

1954

Gene G. Spendlove v. Dr. S. W. Georges : Brief of Appellant

Utah Supreme Court

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Earl J. Groth; Skeen, Thurman, Worsley & Snow; Attorneys for Appellant;

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Case No. 8217

**IN THE SUPREME COURT
of the
STATE OF UTAH**

GENE G. SPENDLOVE, by JOHN
A. SPENDLOVE, his Guardian ad
litem,

Plaintiff and Respondent,

— vs. —

DR. S. W. GEORGES,

Defendant and Appellant.

FILED
SEP 17 1954
Supreme Court, Utah

BRIEF OF APPELLANT

**EARL J. GROTH and
SKEEN, THURMAN, WORSLEY
& SNOW**

Attorneys for Appellant.

INDEX

	Page
STATEMENT OF FACTS.....	1
Pleadings and Judicial Procedure.....	2
Facts at the Conclusion of Respondent's Case.....	6
Facts at Conclusion of All Evidence.....	14
STATEMENT OF POINTS.....	26
ARGUMENT	
Point No. 1. The trial court erred in denying appellant's motion for dismissal and directed verdict made at the conclusion of the respondent's evidence..	31
Point No. 2. The trial court erred in denying appellant's motion for a directed verdict made at the conclusion of all evidence, and in failing to give appellant's requested instruction No. 1, directing the jury to return a directed verdict in behalf of appellant	31
Point No. 3. The trial court erred in refusing to give appellant's request for instruction No. 5, relative to the fact that the standard of care to be applied in a malpractice action is that of the locality in which the doctor practices.....	60
Point No. 4. The trial court erred in refusing to give appellant's request for instruction No. 9, relative to a definition of the period of abandonment and the exclusion of consideration of any other period so far as the claimed act of negligence was concerned.....	61
Point No. 5. The trial court erred in refusing to give appellant's request for instruction No. 11, relative to the right of appellant to assume that the parents of respondent would act as a reasonable man in securing medical assistance.....	63

INDEX—Continued

	Page
Point No. 6. The trial court erred in giving instruction No. 5, which required appellant to foresee the probability of the conduct of the parents of respondent	63
Point No. 7. The trial court erredd in giving instruction No. 7, defining abandonment.....	67
CONCLUSION	70

INDEX OF AUTHORITIES

Anderson v. Nixon, 104 Utah 262, 139 P. (2d) 216, (1943).....	48
Baxter v. Snow, 78 Utah 217, 2 P. (2d) 257, (1931).....	50
Brown v. Dark, 119 S.W. (2d) 529, (Ark. 1938).....	57
Edwards v. Clark, 96 Utah 121, 83 P. (2d) 1021, (1938).....	46
Gray v. Davidson, 130 P. (2d) 341, (Wash. 1941).....	50
Jackson v. Colston, 116 Utah 295, 209 P. (2d) 566, (1949).....	50
Ricks v. Budge, 91 Utah 307, 64 P. (2d) 208, (1937).....	36
Rodgers v. Lawson, 170 F. (2d) 157, (C.A.D.C., 1948).....	45
Smith v. Beard, 110 P. (2d) 260, (Wyo. 1941).....	50
Stohlman v. Davis, 220 N.W. 247, 60 A.L.R. 658, (Neb. 1928).....	39

TEXTS

56 A.L.R. 819, s. 60 A.L.R. 664.....	36
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BRIEF OF APPELLANT

STATEMENT OF FACTS

(All italics, unless otherwise noted, have been added
by Appellant.)

The Clerk of the District Court in numbering the
record on appeal has placed the transcript of proceedings
under one number, 67. References to the record, there-
fore, will be designated by the letter "R" as to the num-
bers placed on the pages by the Clerk, and by the letter

“T” as to the various pages of the transcript. Also, by virtue of the fact that the Statement of Points includes, among others, failure of the Court to grant appellant’s motions for dismissal and directed verdict made at the conclusion of the respondent’s evidence, as well as failure to grant motion for directed verdict made at the conclusion of all of the evidence, the statement of facts will be divided into two portions for the convenience of the Court, one summarizing evidence to the conclusion of respondent’s case, the other to the conclusion of all of the evidence.

PLEADINGS AND JUDICIAL PROCEDURE

This action was initially commenced by complaint (R. 4) filed by respondent on October 23, 1953, in the District Court of the Fourth Judicial District in and for Utah County, State of Utah, which contained three causes of action. The first cause of action alleged that the appellant negligently operated on the respondent on April 25, 1952; the second cause of action alleged that between April 25, 1952 and September 30, 1952, the appellant negligently rendered improper post-operative care to the respondent; the third cause of action alleged that between April 25, 1952 and November 15, 1952, while respondent was a patient, appellant improperly abandoned and failed to give proper medical attention to the respondent. The action was prosecuted by John A. Spendlove, father of the respondent, as guardian ad litem, the appointment being based upon the fact that the respondent is mentally incompetent and a ward of the American Fork Training

School (R. 7). The answer of appellant (R. 9) denied the allegations of negligence and resulting injury and damage as to each cause of action, and affirmatively pleaded contributory negligence and sole negligence of respondent, and also sole negligence of third party or third parties. Pre-trial conference was held on February 26, 1954 before the District Judge (T. 1), during the course of which the respondent wholly abandoned and dismissed the first two causes of action (T. 1, 2), with the result that the case was thereafter tried as to the third cause of action of the complaint only, which alleged in substance abandonment of the patient by the appellant, Dr. S. W. Georges, between dates of April 25 and September 30, 1952. During the course of the pretrial conference, respondent's counsel revised the dates between which abandonment was alleged to have occurred to between approximately September 20, 1952 and November 15, 1952 (T. 3). The first date was further defined as the date of a conversation, which will be hereinafter detailed, wherein Mrs. Spendlove, the mother of the respondent, was notified by appellant that he was ill (T. 4). The termination date of said alleged period was identified as the date on which a release was secured by the parents of respondent for purpose of placing him in the out-patient clinic of the L.D.S. Hospital at Salt Lake City, Utah (T. 4). Respondent's counsel likewise during course of pretrial stated the specific claims which related to the act of abandonment (T. 21). These are reflected in the pretrial order (R. 23) reciting the claim of respondent as: (1) That the appellant failed to treat the

respondent's wound properly or at all. (2) That appellant failed to advise with the respondent as to the respondent's condition, and (3) That the appellant failed to advise the respondent as to the necessity of a future operation.

The pretrial change as to the period within which the abandonment was claimed to have occurred was not reflected in the pretrial order, but this order was revised by oral amendment at the opening of the case to reflect the date change as set forth above (T. 30, 31). The pretrial order also states the affirmative defense of appellant, which is in addition to general denial of negligence, that the negligence of third parties intervened and solely caused any damage or injury to respondent, as follows: That the father and mother of the respondent failed to secure medical assistance from Dr. Clair Judd, who had been associated with the case, and which was known to them; that they failed to secure such services after they knew that the appellant was confined to bed with illness; that they failed to secure medical assistance from any physician practicing in the Provo area if the same was needed; that they failed to follow appellant's instructions with reference to replacing wound dressings.

At the conclusion of respondent's evidence (T. 121) appellant moved for a dismissal of the action and a directed verdict upon the grounds detailed in the transcript, including failure of evidence to establish the sole claim of negligence which was abandonment, and failure of evidence to show any causal relation between any damage and injury and abandonment. In connection with the

claim of the respondent as to damages, it had been asserted during pretrial that there was, among other things, pain and suffering in a normal mental sense, and also that as a result of such pain and suffering the respondent had suffered a mental up-set requiring a change in his custody from the American Fork Training School to the Utah State Mental Hospital. The Court ruled at the conclusion of respondent's evidence (T. 121), that the motions were taken under advisement but that there was no evidence of any causal connection between the mental up-set and any claimed act of negligence on the part of appellant, and that this issue of damage would be eliminated from the case. The minute entry of the Clerk (R. 59) would seem to indicate that the court had dismissed the entire third cause of action, the only ground upon which the trial was based, which is inaccurate for the reasons indicated. At the conclusion of all the evidence respondent moved for a directed verdict which was likewise taken under advisement and the case submitted to the deliberation of the jury, who returned a verdict in favor of the respondent and against appellant, assessing damages in the sum of \$5,000.00 (R. 55).

Thereafter, respondent moved for a new trial, (R. 61) and at the same time moved to have the verdict and judgment set aside and judgment entered in accordance with the motions for directed verdict which had previously been made (R. 63), as well as to tax costs (R. 64). After argument on April 2, 1954 (R. 65), the Court on May 5, 1954 (R. 66) denied all of the appellant's motions.

FACTS AT THE CONCLUSION OF RESPONDENT'S CASE

Plaintiff herein, Gene G. Spendlove is age 36. He had been a ward of the American Fork Training School since 1931 (R. 49). He had at periodic intervals during these years been transferred for confinement to the Utah State Mental Hospital, although no confinement in such State Mental Hospital had occurred within approximately six years prior to 1952. Mark K. Allen, psychologist, testified that the respondent had an intelligence quota of 76 and a mental age of 11 years based on tests the last of which had occurred in 1951 (T. 119). For two weeks prior to April 25, 1952, plaintiff had been with his parents at their home in Provo on an Easter vacation, and was during this time (T. 49) under their care and custody. On this date in the late afternoon the patient was seized with a terrible pain in his abdomen (T. 50), and Mrs. Spendlove contacted American Fork Training School, where she was advised to call their family physician (T. 50). She then called Dr. S. W. Georges, appellant, who came to the home and immediately referred respondent to the Utah Valley Hospital at Provo (T. 51), operating upon him that night. The operation was protracted, and immediately following it the doctor advised Mrs. Spendlove that the respondent had a perforated ulcer, that peritonitis had set in, and that respondent was very critically ill (T. 52), a very serious condition existed, which the parents understood (T. 69). The respondent remained in the Utah Valley Hospital between April 25 and May 4, 1952 (T. 51) when he was released

and returned to his home. He remained at home that day, and the following evening the incision broke open and respondent was immediately returned to the hospital for a corrective and second operation which was performed by appellant the evening of May 5, 1952 (T. 54, 55). Respondent, following this second operation, then remained in the hospital for about five weeks, being discharged approximately June 10, 1952, when he was returned to his home. While the respondent was in the hospital following this second operation, appellant's father died in California and appellant immediately left for that State on or about May 11 or 12th (T. 70). During appellant's absence Dr. Clair Judd of Springville, Utah, cared for the patient until Dr. Georges returned about a week or ten days later (T. 71). During this period of Dr. Judd's care Mrs. Spendlove discussed the case with him, apparently by calling at Dr. Judd's office (T. 71).

The father of the patient also knew that Dr. Judd was attending this patient during appellant's absence (T. 93), and there was no objection on the part of the parents to this arrangement (T. 72).

