claimed. We may summarize the reasons as follows: First, plaintiff testified that he did not insert the gauze into his rectum. Second, the testimony indicates that it is unlikely that the plaintiff swallowed the gauze. Third, it is not claimed that any other operation was performed on the plaintiff after the operation in May, 1929, and if accordingly it is true, as plaintiff testified, that he did not insert the gauze or sponge as claimed, and if he did not swallow it, the only opportunity for the sponge or gauze to get into the plaintiff’s body existed at the time of the operation in May, 1929. Fourth, the plaintiff tes-

tified that he had continued pains and gripings near the place where the operation was performed and the regions surrounding it, and his recovery from the operation did not proceed in a normal way. Fifth, Dr. Keith testified directly that in his opinion, under the facts in this case, the gauze or sponge in question was left in the plaintiff's body at the time of the operation in May, 1929. Under this evidence, if true, the conclusion would, we think, be justified that the plaintiff's claim in this case that the gauze in question was left in his abdomen during the operation in May, 1929, was justified, and that conclusion would not be based upon any presumptions but upon pure matters of fact. It is of course true that it is truly wondrous that a sponge of the size in question can work its way through the large intestines in the manner claimed in the case at bar, and yet this is not the first case in which a situation similar to that has been presented to the courts, as will be noted by examining the cases of *Spears v. McKinnon*, 168 Ark. 357, 270 S. W. 524; *Moore v. Ivey* (Tex. Civ. App.) 264 S. W. 283; *Akridge v. Noble*, 114 Ga. 949, 41 S. E. 78. In *Ruth v. Johnson* (C.C.A.) 172 F. 191, it appears that a sponge left in the abdominal cavity had worked its way into the ascending colon some two and a half to three inches. Counsel for the defendant have sought to distinguish the first two of the foregoing cases because the subjects of the operations in those cases were females. We are unable to see the distinction. In the *Moore Case* the size of the gauze removed from the plaintiff was about eight inches wide to thirty-two or thirty-four inches in length.

* * * * *

“While we do not believe that it would be wise in the interests of society to require too exacting a care of a profession which is, has been, and will

be, of untold benefit to humanity, still we cannot lay down a rule that the jury must, necessarily, accept the testimony of the operating surgeon and the nurses and ignore the circumstances shown in a case, for that would mean that recovery would be practically made impossible in every case. And we think that under the evidence in this case as outlined above, the question of due care was not a question of law, but was one for the jury to decide, subject, of course, to the ordinary right of the trial judge in such cases. We have not deemed it necessary to decide whether or not the doctrine of *res ipsa loquitur* should be applied in a case of this character.”

McCormick v Jones, 152 Wash. 508, 278 Pac. 181.

Plaintiff was a government employee at Puget Sound Navy Yard. He had an injury which resulted in fracture of the fifth lumbar vertebrae. He was treated at the government hospital and thereafter sent by the U. S. Employee's Comp. Commission to defendant; in the meantime he had gone to numerous other physicians for relief. Defendant recommended a bone transplant operation to immobilize the back. He made an incision, removed the portions of the bone that had been fractured, making a gutter in the spine and then made a bone graft. During the course of the operation a sudden hemorrhage developed and sponges were used. Through some inadvertance a sponge was left. Thereafter the sponge was removed.

A verdict for defendant was reversed. In reversing the case the following is said as to the law:

“On the question of negligence we think little need be said. We think all of the witnesses who testified on the subject on both sides admitted that the leaving of the sponge in the wound was negligence. We also think that the court can say as a matter of law that when a surgeon inadvertently introduces into a wound a foreign substance, closes up the wound, leaving that foreign substance in the body, there being no possibility of any good purpose resulting therefrom, that act constitutes negligence. A fair reading of the testimony of all of the medical experts called on this case leads to that conclusion.

“We do not believe that the minds of reasonable men differ on this subject, and that a mere statement of the facts conclusively shows negligence, and that appellant, being the head surgeon in charge of this operation, is responsible therefor. If the jury, therefore, found for respondent on the ground of no negligence, the appellant is entitled to a new trial.”

In addition to the above cases we cite, without quoting from, the following cases which are in point in principle:

Ybarra v. Spangard, 25 Cal. 2d 486, 154 Pac. 2 687.

Reinhold v. Spencer, 53 Ida. 688, 26 Pac. 2d 796.

Morrison v. Acton, 68 Ariz. 27, 198 Pac. 2d 590.

Daly v. Lininger, 87 Colo. 401, 288 Pac. 633.

Ales v. Ryan, 8 Cal. 2d 82, 64 Pac. 2d 409.

In the last above named case the California Supreme Court used some very pertinent language:

“ * * * We have already held upon authority that the failure to remove a sponge from the abdomen of a patient is negligence of the ordinary type and that it does not involve knowledge of *materia medica* or surgery but that it belongs to that class of mental lapses which frequently occur in the usual routine of business and commerce, and in the multitude of commonplace affairs which come within the group of ordinary actionable negligence. The layman needs no scientific enlightenment to see at once that the omission can be accounted for on no other theory than that some one has committed actionable negligence.”

These decisions do not differ materially from principles recognized by this court as applicable in sponge cases but not applied in the decided cases where no such facts were involved.

Baxter v. Snow, 78 Utah 217, 2 Pac. 2d 257.

Passey v. Budge, 85 Utah 37, 38 Pac. 2d 712.

Counsel states, however, that the two motions should have been granted because the evidence in the case brings us within principles announced in *Tremelling v. Southern Pacific R.R. Co.* and two other cases cited.

Counsel states that this court has held in those cases that when a wrong or injury has been brought about from one or the other of two occurrences, either one of which may have been the sole proximate cause, and the defendant in the case is or could be responsible for one only, the plaintiff must prove by a preponderance of the evidence, before he is entitled to have the case submitted

to a jury, that the defendant's wrong was the sole proximate cause. He cites, as authority for that broad statement Tremelling v. Southern Pacific, 51 Utah 189; 170 Pac. 80 and Edd v. U. P. Coal Co., 25 Utah 293, 71 Pac. 215; and Reid v. S.P.L.A. & S.L. R.R., 39 Utah 617, 118 Pac. 1029.

Those cases are not authority for any such proposition.

If we understand counsels statement corectly it is that a defendant, by showing another possible cause of the injury or wrong, thereby takes the case from the jury and makes it mandatory on the trial court to grant a non-suit or direct a verdict.

Or perhaps he means that it then becomes incumbent on the trial judge to determine where the preponderance of the evidence lies and submit the case to the jury only in the event the judge believes that the evidence preponderates in favor of plaintiff.

On the other hand he might mean that it is the duty of this court to say where the preponderance of the evidence is.

In every case the plaintiff must prove his case by a preponderance of the evidence. It is for the jury to decide whether he has done so.

In the Tremelling case there was no evidence as to how the deceased met his death. Nor was there any evidence from which inferences might be drawn as to the

cause of the injury. The only evidence was that the deceased was found near the track, dead. The theory of plaintiff was that deceased struck a freight car on the sidetrack but there were no marks on the car showing such to be the fact. In the absence of such evidence it was just as probable that the deceased fell and hit the ground as it was that he hit the freight car.

One would assume from the case that if there had been evidence of marks on the freight car there would then have been a case for jury determination because it could then have been inferred that he hit the car. Such an inference from factual evidence is what is known as circumstantial evidence.

Where facts are established by competent evidence from which inferences may be drawn that defendant committed the wrong or caused the injury, the case goes to the jury even though there may be direct evidence to the contrary. Courts and text writers have uniformly held that circumstantial evidence may be, and often is, more convincing in establishing the truth than direct evidence.

It simply presents a conflict in the evidence for the trier of the facts to determine.

