

1954

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

Utah Supreme Court

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Rich, Elton & Mangum; Attorneys for Respondent;

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## Recommended Citation

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

FILED

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Clerk, Supreme Court, Utah.

GENE G. SPENDLOVE by  
JOHN A. SPENDLOVE, his  
Guardian Ad Litem,  
*Plaintiff and Respondent,*

— vs. —

DR. S. W. GEORGES,  
*Defendant and Appellant.*

} No. 8217

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Brief of Respondent

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RICH, ELTON & MANGUM  
*Attorneys for Respondent*

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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GENE G. SPENDLOVE by  
JOHN A. SPENDLOVE, his  
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*Plaintiff and Respondent,*

— vs. —

DR. S. W. GEORGES,  
*Defendant and Appellant.*

No. 8217

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## Brief of Respondent

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Appellant's brief, as is usual in malpractice cases, is devoted almost entirely to a statement of the testimony of the doctor, his associates and his nurse. There is one thing, however, that counsel did not tell this Court: The jury of the doctor's neighbors didn't believe it; nor were they obligated to do so, much as the doctor and his counsel desired that result. The jury was not considering the usual malpractice case based upon improper diagnosis or treatment where professional skill only is involved and where expert evidence is necessary and usually controlling. It was a case based upon abandonment, and in

such a case the doctor and his witnesses stand in no favored position before the bar. The jury may believe or not believe the evidence given by either side. In this case they chose to believe the plaintiff.

It therefore resolves itself into a question as to the sufficiency of the evidence presented by plaintiff; and the questions presented by the instructions given and requested.

Let us see, therefore, whether the evidence presented by plaintiff made a case of abandonment, under the authorities for consideration of the jury.

## STATEMENT OF FACTS RESUME OF EVIDENCE

The jury having found in favor of plaintiff, the following is an abstract of the evidence most favorable to plaintiff's case.

### MRS. SPENDLOVE:

Plaintiff is guardian ad litem for his son, Gene G. Spendlove, 38 years old (R. 48), an incompetent. They live at Provo, Utah. Gene is feeble minded and, since 1931, has been a ward or inmate of the American Fork Training School, with certain exceptions as hereafter noted. Normally he is about five feet eight inches tall and weighs around 200 pounds (R. 49).

On April 25, 1952 Gene was home from the Training School when he was seized with a terrible pain and

screamed, holding his abdomen (R. 50). They called the school and were advised to call their family physician. Their family physician was the defendant, Dr. S. W. Georges. They called him and he came to the home that evening. He diagnosed it as either a broken appendix or perforated ulcer and ordered him taken to the Utah Valley Hospital, which was done (R. 51). He was operated on that night by defendant. He remained in the hospital until May 4th under defendant's care. Immediately after the operation defendant informed Mrs. Spendlove and her daughter, Mrs. Breinholt, not to build up any hopes too much, that he was very bad, had a perforated ulcer, going down into his abdomen, and tearing a hole as it went, and peritonitis had set in. The only hope defendant gave was that while there is life there is hope (R. 52).

On May 4th he was taken from the hospital to his home. He stayed home that night and the following day (R. 53). That night the whole incision broke open. They tried to locate defendant and finally did so. He didn't want to come down and said, "Get him to the hospital." The defendant was asked, "Dr. Georges, can't you please come down?", to which he answered, "I guess I can" and came to see the patient. That was the evening of May 5th (R. 54). He was taken back to the hospital and a second operation was performed by defendant. So far as the Spendloves knew, no other physician was involved. He was in the hospital a little over five weeks and during this time the defendant was called out of town and Dr. Judd of Springville took care of Gene (R. 55).

He was released from the hospital sometime in June and the nurses told Mrs. Spendlove what to give Gene (R. 55).

Four or five days later defendant said to bring Gene to his office, which was done (R. 56). Thereafter he was taken to the office once or twice a week.

After he was treated this way and didn't get better, sometime in July or August the defendant demanded pay for the second operation and said, "This boy is about to break us" (R. 57).

About that time the defendant told Mrs. Spendlove to dress it herself and bring him back once a week (R. 57).

During this time the place where the operation was performed was running continually, it never healed up, and it had red bean-like things coming out in two different places and was draining (R. 57). That condition continued. About September 13th she took Gene to the defendant's office and she also talked to defendant on the phone. The defendant told Mrs. Spendlove that it would have to be operated again but we hadn't paid for the second operation. "And I told him we didn't have it, that I was nearly crazy" and "I guess I will have to appeal to my Church". The defendant at that time said, "I would rather this be healed up but I won't let him go over two weeks."

About a week later, about September 20th, she called on the phone and talked to defendant (R. 59) and de-



fendant again said that he would have to "open him up" and again mentioned about the money. He was informed that they owed the hospital one thousand dollars and didn't know what to do, and he said again that he couldn't help that, and made an appointment for a week later.

About a week later, on September 27th, Mrs. Spendlove went to the office. The defendant was not in—only the nurse. Mrs. Spendlove inquired for defendant and was told that he was not in. She was given no other information (R. 60). The nurse said the doctor was not available. She was asked if he was available at his home and was informed, "No, he isn't available there either." She was asked if he was out of town, and was informed that he wasn't. Mrs. Spendlove said, "Well, could I call him at his home?" And the nurse said, "No, he isn't available there either." Mrs. Spendlove said, "Do you know if he has said anything about Gene; has he got the operation scheduled?" The nurse said, "No, he did not, I know he hasn't got the operation scheduled." And Mrs. Spendlove said, "I know we were going to talk about it today. There is nothing to do, we can't discuss it when the Doctor isn't available," and she left.

Three days later Mrs. Spendlove called the defendant's home. She had heard nothing from anyone in the meantime. Mrs. Georges answered the phone and said the defendant was in but was ill (R. 61). She said the nurse was there and to talk to her.

"Q. Did you talk to her?"



“A. I did. I also told her, ‘Jean, let’s wait until the Doctor gets a little better.’ And she said, ‘No, he can’t see you but he will talk to you.’

“Q. And did you talk to Dr. Georges?

“A. I did.

“Q. What was the conversation, Mrs. Spendlove?

“A. Well when I first talked on the ‘phone, I said, ‘Gee, Dr. Georges, I am sure sorry to hear you are so ill.’ Before I could say another word he lashed out, ‘I am not getting out of this bed for the President of the United States.’ And I hadn’a asked him to.

“Q. What was the rest of the conversation?

“A. 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.”

The defendant never saw his patient, Gene, again.

From then until November 7th Mrs. Spendlove changed the bandages and put the powders on, the pre-

scription that defendant had given. No other physician called.

No contact was made during that time by defendant or his office (R. 63).