Following the patient's discharge from the hospital about June 10, 1952, the parents of respondent, and particularly Mrs. Spendlove, took the respondent to Dr. Georges' office approximately once a week until sometime in July or August when an abscess near the incision was lanced, and thereafter they took the patient to the office about twice a week (T. 72). No record was kept by the parents as to the dates of visits to the doctor's office (T. 72). About two weeks after the discharge from the

hospital following the second operation, a cloth belt was prepared for the patient by Mrs. Spendlove. During this period (T. 57), which presumably means July and August, the incision area was running and had some red bean-like projections, which appeared in two different places (T. 73). Mrs. Spendlove testified that in late July or sometime in August she had a conversation with appellant at his offices with reference to the costs of the treatment and operations (T. 57), and at that time the doctor instructed her to change the dressing on the incision every day and to bring the patient to him about once a week (T. 57), which she did. About September 13, 1952, Mrs. Spendlove was again in Dr. Georges' office with the respondent when he advised her that the incision would require another operation and the expenses were again discussed and Mrs. Spendlove stated, "I guess I will have to appeal to my Church" (T. 58). Apparently on this date appellant gave her a prescription to be sprinkled on the incision prior to bandage replacement (T. 76). Mrs. Spendlove, during all of September and in fact until the respondent was ultimately taken to the outpatient clinic of the L. D. S. Hospital on November 7, 1952 (T. 77), used this prescription daily, and likewise changed the bandages each day. This daily treatment with prescription and bandage dressing continued during all of the period in which it is claimed the respondent did not receive medical attention from appellant.

About September 27, 1952, Mrs. Spendlove took respondent to appellant's office and was told by Nurse Jean Rowan that the appellant was not available. Mrs. Spend-

love stated to the nurse that she was going to talk about the scheduling of a further operation with appellant, and was then advised that there was no operation scheduled (T. 60). Mrs. Spendlove testified that she was not sure as to the exact date (T. 79) of this conversation, though she thought it was the latter part of September.

It should be noted that respondent makes no claim of improper operation or medical treatment of any kind as to the foregoing doctor-patient relationship, and concedes that the doctor in every respect fully performed any and all treatment and obligation which he had toward the patient. The claimed date of the period in which abandonment is asserted to have occurred commenced as of the date of a conversation with respondent which took place three days later after the last conversation toward the end of September, when Mrs. Spendlove called appellant at his home (T. 61, 80). The telephone was answered by Mrs. Georges, who advised Mrs. Spendlove that the doctor was ill, to which Mrs. Spendlove replied "Well, then, let's not bother him if he is ill, Mrs. Georges, let's just wait until he gets better" (T. 61). Mrs. Georges then referred Mrs. Spendlove to the nurse, and Mrs. Spendlove again said "Jean, let's wait until the doctor gets a little better", to which the nurse, Jean Rowan, replied "No, he can't see you, but he will talk to you" (T. 61). Thereupon Mrs. Spendlove talked to appellant. Mrs. Spendlove stated that she was sorry to hear appellant was so ill, and he advised her that in fact he was very sick and had pneumonia (T. 61, 80). Mrs. Spendlove further describes the conversation, (T. 62):

“Then I told him, I said the area around it was getting more infected and I said, ‘After the other terrible experience we had had,’ I said, ‘You can’t blame me for being worried’ *and he said, ‘Do you want another doctor?’* And I didn’t know what to say. And I said, ‘No, Dr. Georges, I don’t.’ Then he repeated, ‘Well, I am not getting out of this bed for the President of the United States.’ And I said, ‘Well if I could just be assured he would be all right until you get a little better.’ *‘Well,’ he said, ‘it has gone on this long running that way, it won’t hurt it to go a little longer.’* And I said, *‘Well, all right,’ and hung up and that was the end of the conversation.*” (T. 62)

From this time forward no call was ever made by the Spendloves to appellant, to his office or to Dr. Clair Judd, who had treated the patient with full knowledge of the respondent’s family during the period in May, 1952 when Dr. Georges’ father’s death required his absence from Utah (T. 81). Yet his family knew how to get in touch with Dr. Judd (T. 81). About six weeks later, according to Mrs. Spendlove’s estimate, the family of respondent discussed with Gerald D. Stone, Bishop of the L.D.S. Church, the possibility of referring respondent to the Out-Patient Clinic of the L.D.S. Hospital at Salt Lake City, under the Church Welfare Program. According to Bishop Stone, acting in behalf of respondent, he called appellant’s office about November 6 or 7th (T. 114) for the purpose of getting a release. He was referred by the nurse to Dr. Judd at Springville, who executed such release, which was then sent with this patient to the L.D.S. Hospital (T. 115, 116). Mrs. Spendlove

knew that the release had been secured and its purpose (T. 82).

Dr. George Miller, who was on the staff of the L.D.S. Hospital, first saw the respondent in the Out-Patient Clinic on November 7, 1952, and on his initial examination found patient to be in quite good general physical condition (T. 34), except as to the operative area where he found a seven inch scar on the upper abdomen, and about one inch to the right of the scar two small drainage areas about 1 cc. in diameter, and a hernia with a stomach distention (T. 34). Dr. Miller probed the areas and removed a small piece of cotton suture from the upper area, cauterized both areas with silver nitrate, put on a dry dressing and instructed the patient to return in two weeks and Mrs. Spendlove to change dressings (T. 35). On November 15, 1952 respondent returned to the Clinic, cotton suture was removed from each area and dressing changed (T. 35). On November 29, 1952, no sutures were found by probing, wounds were cauterized and dressing changed (T. 35). On December 27, another suture was removed from the upper area and an intestinal x-ray taken to determine the state of the ulcer (T. 35). By December 13, the two areas were smaller. Dr. Miller described the infected sores as a sinus about one-half inch deep, i.e., a surface opening which did not extend into the abdomen (T. 38). He stated that it was not unusual for pieces of suture to work to the surface at the areas of incision (T. 39). The doctor went on to point out *that it is necessary to cure the infection near the operative site because of the danger of its spreading if surgery is at-*

tempted (T. 37), and that there was nothing urgent about this third operation until such time as this infection was completely cleared up (T. 42). He also pointed out that it is desirable to let operative areas rest for sometime before repairing an incision hernia to let the muscular tone redevelop and the tissues return to normal to prevent difficulties in the operative procedures (T. 43), and that frequently a lapse of six months to a year is permitted to let the tissues restore to proper form before operating on this type of hernia case (T. 43), although that in his own practice he would wait about six months (T. 44). The doctor emphasized that the respondent had a disruption of his wound to which such wait applied, and that in fact the third operation later performed was approximately six months after the herniation had developed (T. 44).

During the entire time of *appellant's* illness and to the date on which Dr. Clair Judd executed a release of the patient on or about November 7, 1952, Mrs. Spendlove had daily changed dressings on the incision area and sprinkled the prescription given her by appellant on such area. Dr. Miller testified, after his attention had been directed to the fact that the last suture removed from the wound by probing had been removed on December 27, 1952, that it was entirely possible that the third operation would have been performed about the same time that it actually was performed, whether respondent saw a doctor or not, and "It is questionable whether he would have found all the sutures sooner than we did" (T. 45). This question was then asked: "Q. In other

words you are dealing with pure speculation?" To which Dr. Miller answered, "That's right, mother nature." (T. 45).

Dr. Miller was removed from the surgical service at the L.D.S. Hospital the end of December, 1952, but did see the respondent again on January 17, 1953, when there still was infection at the site of the incision (T. 36), and he described the purpose of the L.D.S. treatments as simply to heal the two small areas as it was impossible to do any further surgery until they were in proper surgical condition (T. 36). The third operation on respondent was performed at the L.D.S. Hospital on February 28, 1953 (T. 64), and he remained at the hospital for ten days thereafter (T. 65). About the time that respondent was taken from the Hospital he grew more nervous and it was difficult to keep him in bed (T. 66). He was then taken to the psychiatric ward of the County Hospital of Salt Lake County for one day, and thereafter to the State Mental Hospital at Provo, where he remained six months and was ultimately returned to the American Fork Training School (T. 67).

The sister of respondent, Marjorie Breinholt testified that during the four to six weeks prior to the time respondent started treatment at the Out-Patient Clinic at the L.D.S. Hospital, he got thinner, had pains, was pale, inactive and tired (T. 107). On cross-examination, however, she admitted that he had been getting thinner from the time of the first operation in April, 1952, that he was critically ill in the hospital following the first two operations, that he was pale during the period of his en-

tire illness and that he had had stomach pains (T. 109). In other words, she admitted that these symptoms described had been present long prior to the time of *appellant's* illness. The testimony of Mrs. Spendlove was essentially similar (T. 67, 82, 83, 84). No medical experts, other than Dr. Miller, were called by respondent.

FACTS AT CONCLUSION OF ALL EVIDENCE

There is limited evidentiary conflict on matters of importance. The testimony of the witnesses, including medical experts, called by appellant, provided amplification of much of the testimony and periods involved, and also established with greater accuracy various dates of consideration since the witnesses for respondent maintained no records and understandably were uncertain in many instances as to precise dates.

Dr. S. W. Georges, appellant, described his extensive medical education, the fact that he had practiced medicine and surgery in Utah since 1931, was in 1952 Chief of the Surgical Department of the Utah Valley Hospital, and in 1953 and 1954 President of the Staff of such hospital (T. 124). He had been the Spendlove's family physician since 1945 but had never seen the respondent and in fact did not know that he existed (T. 124). He described his visit to the Spendlove home the night of the first operation on April 25, 1952, and the difficult and serious nature of the operation, since the stomach contents had extruded from an ulcer in the stomach into the abdominal cavity in great quantity, causing a very severe peritonitis and adhesion of the bowels throughout the abdominal cavity (T. 127). He described in detail the operation

which lasted approximately two and one-half hours (T. 129), and his discussion with the Spendlove family in the presence of Dr. Clair Judd who assisted in the operation following the same. (The Spendloves admit the conversation with appellant, but deny that they remembered Dr. Judd as present.) In this conversation he advised of the very serious condition of patient, but that "so long as there is life, there is hope." (T. 130). He visited the respondent two or three times a day during the week following the operation and while he was in the Utah Valley Hospital (T. 131), and also detailed a stormy and difficult post-operative confinement for the first week (T. 131). The doctor described the condition of respondent at the time he was re-admitted to the hospital on May 5, 1952, for the second operation, and the fact that the lower incision had opened with a serous fluid draining. This second operation was again extremely difficult, particularly since the patient had eaten vast quantities of food preventing initial general anesthesia and requiring spinal (T. 133). He again operated and sutured the incision, part of which sutures were of cotton (T. 134). Dr. Clair Judd again assisted with this operation and following the same, together with appellant, talked with the Spendlove family in the patient's room following the operation (T. 135). Appellant advised the Spendloves that peritonitis had again set in, that in view of this fact and the previous serious illness, respondent was in a "very serious" condition (T. 135). The second hospitalization continued from May 5 until June 10 (T. 136) and again appellant visited respondent either

two or three times a day, except for the period between May 11 and 22nd when he had to leave unexpectedly and immediately for California as the result of the death of his father (T. 136). He describes the fact that the physical condition of the patient following the operation was critical and serious, although he was improved at the time appellant left for California (T. 137). Between May 22 and June 10, 1952, when respondent was discharged from the hospital, he improved, and at the latter date his condition was good, recuperation had started, incision was healing and he was up and around from May 20th to discharge (T. 138). Both Mr. and Mrs. Spendlove know of the fact that Dr. Clair Judd was attending the patient while appellant was in California (T. 138), and in fact Dr. Judd talked to Mrs. Spendlove daily about the condition of the respondent (T. 193).