The holding of the Tremelling case is not fairly set forth in counsel's quotation. The whole opinion is based upon the following statement:

“ If there had been no frost on the standing car, which of necessity must have been disturbed in case any person, object, or thing came in contact therewith, there would be at least some basis for

the inference contended for by plaintiff. Where, however, as in this case, the inference is based upon an assumed or supposed fact, which fact the evidence shows did not exist, then the inference is left without support. * * * It must not be assumed, however, that the rule thus stated can be given general application. Indeed, the rule can rarely be applied, since the evidence generally is such that it is the exclusive province of the jury to draw the inference therefrom. The case at bar, however, presents a typical case where the rule is applicable. Here the plaintiff relies entirely upon an assumed fact, namely, that the deceased came in contact with the freight car which was standing on the side track. The witnesses produced both by the plaintiff and the defendant, however, all agree that the car standing on the side track was covered all over with a thick coating of frost; that any person, object, or substance touching the car at any point or place interfered with the coating of frost and disturbed it so that it was easily seen by any one that some one or something had come in contact with the car; that after careful examination, lasting a considerable length of time, no mark of any kind was discovered indicating that any one or anything had come in contact with the car at any point, and that experiments were made to determine whether, if any one or anything of substance had touched the frosting on the car, evidence of the fact would appear in the frosting. The assumed fact that the body of the deceased came in contact with the car was thus clearly, if not conclusively, negated."

The Tremelling case was considered and its applicability discussed in the case of *Denver & Rio Grande Western Railroad v. Ind. Comm.*, 66 Utah 494, 243 Pac. 800. Mr. Justice Frick, who wrote the Tremelling deci-

sion, was still a member of this court and concurred in this later decision. The facts are interesting. The employee testified that he hit himself on the knee with a hammer; that there was a bruise, pain, discoloration and swelling. The doctor diagnosed it as rheumatism. Two weeks later he was sent to the hospital where an abscess developed. From this the hip became infected. He then became totally disabled. It also developed in the evidence that two or three months prior to the injury he had some boils which had entirely healed up and disappeared.

Upon this proposition there was a conflict in the opinion of the doctors as to whether the accident caused the infection in the hip or whether the infection in the hip came from the boils.

The Industrial Commission, trier of the facts, found the issues in favor of the employee. On appeal it was argued that the case came within the principle announced in the Tremelling case. This court said that it did not and that there was substantial evidence to support the decision of the trier of the facts and that the finding could not be disturbed on appeal. Here is what this court said, in that case, with reference to the applicability of the Tremelling case to that factual situation.

“ The reasons why the rule invoked can have no application to the case at bar are clearly set forth in *James v. Robertson*, 117 P. 1068, 1072, 39 Utah 414, at page 438, where *Frick, C. J.*, speaking for the court, said:

“ *That doctrine applies only where the plaintiff's evidence, when considered alone, has such an effect, or when the jury finds the evidence*

equally balanced, and not, as appellant's counsel seems to contend, when all of the evidence produced by both sides, some of which is in dispute, is capable of such a construction. The reason the rule is not applicable in the latter event is obvious. There is no law which binds a jury to believe any of the defendant's evidence which conflict with that of the plaintiff. The doctrine, therefore, ordinarily cannot apply in cases of conflicting evidence.'

“Again, at page 429 (117 P. 1073):

“‘The law is not that a plaintiff must fail in case the injury of which he complains might have been caused — that is, that there was a possibility that it was caused — by some cause or causes for which the defendant was not responsible, but he must fail only when it is just as probable from the evidence adduced by the plaintiff, or in case the evidence is equally balanced, that the injury was produced by some cause for which the defendant was not responsible, as it is that it was produced by a cause for which he was.’

“The evidence in behalf of the employee in the case at bar was not open to two inferences of equal probability as to the cause of his disability. The evidence of the fact of injury, following by the abscess in the knee, which in turn was followed by the infection, by the same kind of bacteria, of the hip joint, together with expert opinion evidence that the latter resulted from the former, is substantial evidence and a ‘satisfactory foundation’ for the finding that the injury was the cause of the disability. See *Murray City v. Ind. Com.*, 183 P. 331, 55 Utah 44; *Bingham Mines Co. v. Allsop*, 203 P. 644, 59 Utah 306; *Milford Copper Co. v. Ind. Com.*, 210 P. 993, 61 Utah 37.”

Again, in *Ward v. Denver & Rio Grande Western Railroad Company*, 96 Utah 564, 85 Pac. 2d 837, this court states:

“*Tremelling v. Southern Pacific Co.*, 51 Utah 189, 200, 170 Pac. 80, was a case not where there were equal inferences as is sometimes mistakenly said, *but there was no basis for any inferences. If there is a basis for two or more inferences the jury must decide which is the correct one.* The evidence in this case presents a basis for finding negligence and a basis from which it may be inferred that the negligence caused death.”

Recently the problem of two conflicting inferences was discussed in *Southern Pacific Company v. Industrial Commission*, 96 Utah 510, 87 Pac. 2d 811:

“On the other hand, the commission might have found that death was due to natural causes. But where there is evidence from which two conflicting inferences might reasonably be drawn, this court should not reverse a decision of the commission which adopts what appears to be the more probable of the two. *Columbia Steel Co. v. Industrial Commission*, 92 Utah 72, 66 P. 2d 124. Where there is no basis for an inference as to how death was caused or, put as it has been put, but rather inaccurately, that where there are in law equal inferences, as in the case of *Tremelling v. Southern Pacific Company*, 51 Utah 189, 170 P. 80, affirmed in 70 Utah 72, 257 P. 1066, the jury cannot be permitted to supply the link between the fact of a dead body found in a certain position and the cause of the death by a guess as to how it occurred. *But where there is a basis for some reasonable inferences as to how the death was caused, and it cannot be said in law that a reasonable man could not choose one deduction*

from the underlying facts as against another, the finding of the jury will be upheld.”

See also *Lym v. Thompson*, 112 Utah 24, 184 Pac. 2d 667. The question was as to who stole the steel tubing. Defendant admitted purchasing 38. There was direct evidence, in conflict with that evidence, that he took 63. There were originally 119 tubes and all of them disappeared about that time. Defendant established that there were holes in the fence and that others could get in. Who did it? The trial court said defendant did, notwithstanding the inference that others might have had access to the yard where it was stored. This was based entirely on circumstantial evidence in the face of the conflicting inference created by defendant's evidence. Here is what this court said with reference to the finding of the trial court:

“The well reasoned case of *New York Life Ins Co. v. McNeely*, 52 Ariz. 181, 79 Pac. 2d 948, sets down the rule governing the use of circumstantial evidence in civil cases which we deem sound and will apply to the evidence here. 52 Ariz. 181, 79 Pac. 2d at page 954.

“ ‘In civil cases, involving only property rights * * * it is sufficient, if the ultimate fact is to be determined by an inference from facts which are established by direct evidence, that it be more probable than any other inference which could be drawn from the facts thus proven.’ * * * But, the lower court has seen fit to reject defendant's version of the case and the question for us to decide is not which of the two sides should be believed. *We are called upon to decide whether or not there is evidence in the case that will directly or by inference support the*

decision of the trier of the facts. In deciding that question we decide merely—so far as circumstantial evidence is concerned—that if there are inferences to be drawn therefrom that will support the lower court's conclusions upon the probabilities of that evidence, we are bound to uphold the decision, even though had we been trying the case we might have stressed the inferences adversely to such a conclusion. We have shown above how there are inferences that will support the lower court's conclusion and therefore we must affirm it. It is so ordered."

This court also considered the Tremelling opinion in a malpractice case, viz. Peterson v. Richards, 73 Utah 59, 272 Pac. 229. The plaintiff claimed that her fingers were pinched while she was on the operating table, under defendant's control. She showed that her fingers were uninjured when she went under the anesthetic. About 45 minutes after coming out of the anesthetic in her hospital room she found that her hand was injured. Her fingers had been pinched and crushed.

Defendant contended that they could have been crushed in the hospital bed and produced evidence that it was more probable that it could occur in the hospital bed than the operating table. In fact he had the operating table in the court room, before the jury, and tried to demonstrate that a person's fingers simply could not get caught in the operating table.

But the jury didn't believe that evidence.

Plaintiff rested her case entirely on circumstantial evidence, as she had to do, as against the positive

denial of defendant and the purported inference that she might have gotten her finger caught in the hospital bed.