During the first part of November 1952 the Ward Bishop called to see Gene and he was taken to the L. D. S. Hospital for treatment by Dr. George Miller (R. 63). He was also treated by Dr. Groneman.

On February 28th he had a third operation. He responded to that operation physically. After the operation there was a change in his mental condition. He grew more nervous, he would talk and laugh, and they couldn't keep him in bed (R. 66). He was then sent to the Salt Lake County Hospital, the psychiatric ward, and was then sent to the State Hospital in Provo (R. 67). He remained there about three months and was then sent back to the Training School.

“Q. Now Mrs. Spendlove, I believe you testified that it was about September 27, to the best of your recollection, was when you last heard from Dr. Georges; is that right?

“A. Well, I didn't see him on the 27th; I saw him three days later.

“Q. Now from the time you either last talked to him or saw him until the time Gene was taken to the L.D.S. Hospital, can you describe to the Court and Jury the condition of Gene as you observed it?

“A. Yes, he steadily lost weight, and he grew pale, paler, he was in terrible pain, and he

didn't sleep well nights. He would grab at his abdomen and groan, he couldn't bend over without it hurting him.

“Q. And did this remain throughout that period of time, these conditions you are speaking of?”

“A. Yes.”

After the first operation Dr. Georges said they had a great deal of difficulty with the peritonitis. Mrs. Spendlove did not see Dr. Judd or Dr. Thomas at that time (R. 69). At that time defendant said Gene was very seriously ill.

In May, the defendant called (during the period of the second operation) and said his father had died, and that Dr. Judd would take care of Gene while he was away. Dr. Judd took care of him for about a week until defendant returned (R. 70-71). When defendant returned he took over again (R. 71).

“Q. When did you first find that out, if you ever did? (That Dr. Judd had assisted in operating.)

“A. I never found it out. I didn't ever know he did.

“Q. You didn't even know it following this week when Dr. Georges was on the West Coast?

“A. I didn't know that he helped, was never told.

“Q. That is to say, Dr. Judd said nothing to you that he had assisted?

“A. No, he didn't.

“Q. You didn’t object to Dr. Judd treating him or helping with the boy, did you? I say boy, I mean Gene.

“A. No, I didn’t object, his father was dead, I couldn’t see how I could do anything else.”

After the second operation the defendant said he should wear a kind of corset, which was made for him to wear (R. 73).

It was the latter part of August or first part of September when Mrs. Spendlove was instructed to change the bandages and put on the powder (R. 76). The prescription was September 13th. That continued until November 7th when he was taken to Dr. Miller.

It was the latter part of September when Mrs. Spendlove took Gene to defendant’s office by appointment and was told that he was not available.

When Mrs. Spendlove talked to defendant on the phone he did not ask her if she wanted him to call Dr. Judd (R. 80) or any other doctor. He told her twice, “I won’t get out of bed for the President of the United States” and said, “Do you want another doctor?”

Mrs. Spendlove didn’t call defendant’s office again. She didn’t call Dr. Judd. Dr. Georges said he would be all right until he got better (R. 81).

The release of the case by Dr. Georges was discussed six weeks later (R. 81). The release was obtained by the Bishop of the Ward.

“I knew at that time that defendant had abandoned the case” (R. 82). (This was produced by defendant on cross-examination.)

At the time of the first operation Gene weighed about two hundred pounds (R. 82). He was seriously ill during that first operation. He was likewise very seriously ill from the second operation. He was a very sick man (R. 82-83). He lost a substantial amount of weight—had difficulty in sleeping—had hiccups all the time.

Gene was very nervous and upset after the first operation; also after the second. He would get that way every time he had to go to the hospital for treatments (R. 85). It came every time he had worry about something or have fear about something.

The reason Mrs. Spendlove didn't call Dr. Georges after her last conversation was because his nurse told her he would be back the following Tuesday and she would call her. Naturally we waited there day after day, hour after hour, to have him call, because I didn't figure he would quit the case. He told me in the telephone conversation he would be all right until he could get better. When I read he was in Arizona I got worried. Then I contacted the Bishop (R. 88).

We were never contacted by Dr. Judd or his office or by Dr. Georges or his office during that time (R. 88). The nurse didn't call me the following Tuesday. She never called me again. That is why I called him at his home. He told me he was ill. We simply waited and

waited. I was waiting for Dr. Georges to call, until it went weeks and he never did call again (R. 89). Then finally we talked to the Bishop and he went to the L. D. S. Hospital.

MR. JOHN A. SPENDLOVE:

Father of Gene Spendlove. Was present at the hospital after the first operation on Gene was performed. Understood it was performed by defendant, Dr. Georges. Did not know of the presence of any other doctor (R. 91). Didn't know Dr. Judd and doesn't know him now.

After the first operation Gene was brought home about eleven o'clock Sunday and was returned to the hospital about 7 or 8 o'clock Sunday night because the first operation had broken open and his insides were all oozing out. Dr. Georges came just before we took him back to the hospital.

Was present at the hospital after the second operation in May 1952. Understood it was performed by Dr. Georges. Did not know of anyone else participating in that operation (R. 92).

The first time he ever heard of Dr. Judd was when Dr. Georges went to California on the death of his father. His understanding was that Dr. Judd was looking after Gene during that absence (R. 93).

Gene was at the hospital five weeks on the occasion of the second operation. He was then returned home.

After the second operation the doctor refused to come to the house so we took him to the office (R. 93). We took him once a week until an abscess appeared and then we took him twice a week.

He was taken to the L. D. S. Hospital on November 7, 1952. For four to six weeks prior to that no one was treating him except my wife (R. 95).

Never received any information that Dr. Judd was to take care of Gene.

During the time when Mrs. Spendlove was taking care of Gene alone, his insides were all pushed over to the left side. His navel was right on the left side and it had apparently broken inside and it bulged out like a basketball or football. He was getting weaker and thinner all the time (R. 95).

There were ulcerated areas. It kept running pus in several places along the incision. The doctor never closed it. Gene seemed to be in a great deal of pain and had a look on his face and would scream every now and again (R. 96). This occurred periodically during the entire period (prior to going to the L. D. S. Hospital).

After release from the L. D. S. Hospital there was a difference in his mental condition. He laughed and talked a lot, and cried, and was extremely nervous and we knew that something was happening. We took him to the Salt Lake County Hospital, psychiatric ward, and



from there to the State Mental Hospital. He stayed there about three months (R. 97).

When Gene went to the L. D. S. Hospital I heard that a release had been secured and his entire care had been turned over to the Hospital, prior to his going there on November 7th.

He knew that there were other doctors in the Provo area (R. 99).

Gene lost weight continuously from the time of the first operation.