On June 17th respondent was brought to appellant's office by Mrs. Spendlove and was feeling well. At this point the incision was healing, there was no drainage, and the dressing was changed (T. 140). Nurse Jean Rowan assisted Dr. Georges in changing the dressings during all of the visits which later occurred, except for a brief period when she was on vacation in July. On June 21, 1952, appellant again changed the dressing in his office and a small spot on the incision, the size of a pea, had developed which was starting to drain (T. 142). Appellant changed the dressing, cleaned it up, redressed it and replaced the scultetus, which is a specie of cloth abdominal binder or corset designed to confine the abdomen. Appellant saw respondent at his offices again

on June 24, and in July on the following dates: 1, 3, 8, 14, 18, 21 and 28 (T. 143). During July respondent was eating well and feeling good except for the drainage at the incision, points about the size of a pea (T. 144). The doctor dressed the wound and replaced the bandage, sprinkling either a little sulfa powder or aureomycin on the incision and replacing the scultetus (T. 144). In August he saw him on August 4, 8, 15, 19 and 26, again redressing the incision area, and on one occasion removed a piece of cotton suture which had been used to sew up one of the stomach layers on the second operation, an occurrence which is not unusual (T. 145). The drainage spot at the incision during August was doing well, but still draining though getting less (T. 145). Also during the first part of August evidence of herniation of the incision began to appear (T. 146), which the doctor described as a separation of the inner layers of the abdominal wall (T. 146).

The latter part of August, or early September, appellant had a conversation with Mrs. Spendlove at which nurse, Jean Rowan, was present, wherein he advised her that a hernia had developed and would ultimately require another operation (T. 146), but that before that could be done the sore had to heal, that "it isn't urgent but this has got to heal first" (T. 147). Mrs. Spendlove complained about the cost, and was advised by appellant that she had better consult the Bishop and see if they could get help from the Church since the expenses would be paid by the Church, including hospitalization, etc. Mrs. Spendlove agreed that she would see the Bishop of the Church and let appellant know (T. 148).

In September appellant saw respondent on the 2, 9, 16, 23 and 30th, and during this period he was progressing well and doing fine, although there was a small drainage still present at the incision (T. 149, 150). In the early part of September the doctor instructed Mrs. Spendlove as to making a new body binder as the old one was cutting the respondent, and the method of changing the dressing and placement of a prescription powder on the wound (T. 150).

The appellant described the necessity of a third operation, the fact that it is very dangerous to perform such an operation when there is infection at the incision site, and that it is customary to wait at least six months to a year to permit the tissues to strengthen before again incising (T. 151). The appellant advised Mrs. Spendlove of the necessity of the third operation, but stated that at no time did he tell her it was to be performed within any specific period of time (T. 151). Specifically as to the time of performance of the third operation he stated (T. 151):

“Q. Doctor, how often do you normally perform that type of operation after a hernia develops of the type involved here?

A. We usually wait at least six months, sometimes a year. The fact is these tissues being under stress and strain, they are fragile, friable, they have no strength, if you repair them too soon they will break out again.”

Appellant described the effects of a hernia of the type here involved, as relatively mild, and the fact that distention of respondent's stomach wall was not very ex-

tensive, but gradually getting a little larger, though held in check with the binder (T. 152). He also pointed out that where a perforated ulcer is accompanied with generalized peritonitis, the ulcer is not removed but merely closed, and *until such time as the ulcer was entirely healed there would be pain present from the ulcer itself* (T. 152).

By the first of October, 1952, the doctor had a cold and was in bed that day, returned to the office and kept working until the afternoon of October 4, when he went to bed again with pain and coughing (T. 153). An operation had been previously scheduled for October 6, and the doctor performed the same, going home that day and directly to bed following a few office appointments (T. 153). By October 7, appellant had developed a severe chest pain, a temperature of 103 degrees, with a cough, badly inflamed and swollen sinuses, and difficulty in breathing (T. 153). Dr. Clair Judd was called on October 8, and he testified that appellant was severely ill with a high temperature of 103½, chest pains, rales throughout his chest, lung phlegm, an infected sinus and throat, and virus pneumonia (T. 196). On October 10, appellant was bedridden with virus pneumonia, high temperature and other symptoms, when Mrs. Spendlove called in the afternoon (T. 154). Mrs. Georges answered the phone and stated that the doctor was ill and that she did not think he could talk to her (T. 154). After Mrs. Spendlove talked to the nurse, appellant picked up the phone by his bed and talked to Mrs. Spendlove (T. 155). The conversation appears at T. 155, as follows:

“A. I said, ‘Hello, Mrs. Spendlove.’ And she says, ‘*I am sure sorry you are sick.*’ I says, ‘*Mrs. Spendlove, I am very sick, in fact I am so sick I have virus pneumonia.*’ And she said, ‘Well, I am terribly worried about Gene.’ ‘Well,’ I says, ‘Mrs. Spendlove, I don’t see any reason why you should be worried, all you have to do is change the dressing and everything will be all right for a little while.’ I said, ‘*I am very ill, I just can’t come out and take care of anyone.*’ I said, ‘*Do you want another doctor? I will call a doctor, or you call Dr. Judd.*’ She got angry with me, she said, ‘Dr. Georges!’ and hung up, and I was still holding the receiver in my hand. My wife said, ‘What is wrong?’ I said, ‘She hung up on me.’ That was the end of it.

Q. Was anything said about getting out of bed for the President of the United States?

A. I forgot that. When I said I was very ill, I couldn’t take care of anyone, in fact I says, ‘I can’t even take care of the President of the United States.’ I did say that, I am not denying it.”

Mrs. Georges (T. 210) and Nurse Jean Rowan were present in the room, and heard the statements made by appellant to Mrs. Spendlove (T. 221, 222). Both confirmed the statements of appellant in this conversation as testified to by him, and both testified as to the abrupt manner in which Mrs. Spendlove slammed down the receiver ending this conversation.

When asked as to the condition of respondent at his last office call on September 30, 1954, appellant stated that it was not dangerous (T. 186).

From October 6 forward, appellant's illness continued and he was treated by Dr. John Rupper, Dr. Clair Judd and Dr. Ellis (T. 156), and was attended each day by nurse Jean Rowan. He was taking medicine of various kinds, including penicillin, streptomycin, aureomycin, steam inhalations and hot packs (T. 156), and the virus pneumonia accompanied with acute sinusitis continued. On October 11, he was taken to the hospital in his bathrobe for the purpose of taking x-rays but was otherwise in bed entirely (T. 157). He was not hospitalized as no room was available at the Utah Valley Hospital. By October 23rd the chest involvement was improved, but there was continuing difficulty with the sinuses, and pursuant to the recommendations of the attending doctors, who prescribed a warmer climate, appellant went to Phoenix on October 23, 1952, where he stayed until November 6, thereafter returning to Utah (T. 158). While in Arizona, appellant continued under medical care.

During this entire period appellant was too ill to engage in the practice of medicine in any way and in fact did not do so (T. 159). He had, however, instructed Dr. Clair Judd that "Whenever any of my patients or my nurse calls you take care of my patients." (T. 160), and had also named as additional alternates in the event that Dr. Judd was not available for his patients, Dr. Rex Thomas and Dr. John Bowen (T. 159). Appellant informed Dr. Judd, who, of course, had participated in both previous operations, as to the condition of respondent (T. 177).

While appellant was in Arizona, and on either the

latter part of October or the first or second of November, 1952, he called from Phoenix to his office and was advised by his nurse that a release had been executed relative to respondent entering the L.D.S. Hospital (T. 162). The doctor stated between October 6 and his return from Phoenix, *he was physically unable to treat any patient, had not in fact treated any patient* or engaged in the practice of medicine (T. 159), and that the last time he received any call from the Spendloves was when Mrs. Spendlove got mad and slammed the receiver in his ear on October 10, 1952 (T. 163). Appellant treated no patients between October 6 and November 11, 1952 (T. 184).

Appellant stated (T. 183, 184) that under the practice in Provo, a doctor cannot make a patient take another doctor, as that patient must be free to make a selection of his own choice.

Dr. Clair Judd was also called on behalf of appellant, and likewise described the first and second operations and hospital convalescence progress of respondent (T. 195). He described the serious illness of appellant in detail from its beginning in late September forward, and the difficulty in treatment of appellant because the virus infection present did not respond to normal antibiotics (T. 197). Dr. Judd categorically stated that appellant was not, in his opinion, well enough to attend patients during any of this time (T. 197). He instructed appellant that it was necessary to go to Phoenix or a warmer climate, since if he started working too soon with the virus infection and colds he had been having, he

would suffer a relapse. Appellant had a past history of virus infection difficulty in 1936, when he had been confined in the L.D.S. Hospital from January to August (T. 182), an element of concern during his present illness.

Dr. Judd described the instructions given to him by appellant relative to respondent when it became apparent that appellant was seriously ill, and likewise the custom in Provo relative to a substitute doctor, at T. 198, 199:

“Q. During this period did Dr. Georges give you any instructions with reference Gene Spendlove?

A. Yes.

Q. When was the first of such instructions, do you remember?

A. The first day I saw him at his home was on the 8th.

Q. What was his instructions?

A. He told me Gene's condition. Well, he told me before, all along he had talked about Gene, and I knew pretty well how Gene was even without him telling me at that time. But he again described how it was and asked me if I would take care of him if they called me.

Q. What did you say to that?

A. I said I would.

Q. Did you call the Spendloves at all?

A. No.

Q. Why not, Doctor? What was the practice with reference to that?

- A. If they thought Gene needed a doctor's care they would call me. It isn't good practice for us to choose ourselves or anybody unless they want us to come.
- Q. Doctor, during this entire period when Dr. Georges was ill did you maintain your offices in Springville, were they open?
- A. Yes.
- Q. Were you available?
- A. Yes.
- Q. Were you at the Utah Valley Hospital during that period?
- A. Yes.
- Q. How frequently?
- A. Every day.
- Q. Do you have nurses in your office there in Springville?
- A. I have a receptionist.
- Q. She is there during the day?
- A. Yes.
- Q. Your phone is listed in the phone book, is it?
- A. Yes.
- Q. Both home and office?
- A. Yes."

Dr. Judd, testifying with reference to respondent, stated that it was unwise to try and repair respondents hernia in the presence of infection, and that practice requires waiting for the infection to heal (T. 208).