There, as here, defendant said the trial court should have directed a verdict on the basis of the Tremelling case and the Reid case, both cited by defendant as authority here. This court refused to reverse the ruling of the trial court in submitting the case to the jury and sustained the verdict. in these words:

“Upon this evidence it is the contention that the plaintiff failed to prove that her fingers were injured on or about the operating table or while she was being operated on and as in her complaint alleged; that on the evidence it is mere conjecture or speculation that her fingers were injured in such manner; that on the evidence it is just as probable that the injury occurred through manipulations or adjustments of the bed after the plaintiff was removed from the operating room as through manipulations or adjustments of the operating table, and that in such situation of equal probabilities, or equal probable causes, one for which the defendant might be responsible and the other not, the case ought to have been withheld from the jury. * * *

“On the evidence adduced on behalf of the plaintiff herself, it is not reasonably inferable that her injury resulted through manipulations or adjustments of the bed. Whatever inference in such particular, if any, may be deduced, comes from the defendant's evidence. The plaintiff, of course, was required to adduce sufficient evidence to justify a finding that her fingers were injured through manipulations or adjustments of the operating table and as in her complaint alleged.

It is not claimed that she was required to prove that by direct or positive evidence or by the testimony of some one who actually saw the fingers pinched or hurt in such manner. It is enough if facts and circumstances are proven which reasonably point to the inference that her fingers were injured in such manner and which are consistent therewith and not equally consistent with an inference that they were injured in some other manner. * * *

“It is urged the case is within the rule announced in the cases of Tremelling v. S. P. Co., 51 Utah 189, 170 P. 80; Reid v. S. P. L. A. & S. L. R. Co., 39 Utah 617, 118 P. 1009, and other cases, where it in effect is stated that the plaintiff to sustain his cause must prove more than a mere conjecture or probability that the injury occurred as alleged by him; and that where the plaintiff seeks to prove an allegation essential to his cause only by an inference or inferences sought to be deduced from proven facts and circumstances, and the evidence so adduced by him with equal force points to several inferences or causes, one of which rendering the defendant liable and the other or others not, the plaintiff has not sustained his cause by sufficient evidence. Such is but familiar doctrine and upon which the rule of indirect or circumstantial evidence is founded. But it here has no application, for on the theory of plaintiff's cause and upon the evidence adduced by her, though indirect or circumstantial in character, whatever inference or inferences may be deduced therefrom point in but one direction and are consistent only with the inference or inferences that plaintiff's fingers were injured at or about the operating table. Whatever inference or inferences, if any, may be deduced that the injury occurred in some other way or by manipulations or adjustments of the

bed, are to be deduced from facts and circumstances shown by the defendant and not by the plaintiff. The defendant did not by any direct or positive evidence show that plaintiff's fingers were injured by manipulations or adjustments of the bed. He but sought such an inference to be deduced from facts and circumstances proven by him and from manipulations of the bed before the jury. Of course, throughout the case, the plaintiff had the burden of proving by a fair preponderance or greater weight of the evidence that the injury occurred as alleged by her. Whether on all of the evidence she sustained that burden was on the record a question for the jury. It is not within our province to determine whether the injury occurred in the one way or the other, or whether it is even more probable that it occurred the one way rather than the other. We may only determine whether there is sufficient evidence, if believed by the jury, to justify or warrant a finding that the injury occurred as alleged by the plaintiff. We think the case, on the evidence, does not come within the rule contended for by the defendant. *James v. Robertson*, 39 Utah 414, 117 P. 1068. We are therefore of the opinion that the motion for a directed verdict was properly over-ruled."

Counsel also refers to the case of *Reid v. S. P. L. A. & S. L. R. R. Co.*, 39 Utah 617, 118 Pac. 1009. A cow got onto the right of way and was killed. There was an open gate, for the opening and closing of which defendant was not responsible, near the dead cow. About a mile away was a break in the fence for the maintenance of which the railroad was responsible. There the evidence rested and this court very properly held that the jury could not speculate as to whether the cow went

through the gate, which was more probable, or through the fence, which was remote. What would have been the situation if the cow had been found near the broken fence and in addition the plaintiff had established some recent droppings of the cow at or near the broken fence, with additional evidence that no other cow had been there to leave those droppings? Would the court then have said that there was no evidence from which the jury could have concluded that the cow went through the broken fence?

Under our Constitution guaranteeing to citizens the right to a trial by jury and placing the burden of finding the facts upon a jury, courts have been very loathe to encroach upon the province of the jury.

Where there is any substantial evidence to go to the jury it must be submitted. And this is true where the evidence is conflicting and where several inferences may be drawn from the evidence. The general principles are set forth in 53 Am. Juris. 147, sec. 164, under "Trial," as follows:

"Sufficiency of Evidence.—While as a general rule a party is not entitled to the submission of the case to the jury unless the evidence is sufficient to warrant a finding in his favor, where there is evidence of so positive and significant a character as would support a verdict, if uncontradicted, it is the duty of the trial court to submit the case to the jury. *It is the province of the jury to determine the weight and sufficiency of the evidence when the evidence is conflicting; even though it is not conflicting, the court may not take the case from the jury when different*

inferences may be drawn therefrom and when there is evidence which will support a verdict. Some cases hold, moreover,, that it is not necessary, in order to entitle the plaintiff to go to the jury, that his evidence be such as to warrant a verdict, but only that the evidence be sufficient to present to the jury a question of fact."

See also Sec. 158 of the same text:

“Questions of Fact.—In a case being tried by a jury the court should not undertake to pass on and decide issues of fact. The jury’s function has as definite sanction as that of the court. The controlling functions of a jury are to pronounce on the credibility of witnesses; to determine disputed facts; to draw conclusions from doubtful and contradictory premises; and to admeasure damages where the law has afforded no standard. It is the province of the jury to hear the evidence and by their verdict to settle the issues of fact, no matter what the state of the evidence. *Where different conclusions may reasonably be drawn by different minds from the same evidence, the question is ordinarily one for the jury. This is true not only where the uncertainty is caused by a substantial conflict in the testimony, but also where the facts are undisputed but are such that different conclusions may reasonably be drawn from them.* But it is only where different minds may draw different conclusions from evidence of a fact in issue that a question for the jury is presented. The issue presented by the invocation of the rule against creation of unfair prejudice in favor of one person to an action, by the introduction of evidence, is one of fact.”

There is practically no conflict in the authorities on this proposition. The cases are annotated in the Digest

System under subdivision 142 "Trials" so far as they relate to inferences to be drawn from the evidence as affecting the right of the court to grant a motion for non-suit or directed verdict.

Utah has several cases on this subject. It would unduly lengthen this brief to give them all. We cite only a few of the many.

Anderson v. Nixon, 104 Utah 262; 139 Pac. 2d 216:

"Medicine not being an exact science, it is not necessary that the proximate cause of an injury sustained through the negligence of a doctor be proved with exactitude. It is enough if there is substantial evidence to support the judgment. *Reynolds v. Struble*, 128 Cal. App. 716, 18 P. 2d 690. *If the injury sustained could be attributed to two or more causes, one of which was the negligence of the doctor, it would be a question for the jury to determine which was the proximate cause of the injury.*"

Yowell v. Occidental Life Ins. Co., 100 Utah 120, 110 Pac. (2d) 566:

"At the outset we may remark that it is well settled in this state that we are bound by the findings of fact of the trial court, if there is any substantial evidence to maintain them (*Brittain v. Gorman*, 42 Utah 586, 133 P. 370), and that where a finding is based upon sufficient evidence we will not reverse it, even if we are inclined to arrive at a different conclusion than the trial judge. *Fee v. National Bank*, 37 Utah 28, 106 P. 517.

* * *

"It is of course true that where opinion evidence flies in the face of uncontroverted physical

facts also in evidence that the opinion must give way to the fact, and that the opinions of witnesses are not properly admissible where the issue may be resolved by persons of common knowledge and understanding who have possession of the facts. *Ruping v. Oregon Short Line R. Co.*, 51 Utah 480, 171 P. 145.