The hernia developed some time before the last trip to Dr. George's office (R. 100). He was holding his hands to his stomach and screaming. He was a very sick man (R. 100). He had these same kind of stomach pains following the first and second operations (R. 101). The first time during this period that I noticed the mental state was in the last day or so in the period at the L. D. S. Hospital (R. 101). That was around March 1953. He had had these reactions before.

The last time before this that he had such a reaction was nine years before (R. 102).

MARJORY BREINHOLT:

Daughter of Mr. and Mrs. Spendlove; sister of Gene (R. 102-3). Was present at the Valley Hospital after the

first operation in April 1952. After the operation Dr. Georges came out of Gene's room. My mother asked him, "How is he?" And he said, "He is a mighty sick boy. He is full of peritonitis." I asked him, "How are his chances?" and he said, "Well, where there is life there is hope." I did not note the presence of any other doctor besides Dr. Georges (R. 104). No other doctor was mentioned to anyone. Heard nothing of Dr. Judd.

Was present at the Hospital after the second operation. Talked to Dr. Georges and asked him how Gene was. He told me that the peritonitis was worse this time than in the other operation and that he was a mighty sick boy (R. 105).

After the second operation saw him every day. For four to six weeks prior to going to the L. D. S. Hospital the only treatment Gene got was what my mother was doing (R. 106).

During that period he got thinner right along. There were occasions when he would grab himself and groan. He was inactive, tired out physically (R. 107).

Dr. Georges was our family physician (R. 108).

Gene lost about seventy pounds altogether (R. 108). He was a very sick man following the first and second operations. He was critically ill (R. 109). When he would grab himself and would turn just deathly white (R. 109).

## GERALD STONE:

Groceryman; has known the Spendlove family for about fifteen years; visited their home many times during 1952; Bishop of the L. D. S. Ward. Kept in touch with the family during Gene's illness. He was a sick boy (R. 112).

During October he was not going to the doctor. I approached the family personally and asked if they needed help.

In the Welfare Program of the Church we have to have a release from the attending physician to take over a case and admit them to the L. D. S. Hospital (R. 113).

I talked with them and then I called Dr. Georges' office and talked to his nurse, or someone answered the phone and I was instructed to get in touch with Dr. Judd in Springville and get that release. I talked with Dr. Judd and he told me to come to his office and he would give a release (R. 113). I went to his office and got the release and sent that release with Gene to the L. D. S. Hospital.

The time I talked to Mr. and Mrs. Spendlove about the Welfare Program was right near the time I made the application for the release. I didn't know the circumstances before that (R. 115). I could then see that they needed some assistance.

Under the Welfare Program the Church assumes full care of the patient and the settlement is made later (R. 116).

That is why we got the release from Mr. Judd in behalf of Dr. Georges.

MARK K. ALLEN:

Lives at Provo; psychologist; in the Department of Psychology at the University and consultant for the State Training School at American Fork (R. 117).

Has known Gene Spendlove very well; gave him examinations to determine his mental level; he would be classed as a mentally defective person; has an intelligence quotient of 76, mental age about eleven years (R. 119). During the time he has improved a couple of years in mental age. The mental age of eleven years is as high as I have found it. In 1952 his mental age was 11. He showed a gradual improvement from 1933 to 1946. It then leveled off and was quite consistent (R. 120).

DR. GEORGE ALBERT MILLER:

Licensed physician and surgeon in the State of Utah (R. 33), treated Gene Spendlove in the out-patient clinic at the L.D.S. Hospital on November 7, 1952; and treated him subsequently.

Upon initial examinations found him in quite good general physical condition; all of the positive findings were in the operative area (R. 34).

That was on the abdomen. There was a seven inch surgical scar just to the right of the midline of the upper abdomen. About one inch to the right of the scar there were two small draining areas about 1cc in diameter each. They were about 2½ to 3 inches apart. In the area of the incision there was a large hernia which extended for most of the length of the incision. The stomach was distended. There was a definite weakness there in the area of the wound which allowed the abdomen to protrude (R. 34).

“Q. Now you mentioned, Doctor, that there were two small draining areas. What did that indicate?

“A. My impression was then that there was something in there that was causing those two small areas to remain open and drain.

“Q. Will you describe to the Jury the nature of treatment that you engaged in with the Plaintiff, Gene Spendlove?

“A. At the first visit, as I said, I thought there was something in the wounds, in the areas, that kept them draining. So I probed the two areas. I removed a cotton suture about an inch and a half long from the upper area. I probed the lower area but I couldn't find anything. So I cauterized both areas with silver nitrate, put on a dry dressing, and told him to return in about two weeks, and instructed his mother to change the dressing.

“Q. Did you engage in any further probing after that time?

“A. Yes sir.

“Q. Did you find anything?

“A. Yes sir.

“Q. Would you describe the nature of those occurrences to the Jury?

“A. He returned to the out-patient clinic on the 15th, and I probed both areas again, and I removed a two-inch cotton suture from each one, and cauterized them again, put on a dry dressing, and asked them to return in another two weeks.

He returned on the 29th of November. The areas were smaller. I cauterized both of them again—I probed them again and couldn’t find anything. I cauterized them and asked them to return on the 13th of December.

He returned then. I didn’t probe at that time because the areas were definitely smaller. And on the 27th of December he returned. We had an upper gastric intestinal x-ray taken to see what the state of his ulcer was. At that time I drew out another suture from the lower area. I stand to be corrected there, that was another one from the upper area. That was the last one I removed.

“Q. How long did you treat the Plaintiff, Doctor?

“A. I went off the surgical service the end of December. However, on the 17th of January there were no other surgical residents available so they asked me to come down and see him, and I saw him on the 17th of January.

“Q. What was the purpose of all this treatment, Dr. Miller?

“A. To heal those small areas. There was definite infection at the draining site. It would

be impossible to do any surgery until both of these areas were—

“Q. Until they were surgically conditioned?

“A. Yes. sir.

“Q. And these areas indicated infection, did they not?

“A. Infection and a foreign body, which any suture is of course.

“Q. Doctor, at the time you first saw the Plaintiff, Gene Spendlove, was he in need of medical attention?

“A. Yes.”

We repaired the hernia in the incision. It was necessary and desirable to cure the infection at or near the operative site because of the danger of spreading if you attempt to do any surgery (R. 37). The initial treatment was solely to clear up the spots of infection.

The suture keeps the sinus open so that infection can get in (R. 39), and the proper treatment is to get those sutures out as they come up and keep taking them out without actual operative procedure. The first time I probed a found a suture.

The next visit on November 17th I again removed two cotton sutures (R. 40). The next visit on November 29th and until December 27th I finally found another suture, which was taken out. The final operation was performed on February 27th (R. 40). Prior to this he was an out-patient (R. 41).



“Q. Now during that period what you were basically working on was to get this infection cleared up, weren’t you, so that you could then go ahead and operate?