Dr. John H. Rupper likewise attended appellant during his illness of October and early November (T. 229). He first saw appellant on October 9, 1952, at his home and diagnosed his condition as that of virus pneumonia with acute sinusitis (T. 230). On October 11 he saw appellant again, who was unimproved with continuing high temperature, and still bed-ridden. Since appellant was not responding to treatment, Dr. Rupper secured pathological studies during the week of August 12 to 18 and by October 20 appellant was improved somewhat, but was still bedridden and with continuing lung infection and he was "physically unable to treat patients" (T. 233). Dr. Rupper was concerned about relapse (T. 234), particularly with virus pneumonia, and recommended that appellant immediately get to a warmer climate for better treatment of the respiratory infection (T. 233). He again testified that the appellant was too ill to practice during the period in question (T. 236).

Nurse Jean Rowan likewise testified as to the operations performed on respondent and the method of treatment during the months of July, August and September as being that of basically of removing the bandage over the incision and redressing (T. 216). She confirmed appellant's version of the conversation with Mrs. Spendlove about the first of September 1952, when expenses were discussed, appellant suggested they contact the Bishop and get some help from the Church, and Mrs. Spendlove stated she would do so (T. 217). She also described the statement of the doctor to Mrs. Spendlove that the third operation could not be performed until the draining

areas were clear (T. 218), and likewise confirmed the statements made by appellant in the conversation with Mrs. Spendlove on October 10, 1952 (T. 222).

Bishop Stone called at the office after appellant had gone to Arizona and in the latter part of October (T. 223) and wanted to know whether he could have the appellant sign a release. The nurse told him the doctor was ill and to contact Dr. Judd who could sign the release since he had been previously connected with the case (T. 223). Later the nurse advised appellant that the release had been signed when the appellant called by telephone from Phoenix (T. 224), prior to his return to Provo and resumption of practice.

STATEMENT OF POINTS

Appellant relies upon the following points:

Point No. 1

The trial court erred in denying appellant's motion for dismissal and directed verdict made at the conclusion of the respondent's evidence (T. 121).

Point No. 2

The trial court erred in denying appellant's motion for a directed verdict made at the conclusion of all the evidence (T. 238, 239), and in failing to give appellant's requested instruction No. 1, (R. 34), directing the jury to return a directed verdict in behalf of appellant.

Point No. 3

The trial court erred in refusing to give appellant's request for Instruction No. 5 (R. 38) to which failure

appellant excepted (T. 244), and which reads as follows:

“In determining whether or not the defendant properly discharged his responsibilities as a physician and surgeon in this case, you should judge the defendant by comparison of his conduct with the standard of conduct on the part of the ordinarily and reasonably careful physician and surgeon practicing in Provo, Utah in the year 1952. The fact that the defendant may have conducted himself in a manner different from the way doctors ordinarily perform their services in other communities, if such be the fact, is immaterial because the defendant was required only to exercise such reasonable care, diligence and consideration for his patient as was ordinarily exercised by the ordinarily skillful physician and surgeon practicing in Provo, Utah in the year 1952.

“Therefore, if you find from the evidence in this case that the defendant exercised the ordinary and reasonable care, diligence and consideration of his patients as was exercised by the ordinarily skillful physician and surgeon in Provo, Utah in 1952, you must return a verdict in favor of the defendant and against the plaintiff no cause of action.”

Point No. 4

The trial court erred in refusing to give appellant's request for Instruction No. 9 (R. 42), to which failure appellant excepted (T. 244), and which reads as follows:

“You are instructed that the sole issue of negligence claimed by plaintiff in this case is whether or not Dr. S. W. Georges abandoned the plaintiff in the fall of 1952, beginning on the date on which Mrs. Maude Spendlove, mother of plaintiff, talked to Dr. S. W. Georges at his home

and was told the Doctor was ill, and ending with the date on which Bishop Stone obtained the release from Dr. Clair Judd relative to placing plaintiff under care of the L.D.S. Hospital at Salt Lake City, Utah.

“There has been evidence introduced in this case relative to the operations performed by the defendant on the plaintiff on April 25, 1952 and May 5, 1952, and the care rendered by him in connection therewith. Such evidence is not to be considered by you as any indication that plaintiff claims damage or injury resulting from either of the two operations or from the treatment afforded to the plaintiff by defendant with respect to said operations. Plaintiff does not make such claim.”

Point No. 5

The trial court erred in refusing to give appellant's request for Instruction No. 11 (R. 44), to which failure appellant excepted (T. 244), and which reads as follows:

“You are instructed that in this case the plaintiff Gene Spendlove was a mental incompetent and a ward of the American Fork Training School, a public institution for mentally deficient persons. During all times herein involved he was living with and under the direct supervision of his parents, Maude and John Spendlove.

“You are therefore instructed that the defendant, Dr. S. W. Georges, had a right to assume that the parents of Gene Spendlove would take such action with reference to employment of doctors and seek proper medical attention for Gene Spendlove as would be taken by any normal person in the exercise of reasonable care in his own behalf under similar circumstances.”

Point No. 6

The trial court erred in giving Instruction No. 5 (R. 49) to the giving of which appellant excepted (T. 242), and which reads as follows:

“In this action the defendant as an affirmative defense claims that the parents of the plaintiff were negligent in the particulars set forth in Instruction No. 1. If you find that the defendant was guilty of malpractice or negligence, then you should consider and determine whether the parents of the plaintiff, or either of them, were also guilty of negligence, and further, whether such negligence was an efficient intervening cause which displaced the conduct of the defendant in proximately producing the plaintiff's injury and damage. However, if the negligence of the parents was only a concurring cause of the plaintiff's injury, then you should find against the defendant on this defense.

“The test by which you will determine this issue is as follows: If the defendant foresaw, or by the exercise of ordinary care would have foreseen, the probability of the conduct of the parents of the plaintiff, and the probability that the defendant's conduct and that of the parents would result in injury to the plaintiff, then the conduct of both was the proximate cause of the injury. But, if the probable result could not have been foreseen and if the immediate cause of the injury was the conduct of the parents, then your verdict must be in favor of the defendant, no cause of action. The burden is on the defendant to prove by a preponderance of the evidence the above proposition.”

Point No. 7

The trial court erred in giving Instruction No. 7 (R. 50) to the giving of which appellant excepted (T. 242, 243), and which reads as follows:

“You are instructed that where a physician is employed to attend a patient the relationship of physician and patient continues until ended by the consent of the parties, or revoked by the dismissal of the physician, or until his services are no longer needed. The physician is required to exercise reasonable and ordinary care and skill in determining when to discontinue his treatment, and where he fails to attend upon his patient and terminates his employment without notice to his patient and without affording the latter an opportunity to secure other medical attendance, he is liable for any damage caused thereby.

“In this case if you find from a preponderance of the evidence that the defendant discontinued the care and treatment of the plaintiff; that such care and treatment were reasonably necessary, and that the defendant failed to notify the plaintiff or the plaintiff's parents that he was discontinuing such care and treatment, or that he was unable to render further service, then the defendant was guilty of malpractice in abandoning the plaintiff. And if you further find that the plaintiff suffered injury and damage as a proximate result of such conduct on the part of the defendant, then your verdict must be in favor of the plaintiff.”

ARGUMENT

Point No. 1

The trial court erred in denying appellant's motion for dismissal and directed verdict made at the conclusion of the respondent's evidence. (T. 121).

Point No. 2

The trial court erred in denying appellant's motion for a directed verdict made at the conclusion of all the evidence. (T. 238, 239).

Both of the above two points are essentially concerned with the fact that the evidence, whether taken as it stood at the conclusion of the respondent's case, or of the entire case, fails to establish the abandonment of the patient by appellant, which is the ground of claimed negligence, failed to show any causal relation between any such claimed abandonment and any injury or damage respondent might have suffered, and that if in fact there was any pain and injury, it was caused solely by the negligence of the parents of respondent, in whose custody he was at and prior to the time of alleged abandonment.

Appellant respectfully asserts that this proceeding is of the utmost importance to the medical profession of Utah as a whole, because the action of the trial court in refusing to grant motions of dismissal and for directed verdict has necessarily accepted a definition of abandonment which imposes an unreasonable and unwarranted burden on any doctor who is so stricken with illness that he is unable to attend his patient, and an illness moreover, over which he has no control. Appellant makes such

assertion fully cognizant of the fact that this court must necessarily confine its consideration to the evidence of this record, and in one sense its concern to the litigants herein.

Much of the testimony does not directly tie with the claimed act of abandonment, although it does bear on the question of the claimed nature and extent of the illness of respondent in the general period of claimed abandonment, and the problem of causal relationship between claimed negligence and any resulting injury.

Act of Abandonment

This record shows that the respondent and plaintiff was an adult of 36 years of age during the events of concern; had been at periodical intervals confined to the Utah State Mental Hospital, and had otherwise for many years been under the care of the American Fork Training School, and who, according to the psychologist called by respondent, had the mentality of a boy 11 years old. Two weeks prior to the time that appellant saw respondent for the first time, respondent had been in the care and custody of his parents, the Spendloves, at the family home at Provo, Utah. He had been taken to such home for Easter Vacation from the American Fork Training School.

The evidence indicates the critical condition of respondent the night of April 25, 1952, when appellant operated on him for an ulcerated stomach at the Utah Valley Hospital. The operation was of a serious nature as vast quantities of food had poured from the stomach into the

abdominal cavity, and bowel adhesions had set in with accompanying peritonitis prior to the time of this operation. As the appellant advised the parents, the patient was critically ill that night and for several days following the operation.

Respondent remained in the hospital until May 4, 1952, having an initial stormy convalescence, and on such date was returned to his home. The record indicates it was most difficult handling him at the hospital and appellant testified that Mrs. Spendlove told him on more than one occasion with reference to the overall illness, that she was "scared to death" of respondent (T. 149).

In any event, the incision had started to pull apart and had herniated following the first operation, with the result that a second and again difficult operation was performed the night of May 5, 1952, with in fact many of the complications of the first operation. Thereafter respondent was discharged from the hospital in early June and for a time seemed to progress rather well. There was, however, a small external infection at the incision site with the result that the doctor was seeing the patient periodically throughout the months of June, July, August and September, at which visits the dressings were changed at the incision site for the purpose of clearing up the infection before a third operation could be performed.