* * *

“Accordingly, we conclude that the questioned findings of the trial court as to the cause of death of the deceased insured is sustained by the evidence, and we may not interfere with such finding.”

Carpenter v. Syrett, 99 Utah 208, 104 Pac. 2d 617:

“Where different conclusions may be reasonably drawn by different minds from the same evidence, the decision must be left to the jury. *McStay v. Citizens’ National Trust & Savings Bank of Los Angeles*, 5 Cal. App. 2d 595, 43 P. 2d 560; *Pollard v. Broadway Central Hotel Corporation*, 353 Ill. 312, 187 N. E. 487. And as said by this court in *Robinson v. Salt Lake City*, 37 Utah 520, 109 P. 817, 820: ‘If the evidence and the inferences are of the character which would authorize reasonable men to arrive at different conclusions with respect to whether all the essential facts were or were not proven, the question is one of fact and not of law. This is so although the evidence on some points may be very unsatisfactory or doubtful.’ ”

Spackman v. Benefit Ass’n, 97 Utah 91, 89 Pac. 2d 490:

“In so far as external appearances were concerned witnesses described the lesion or injury as having the appearance of, or being like, the ‘bite of an insect or sting of a bee’. Three lay

witnesses so testified. This was the expression of an opinion or a descriptive appearance constituting a generalization of matters of common knowledge. No other description or explanation was offered.

* * *

“Negatively, it was said the lesion did not have the appearance of a pimple or boil. The physicians ventured the opinion that it would be impossible to determine from the descriptions given what the cause of the infection was. No other or different explanation or theory of the origin of the infection was suggested or given than that it was like a bite of an insect or bee sting. Two witnesses testified there was an opening in the center of the lesion. The doctor, who examined it and treated it, said he did not see such opening. *That was a matter for the jury.*

* * *

“We think the evidence sufficient to require us to say we cannot disturb the verdict as it was based upon a permissible inference from the evidence properly submitted.”

Helper State Bank v. Crus, 95 Utah 320; 81 Pac. 2d 359:

“If there was any substantial evidence from which the jury could find that John Crus gave this money to the defendant, Anne Crus, during his lifetime then the court erred in directing a verdict for the plaintiff. In Papanikolas v. Sampson, 73 Utah 404, 274 P. 856, this court said (page 863): ‘If there was any substantial evidence upon which the jury could find for the plaintiffs under the pleadings, the court erred in directing the verdict.’ And in Robinson v. Salt Lake City, 37 Utah 520, 109 P. 817, the court said (page 820): ‘The test is whether or not there is some sub-

stantial evidence in support of every essential fact which a plaintiff is required to prove in order to entitle him to recover. If the evidence and the inferences are of the character which would authorize reasonable men to arrive at different conclusions with respect to whether all essential facts were or were not proven, then the question is one of fact and not of law.' And in *Green v. Higbee*, 66 Utah 539, 244 P. 906, the court said (page 908): 'A verdict should not be directed for defendant, unless all reasonable men would draw the same conclusion from the evidence, and that conclusion would require a verdict for the defendant.' To the same effect, see *Nelson v. Lott*, 81 Utah 265, 17 P. 2d 292."

Wilcox v. Cloward, 88 Utah 503, 56 Pac. 2d 1:

"Where two or more inferences may be drawn even from uncontradicted evidence, it is still a matter for the fact finder. Such is not the case where the facts are not disputed and only one inference may be made. In that case it would be incumbent upon the court to apply the law to the uncontested fact and in a jury trial direct a verdict."

Now let us take a look at the evidence on this subject matter. Plaintiff's evidence, brought out on cross-examination without objection, shows that all of her rear molars were extracted many years ago—twenty to thirty years, when she was a young woman. One of the dentists who may have extracted one or more of those teeth was a Dr. Morgan, now deceased. Her dentist since 1935 has been Dr. Wright of Murray, Utah. When Mrs. Fredrickson's deposition was taken she was asked as to any teeth that had been pulled and

when. She said the rear molars, upper and lower, were pulled twenty or thirty years ago; that Dr. Wright might have pulled two or three teeth (not molars) after 1935 or maybe he didn't pull any. When Dr. Wright was on the stand he produced his records showing that he pulled no teeth for the plaintiff until January 1946 (all front teeth); used no gauze or sponges in her mouth; and that his work prior to that time consisted of cleaning her teeth and filling a few cavities.

Upon this evidence counsel says that Dr. Morgan is the one who left the gauze packs in her throat, or that it is equally probable that he did do so; hence, he says, the case should have been taken from the jury.

The only evidence is that the rear molars were pulled twenty or thirty years ago and that Dr. Morgan was one of the dentists who extracted one or more of them. This is all that the evidence shows.

Upon these two facts counsel says that the trial court should have taken the case from the jury. He asked the trial court to make the following inferences upon inferences: (1) That two of the rear molars extracted twenty or thirty years ago were dry sockets or bleeders; and upon that inference to make the further inference that the dentist or dentists (either Dr. Morgan or someone else) packed the sockets with gauze packs; and upon those inferences infer that he or they left two packs in the sockets; and upon those inferences to infer that, *if they were lower molars*, that such packs either moved in mass through the jawbone into the

throat; or that such hypothetical packs, if left in the lower molars, moved upwards out of the sockets (which they say it couldn't do) into the mouth and then re-entered the mouth tissue and moved in mass to the tonsil area; or as an alternate to this hypothesis that it wasn't two lower molars at all but two rear upper molars and that two such packs, inferred to have been used, inferred to have been left, and inferred to have remained there for twenty or thirty years without any one knowing about it, came out of the upper sockets into the mouth, reentered the mouth tissue in mass and then moved in mass downward to the tonsil area; or perhaps he suggests that it moved laterally out through the jaw bone encasing the socket. More than that he is asking the court, in order to erect this straw man, to infer that two such packs were left, one on either side, and that after twenty or thirty years of having been imbedded as two masses of cotton gauze in her teeth, without her knowledge or any infectious manifestations of their presence for such a long period of time, that they finally arrived at the tonsil area simultaneously just at the psychological moment to appear as lumps in her throat and become gatherers and spreaders of infection immediately following Dr. Maw's operation. And this in spite of the evidence of Mrs. Fredrickson, Betty Fredrickson, Mrs. Mathews and Mrs. Rupp that it was gauze that came out of her throat. It certainly retained its form and texture for a long time if it had come out of tooth sockets and been in her throat for twenty or thirty years.

Not even Dr. Maw's loyal professional friends suggested any such nonsense. It was not even testified to by Dr. Maw. The latter took two positions. In the first place he said it wasn't gauze at all but undigested food matter. The City Chemist answered that proposition and Dr. Maw himself finally admitted (R. 470) that it was cotton threads but said it wasn't the kind he used. He then said her dentists were responsible but didn't say how. That was answered by Mrs. Fredrickson and Mr. Fredrickson who testified that no gauze packs had ever been used in her mouth by any dentist and by Dr. Wright and Dr. Browning themselves.

Counsel would have all of these inferences rest one upon the other without a word of evidence to support them, and yet he says that this wholly imaginary setup, purely a figment of counsel's imagination, was sufficient to destroy the case against Dr. Maw.

It will be noted that defendant did not request the trial court to give any instruction to the jury upon any such absurd theory. In the presentation of evidence he was given the widest latitude to try to develop a solid basis for such a theory if he could do so but, when he got through, all he had was the fact that the rear teeth had been pulled twenty or thirty years ago. Dr. Maw himself said that prior to his operation her throat was normal, without evidence of prior surgery and that she showed no abnormal throat condition. He even examined her sinus and found it clear.

What a fertile imagination counsel has, when he can build all of this upon the one fact that plaintiff had

had her rear molars pulled twenty or thirty years ago and that one of her earlier dentists was named Dr. Morgan. When they have to hang their hat on that one nail, driven into nothing more substantial than counsel's vivid imagination as to inferences upon inferences as to what he imagines might have occurred twenty or thirty years ago, they have a weak basis for asking this court to apply the doctrine of the Tremelling case, or any other case.