“A. Yes sir.

\* \* \* \*

“Q. Will you explain, Doctor, how this pressure comes about on the abdomen from the hernia? That is, you have a herniated incision, as I understand, and there was some distention, was there, of the abdomen? Do I make myself clear?

“A. There is a little difference here in medical terms. Distention usually means bloating with gas or something like that. That is what we mean by distention. Now there was actually nothing inside wrong with the abdominal organs. The abdominal wall was weak, allowing the abdomen to protrude without any actual increased pressure inside. Most of the strength of the abdominal wall is due to the muscles and the facial layers, and it is the facial layers and muscles that have given way.

“Q. In other words, what you have observed was simply the result of the muscular layers of the abdomen at the incision coming apart?

“A. That’s right.

“Q. And there was a hernia?

“A. That’s right.

“Q. And as a result they weren’t holding the stomach in tight as they would had they been in a normal condition?

“A. That’s right.

“Q. And that is the so-called swelling, or whatever you want to call it, that you were talking about?

“A. Yes.

“Q. The pressure of the bowel on the stomach wall?

“A. Yes.

“Q. So far as the actual operation was concerned, Doctor, the necessity of an actual hernia operation, there wasn't anything particularly urgent about it, was there, until such time as you could get this cleaned up.

“A. No sir.”

It is extremely difficult to say whether or not probing would have brought the sutures—I mean, whether or not the probing had been started sooner, but it is questionable whether we would have found all the sutures sooner than we did (R. 45).

“Q. Mr. Worsley mentioned to you Doctor, unless you cleared up this infection, there would have been danger of it spreading during the operating procedures?

“A. Yes sir.

“Q. And is it true that where there is infection present there is always a danger of it spreading?

“A. That's right.

“Q. And particularly the danger when infection exists in the area around the stomach; is that right?

“A. It would depend, sir, on if you want to actually enter the abdominal cavity at the time

of operation. If you want to open up the peritoneum again it would possibly start peritonitis again, which would make it quite serious to the other parts of the body, if that is what you mean.

“Q. And the other point I am making, infection always needs treatment, does it not?

“A. Yes sir.

“Q. Now you mentioned that you probed and later discovered the small portions of suture. Now didn't your probing help discover and find and remove those pieces of suture you spoke of?

“A. The only way we could find them is by probing, you couldn't see them. Pardon me, you could see the first one.

“Q. You could see the first one?

“A. You could see the first one.

“Q. On examination?

“A. Yes sir.

“Q. This herniation which you speak of, Doctor, do you have any idea what causes that?

“A. Probably the major contributing factor is the infection.”

In addition to the foregoing evidence produced in plaintiff's case, the following admissions were obtained as a part of defendants case.

DR. GEORGES:

Described first and second operations and post operative treatment of Gene Spendlove.

Has been Spendlove family physician since 1945 (R. 124).

On June 21st there was a small spot on the incision the size of a pea, which was starting to drain; changed the dressing, cleaned it up (R. 142). During June and July to July 28th Gene was eating well and feeling good except he had this drainage (R. 143). It was right on the incision. He developed the first one which we treated and that healed, and a little later on he had another one just above that. On one occasion pulled out one of the cotton sutures (R. 144). A suture is a foreign body and the tissue reacts to a foreign body and will start a little ulceration and there will be a little drainage (R. 145).

During August it was still draining (R. 145).

There was evidence of herniation started appearing during August 1st. I called Mrs. Spendlove's attention to it (R. 146). Saw Gene during September, the last time September 30th (R. 149). He was doing fine. The drainage was very small. I instructed Mrs. Spendlove to change the dressing and put the powder on, and I would see him once a week (R. 150). This was about the 2nd of September. There was nothing specific said about the third operation. We were waiting to hear from the Bishop.

“Q. Was there any specific conversation about the church or the bishop then?

“A. No, there was no specific conversation from the bishop at all; that is, I hadn't heard any answer from either him or her.”

In the third operation the first thing you have got to do is to clean up the infection. It is very dangerous to re-enter the abdominal cavity when there is infection present. The infection was all in the wall, just about through two layers (R. 151). You have to take the old scar out, resew it, every layer, layer by layer, first your peritoneum, then your muscle, then your deep fascia, then your superficial fascia, then your skin (R. 151).

In September the distention wasn't very extensive, mostly in the region of the navel, because gradually it was getting a little larger (R. 152).

This man had a perforated ulcer with generalized peritonitis, or general infection. You couldn't in the presence of infection do a stomach resection or remove the ulcer. All you could do is close the hole and remove all the foreign bodies. But mind you, he still has an ulcer and is going to have pain as long as the ulcer is there (R. 152).

Had a cold on October 1st. Kept on working until Oct. 6th when he performed an operation (R. 152-153). Went to bed on Oct. 7th.

On Oct. 10th had telephone conversation with Mrs. Spendlove in which Mrs. Spendlove said "Well, I am terribly worried about Gene". (Dr. Georges then gave his version of the telephone conversation.)

That was the end (R. 156).

Stayed in bed until the 18th or 19th of October excepting for a visit to the hospital for x-ray (R. 156-157). Chest was getting better but sinuses were worse (R. 157). Left for Phoenix on October 23rd (R. 158). Stayed there until Nov. 6th.

The early part of November was informed of the release of Gene Spendlove (R. 162).

Knew that Gene was a defective person and was in the school for feeble minded at American Fork (R. 164).

When he was called again on May 5th the incision had opened and a nodule of the bowel was showing (R. 167).

Dr. Judd had a difficult time with the Gene Spendlove case while I was away in May to the funeral of my father (R. 168-169).

The first infectious spot started on June 21st—about a quarter of an inch in size (R. 170). One of them got larger. The last time I saw him it wasn't that large.

“Q. Would there be any opportunity, Doctor, of that little infected area getting larger?

“A. Yes, it could.

“Q. It could?

“A. Yes.”

Infection is always a dangerous condition (R. 172). There was drainage from the 1st to the 28th of July (R.

172). First discovered herniation the latter part of August. In September it was getting larger (R. 174). I had no knowledge of anyone giving medical attention to Gene Spendlove after the conversation with Mrs. Spendlove on September 30th (R. 176-178). I had no knowledge of him getting medical attention while I was in Arizona (R. 179). Returned to Provo Nov. 7th (R. 184).

“Q. Now there was some testimony, Doctor, with reference to the frequency with which hernia occurs in these abdominal cases where you have an abdominal incision.

“A. When you have abdominal incision of this type usually occurs or rupture occurs in one-third of cases.

“Q. Doctor, when you say ‘this type’ what do you mean? Is this particular type operation here with Gene Spendlove any different than other abdominal cases?