By late September and early October appellant was becoming ill, and by this time was bedridden with virus pneumonia, acute sinusitis, high fever and other incidental and related ailments. If there is any fact clear

in this record it is the illness of the appellant, which continued to November 11, 1952, when he again resumed the practice of medicine. The record contains detailed testimony of appellant himself and of his attending physicians, Dr. Clair Judd and Dr. John H. Rupper that appellant was bedridden at Provo until approximately October 23, when he was told by his physicians that it was essential for him to enter a warmer climate since the virus infection present had not cleared up in a satisfactory manner and this was the prescribed treatment. The record is also clear, based on the undisputed testimony of all of the doctors who testified in behalf of appellant, which is uncontradicted in any way by the respondent, as in fact it could not be, *that appellant was physically unable to treat any patients or engage in the practice of medicine during this period and in fact he did not do so.*

On or about October 10, 1952, a conversation occurred between Mrs. Spendlove, in whose custody the respondent then was and who had assumed responsibility for securing medical care and assistance for him, and appellant. In this conversation and based solely upon the testimony introduced by respondent, Mrs. Spendlove was advised and knew that the doctor was seriously ill with pneumonia, that he was unable to treat patients, and was asked by the doctor whether or not she wanted him to secure another doctor. The conversation as related by Mrs. Spendlove, Nurse Jean Rowan and appellant included this notice given above, but went further in that the doctor had in addition asked Mrs. Spendlove whether she

desired him to call Dr. Clair Judd. This apparently is the alleged act of abandonment, which is an incredible assertion under the circumstances as evidenced by the record. Before the return of appellant to active practice on November 11, 1952, the Spendloves themselves, through Bishop Gerald D. Stone, secured a release of respondent for the purpose of placing him in the outpatient clinic of the L.D.S. Hospital, which release was executed in behalf of the appellant by Dr. Clair Judd. The record is likewise clear that the custodians of respondent knew that by this affirmative act they were terminating all relations with appellant by securing this release. Appellant was advised of this fact while he was at Phoenix, Arizona, approximately a week prior to his return to his practice. It is difficult to grasp the theory upon which the respondent attempts to predicate abandonment. It can scarcely be on the date of the conversation with the appellant, when the Spendloves were advised of an illness preventing practice by appellant and further notified that appellant would obtain another doctor for them if desired. There was obviously nothing more that the doctor could do on that date whether he desired to or not, and he certainly did all that could be done by way of notice and offer to secure another doctor that could be expected or was even possible. It may be, and respondent has never defined any date of abandonment either on pretrial or otherwise, that respondent claims this act occurred sometime subsequent to the initial conversation, yet again appellant is at a loss to understand when the act occurred because he was physi-

cally unable to and did not treat any patients at any time thereafter, to November 11, 1952, which was subsequent to the date a formal release was secured by the Spendlows from Dr. Clair Judd. He was able to go to Arizona on October 23 for further medical treatment and in a favorable climate, and yet the evidence is uncontradicted he was still physically ill and still not attending his practice. In short, the doctor performed every possible obligation toward this patient during the appellant's illness, and there was obviously no abandonment within any conceivable legal definition of the same. Since these matters are without dispute in the record, there is no basis whatsoever upon which this case should have been submitted to the jury.

There are relatively few cases that appellant has been able to find which deal with abandonment resulting from the illness of the physician, which are factually similar to the instant case. Most of the decisions seem to have been collected in an annotation "Liability of Physician or Surgeon Who Abandons Case" appearing at 56 A.L.R. 819, s. 60 A.L.R. 664, and cases cited therein. There is one dominant factor which appears in any abandonment case and that is that the doctor without cause refuses or fails to render medical assistance *at a time when the patient is seriously and critically ill, without notifying the patient.*

The Utah case of *Ricks v. Budge*, 91 Utah 307, 64 P. (2d) 208 (1937) is factually distinct in that it does not involve the illness of the physician, but of possible interest because it is the Utah case on abandonment. There de-

fendant doctors had treated plaintiff for a finger infection arising from contact with a barbed wire. The doctors had operated on such finger and hospitalized plaintiff between March 11 and 15th, 1935, on which latter date, against the advice of Dr. S. M. Budge, the plaintiff left the hospital. He was instructed by the doctor to return to him if the finger showed any signs of getting worse. It did, and, on March 17, the plaintiff went to the doctor's office where his finger was examined and he was immediately sent to the Budge Memorial Hospital at Logan for treatment. Dr. S. M. Budge testified that *at that time* plaintiff was in a dangerous condition and needed immediate surgical and medical attention. Thereafter, according to the plaintiff, when the doctor arrived at the hospital he refused to proceed with any medical treatment until certain bills had been paid. The plaintiff thereupon left the hospital and walked to the Cache Valley Hospital a few blocks away where he arrived a few minutes later and where an immediate operation was performed by one Dr. Randall. The latter testified that when he saw the plaintiff's hand and finger, they were in serious condition and required *immediate surgical attention*. The majority opinion of the court held that a jury question existed as to whether or not Dr. Budge was guilty of abandonment.

The physician involved was not ill himself, which distinguishes the Budge case from the instant case. The court, however, at page 211, defined abandonment in general language:

“We believe the law is well settled that a phy-

sician or surgeon, upon undertaking an operation or other case, is under the duty, in the absence of an agreement limiting the service, of continuing his attention, after the first operation or first treatment, so long as the case requires attention. The obligation can be terminated only by the cessation of the necessity which gave rise to the relationship, or by the discharge of the physician by the patient, *or by the withdrawal from the case by the physician after giving the patient reasonable notice so as to enable the patient to secure other medical attention.* A physician has the right to withdraw from a case, but if the case is such as to still require further medical or surgical attention, he must, before withdrawing from the case, *give the patient sufficient notice so the patient can procure other medical attention if he desires.* (Citations)

* * * *

“In *Mucci v. Houghton*, 89 Iowa 608, 57 N.W. 305, 306, the court announces the law as follows: ‘If a physician or surgeon be sent for to attend a patient, the effect of his responding to the call, in the absence of a special agreement, will be an engagement to attend the case as long as it needs attention, *unless he gives notice of his intention to discontinue his services, or is dismissed by the patient;* and he is bound to exercise reasonable and ordinary care and skill in determining when he should discontinue his treatment and services.’ ”

The Court, at page 212, quoted with approval from the Maine case of *Barbour v. Martin*:

“ ‘A physician who leaves a patient, *at a critical stage of the disease,* without reason, or *sufficient notice to enable the party to procure another*

medical attendant, is guilty of a culpable dereliction of duty.' ”

It will be noted, although again the language is not applicable to the illness of a physician, that the law recognizes the ability of the physician to withdraw from a case, providing “he gives the patient sufficient notice so the patient can procure other medical attention if he desires.” It is likewise apparent from the language quoted and approved by this court, and the emphasis the opinion places on the fact, that abandonment must occur at a relatively “critical stage of the disease.” It is obvious that the inherent theory of abandonment is that it occurs suddenly and unexpectedly at a time when medical attention is urgently required and in such a way that the patient is unable to secure other assistance which is then urgently needed.

The case of *Stohlman v. Davis*, 220 N.W. 247, 60 A.L.R. 658 (Neb. 1928) is closer factually to the instant case, although with a major point of distinction. There the plaintiff, age 18, had osteomyelitis in the femur above the knee. On November 12, 1923, defendant, Dr. B. B. Davis, performed the initial operation, and later on February 4, 1924, a second operation during which a piece of the femur was removed. No cast or splint was placed on the leg until March 8, 1924. However, on February 20, 1924, Dr. B. B. Davis became ill and went to the Mayo Clinic for consultation, returning to Omaha February 26, 1924, where he remained but a few hours continuing on to Arizona where he thereafter remained for a month. While in Omaha for those few hours on Febru-

ary 26, 1924, he called on his patient at the hospital, examined x-rays, and consulted a Dr. Herbert Davis in whose charge he had placed the patient. At the time he left for the Mayo Clinic as well as for Arizona he wholly failed to notify either the patient or the patient's father of his intended absence, and the patient was taken over wholly without his consent, or the consent of his father, by Dr. Herbert Davis. In fact the patient and his father were not advised of the absence of Dr. B. B. Davis until March 7, 1924, when a Dr. Lord took over the case.

The court defined the duty of the doctor under such circumstances as follows, A.L.R. page 662:

“When a surgeon performs an operation, not only must he use reasonable care and skill in its performance, but also, in subsequent treatment of the case, it is his duty to give the patient such attention after operation as the necessities of the case demand, in the absence of any special agreement limiting the service *or reasonable notice to the patient.*

* * * *

“We do not overlook the fact that the doctor was ill; that his physical condition prevented the rendition of further services. But his physical condition did not interfere with or prohibit the giving of due and ample notice of his disability to his patient or to his patient's father. The clear duty, under the circumstances, was imposed upon him either to secure the patient's acceptance of the substitution of his son, Doctor Herbert Davis, *or to give him notice so as to secure another physician or surgeon of his own choice.*”

Again the court emphasizes the necessity of a critical condition in the patient, page 663:

“The record contains ample evidence which, if believed, sustains the conclusion that, at the time the defendant herein left Nebraska for Arizona, *the plaintiff was in critical condition.*

“The undoubted rule applicable to the situation is that a ‘physician who leaves a patient in a *critical stage of the disease*, without reason or *sufficient notice to enable the party to procure another medical attendant*, is guilty of a culpable dereliction of duty and is liable therefore’. (Citation).”

It is apparent that appellant gave notice to the parents of respondent of his condition so that they could secure another physician if desired, which is precisely the action indicated by the Stohlman and Budge cases, *supra*. It is also apparent from the record herein that respondent was in reality not in any critical condition at the time of notification of the doctor's illness. In this regard the evidence is clear that from the middle of June until the early part of October the only purpose of the visits to the doctor's office by respondent was to secure a change of the dressing on the incision area, and during this period also respondent was wearing a scultetus at the prescription of the doctor, which was nothing more than a cloth corset to assist in holding the stomach muscles in proper place. About the middle of September appellant gave Mrs. Spendlove an antiseptic preparation to dust on the incision area and had Mrs. Spendlove change the dressing at her home, visiting the doctor only once a week. During this period there was an exterior infection at the incision site and some small bean like

bumps indicative of a hernia. By the middle of September, or perhaps a little earlier, it had become apparent that a third operation for corrective repair surgery was required. In this connection, however, the testimony of Dr. George Miller who was called by respondent, appellant, Dr. Clair Judd (and there was no testimony whatsoever to the contrary) all indicated that so long as infection remained at the site of the operation *it was not sound practice to attempt a corrective operation because of the danger of spreading the infection*,. Also both Dr. Miller and appellant testified that frequently such corrective surgery is delayed for a period of six to twelve months to permit the muscles of the stomach around the incision to develop and restore their tone and to avoid dealing with what was described as friable tissue. It is perfectly obvious from this record that during all this period the purpose of treatment was simply to assist in changing the dressings to the end that the body itself would cure the infection and permit the third operation. In fact from November 7, 1952 until the third operation of February 28, 1953, this is essentially all that was done at the L.D.S. Hospital, about whose care no complaint is being made, except that the visits there were from ten days to two weeks apart and less frequent than they had been to appellant's office. In short, and as appellant advised Mrs. Spendlove and testified, there was no urgency in any illness that respondent had at the time of or more accurately during the period within which respondent claims abandonment occurred. The additional element, and underlying premise in abandonment cases of

critical or serious illness at the time of the active abandonment is in no sense present in this case.

The *Stohlman case*, supra, points out that under the circumstances of illness a doctor does not have the ability to substitute another physician for himself. Thus at page 662:

“It is also to be remembered in this connection that the facts in the record disclose that the defendant, by his excellent preparation and for thirty odd years of successful practice, had acquired peculiar qualifications and special knowledge on the subject of surgery. In short, his employment by the plaintiff was, in fact, if not in name, the employment of a specialist or an expert in surgery. It would seem, in view of the nature of his employment and the circumstances and conditions of his patient, as shown by the record in this case, that to substitute for himself another physician of but three or four years’ experience in the practice, without any notice to, or agreement with, the patient involved or those representing him would be not only a clear violation of duty but, in effect, to utterly abandon the case.”