Counsel for defendant has quoted copiously from the evidence of defendant and his witnesses on issues where there was a conflict between the direct and opinion evidence of defendant and the circumstantial evidence of plaintiff. The jury resolved that conflict in the evidence against defendant and yet he quotes such evidence as though it were established facts in the case.

A good example of this is the statement of defendant and his witnesses that a piece of gauze placed in the tonsil fossa could not remain there longer than a few days—not over thirty days—and certainly not longer than sixty days. In fact two of defendant's experts, Dr. Snow and Dr. Cleary, stated that if two pieces of gauze exuded from the two points indicated by Dr. Dolowitz in plaintiff's throat on the dates indicated, to-wit, June 26, 1948, and November 15, 1948, that in their opinion they had to have been placed in the throat of plaintiff at those same places not over thirty—and certainly not over sixty—days prior to their emission. This was in conflict with the established fact that there had been no surgery in her throat since

the tonsillectomy. In expressing this opinion the doctors completely overlooked the fact that for more than thirty days or even sixty days prior to those dates she had been under the constant observation and treatment of Dr. Dolowitz who did no surgery in her throat *beyond the taking of biopsies which loosened the gauze so that it could come out and disclose the cause of the trouble that had been infecting her throat and causing fear of cancer since the date of the tonsillectomy.*

Counsel completely disregards the direct evidence that no one but Dr. Maw had ever performed surgery in her throat before or after the tonsillectomy.

He completely disregards the admissions of his own experts on cross-examination that the tonsil fossa can be shallow or deep, as much as 5/8ths of an inch in normal cases and as much as 3/4ths of an inch in diseased cases; that the tonsils rest in a deep red sac; and that in cases of imbedded tonsils the incision can go into the tissue outside of and beyond the tonsil fossa; and that there is also a practice of some physicians in cases of excessive bleeding to suture a gauze pack in the tonsil fossa and remove it later, which practice is rejected and "damned" by the medical profession, but which is nevertheless sometimes done.

He also completely disregards the fact that while defendant and his experts said packs of gauze in the throat will not remain longer than thirty or sixty days so far as doctors are concerned, he nevertheless argues that they remain there for twenty or thirty years if a

dentist is to be the victim. Juries don't have to believe such evidence—and this one did not.

It is no wonder the jury, and particularly the juror Emery, did not believe such sophistry.

When Drs. Snow and Cleary said that these masses of cotton threads had to have been placed in plaintiff's throat not over thirty—and certainly not over sixty—days prior to the dates of emission from the ulcers in plaintiff's throat, they manifested a magnificent example of how far they were willing to go in their professional loyalty to a brother in distress, but they thereby condemned their evidence to disbelief in the light of the positive evidence of everyone, including Dr. Dolowitz who had had plaintiff under treatment since May 10, 1948, that no such thing had occurred; hence their testimony that it, medically, had to have occurred within thirty or sixty days was not believed by the jury, and properly so. It was contrary to the established facts, and unbelievable.

And yet counsel, in the face of this, states as a fact that Dr. Maw couldn't have left the gauze there because it wouldn't have remained over a few days if he had. He completely ignores the conflicting evidence that it did happen and did remain.

Counsel also makes much of the fact that the ulcers from which the gauze exuded was not directly on the tonsil area. The ulcers from which the gauze finally exuded were the last ulcers, excepting some minor ones

from which threads were still coming out practically to the time of trial. He completely ignores the evidence that her throat was sore and ulcerated at different points during the whole period from the date of the tonsillectomy, some of which ulcers were right in the tonsil hole. They would come and go, only to reappear or appear in different places. The infection spread throughout her entire mouth.

Infection, as stated by Dr. Dolowitz, is a result of bacteria breaking down the healthy tissue and the pressure of nature causes foreign material to seek a way out through openings made by ulcers. Of course when the biopsies were taken by Dr. Dolowitz the capsulated condition was relieved and they appeared on the surface where the enlarged opening was made by him. He so testified.

It isn't a question of where the gauze packs and threads came out. They migrate with the infection and pressure. The question is, where did they go in and who put them there? That was a jury question under the conflicting evidence, both direct and circumstantial.

Malpractice cases are not few, even in this jurisdiction. Most of them involve diagnosis and treatment where expert evidence is necessary to sustain a judgment. This is not such a case. No expert evidence is required in cases involving the leaving of a sponge or piece of gauze in the body of a patient, in the absence of some showing that the operation was of such character as to require it. No such issue is involved here.

The leaving of gauze or sponges in this case was not attempted to be justified. It was condemned as an improper practice. The only defense attempted to be presented was that Mr. Maw didn't do it.

On that issue a doctor stands before the court and jury the same as any other defendant who says he didn't do a thing for which he is charged, but the evidence says that he did.

In malpractice cases of this kind not involving or calling for expert evidence, it is not uncommon for the doctor to say that he didn't do it; that he couldn't have left the sponge because he put hemostats on his sponges or that he counted them; or that the negligence was that of the nurses, or some assistant; or that some other doctor had attended the patient before or after the operation who also could have left the sponge; or that the patient was sick anyway and the same thing would have occurred even if he had removed the sponge; or that there are many causes that could have contributed to the result.

All of these cases have to rest more or less on circumstantial evidence. The patient doesn't know what actually occurred. Usually she is unconscious or so situated that she can't see. She wouldn't know if she could see, because surgery is something that she wouldn't know about, whether it was proper or improper. A patient wouldn't know how deep or how extensive the incision was, or should be; whether the tonsil was imbedded and the incision went beyond the tonsil fossa;

or whether there were gauze packs sutured in the incision. They are simply told what to do and when to come back. They follow their instructions. In the meantime scar tissue forms over the incision and all they know is that they are sick; that it feels like there is a lump in their throat; that ulcers form and the mouth is sore everywhere from the infection; they are fed endless doses of sulfa and penicillin to control or eliminate the infection; and eventually the gauze is exuded and healing takes place. They know that only one doctor has worked where the gauze is found. They must prove their case by circumstantial evidence. In the cases cited above the courts have held that when the patient has done that in this kind of a case it is for the jury to say whether the doctor did it.

Counsel says that it was incumbent on plaintiff to show that the pieces of gauze migrated from the tonsil fossa to the places of emission. There was no such burden on plaintiff. Her burden was to show where it went in and who did it. She carried this burden and excluded, by her evidence, all other probable sources. No one other than Dr. Maw performed any surgery in her throat, before or since. She did not know what Dr. Maw did. She did not know whether he found imbedded tonsils and went beyond the tonsil area or whether he got excessive bleeding and sutured the gauze in as a temporary measure, intending to remove it later, and then forgot to do so; or whether it was some pieces that got caught in the suturing and then got covered over with scar tissue. A patient never knows what a doctor does. She did know that he made an incision and used

gauze sponges and sutures and that she had a lump in her throat immediately afterwards at the place of operation, and that from then on to the time the pieces of gauze came out she had ulcers and abscesses in her throat, some of which were *right in the hole of the tonsil*. Infection spread throughout her mouth and throat. Dr. Dolowitz testified that the gauze was the source of infection. It was, therefore, a question of who put the gauze in there. Counsel makes much of the marks placed on exhibit 1 (the enlarged diagram of the mouth) by Dr. Dolowitz. Prior to the exuding of the gauze through ulcers at the points indicated, plaintiff's mouth and throat had ulcers at other places, including right in the tonsil hole. The tonsil pillars do not define the size of the fossa. As stated by Dr. Snow (R. 425) there may be only a small part of the tonsil showing within the pillars. The tonsils may be large, in which case, of course, the fossa are larger than the extremities of the pillars. They may even extend through the fossa into the tissue beyond.

When Mrs. Frederickson established by her evidence that Dr. Maw was the only one who used gauze sponges there and immediately afterward she had a lump in her throat which finally turned out to be gauze sponges, there is certainly more than a fair inference that defendant put them there.

There is no dispute that these pieces of gauze caused ulcers, abscesses and sores right from the start, exactly as the doctors said they should. They also said that infection caused the ulcers and abscesses and that pres-

sure of nature in trying to expel the foreign body caused them to move. In addition we must remember that Dr. Dolowitz had taken several biopsies from those areas which caused them to come out where he had made the openings.