“A. Yes, because this was an infected case to begin with.

“Q. Does that infection have any relation to the development later on of a hernia?

“A. Yes, it weakens the tissues.”

DR. JUDD:

Was present at and participated in the first operation on Gene Spendlove (R. 188). There was infection present in the abdominal cavity. After the first operation didn't see any of the Spendlove family other than Gene (R. 191).



Assisted in the second operation on May 5th (R. 191). Was requested to take over the patient while Dr. Georges was away (R. 192). During that time for ten days I talked to the Spendlove family about Gene and took care of him (R. 192). During this period he had a bad coughing spell, four or five days, his temperature shot up to about 102, and the x-ray showed a little atelectosis in the lungs, which means when coughing he probably got a little plug in one of the bronchi and collapsed part of the lung (R. 193-194). Never saw Gene after he left the hospital.

On October 8th Dr. Georges asked me if I would take care of Gene if they called me and I said that I would (R. 198). Never called the Spendloves.

During the time Dr. Georges was in California Gene was critical for about a week (R. 200).

After my conversation with Dr. Georges on October 8th I was informed of the draining that was going on and that a further operation was anticipated (R. 203). My instructions from Dr. Georges were very simple, that if they needed care they would call me and I would see him and do what was necessary at the time I saw him (R. 204).

I knew on October 8th that Dr. Georges was the doctor for Gene. I never at any time after October 8th inquired of the Spendloves as to the condition of Gene (R. 204).

I have never seen Gene Spendlove since he left the hospital on June 10, 1952 (R. 208).

MRS. GEORGES:

On Oct. 10th I heard Dr. Georges say to Mrs. Spendlove on the phone, "Well you shouldn't worry too much about Gene because his case is not urgent" (R. 211) and he said, "I am too sick to come and see anyone; in fact I can't even get out to see the President of the United States."

JEAN ROWEN:

Registered nurse; works for Dr. Georges; was at the first and second operations.

"Q. Now do you remember a conversation that occurred in Dr. Georges' offices when Mrs. Spendlove and Gene were there toward the end of August when some mention was made of the necessity of a further operation on Gene?

"A. Yes sir.

"Q. And are those the individuals who were present?

"A. Mrs. Spendlove, the Doctor, and myself.

"Q. About when was that, do you remember?

"A. The latter part of August or first of September.

"Q. Will you tell us what that conversation was, Miss Rowen?

"A. He told Mrs. Spendlove that Gene would need another operation. And when he told

her this she was very upset, said she didn't know how they could stand any more expenses that their hospital bill had been terribly high, and that they just didn't know what to do. So he suggested to her that she contact the bishop and get some help from her church.

“Q. What did she say to that?

“A. She said she would see what she could do and we would hear from her.”

Dr. Georges told Mrs. Spendlove the third operation couldn't be done until the draining areas were clear (R. 218). Mrs. Spendlove got appointments from the receptionist.

During the last week of September or first week of October Dr. Georges was off work part of the time (R. 218). He was ill.

There was a conversation with Mrs. Spendlove the last of September or first of October. She wanted to talk to the doctor about Gene (R. 219).

On October 7th Mrs. Spendlove came to the office.

“Q. All right, tell us what that conversation was.

“A. I told her that the doctor wasn't in and that he wasn't available. And she was worried about Eugene. I told her that he just wasn't available in his office or at his home and **THAT HE WOULD HAVE TO GET IN TOUCH WITH HER.** Since it wasn't urgent I didn't tell her that the doctor was ill.”

The Bishop called about getting a release signed by the doctor and I said he could get it from Dr. Judd (R. 223). I advised Dr. Judd of the release (R. 224).

Dr. Georges drove to Phoenix (R. 225). Some friend drove down with him.

“Q. Now on or after October 10 of '52 did you ever contact the Spendloves?

“A. No sir.

“Q. Made no attempt to?

“A. I am not in the habit of calling patients.

“Q. You made no attempt to contact them?

“A. It isn't my position.

“Q. Nor did the office of Dr. Georges, to your knowledge?

“A. It isn't my position.”

DR. RUPPER:

Treated Dr. Georges from Oct. 9th to 20th (R. 229-234). He was able to talk to me. In my opinion he was able to a degree to instruct his nurse as to what to do about his office (R. 236).

From which evidence the following pertinent facts appear:

Gene Spendlove, an incompetent ward of the State at American Fork Training School, was a patient of defendant, who was called to render professional services

for him as physician and surgeon on April 25, 1952. Defendant found him to be suffering from herniated ulcer with peritonitis. Little hope was given for his survival. A corrective operation was performed on April 25, 1952. He remained in the Provo Hospital until May 4, 1952, when he was released to go to his parental home, although still a very sick man.

The following evening, May 5, 1952, the whole incision broke open. The defendant directed that he be taken back to the hospital and a second operation was performed by defendant that night. He remained in the hospital a little over five weeks under the care of defendant. During this time defendant was absent in California on account of the death of his father, during which time Dr. Judd of Springville took care of the case with the consent of Mr. and Mrs. Spendlove. This was for a period of about ten days. During this period, while defendant was away, serious complications developed and Dr. Judd had serious problems due to high temperature and continuous hiccuping of the patient. Upon defendant's return he resumed his handling of the case. The patient was released from the hospital in June and was returned to his parental home.

During the remainder of June and during July, August and September, 1952, he was taken once or twice a week to defendant's office for treatment by appointment. The place where the operation was performed was running continually and never healed up. Red spots appeared and it was draining.

About September 13, 1952 defendant advised them that another operation would have to be performed, but that he hadn't been paid for the second operation. He was advised that hospital expenses, the cost of medicines and the first operation had taken their finances to the point where they didn't know what to do. Defendant suggested that they appeal to the Church for aid. Mrs. Spendlove thought she would have to do this. At this conversation defendant said he would rather wait until the infection healed but he wouldn't let it go over two weeks.

About a week later, about September 20, 1952, defendant again stated the operation would have to be performed and again asked about the money. He was told that they didn't know what to do and defendant said he couldn't help that and made an appointment for a week later.

At the appointed time, on September 27th, Mrs. Spendlove went to the office with the patient. She was told that the defendant was not available but if he was back the following Tuesday she would call (R. 60, 88) nothing more. She then asked if he was out of town and was told that he wasn't. She was asked if he was home and was told that he wasn't available there either. The nurse was asked if the operation had been scheduled and she said it had not. The nurse said she knew they were to discuss the operation at that time but there is nothing to do, we can't discuss it when the doctor isn't available. At that time the nurse told Mrs. Spendlove that "We would have to get in touch with her". She didn't

tell Mrs. Spendlove the doctor was ill (R. 220).