This statement above from the *Stohlman case* as to medical custom is confirmed without contradiction in the testimony of appellant and of Dr. Clair Judd, both of whom stated that having notified the patient of the illness and the inability of the physician to attend any further, the patient, or the individual in whose custody the patient is at that time, alone can select another doctor for further treatment, if in fact the selection is required because of the illness of the patient. This would almost seem obvious in any professional relationship, but appellant did not

stop with notification, he went further in an additional step not technically required at all, when he asked Mrs. Spendlove whether or not she desired him to get her another doctor. When she replied "No" and hung up the telephone, there was nothing he could do. As a practical matter and as will be more fully pointed out hereinafter, we believe it immaterial in one sense whether the patient actually saw another doctor or not, *because there is not one scintilla of evidence to indicate the necessity of anything further than dressing changes which Mrs. Spendlove, under instructions given her by the appellant, did every single day of the period, according to her own testimony.*

Moreover, it is clear from the authorities that the purpose of the notice is simply to advise the patient of the inability to attend so that the patient has an opportunity to secure other medical assistance. Appellant was seeing respondent only once per week during the month of September, 1952, and the L.D.S. Hospital outpatient clinic saw him only about once each two weeks when he was taken to them in November through February 1953. It is utterly without reason to contend that respondent, or his parents who were responsible for his care, did not have amply opportunity to secure any medical assistance required. *Yet respondent must show this by a preponderance of evidence to establish one of the essential elements of the abandonment.*

Causal relationship

Whether or not the act of abandonment occurred in

this case is in one sense immaterial, since there is no evidence whatsoever to establish any causal relation between the fact that for a period of approximately 4 to 5 weeks the respondent did not receive any active supervision by a doctor, and any resulting or adverse effect on his physical condition, or that such lack of attention in anyway added to or pro-longed any pain or suffering.

The decisions on this subject clearly establish the rule that such relation must be shown by competent evidence, a burden of the plaintiff, and that it may not be left to conjecture or surmise on the part of the jury. Where, as here, the problem centers on the necessity of considering physiological characteristics of the human body which are in the province of experts, the problem is not one which is perfectly obvious to a layman, and expert medical testimony is required to establish causation.

In *Rodgers v. Lawson*, 170 F. (2d) 157 (C.A.D.C., 1948), an action for malpractice was brought against the doctors for failure to use proper care in treating the breasts of plaintiff following the birth of her child, including among other things an alleged abandonment of the case. Defendant Lawson delivered plaintiffs baby and undertook prenatal care, during which later period she had a soreness of her breasts and other difficulties which the doctor seemed to have indicated to her were not unusual and to be expected. By five weeks after the baby was born, the breast pains had increased to an extreme intensity. Dr. Lawson refused to call at the home

and the husband of plaintiff thereafter retained another doctor. This doctor immediately examined her breast and operated on the same the same evening inserting tubes for drainage. The court of appeals upheld the lower court's directed verdict and stated on causation at page 162:

"It is true that the evidence shows that Mrs. Rodgers suffered severe pain for an extended period. But this, without more, does not evidence neglect by the defendant. The pain was obviously the result of the pooling and pressure of the milk. This common postnatal condition was, so far as the evidence shows, brought about by nature, not by the defendant. There is no evidence that due professional care required the administration of sedatives. It appears from Dr. Bailey's testimony that the profession recognizes both incision and drainage on the one hand, and the more conservative treatment of symptoms on the other, as proper measures. Early incision and drainage would apparently, in view of the relief after Dr. Bailey's incision, have lessened the pain. But it is not shown that it was a departure from proper professional judgment for Dr. Lawson to choose to postpone incision until infection appeared and failed to respond to the treatment with hot Epsom salts and penicillin. It is common knowledge that even 'minor' surgery is fraught with danger and that good professional judgment at times requires exposure to pain rather than to the knife, that is to say, *leaving the patient to the restorative process of nature*, aided medicinally rather than by surgery."

In *Edwards v. Clark*, 96 Utah 121, 83 P. (2d) 1021 (1938) it was claimed that defendant physician had

negligently treated or failed to treat one Vida Edwards, mother of plaintiffs, during a period following the birth of a child. She had encountered considerable difficulty in this birth and ultimately died from septic toxemia. The gist of complaint was that the doctor failed to properly diagnose her condition, and although he did see her periodically during this period of illness did not see her frequently enough nor make adequate examination to determine the existence of the blood poison. There is an element, though in a different sense than in the instant case, of abandonment in the claimed negligence. The Court at page 1029 describes the type and quantum of evidence required to establish a causal relation between alleged negligence and resulting injury in a malpractice case :

“In the instant case it is difficult to find anything the attending physicians did that the evidence shows they should not have done, or failed to do what the evidence shows they should have done.

‘The doctrine of *res ipsa loquitur* does not apply. In this both parties concur. There is nothing arising out of the case that ‘shows anything the defendants could or should have done that would or could have changed the unfortunate result. The testimony of the father, mother, and husband of the deceased might give rise to an inference that all was not done that they had in their minds afterwards might or should have been done. *Nothing is indicated even in their testimony as to what that was. To have submitted the cause of the jury would have set the jury to conjecturing, surmising or guessing at the possibilities as*

to what should or should not have been done. A verdict of a jury may not be based on such conjectures. (Citations).

“In order to recover in such case the plaintiff must show that in treatment of the patient the defendant physician did not exercise such care and diligence as is ordinarily exercised by skilled physicians, doing the same type of work in the vicinity, and that the want or failure of the required skill and care was the cause of the injury complained of. *That there might have been neglect or lack of skill is not enough. To permit a cause to go to the jury on testimony showing only possibility, or what might or could have happened, is to permit a jury to base a verdict upon conjecture, speculation or suspicion.*”

In *Anderson v. Nixon*, 104 Utah 262, 139 P. (2d) 216 (1943), plaintiff sought to recover judgment against defendant doctor for alleged negligent treatment which resulted in the loss of plaintiff's left leg. On November 30, 1937, plaintiff had received a puncture wound on his hand from a coyote bite and a few days thereafter consulted the doctor, during which time his arm and hand became progressively worse. By December 10, his left leg began to ache and the doctor thereafter called on him at his home diagnosing leg trouble as rheumatism. The condition of the leg became increasingly worse until on December 19, 1937, some neighbors took plaintiff to another doctor who operated after discovering osteomyelitis of the left tibia. About a year later, and in view of the continued existence of the disease, the leg was amputated. There was no expert testimony introduced showing that

a physician in the exercise of ordinary care would have known from symptoms that this plaintiff was suffering from a blood infection and that osteomyelitis should have been expected. The proper treatment would have been bed-rest, good diet and to make patient as comfortable as possible and defendant did not so instruct or direct the plaintiff. While the court held there was sufficient evidence of negligence to submit the case to the jury, it is also held that under the circumstances the evidence did not disclose a causal relation with any damage or injury. The Court stated at Page 220:

Plaintiff, however, based his case on the failure of Dr. Nixon to recognize that osteomyelitis had set in by December 10, 1937, and to treat him for it properly by administering blood transfusions and operating in time. There was no expert evidence in this case that if defendant had done these things at that time the condition which caused the eventual amputation of plaintiff's leg could have been avoided. No expert testified that had Dr. Nixon recognized the symptoms of osteomyelitis he could have alleviated or cured it by using the ordinary skill, care, and knowledge of a physician practicing in that vicinity. As to blood transfusions, one expert did testify that it was beneficial in blood stream infections, but did not testify that had there been transfusions the end result might have been avoided. Osteomyelitis being a disease the cause and cure of which is peculiarly within the knowledge of medical men and not a matter of common knowledge, it is necessary to have expert testimony on the effect of the negligence of a doctor on the end result. In this case there was no evidence that anything

Dr. Nixon did or failed to do after osteomyelitis developed caused the end result. In the absence of such expert testimony there is nothing upon which a jury can base its finding on the proximate cause of the injury. A jury may not conjecture or speculate, but must have substantial evidence upon which to base a verdict. (Citation)”

Again in *Jackson v. Colston*, 116 Utah 295, 209 P. (2d) 566 (1949), this court stated at page 568:

“It is fundamental that the burden rests upon the plaintiff to establish the causal connection between the injury and the alleged negligence of the defendant; (Citations); *that the court may not permit the jury to speculate concerning defendants’ liability*; (Citation); *and that the court is required to direct a verdict unless there is evidence from which the jury could reasonably find in favor of the plaintiff.* * * *

“Analyzing the testimony to determine whether or not plaintiff has sustained a burden of proving a causal connection between the alleged negligent acts of the defendant and the injury to the plaintiff, we find that under the present record the jury would be required to speculate and guess on too many elements in the chain of causation.”

See also *Baxter v. Snow*, 78 Utah 217, 2 P. (2d) 257 (1931); *Smith v. Beard*, 110 P. (2d) 260 (Wyo. 1941); *Gray v. Davidson*, 130 P. (2d) 341 (Wash. 1941).

Upon the evidence before the court there is no basis establishing any causal relation between the failure of appellant to attend the respondent and any pain or injury of any kind.

After respondent was discharged from the Utah Valley Hospital about June 10, 1952, he was taken to appellant's office approximately once a week until sometime in late July or August. During the early part of this period the doctor had recommended the use of a scultetus binder for the abdomen (a cloth corset) and was changing the dressing over the incision as might be expected. Toward July or August it began to appear that the incision might again start giving way and there began to appear a small drainage from an infection near the incision. About this time, according to Mrs. Spendlove, a small abscess was lanced and thereafter the patient visited the doctor about twice a week. Mrs. Spendlove testified that about the middle of September the appellant instructed her to change the dressing on the incision daily, and to bring the patient in once a week. He also gave her a therapeutic prescription to dust on the incision. Mrs. Spendlove changed dressing every day thereafter until the respondent was ultimately taken to the Out-Patient Clinic of the L.D.S. Hospital on November 7, 1952, which was after the Spendloves themselves had secured the release of appellant from the case. The testimony likewise indicates that at one time in August the doctor had removed a small piece of cotton suture which had worked itself to the surface at the small infection sinus. During the month of September the doctor would probe for sutures, clean the wound, put an antiseptic powder on it, and change the dressing, replacing the binder. In essence he was only doing that which

Mrs. Spendlove testified she herself had done. The evidence fails to disclose even any suggestion that anything else could be done, and affirmatively indicates that in fact the only thing which could be accomplished was to keep proper dressings on the incision area to the end that the body itself would cure this infection, which would permit the corrective operation.