At page 62 of counsel's brief is a statement which we challenge. He says, "The nearest ulcers were but 1 to 2 inches distant from the tonsil fossae." Counsel gives no reference to the record in making that statement. There is no such evidence. On the contrary the record is replete with evidence that the ulcers were occurring right in the tonsil area—in fact right in the hole of the tonsil. We give the following page references: Mrs. Fredrickson: R. 99, 104, 108, 110, 111, 112, 146, 147, 148. Read the record as to where the ulcers were.

Dr. Dolowitz was asked by counsel for defendants to place on Exhibit 1 (an enlarged illustration of the mouth—not Mrs. Fredrickson's mouth) the location of the ulcers from which the two gauze sponges and several thread were exuded. He did not see the gauze sponges come out. The ulcers had been enlarged by his biopsies. He stated very candidly that in placing the marks on the illustration he was just giving an approximation (R. 202). He was testifying from memory with the aid of his notes. He first testified that the left ulcer was about midway between the anterior pillar of the tonsil and the last upper tooth (R. 186-190). He then said it was closer to the tooth. Later he testified that on October 25, 1948 he found this ulcer healing "just lateral to the

fossa'' (R. 191). As to the right ulcer he testified that he found two lesions, "there was a slightly healing of the wounds, what type I couldn't testify, on the right side over the tonsil area'' (R. 191), midway between the right anterior pillar and the last tooth. He was asked to read his notes on what he found on the right side on November 15, 1948 (R. 507). They are as follows:

"Patient comes in reporting that on the 8th of November a large mass of material sluffed out of the right side of the throat *at the pole of the tonsil slightly backward*, that is my way of putting it, slightly behind the pole area, 'and upward toward the upper teeth. A large pocket was formed and she reported to Dr. Argyle. She brings in some material which she recovered from her stool believing it to be the material she swallowed. I am unable to tell her what it is composed of, and suggested if she really wishes to know to contact a laboratory. The hole is almost healed though there is still some infection. At the site of the granulation that I removed on the first there is one thread that I removed. No other foreign body seen. There was some pus surrounding this. She insists there is still further foreign body deeper in. To continue hot packs and ichthyol packs. Advise against probing for further material at this time.

This doesn't sound as though the ulcers were 1 to 2 inches away from the tonsil area.

Dr. E. W. Browning saw her condition in 1947. Counsel asked him expressly if the ulceration that he saw was not removed from the tonsil area (R. 313). Here is the testimony of Dr. Browning elicited by counsel for defendant:

“Well, no, no it wouldn’t removed from it because, as I say, you haven’t too much distance from here to her, you are getting over the tonsil area.

“Q. When you say ‘over the tonsil area’ you are pointing to the left?

“A. To the left, *to the soft palate covering the tonsil fossa.*

“Q. Now, the tonsil fossa — fossa simply means an indentation, doesn’t it?

“A. That is right.

“Q. The tonsil, when it is in place, sets in that indentation, that is correct, isn’t it?

“A. That is right.”

Dr. Maw, himself, on cross-examination (R. 473) stated that the ulcer on the left side as indicated by Dr. Dolowitz was within half an inch of the anterior pillar of the tonsil.

That evidence doesn’t sound like the nearest ulcer was 1 to 2 inches from the tonsil fossa. The whole mouth, throat, cheeks and gums were infected. The infection spread everywhere, and so did the threads and string — particularly after doctors took several biopsies and thereby loosened the tissue. They were being pressed out toward any opening created by an ulcer of a knife.

Again we state, it isn’t a question of where they came out. It is a question of where they went in and who put them there.

There was only one man who put an incision in Mrs. Fredrickson’s throat. That man was Dr. Maw.

The jury so found and there was substantial evidence to support the finding.

POINT NO. 3

This point is directed to the alleged error in instruction No. 12 with reference to the measure of damages. The jury was told that they should determine the nature, extent and severity of the damages and the temporary or permanent character thereof. Counsel says that this permitted a recovery for permanent injuries and that there is no evidence thereof.

Our answer to this proposition is (1) that there was plenty of evidence of permanent injuries, and (2) that the verdict is not excessive and shows no allowance for permanent injuries which should warrant a reversal of the verdict on that ground.

Mrs. Fredrickson and her witnesses testified that she felt the lumps in her throat immediately following the operation; complained of the condition to Dr. Maw, Dr. Muirhead, Dr. Boucher, Dr. Argyle, Dr. Browning, Dr. Hatch, Dr. Wright and everyone else who would listen to her; and finally to Dr. Dolowitz who was responsible for the biopsies which permitted the gauze to come out. She and her witnesses testified that she had a sore throat, ulcers and abscesses throughout her throat and mouth from the time of her operation to the time of trial over four years later. They testified that this infection spread to her gums and even appeared in an abscess behind the ear on one occasion. The abscesses and ulcers came and went, which was natural in view

of the fact that every doctor, including Dr. Maw was prescribing sulfa and penicillin for control and elimination of the infection, but which did not remove the cause. These constant and continuous dosages of sulfa and penicillin were probably the reason for the infection failing to sooner bring the gauze to the surface.

During this time cancer was a natural thought, since no one could find out what the source or cause of the infection was. It was first suggested by Dr. Maw. He said it didn't look good. He called in Dr. Hatch. They told her they didn't think it was cancer; but nevertheless the sores, ulcers and abscesses persisted and spread throughout her mouth. She was terrified. Each new doctor suspected and suggested the possibility of cancer. So did Dr. Browning and Dr. Sears, so they sent her to Dr. Dolowitz, who also suspected cancer. Is it any wonder that she lost 60 pounds in weight, became sick physically and mentally; that the relations between herself and her family became strained. They regarded her as a mental subject and she was regarded with suspicion by her family. Her mouth was foul and offensive, with a bad odor, and diseased. The only evidence of recovery was that her mental and physical health had improved.

She testified that she was getting no relief or satisfaction from Dr. Maw or the Clinic and she naturally suspected that her teeth might be the source of the trouble. She didn't know that the cause lay imbedded in some gauze left there in her throat by the only individual that ever performed any surgery there. So she

went to her dentist, Dr. Wright. He was as helpless in his inability to diagnose her difficulty as the rest of the doctors. He said he couldn't say for sure whether it might be her teeth. It might or might not be. He left it up to her to decide, which was his practice in cases of doubt. In leaving the ultimate decision to the patient he followed the same practice as Dr. Maw and Dr. Tyndale. In the initial diagnosis of plaintiff's condition they felt that the tonsils might be the cause of her arthritis but they left it to her to decide as to whether they should be removed. She decided to try it, since it was at least a chance for recovery, which was more than she had been able to get from the doctors, including Dr. Maw and the Clinic. So her front teeth were drawn in the faint and futile hope that it would be a solution. But that too was ineffectual. The cause was not there. It lay deeper in the gauze imbedded in her throat.

Only after the cause and source of the infection was found did she and the doctors find the truth.

But in the meantime she suffered four years of physical, mental, and social distress, including the permanent loss of her teeth—all to no purpose—in her frantic efforts to find the cause of her trouble.

Counsel states that this was no evidence of permanent injury. We have never heard of teeth coming back in at the age of 54; and who are we to say that her mental and physical health was not impaired, at least to some degree, permanently. For four years she had those pieces of gauze in her throat, as collecting and

breeding places for bacteria and infection, sending their pus into her system and particularly her mouth, gums and teeth.

The evidence as to the loss of her teeth and the reason for their withdrawal was not objected to nor was there any motion made by counsel for it to be stricken as an element of damages.

If there were any dispute or uncertainty as to whether the infection in the mouth was the cause of removal of the teeth, counsel himself removed that doubt. He asked the question of Mrs. Matthews (R. 250) and she said it was because of the sore throat. He asked Mr. Fredrickson why she had her teeth removed (R. 265). His answer was as follows: "Because she had a bad condition in her throat." He asked the same question of Dr. Wright (R. 339) and was told that it was because she was having trouble and thought the teeth might be the cause.