After the conversation of October 1, 1952 the defendant remained at home until October 23, 1952, when he drove to Phoenix, Arizona (R. 225) and remained there until November 6, 1952 (R. 158). While claiming to be sick with pneumonia, he went to the hospital on one occasion for x-rays for himself and was at all times capable of talking to his office and giving directions to his office. He never contacted the Spendloves, nor did his office do so.

On November 7, 1952 the Ward Bishop called at the Spendlove home; and seeing Gene's condition, offered Church help. Under Church Welfare procedure he had to obtain a release of the patient before he could send Gene for treatment so he contacted the defendant's nurse, was told to get the release from Dr. Judd; did so and sent Gene to the L.D.S. Hospital.

When Gene arrived at the L.D.S. Hospital on November 7th he was attended by Dr. Miller. He found a seven inch surgical scar and about one inch to the right two small drainage areas about 2½ to 3 inches apart. In the area of the incision there was a large hernia for most of the length of the incision. The stomach was distended and there was a definite weakness in the area of the wound which allowed the abdomen to protrude. The drainage areas indicated infection, so he probed and removed some sutures at various times, which were causing the infection. The infection was treated and relieved by out-patient treatment between Nov. 7, 1952 and Jan.



17, 1953. It was not possible to do any surgery while the infection persisted.

Dr. Miller testified that when he first saw plaintiff on Nov. 7, 1952 he was in need of medical attention (R. 36).

The operation was performed on Feb. 27, 1953.

Immediately following this operation plaintiff (Gene) broke down mentally, was taken to the Salt Lake County Hospital and from there to the State Mental Hospital at Provo where he was kept for three months and was then returned to the American Fork Training School.

There was a direct conflict in the evidence on many issues, particularly as to conversations. The jury found those issues against defendant.

## ARGUMENT

### POINTS I AND II.

THE TRIAL COURT PROPERLY REFUSED DEFENDANT'S MOTION FOR DISMISSAL, MOTION FOR DIRECTED VERDICT AND REQUESTED INSTRUCTION NO. 1. IT WAS A JURY QUESTION AND THE JURY DECISION IS CONCLUSIVE.

Appellant's brief takes three positions:

(a) That there was no abandonment;

(b) That there was no evidence that the abandonment caused any damage; and

(c) That negligence of Mr. and Mrs. Spendlove caused any damage there was, if there was any damage.

Appellant's brief in this case reeks with confusion: (1) as to the facts relevant to a consideration of this case on appeal; and (2) as to the law applicable to the facts that the jury believed.

Counsel for appellant has assumed that because his client and his witnesses testified to something the jury had to believe them as against the plaintiff, and upon that false assumption has based the entire appeal in this case. Throughout the brief of appellant counsel confuses this case based on abandonment with cases relating to skill and diagnosis.

Plaintiff and his wife and daughter all testified that they had no knowledge of any connection of Dr. Judd with the case excepting for a ten day period in May 1952 when Dr. Georges was away in California by reason of the death of his father. Mrs. Spendlove denied that on October 3rd, when she talked to Dr. Georges on the phone, the name of Dr. Judd was mentioned in any way. The jury had a right to believe the evidence of plaintiff in this regard.

Surely counsel for appellant is familiar with the numerous decisions of this court to the effect that after

judgment all such disputes of fact are assumed to have been resolved in favor of respondent on appeal. And yet practically the entire appeal is based on the false assumption that the jury had to believe appellant in this regard.

There has been a lot of news in the press recently about "ghost surgeons" and we don't assume to know much about the subject, but so far as Dr. Judd is concerned in this case, excepting for that ten day period, it certainly was a phantom relationship so far as plaintiff was concerned; he knew nothing of him, did not employ him, nor authorize anyone else to do so, never consented to his acting in the case after May 22, 1952 because it was never discussed with them. Dr. Judd may be, and undoubtedly is, a thoroughly qualified physician and surgeon, but he was not plaintiff's physician and was not substituted to take care of plaintiff excepting during the ten day period in May. Appellant has erected a "ghost" straw man and then based his whole appeal on the phantom that the jury had to believe him.

Had plaintiff known that Dr. Georges was discontinuing his practice of medicine for a period of time by reason of illness, or even to take a vacation in Phoenix, Arizona for six weeks, and had they been told that plaintiff had to look elsewhere for medical service, a different case would have been presented. Plaintiff testified to no such facts; in fact the opposite. Here is a

summary of the final scenes in this tragic case as testified to by plaintiff:

(a) On Sept. 27th plaintiff and his mother went to the doctor's office by appointment to arrange for the third operation;

(b) They were told by the doctor's nurse that the operation had not been scheduled; that the doctor was not available either at home or in the office; that if he was available the following Tuesday the nurse would call; that the doctor's office would have to get in touch with Mrs. Spendlove;

(c) Silence from the doctor and his nurse;

(d) The patient is suffering with infection that is getting worse and an abdominal hernia that is breaking out until it looks like a football or basketball;

(e) The frantic mother calls the doctor and is informed that he has pneumonia and wouldn't get out of bed for the President of the United States; asks if the mother wants to get another doctor. She says, "No." The doctor then says, "it has gone this long. A little longer won't hurt."

(f) Silence; no call from the doctor; no call from the nurse; no call from anyone. The mother waiting anxiously day by day, relying on the doctor or his office to call;

(g) In the meantime the condition of the patient has become such that action has to be taken and the case is taken over by the Church;

(h) He was taken to the L.D.S. Hospital where he was found to be in need of medical attention; infected, and with abdominal hernia which needed surgery but the infection had to be cleared up first.

In this connection we must bear in mind the background of the case. This unfortunate patient was not normal. He was in a dying condition when and after the first operation was performed; full of peritonitis, and it was a question whether his life could be saved. The day following his release from the hospital the whole thing broke open again, and a second operation was performed. During his convalescence from the second operation, and while in the hospital, complications developed and again it was touch and go as to whether he would survive. Again the infection developed and a new operation was scheduled. At the last personal examination in September the doctor said the infection was getting worse and the hernia larger, and the doctor said the operation should not be delayed longer than two weeks.

Place those facts against the assurance of the doctor in early October that "a little longer won't hurt" and the fact that on November 6th the doctor at the L.D.S. Hospital (testifying for plaintiff, but hoping to help his fellow practitioner wherever he could), testified that the patient needed medical help.

Also let us look at another bit of background. The doctor had been paid \$200 for the first operation, but he hadn't been paid for the second. Ten days in the hospital for the first operation and five weeks in the hospital for the second operation, plus \$35.00 per day for medicines, had taken the family resources. In August the defendant wanted to know about money and was told that they didn't know where they could get it. He suggested and they concurred that maybe the Church could help. The doctor candidly admitted that he was waiting for this financial help to plaintiff.