The infection is a matter of vital importance, as all the doctors testified in detail as to the fact that so long as the drainage continued at the post-operative site there should be no further operation because of the danger that additional cutting of the abdomen at this point would tend to spread the infection, and possibly permit it to penetrate to the interior of the stomach. The infection had to be cleared up. The doctors also testified that the corrective operation would not be performed ordinarily for a period of six to twelve months to give the muscles of the abdomen an opportunity to heal, strengthen and solidify. In other words, whether there had been infection or not, the operation in all probability would not have occurred until the time when it was actually performed in February of 1953. So far as the probing for cotton suture which remained from the previous operation was concerned, it will be noted that when respondent on November 7, 1952 was taken to the L.D.S. Hospital, and placed under the care of Dr. George Miller, a cotton suture was removed, yet Dr. Miller continued dressing changes which is all that had been occurring during all of this period, and continued to probe at each of the examinations which were about two weeks apart.

Moreover, he testified that a suture tends to work out of the wounds. It seems obvious that a suture removed as late as December would not have worked up from the wound until this date as there were almost two months of medical care of Dr. Miller before it did so, a fact which he describes as a probability. There is not one scintilla of evidence in this record to the contrary.

The medical testimony, therefore, in detail and logic affirmatively indicates that the fact that the patient was not seen by appellant during the period did not retard the time of operation, and in fact under the circumstances had no relation to the rapidity or the extent of cure because the point was simply to permit the body to cure the infection which existed. It is therefore obviously immaterial whether the doctor attended the patient during this month or not, and particularly in view of the fact that Mrs. Spendlove herself was doing essentially all that a doctor would have done which was to change the dressings. It is utterly preposterous to assert that the fact that the doctor did not see the patient for approximately four or five times during the month added to any pain or suffering, mental or otherwise, of respondent.

This very obviously is a matter dealing with the relation of infection to operative procedures, and treatment of infection to cure the same. While it is not a complicated subject, it is one which is not within the purview of the average layman, and in fact must necessarily be controlled by expert testimony. *It is highly significant that the respondent made no attempt whatsoever to produce a single medical witness to testify on*

this subject, nor any testimony of any kind to indicate anything which could or should have been done, and which would in anyway have affected the healing of infection.

What respondent did attempt to do was to utilize evidence of laymen which in and of itself proved nothing, and there is in fact no causal evidence from this source in the record. Mrs. Spendlove testified that during the approximate four or five week period of abandonment respondent had pain in his abdomen, was pale, did not feel well and lost weight. Mrs. Breinholt, sister of respondent who visited the Spendloves' home frequently during all of the period of illness, attempted to testify to the same thing. Yet on cross-examination both witnesses freely admitted that each of these claimed symptoms of illness had existed long prior to such period of claimed abandonment. This patient had lost weight beginning with the time of the first operation and his critical illness at that point. He had during all of such period had pain for, as appellant explained, the ulcer itself on the interior of the stomach would not have healed and would cause pain. The same thing is true of the other symptoms of paleness, and a tired feeling which would obviously exist from the two previous critical illnesses of respondent.

It is a matter of regret that the respondent himself could not have told the jury what pains and suffering he was incurring during the entire period of illness and particularly the four or five week period of claimed abandonment, as well as that period of November, December,

January and February when he was under treatment at the L.D.S. Hospital. If ever a jury was left to utter speculation and conjecture, this jury was when the court submitted this case to them. In fact, the evidence so strongly indicates a continued course of illness which was unaffected by the failure of respondent to visit the doctor's offices for four or five visits and which arose out of a period of illness as to which there is no claim of negligence, that the consideration of the jury on causation can scarcely be said to have arisen to the level of conjecture.

It should likewise be noted that the doctor told Mrs. Spendlove in the conversation of October 10 that there was no urgency as to the condition of respondent; that he affirmatively testified as to the lack of any emergency; and that in fact when Dr. Miller first saw the patient on November 7, 1952 he described him as being in good physical condition except for the distention of the stomach and the drainage at the incision area. As to the distention, the mechanics of that were explained by the doctor, the fact that it was not painful, and that it was easily controlled by a scultetus binder or a corset of any kind which he had instructed Mrs. Spendlove to use and which she apparently did use.

All of the foregoing is fortified by the treatment rendered to patient at L.D.S. Hospital. Appellant was seeing him prior to his illness once a week, yet the L.D.S. Hospital staff saw him less frequently, which would seem an affirmative indication that either they were not as diligent as appellant, or that in fact the pa-

tient had sustained some recovery during the four or five week period.

It is, therefore, submitted that there is a complete and total lack of evidence to establish causation and that in fact the evidence affirmatively indicates the non-existence of the same.

Negligence of Spendloves

Among the defenses interposed to this action was that of the negligence of the parents. Dr. Clair Judd of Springville, Utah was thoroughly cognizant with the medical history of the respondent. He had assisted in both operations and had actively supervised the patient for a period of one week while he was hospitalized following the second operation. The parents denied knowledge of his participation in the operation, but they knew that he was familiar with the case since during the week's absence Mrs. Spendlove talked to him daily about the patient. On October 10, 1952, they knew that Dr. Georges was seriously ill with pneumonia. There is no reason nor excuse for the failure of the Spendlove family to call Dr. Clair Judd, if in fact any medical attention was required, although for reasons indicated above, we doubt this. They did not do so, although appellant in discussing his patients with Dr. Judd had in effect brought him to date on the Spendlove case and requested him to take care of the patient *if* anything developed and *if* he was called by the Spendloves. There is nothing to show anything did develop, but the Spendloves did not choose to call a doctor. Of course, they had no obligation what-

soever to call Dr. Judd, and for all appellant is advised they may not have cared to do so. This would make no difference, because the testimony affirmatively shows that there were numerous other practicing physicians and surgeons in Provo during all of the time. In other words, if in fact respondent required any medical attention from a doctor it was as simple as picking up the phone and calling either Dr. Judd or some other doctor as selected. This then, assuming attention was required, was inexcusable negligence by any standard which might be implied, and served to deprive this respondent of the very thing which they complain he did not receive. It is as a matter of law negligence which caused any injury or suffering which respondent might have sustained.

The effect of the negligence of the parents, in whose custody a minor has been placed, is indicated in *Brown v. Dark*, 119 S.W. (2d) 529 (Ark. 1938). There in an action by the father for himself and as next friend of his minor son, age 6, the boy had suffered a green stick fracture of the left arm. Shortly thereafter the father took the boy to Dr. Brown's office who felt the arm should be x-rayed. They then went to a neighboring town where a Dr. McAdams performed an x-ray and together with Dr. Brown placed a splint on the boy's arm. At the time that the boy was in Dr. McAdams' office the doctor let the father take the boy home on the promise to return him to the office in case of any swelling. The father did take the boy to the home but did not later return him to the doctor's office for consultation. The father did, however, consult thereafter with Dr. Brown the initial physician.

Swelling developed under the cast and ultimately an operation was performed by a third doctor when osteomyelitis of the bone developed producing a Volkmann's paralysis. A judgment for plaintiff was reversed and the cause dismissed by the court, which viewed the negligence of the father as the source of injury. The court stated, page 534:

"Our conclusion is that appellee has failed to support his allegations with substantial evidence. This is a case where a layman took chances and experienced misfortune of a tragic nature. If the doctrine of *res ipsa loquitur* applied, the judgments might be sustained. But it does not. Medicine and surgery are inexact sciences, and physicians are not guarantors of results. Our view is that permanent injuries to appellee's son were occasioned by appellee's own negligence or error of judgment in not leaving the patient with Dr. McAdams when it became apparent infection had developed.

"The judgments are reversed and the causes dismissed."

This case is somewhat similar to the instant case in that the parents of the boy who was unable to care for himself themselves failed to take any necessary steps which might have been required, and did not return the boy to the doctor for further examination. In the instant case the parents did not call or attempt in any way to reach another doctor to attend respondent. It is submitted that the negligence of these parents is obvious, although appellant must necessarily concede that the same problem of causal evidence is present since the

record simply does not seem to indicate in any way the effect upon respondent of the fact that a doctor did not examine him during the four or five week period.

The foregoing is equally applicable to the status of the evidence at the conclusion of the respondent's case as it is to the conclusion of all evidence. The additional testimony introduced in behalf of appellant does, however, amplify considerably the details, nature and extent of the appellant's illness, and of the two operations which were performed in April and May long prior to the period as to which complaint is now made. There is additional testimony with reference to the conversation wherein appellant notified Mrs. Spendlove of his illness in that he not only offered to get another doctor but asked if Mrs. Spendlove wanted to call Dr. Clair Judd. The notice specifying the illness and the offer to secure medical assistance were detailed by Mrs. Spendlove in her version of this conversation. There was additional testimony likewise introduced by appellant with reference to the desirability and necessity of permitting an infection near the incision site to heal before further operation could be performed, and also as to the necessity of a wait to permit the muscle tone to restore. However, this expert medical opinion had been testified to by Dr. Miller who was called by the respondent and whose testimony was introduced as a part of the respondent's case.

In conclusion, therefore, it is earnestly submitted that both of the motions should have been granted by the lower court, based upon the uncontradicted testimony which completely negatives any possibility that an effec-

tive abandonment could have occurred.

Point No. 3

This error is directed to the failure of the court to give appellant's requested instruction No. 5 (R. 38), which reads as follows:

"In determining whether or not the defendant properly discharged his responsibilities as a physician and surgeon in this case, you should judge the defendant by comparison of his conduct with the standard of conduct on the part of the ordinarily and reasonably careful physician and surgeon practicing in Provo, Utah in the year 1952. The fact that the defendant may have conducted himself in a manner different from the way doctors ordinarily perform their services in other communities, if such be the fact, is immaterial because the defendant was required only to exercise such reasonable care, diligence and consideration for his patient as was ordinarily exercised by the ordinarily skillful physician and surgeon practicing in Provo, Utah, in the year 1952.

"Therefore, if you find from the evidence in this case that the defendant exercised the ordinary and reasonable care, diligence and consideration of his patients as was exercised by the ordinarily skillful physician and surgeon in Provo, Utah in 1952, you must return a verdict in favor of the defendant and against the plaintiff no cause of action."

It would seem axiomatic in a malpractice case that the actions of a doctor be measured against the practice in his or or substantially similar communities. This fact is of particular importance in this case, since there was

expert medical testimony to the effect that in Provo, Utah, when a doctor becomes ill his obligation is no more than to notify the patient of such illness, and beyond that, he is prohibited by professional ethics from forcing another doctor on the patient. In other words, the selection of the doctor is and remains with the patient or those in whose custody he has been placed. The court in *Stohlman v. Davis*, supra, seemed to have affirmatively accepted this professional standard without question and probably without actual testimony in this regard, and in fact the Stohlman case founds liability of the doctor upon the very fact that he did attempt to impose another doctor of inexperience on the patient. This evidence, therefore, we feel was particularly significant in this case.

Notwithstanding this, and in the face of appellant's requested instruction No. 5, specifically covering this point, the trial court refused to give any instruction whatsoever on the subject. We are left to utter conjecture as to what standard the jury may have applied in this regard, and the vice of the failure is that they may have considered this point against a background of knowledge they possessed, based on experience in other areas or states which may be inconsistent with the testimony which had been introduced. Appellant was entitled to have the jury instructed on this subject, and the failure of the court to do so constituted reversible error.