There are some injuries that are objective in character and are in the very nature of themselves permanent in character. Loss of a portion of the body and disfigurement are of that type. The jury knows they are permanent without being told by a doctor.

Counsel says there was no casual connection shown between the malpractice of Dr. Maw and the extraction of the teeth. He says the teeth were removed because of pyorrhea. Pyorrhea is the result of infection. Dr. Wright did not testify that he took the teeth out because of pyorrhea. He said he took them out because

of the diseased condition of her throat in the hope that it might help.

The fact that both Dr. Wright and Mrs. Fredrickson may have been in error in this decision is not a matter that Dr. Maw can complain about. They had a condition created by Dr. Maw that none of the doctors had been able to diagnose or treat because the existence of the foreign body in the throat was not known then. Even Dr. Maw had been erroneously treating it for sinus infection.

This is a similar situation to the one considered by this court in *Gunnison Sugar Co. v. Industrial Commission of Utah*, 73 Utah 535, 275 Pac. 777.

In that case an injured man went to a doctor who erroneously diagnosed his condition as rheumatism and recommended he have his teeth out, which he did. It subsequently developed that his back was injured and that his teeth had nothing to do with his condition. This court held that the loss of the teeth was a compensable injury arising out of the accident for which allowance should be made.

It is, in any event, very evident in this case that the jury made no substantial allowance for permanent injuries. The verdict of \$5,000 for over four years of physical and mental suffering, humiliation and terror of cancer, is certainly not excessive. In fact it was niggardly. She should have had many times that amount. Dr. Maw was the first one to put the cancer thought in

her mind when he saw an ulcer near the root of her tongue and asked for a sample for analysis. She asked if he suspected cancer and he said he wouldn't say it was but it didn't look good. From then on to the time when Dr. Dolowitz uncovered the hidden gauze cancer was the first thing that each new doctor suspected, and it was the thing that caused Drs. Browning and Sears to send her to Dolowitz. As Mrs. Fredrickson said, she was in a state of mortal terror throughout this entire time. Certainly defendant was not prejudiced by this instruction because the jury allowed only a very nominal amount for such terrible injuries.

Anything that counsel for plaintiff failed to ask in the way of connecting up the loss of the teeth with the throat condition was well taken care of by counsel for defendant.

It is not claimed in this case that the verdict is excessive, because it obviously is not. No such contention is made. The error, if any there were, is purely technical. Inclusion of the words, "if any" in the instruction had the effect of leaving it to the jury to determine the nature and extent of the damages *as shown by the evidence*. In other instructions the jury was told that in considering this question they should not be guided by sympathy or prejudice and that they should consider only the evidence introduced in the case.

Where the verdict is not excessive and no error is assigned upon the ground that the verdict is excessive under the evidence, the appellate court will not regard

any such purported error as prejudicial, even though it were to be technically so, which in this case it is not.

The general principle is well stated in 5 C. J. Sec. 1146 (Sec. 1773b, Appeal and Error), as follows:

“Erroneous instructions as to the measure of damages or the amount of recovery do not constitute a ground for reversal where it is apparent that the jury were not influenced or misled thereby. Error in instructions will be considered harmless where * * * the amount awarded was fully justified by the evidence, was not excessive, or was for a smaller amount than the evidence showed or tended to show plaintiff was entitled to;”

The authorities uniformly hold that where the appealing party does not claim or establish that the verdict is excessive that no prejudicial error is shown, even though it were to be shown that the instruction is technically erroneous.

Barlow v. S. L. & U. R. Co., 57 Utah 312, 194 Pac. 665.

The court in its instruction on the measure of damages said they might consider the cost of nursing, with reference to which there was no evidence. The verdict was not excessive and this court refused to reverse the case on that technical ground.

“In instructing on the measure of damages the court informed the jury that if the verdict was in her favor plaintiff was entitled to such damages as would compensate her for all pain, suffering, and distress of mind and body, *if any*

which she had endured, or which she would endure in the future as a result of such accident; also injuries to her person received by her, if any, as a result of such accident; also for any permanent injuries sustained by her, if any, as a result thereof, together with all reasonable and necessary expense, if any, as shown by the evidence, which she paid or incurred for nursing and for medical expense in her attempt to relieve herself of the injuries sustained, and also any necessary and reasonable sum which she paid in removing herself from the place of injury to her residence, and from all the facts and circumstances as shown by the evidence to award plaintiff such an amount as would compensate her for all of the injuries and damages by her sustained. No evidence whatever was introduced showing the respondent paid anything for nursing or incurred any expense therefor. The jury knew what the evidence was, knew that nothing had been paid for nursing, and that there was no evidence of any obligation having been incurred therefor. There is no reason for thinking that when \$2,999 was decided upon as the proper amount of respondent's damages an imaginary and conjectural amount for nursing was included. Technically the court erred in referring to expense of nursing. Nevertheless, we do not think that with the qualifying words 'if any' the instruction could possibly be misleading. *Bergstrom v. Mellen*, 192 Pac. 679."

This was substantially what was held by this court in *Olsen v. Kress*, 87 Utah 51; 48 Pac. (2d) 430. No one testified in that case as to future pain and suffering. The trial court included that element in the instruction on the question of damages but inserted the words "if any" as a part of the instruction. Counsel for defendant

excepted to the instruction on the ground that there was no evidence to sustain the same. The trial court, however, instructed the jury, as it did in this case, that they should be guided solely by the evidence in that regard. This court refused to reverse the case upon that ground.

“On the question of damages the trial court instructed the jury that they must first determine whether plaintiff suffered a miscarriage as a proximate result of the accident. If they found that she did not so suffer, then they should not include any damages for miscarriage or for any pain and suffering therefrom, but only such pain and suffering and impairment of ability as *may have resulted independent of the miscarriage, and they should then ‘only take into consideration such bodily pain and suffering caused by such injuries, if any, as you may believe have been shown to have resulted proximately from the accident or which in the future you believe she may suffer. If you believe from the evidence she may suffer any pain in the future.’* Defendant excepts to this instruction for the reason that there is no evidence to support future pain and suffering unless the miscarriage was caused by the accident. However, the evidence shows that plaintiff’s leg was bruised and she had pains all around the lower part of her body and back and that these pains have continued. Whether these injuries and pains were connected solely with the miscarriage and so should not be considered if the miscarriage were eliminated from consideration was a question of fact which the jury should pass upon. The trial court could not, nor can this court say, as a matter of law, that these injuries and pains were a part of the injuries and pains growing out of or insepar-

ately connected with the miscarriage. Whether there would be future pain resulting from the injuries other than those incident to the miscarriage was likewise a question for the jury. We see no error in this instruction."

Briley v. White, Ark., 193 S.W. (2d) 326.

The court gave a general instruction on the measure of damages in a personal injury action similar to the one in the case at bar. Defendant assigned error on the ground that there was no evidence of permanent injury. The appellate court refused to reverse the case upon the ground where it was not claimed or shown that the verdict was excessive.

"While attending physicians expressed the opinion that the boy would have normal use of his leg upon complete healing, which admittedly had not taken place at the time of the trial, there was substantial testimony from which the jury might have inferred that his injury was more than a temporary one. Furthermore, it cannot be said with certainty that when the shock of such an injury, the slowness of the healing process, the pain and suffering undergone by the appellee, and his loss of a year's school work are considered the jury's verdict was grossly excessive, even if no permanent damage to the leg was shown. In this view of the matter, the instruction complained of, even though objectionable, was not prejudicial. Dallas & Gulf R. Co. v. Steel, 108 Ark. 14, 156 S.W. 182, Ann. Cas. 1915B 198.

See also the following authorities to the same effect:

Hecker v. Union Cab Co., 134 Ore. 385, 293 Pac. 726.

Ball v. Gessner, 185 Minn. 105, 240 N.W. 100.

Romann v. Bender, 190 Minn. 419, 252 N.W. 80.

Snyder v. Western Union, (Mo. App.) 277 S.W. 362.