Did the doctor inquire from anyone about this patient after Sept. 30, 1952? He did not.

Did his nurse inquire about this patient after Sept. 30, 1952? She did not.

Did Dr. Judd or anyone else on defendant's behalf inquire about this patient after September 30, 1952? Dr. Judd answered that one. He did not and wasn't supposed to do so.

This man, full of infection and with a herniated abdomen distended to the size of a football or basketball, was left unattended, ignored and neglected so far as medical care was concerned, excepting for the ministrations of his mother.

Up to Sept. 30th his condition had become such that he required the examination and medical services of defendant once or twice a week and his condition was



getting worse, according to the doctor. Why, then, was he left wholly unattended by anyone from then until Nov. 6th?

Defendant said he had pneumonia. Mrs. Spendlove admitted that he said he had pneumonia. Nothing was said, according to either version of the conversation as to how long the doctor would be ill. The nurse indicated he might be back in the office the following Tuesday. In these days of wonder drugs and anti-biotics pneumonia doesn't mean what it used to. In any event it was not completely disabling to the extent that the doctor couldn't lift a hand to take care of his patients. He was able to go to the hospital for his own x-rays. He was able to communicate with his office to give directions what to do with patients. He was able to get in his car and drive with a friend to Phoenix. But according to his story, he was not able to give any directions about this patient; he wasn't even able to inquire about him before taking off for Phoenix; he wasn't even able to lift the telephone before he got in his car to leave for Phoenix to find out whether this patient was dead or alive. He must have been in fairly good condition to undertake the drive to Phoenix, and it didn't all occur within a matter of hours. Jurors were not born yesterday, nor do they have to believe all that a doctor, or his nurse, or their associates say. They have the right to believe others. And it is undisputed that the last word Mrs. Spendlove gave him as to Gene's condition was that he was getting worse and needed attention.



The doctor simply walked (or motored) out on this case, without making adequate arrangements for Gene's care, while the doctor-patient relationship still existed. According to Mrs. Spendlove's evidence, according to the doctor's own evidence, she answered "No" when he asked if she wanted another doctor. That is one place where there was no conflict.

We respectfully submit that these facts make a case of abandonment for consideration of the jury at the conclusion of plaintiff's evidence and at the conclusion of all of the evidence.

*Tadlock v. Lloyd*, 173 Pac. 200, 65 Colo. 40.

In the Tadlock case, as in the instant case, the plaintiff predicated his action upon the theory that defendant failed to inform himself and give attention to the case. As the court said at page 202, "*It is in no sense an error of judgment*, but an absolute failure to attend upon the patient and secure data upon which to base any judgment, that constitutes the ground of the complaint. There is abundant testimony that defendant made no effort to inform himself of the condition of his patient, or the progress of the malady, and if damage resulted therefrom he is liable. \* \* \* *The case involves no question of either of skill or the exercise of skill by defendant. The charge is one of deliberate neglect.*"

Bear in mind that by the testimony of Dr. Georges and his office nurse, and by Dr. Judd, not one of the three ever saw Gene Spendlove after October 1, 1952,

and not one of the three ever made any personal or telephone inquiry about his condition or progress after the same date (R. 177, 225, 204-5). The last time Dr. Georges talked with Mrs. Spendlove, which was by telephone when the Doctor was ill, according to the Doctor's own testimony he said, "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." Miss Rowan, Dr. Georges' nurse, told Mrs. Spendlove on the occasion of Mrs. Spendlove's last visit to the office (this is Miss Rowan's own testimony), "I told her that he (the doctor) just wasn't available in his office or at his home, and that we would have to get in touch with her." She did not even deem it necessary to say the doctor was sick.

The good doctor has made a great deal out of his own illness. In fact counsel suggests to the court that the practice in Provo among the doctors there is to notify the patient that the doctor is ill and that thereafter the doctor-patient relationship is automatically terminated and the patient has to look elsewhere for a doctor. The rule that the actions of a doctor be measured against the practice in his own community applies to standards of skill and methods of treatment, and has no application at all when the charge against the doctor is complete and total lack of care. That is what the Tadlock case says. The standard requiring care is supplied by the law, not by the practice in a community. Furthermore, the testimony of Dr. Georges and his nurse, Miss Rowan, show that both went far beyond merely advising the

Spendloves about the Doctor's illness. The Doctor indicated that Gene would be "all right for a little while" (R. 177) and "it has gone on this long running that way, it won't hurt it to go a little longer" (R. 62). Miss Rowan told Mrs. Spendlove the Doctor wasn't available and "that we would have to get in touch with her". Both of the conversations show an absolute continuation by the Doctor of the doctor-patient relationship plus the assurance that everything would be all right for a little longer. Further, Mrs. Spendlove specifically said that they did not want another doctor. Thus the factual picture is very similar to that in the case of *Gerken v. Pliny-ston*, 70 N.Y.S. 793 (1901). In that case the defendant doctor set a broken arm and told the patient to keep it in a sling while he was gone on a vacation for ten days or two weeks. The doctor actually stayed away five weeks and when he examined the arm the bones had slipped and overlapped and formed an improper union. The defendant doctor testified he told the plaintiff that if she desired him to call again, she must send for him. The court held that if the jury believed the plaintiff, as they must have since they found for plaintiff, then she was entitled to recover. The malpractice consisted in abandonment, doing nothing, just as it does in Gene's case.

Judging by the testimony at the trial and the argument in appellant's brief, it would seem that proof of Dr. Georges' illness should alone excuse and condone the failure of the doctor to ever again see or treat Gene. We heartily agree with appellant that the case of *Stohl-*

*man vs. Davis*, 220 N.W. 247, 60 A.L.R. 658 (Neb. 1928) is factually close to the instant case. We also agree that there is a major point of distinction, but emphasize that the distinction only serves to highlight Dr. Georges complete and utter abandonment of Gene Spendlove. Let's compare the facts of the two cases. Dr. Davis, in the Stohlman case, left town because of his own illness, as did Dr. Georges. Dr. Davis wholly failed to notify either the patient or the patient's father before leaving town, just as Dr. Georges failed to notify the Spendloves of his departure (R. 88). Dr. Davis placed the patient in the hands of another physician who actually treated the patient for some time. Since this was done without the consent of the patient or the consent of the patient's father, Dr. Davis was held fully responsible for the errors of the substitute doctor. Dr. Georges left no doctor to treat and care for Gene, as the record absolutely shows that no medical attention was thereafter given Gene Spendlove until he was brought to the L.D.S. Hospital in Salt Lake, a month later. Even Dr. Georges' version doesn't help his position as he at no point in his testimony claims that he asked or received the consent of the Spendloves to have any other doctor take care of Gene while he motored to Arizona. Add to this the fact that no other doctor did take care of Gene and you have a major distinction between the two cases, but it is a distinction which only emphasizes and highlights Dr. Georges' utter disregard for the welfare of his unfortunate patient. One other important comparison justifies comment. The court in the Stohlman case said