Point No. 4

This error was directed to the failure of the court to give appellant's requested instruction No. 9 (R. 42), which follows:

“You are instructed that the sole issue of negligence claimed by plaintiff in this case is whether or not Dr. S. W. Georges abandoned the plaintiff in the fall of 1952, beginning on the date on which Mrs. Maude Spendlove, mother of plaintiff, talked to Dr. S. W. Georges at his home and was told the Doctor was ill, and ending with the date on which Bishop Stone obtained the release from Dr. Clair Judd relative to placing plaintiff under care of the L.D.S. Hospital at Salt Lake City, Utah.

“There has been evidence introduced in this case relative to the operations performed by the defendant on the plaintiff on April 25, 1952 and May 5, 1952, and the care rendered by him in connection therewith. Such evidence is not to be considered by you as any indication that plaintiff claims damage or injury resulting from either of the two operations or from the treatment afforded to the plaintiff by defendant with respect to said operations. Plaintiff does not make such claim.”

Appellant's requested instruction No. 9 set forth above was intended to confine the attention of the jury on the issue of negligence to a specific period, and to advise them that there was no claim of any improper medical diagnosis, performance of the operations or post-operative treatment outside of such period. Appellant believes this to be of the utmost importance in this particular case, because of the fact that there was evidence of herniation of an incision. Because the issue was confined to abandonment in a particular period, appellant did not attempt to introduce expert medical testimony as to why the herniation occurred or whether in fact there

was anything unusual, or to negative the possible thought that this represented the result of any dereliction of duty of the appellant. The importance of this type of instruction was that an incision had in fact herniated, which to the uneducated layman might in and of itself indicate negligence, a potential to be avoided because a jury might in its own mind decide that while there was no abandonment something was wrong with the operational procedure. Appellant was entitled to such an instruction, yet the court itself does not in any way deal with the specific problem and the only reference to the period is found in its Instruction No. 1 (R. 47) which is simply the opening summary of the claims of each of the parties. There is not the slightest admonition to the jury relative to the prior period of treatment and particularly the manner of performance of the two prior operations, and certainly appellant was entitled to have this period of abandonment clearly defined not only as establishing the beginning and end of the period but excluding other periods irrelevant under the issues. This failure constituted prejudicial and reversible error, particularly since the requested instruction tied directly to the theory upon which defense of the action was based.

Points Nos. 5 and 6

These two points will be considered together, since they are related. Point No. 5 refers to the failure of the court to give appellant's requested instruction No. 11 (R. 44), and Point No. 6 to the error of the court in giving

its instruction No. 5 (R. 49). The request and the instruction read as follows:

Appellant's requested instruction No. 11

"You are instructed that in this case the plaintiff Gene Spendlove was a mental incompetent and a ward of the American Fork Training School, a public institution for mentally deficient persons. During all times herein involved he was living with and under the direct supervision of his parents, Maude and John Spendlove.

"You are therefore instructed that the defendant, Dr. S. W. Georges, had a right to assume that the parents of Gene Spendlove would take such action with reference to employment of doctors and seek proper medical attention for Gene Spendlove as would be taken by any normal person in the exercise of reasonable care in his own behalf under similar circumstances."

The court's instruction No. 5

"In this action the defendant as an affirmative defense claims that the parents of the plaintiff were negligent in the particulars set forth in Instruction No. 1. If you find that the defendant was guilty of malpractice or negligence, then you should consider and determine whether the parents of the plaintiff, or either of them, were also guilty of negligence, and further, whether such negligence was an efficient intervening cause which displaced the conduct of the defendant in proximately producing the plaintiff's injury and damage. However, if the negligence of the parents was only a concurring cause of the plaintiff's injury, then you should find against the defendant on this defense.

“The test by which you will determine this issue is as follows: If the defendant foresaw, or by the exercise of ordinary care would have foreseen, the probability of the conduct of the parents of the plaintiff, and the probability that the defendant’s conduct and that of the parents would result in injury to the plaintiff, then the conduct of both was the proximate cause of the injury. But, if the probable result could not have been foreseen and if the immediate cause of the injury was the conduct of the parents, then your verdict must be in favor of the defendant, no cause of action. The burden is on the defendant to prove by a preponderance of the evidence the above proposition.”

Appellant’s requested instruction No. 11 set forth above, advises the jury that the appellant had a right to assume that the Spendloves would take such action with reference to the employment of other doctors as would be taken by any normal person in the exercise of reasonable care in his own behalf, in similar circumstances. This is a logical request and an important facet of this case, because this was an assumption that the doctor was entitled to make, particularly in view of the mental incapacity of the respondent. It defines a part of the relation between the Spendloves and their respondent son, and affirmatively tells the jury that the parents are not strangers to this case, but individuals who have a definite obligation relative to the matter of securing and arranging for medical assistance, if it is required. However the court, in a studious attempt to avoid reference to the actions of the parents, fails to instruct the jury in this regard. Moreover, it directly relates to the appellant’s

possible actions in view of the medical testimony stating that in Provo, Utah, professional ethics prevented a physician from forcing a patient to accept another physician, and affirmatively showing that the most he can do is to advise either the patient or his custodian of an inability to attend because of illness, perhaps offer to secure other medical assistance, and to thereafter leave the matter to the patient or his parents.

The instruction given by the court imposes a distinctly different duty, however, and in effect destroys the right of the physician to make such assumption and forces him into a guessing game as to what action the parents might take, even in the face of their positive knowledge of the physician's illness preventing him from attending any patient or engaging in any way in his practice. This is so because the instruction states that if the appellant foresaw, or should have foreseen, that the probability of the conduct of the parents of the respondent would result in injury to the patient, then that would unite with his actions and both would be the proximate cause. It then goes on to add that if the probable result could not have been foreseen, and the actions of the parents were the immediate cause of injury, then the jury shall find for appellant. The physician should be allowed to assume that the parents will act as reasonable individuals in securing medical assistance, but the instruction in effect forces him to psychoanalyze the parents to determine what these particular individuals might do under the circumstances. It would impose an unreasonable and unwarranted burden so far as the instant

case is concerned, particularly when it is establishing a general obligation of the physician not to one case but to a tremendous number which may be pending in his practice at a time when he is stricken with illness. The only logical and reasonable rule of law to be applied would permit the physician to assume that his patients will act as a reasonable man would act under the circumstances, and not forcing him into a position of trying to anticipate the actions they might take.

Appellant asserts that this distortion of the duty of the physician toward his patient is extremely prejudicial, contrary to the theory on which the defense was in part conducted, and since it must have influenced the jury, prejudicial and reversible error.

Point No. 7

This point is directed to the Court's Instruction No. 7 (R. 50), to which appellant excepted (T. 242, 243). The instruction attempted to define the act of abandonment, and reads as follows:

“You are instructed that where a physician is employed to attend a patient the relationship of physician and patient continues until ended by the consent of the parties, or revoked by the dismissal of the physician, or until his services are no longer needed. The physician is required to exercise reasonable and ordinary care and skill in determining when to discontinue his treatment, and where he fails to attend upon his patient and terminates his employment without notice to his patient and without affording the latter an opportunity to secure other medical attendance, he is liable for any damage caused thereby.

“In this case if you find from a preponderance of the evidence that the defendant discontinued the care and treatment of the plaintiff; that such care and treatment was reasonably necessary, and that the defendant failed to notify the plaintiff or the plaintiff’s parents that he was discontinuing such care and treatment, or that he was unable to render further service, then the defendant was guilty of malpractice in abandoning the plaintiff. And if you further find that the plaintiff suffered injury and damage as a proximate result of such conduct on the part of the defendant, then your verdict must be in favor of the plaintiff.”

The one salient fact with reference to the claimed abandonment was the undisputed illness of the appellant during the period in which the abandonment is claimed to have occurred. Yet the instruction does not in any way mention such illness, but simply sets forth an abstract proposition of law which seems to have been taken from the case of *Ricks v. Budge*, supra, and which is of limited assistance to the jury.

The court undoubtedly had difficulty in framing this instruction because it is impossible to do so upon facts as to which there is any dispute. In the second paragraph of the instruction appears the following:

“ . . . that the defendant failed to notify the plaintiff or the plaintiff’s parents that he was discontinuing such care and treatment, or that he was unable to render further service, then the defendant was guilty of malpractice in abandoning the plaintiff.”

Yet the testimony indicates without dispute that the

appellant notified Mrs. Spendlove of his serious illness, his inability to treat the patient, and even offered to get another doctor. The requirements of the appellant's duty had apparently been fully satisfied, yet it must have mystified and confused the jury to find this instruction to be applied against the undisputed testimony, and an implication that the notice received by the parents was inadequate, and that something additional or different was required. If the court felt that something more was required, it should have made that fact clear to the jury and indicated just what might be involved in such additional notice. In all events it should have tied the facts of this case to its definition of abandonment. Moreover, the instruction deals needlessly in unrelated and abstract legalities. For example, in the first paragraph it states

“The physician is required to exercise reasonable and ordinary care and skill in determining when to discontinue his treatment . . .”

This would seem to be an indication on the part of the court that there was somehow an issue on this before the jury, and that there was an element of volition on the part of the doctor in determining that his services were no longer required. It would be applicable to a situation where the physician simply ceases treatment although he is perfectly capable of continuing it if desired. That is distinctly contrary to the facts of this case, where the physician was so ill he could not continue his practice whether he wanted to or not. There is no issue before the jury on this stated rule of law and no reason why the

court should have given it since it could obviously cause a conjecture on their part which had no place in this case. Again, there is an illustration of the court's approach to its instructions by the use of broad generalities of law, correct in an academic sense, but totally unrelated to the case. Unfortunately juries are not concerned with a legal education but in reaching a decision on the facts of a case under the specific instructions of the court. Statements of law unrelated to the facts can only lead to confusion, uncertainty, and error.

CONCLUSION

Respondent has wholly failed in his attempt to establish the fact of abandonment, the burden of which he necessarily assumed. The undisputed evidence shows that when the appellant became so ill that he could no longer continue the practice of medicine, the parents of respondent were notified of this fact, and of an offer to secure other medical assistance if they desired, a choice necessarily left to them. Apart from the fact that the appellant fulfilled every requirement of the law of abandonment so far as notice was concerned, the evidence further failed to show the existence of an emergency or pressing need for medical services, which is an additional element of abandonment. Moreover, there was not one scintilla of evidence to establish any causal relation between the alleged abandonment, even if it had been established, and any pain or suffering of respondent, directly or indirectly. The jury could do nothing more than engage in the vaguest conjecture and surmise.

The instructions were essentially generalities of law which were not only of limited assistance to the jury, but tended to confuse rather than to establish a set of standards by which the evidence could be adjudged by applicable legal principles. They consistently rejected the theory of the case which appellant was entitled to have submitted, if in fact there was any basis upon which to submit the cause to the jury.

Appellant submits that the trial court erred in the various rulings and acts set forth under the points herein presented and argued.

Respectfully submitted,

EARL J. GROTH and
SKEEN, THURMAN, WORSLEY
& SNOW

Attorneys for Appellant.

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