Jacklich v. Starks, 338 Ill. App. 433, 87 N.E. 2d 802.

It is a jury question as to whether injuries involving mental and physical distress and illness resulting in great loss of weight is or is not of a permanent nature. This in addition to the loss of teeth fully justified the trial court in giving instruction No. 12 in leaving to the jury to determine the question and include an allowance therefor if it so found. There was no prejudicial error, particularly where no claim is made that the verdict is excessive, which it obviously is not.

POINTS 4 AND 5

These points have to do with the propriety of the trial court's ruling on the right of defendant, upon cross-examination of Dr. Dolowitz, to go into matters not covered by the direct examination, namely, his professional opinion as to whether gauze left in the tonsil area could travel to the place of ulceration from which gauze, threads, or strings were removed by him and by Mrs. Fredrickson as told to him by Mrs. Fredrickson.

Objections to the questions were made by plaintiff upon the ground that it was not proper cross-examination as the subject matter had not been covered in the

direct examination. The trial court sustained the objection and thereafter defendants called Dr. Dolowitz as their witness and the subject matter was covered by defendants by the same witness as a part of defendants' case.

To these points plaintiff says:

(a) The trial court was right in its rulings; and

(b) If there was any error, which plaintiff denies, it was not prejudicial.

A reading of the direct examination of Dr. Dolowitz as plaintiff's witness shows that he was asked only to state the facts as he found them and what he saw and did. He was nowhere asked for his professional opinion as to the source of the foreign substances, whether they arrived at the point of ulceration from the tonsil area or any other place by migration or whether they were originally deposited there by someone.

It will be noted that the discussion of these points is presented by appellant without citation of authority. Counsel either found no authorities sustaining their position or found them adverse to their contention. The principle involved is not new. The cross-examination may not go beyond the scope of the subject matter covered by the direct examination. Any matters and things tending to vary, contradict, modify or explain the direct examination may be covered by the cross-examination.

Dr. Dolowitz was called as any other witness to testify as to facts. The fact that his relationship to plaintiff was shown as physician and patient was shown not for the purpose of qualifying him as an expert to express an opinion but to show the circumstances under which he learned and observed the facts to which he was testifying.

The applicable rule of law is well stated in 58 Am. Juris. 474 (Witnesses Sec. 844) as follows:

“In the event an expert witness has testified to facts observed by him, and not to his opinion based thereon, he cannot be cross-examined as to his professional opinion, nor will questions be allowed to be put to him which tend merely to discredit him, and in no way affect the value of his testimony.”

The cited authority is *Enos v. St. Paul F. & M. Ins. Co.*, (S. D.) 57 N.W. 919. The case is in point and sustained the announced principle.

The extent and character of cross-examination to be permitted under the announced limitation is in the sound discretion of the trial court, and its rulings will not be a ground of reversal unless abuse of discretion is shown.

Malia v. Seeley, 89 Utah 262, 57 Pac. (2d) 357.

Anderson v. S. L. & O. Ry., 35 Utah 509, 101 Pac. 579.

The general principle that the cross-examination may not go beyond the scope of the direct examination

is announced and applied by this court in the following cases :

Tuft v. Brotherson, 106 Utah 499, 150 Pac. (2d) 384.

State v. Murphy, 92 Utah 382, 68 Pac. (2d) 188.

State v. Bruno, 97 Utah 33, 92 Pac. (2d) 1103.

Jensen v. Kress, 87 Utah 434, 49 Pac. (2d) 958.

Dr. Dolowitz subsequently appeared as an expert witness for defendants and expressed his opinions on the same subject matter attempted to be covered on cross-examination. Defendant was not prejudiced If there were any error, which we deny, it was harmless and was cured by the subsequent evidence of Dr. Dolowitz.

Malia v. Seeley, 89 Utah 262, 57 Pac. (2d) 357.

In re Bryan's Estate, 82 Utah 390, 25 Pac. (2d) 602.

Colorado Milling & Elevator Co. v. Proctor, 58 Idaho 578, 76 Pac. (2d) 438.

Radermacher v. Radermacher, 59 Idaho 716, 87 Pac. (2d) 461.

Jackson v. Utah Rapid Transit Co., 77 Utah 21, 290 Pac. 970.

Thompson v. Bown Livestock Co., 74 Utah 1, 276 Pac. 651.

Ashton v. Skeen, 85 Utah 489, 39 Pac. (2d) 1073.

Apparently these points were thrown in by appellants in a wild hope that this court had forgotten funda-

mental principles of law; or perhaps it was to give this court a little extra work; or again it may have been a desperate chance in a hopeless case in the thought that someone might, notwithstanding the law, "hang their hat on it" to give them a new trial.

It seems to have been "thrown in for what it is worth", which is nothing.

CONCLUSION

The plaintiff, Mrs. Fredrickson, was the victim of malpractice. It was uncontradicted that there were two pieces of gauze sponge—one on either side—left in her throat. They exuded through incisions made by Dr. Dolowitz in removing some large ulcers in taking deep biopsies to determine if she had cancer. These sponges were loose weave surgical gauze, seen and identified as such by several witnesses. For four years, commencing immediately following the tonsil operation performed by Dr. Maw, she had felt a lump in her throat and had suffered from ulcers, abscesses and sores in her mouth and throat. Counsel for defendant, in his address to the jury, said that whoever left them there was guilty of criminal negligence. We hesitate to use such strong language, but it certainly was grossly careless. Shortly after the operation Dr. Maw, himself, planted the thought of cancer. For four years she lived in terror of that possibility, notwithstanding opinions by Cowan & Nielson and Dr. Hatch that it was not. Each new doctor or dentist from whom she sought relief from her diseased and distressful condition, replanted the thought

of cancer. She lost 60 pounds in weight, and became, as her husband and friends described her, a nervous wreck, worrying about the possibility of cancer. She even contemplated suicide rather than cancer. They regarded her as mentally unbalanced because of her insistence that there was a lump in her throat and that she had not recovered from the effects of the tonsil operation. Her throat was sore, infected and offensive. Her mouth had a foul odor and it impaired her relations with her husband, her family and her grandchildren. In spite of her infected mouth and throat they thought it was all imagination on her part and that there was some other cause for her distress. Finally Dr. Browning and Dr. Sears, suspecting cancer, referred her to Dr. Dolowitz who, taking deep biopsies, uncovered the two gauze sponges and made it possible for them to escape from their imbedded and concealed recesses.

Who did that terrible and careless thing? The jury said Dr. Maw did it. He was the only one who performed surgery in her throat before or since. He made an incision on each side, removed a tonsil on each side, used gauze sponges and catgut sutures on each side, and a piece of gauze came out on each side. The City Chemist identified the exuded foreign material as gauze and catgut after Dr. Maw said it was undigested food; and the gauze sponges were the cause of her injury and distress. The mass of threads, cotton and strings were introduced in evidence, excepting the one from the left side which was used by the City Chemist for analysis. Dr. Maw saw it before it was analyzed and said it was undigested food.

By the evidence of plaintiff all individuals other than Dr. Maw were excluded from possible or probable responsibility. None of them performed any surgery in her mouth or throat where gauze sponges or catgut suturing were used. Their efforts were primarily subsequent to the malpractice in an effort to diagnose her condition and find a remedy. To every one of them she told her story—always the same—that she had had a tonsil operation, had a lump in her throat immediately following it and an ulcerated, abscessed and diseased condition in her throat and mouth continuously since the operation. They prescribed sulfa, penicillin and removal of her remaining front teeth as the remedy. It finally remained for Dr. Dolowitz to find the gauze sponges, which gave the answer.

Dr. Maw had a fair trial. The evidence was overwhelmingly against him. He shifted his position from undigested food to the dentists but there was no substantial evidence to back him up. The witnesses closed all of those avenues of escape for the responsibility for this oversight or forgetfulness or whatever it was on the doctor's part that resulted in this malpractice.

The verdict was not excessive. It should have been much larger.

We respectfully submit that the judgment should be affirmed.

Respectfully submitted,

RICH and ELTON,

Attorneys for Respondent.