that Dr. Davis' illness "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". Dr. Rupper, one of appellant's witnesses, testified that Dr. Georges did leave his home and go to the hospital for x-rays, that he was able to talk to Dr. Rupper, and that to a degree he was able to instruct his nurse as to what to do about his office (R. 236). In fact Dr. Georges was well enough to drive a car from Provo, Utah, to Phoenix, Arizona (R. 225). Yet Dr. Georges didn't even advise the Spendloves of his illness, nor did his own office, until Mrs. Spendlove in desperation called the doctor's home. During that conversation the illness of the doctor first came to the attention of Mrs. Spendlove, but Dr. Georges did not advise the Spendloves to seek other medical aid. Instead he told them, "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." So Dr. Georges, with the help and advice of several doctors and nurses (R. 176) suddenly finds himself well enough to drive to Phoenix, where he rests and convalesces with additional medical help, while Gene Spendlove goes without any medical attention upon the express advice of Dr. Georges that "it won't hurt it to go a little longer". "A little longer" stretched into quite a period as Dr. Georges never did again see Gene or consult with Gene's parents, nor make any inquiry as to his condition.

Neither Dr. Georges nor his office staff ever did advise the Spendloves that the doctor was going to Ari-

zona. The doctor just summarily left town without so much as a word of advice or instructions for Gene's care so far as they knew. We submit that Dr. Georges owed this poor man the best, kindest and most considerate attention possible for Gene is a mental defective who had to rely on others for his just and proper treatment. Mr. and Mrs. Spendlove are plain, trusting people who placed their trust in Dr. Georges and relied on him implicitly. But the Spendloves, like the proverbial forgotten bride, were left standing at the altar, abandoned and neglected.

According to Dr. George's own testimony Gene Spendlove was examined and treated by Dr. Georges on the following dates subsequent to release from the hospital on June 10 (R. 138), and his condition was as noted below:

June 17 (R. 138), no drainage (R. 140).

June 21, small spot appeared and drainage began (R. 142).

June 24, (R. 143).

July 1, wound draining, spot now  $\frac{1}{4}$  inch in size (R. 143).

July 3, drainage continuing (R. 143).

July 8, drainage continuing (R. 143).

July 14, drainage continuing (R. 143).

July 18, drainage continuing (R. 143).



July 21, drainage continuing (R. 143).

July 28, drainage continuing (R. 143).

Aug. 4, Drainage continuing (R. 144).

Aug. 8, Drainage continuing but lessening (R. 145).  
Herniation commenced (R. 146).

Aug. 15, 19, 26, During August a cotton suture was  
removed by Dr. Georges (R. 145).

Sept. 2, Discussed need for third operation (R. 146).

Sept. 9, Gene doing better (R. 149).

Sept. 16 (R. 149).

Sept. 23 (R. 149).

Sept 30, Last time Dr. Georges saw Gene (R. 149).

Dr. Georges said the hernia and distention gradually  
was getting larger toward last visits (R. 152 and 174).

When Dr. Miller first saw Gene on November 7, 1952  
(R. 34) he observed a large hernia extending for most  
of the length of the incision and two draining areas  
about 1cc in diameter each (R. 34). Dr. Miller testified  
that "there was definite infection at the draining site"  
and that Gene was in need of medical attention (R. 36).  
Dr. Georges himself testified that infection is always  
considered a dangerous condition (R. 172). Mrs. Spend-  
love, Mrs. Breinholt and Mr. Spendlove all testified that  
during the period after Gene's last visit to Dr. Georges  
and up to his first visit to L.D.S. Hospital that Gene



steadily lost weight, grew pale, and was in great pain (R. 67, 107 and 96) and the hernia became as large as a basketball.

A quotation from this very court fits these facts to perfection. In *Ricks v. Budge*, 64 Pac. 2nd 208, 91 Utah 307, this court said:

“When a physician is employed to attend upon a sick person, his employment, as well as the relation of physician and patient, continues, in the absence of a stipulation to the contrary, as long as attention is required; and the physician or surgeon must exercise reasonable care in determining when the attendance may be properly and safely discontinued. *Dashiell v. Griffith*, 84 Md. 363, 35 A. 1094, 1096.

“We have briefly reviewed the evidence showing the urgent need of plaintiff for medical and surgical attention at the time Dr. S. M. Budge refused plaintiff further treatment. As the case stands on the record before us, we must consider the evidence in the most favorable light of which it is reasonably susceptible in behalf of plaintiff. The evidence warrants the inference that plaintiff was being prepared for an operation when Dr. S. M. Budge arrived at the hospital and told the plaintiff that he would give him no further medical attention until something was done about the old account.

“We cannot say as a matter of law that plaintiff suffered no damages by reason of the refusal of Dr. S. M. Budge to further treat him. The evidence shows that from the time plaintiff left the office of the defendants up until the time that he arrived at the Cache Valley Hospital his hand continued to swell; that it was very painful; that

when he left the Budge Memorial Hospital he was in such condition that he did not know whether he was going to live or die. That both his mental and physical suffering must have been most acute cannot be questioned. While the law cannot measure with exactness such suffering and cannot determine with absolute certainty what damages, if any, plaintiff may be entitled to, still those are questions which a jury under proper instructions from the court must determine.”

Appellants in their brief at page 51 recite that Dr. Georges probed for sutures during the month of September. We have searched the record very carefully and can find no reference to probing by Dr. Georges at any time. He did take out one suture that came to the surface. Dr. Miller did probe for sutures each time he examined Gene. He further testified that the only way you could find the sutures was by probing (R. 46). Yet Dr. Georges never did probe. Dr. Miller further testified that the major contributing factor for the herniation was the infection (R. 46). And last and most important, Dr. Miller testified that when there is infection there is danger of it spreading and that infection always needs treatment (R. 45). Gene was in need of medical attention when Dr. Miller first saw Gene (R. 36). Dr. Miller said as long as the cotton sutures were present in the wound they would keep it open so that infection could get in (R. 39).

On about September 13 or 20, 1952, Dr. Georges himself told Mrs. Spendlove, while discussing the necessity of a third operation, “I would rather this be healed up

but I won't let him go over two weeks''. Yet two weeks later when Mrs. Spendlove came to the doctor's office the doctor was unavailable and in fact never did see Gene again.

Thus Dr. Georges himself had expressed the necessity of early surgery, and the whole course of treatment from the date of the second operation was based upon the necessity of medical care one or twice each week, and Dr. Miller at least corroborated the necessity of continued medical attention. Bear in mind the "well known fact that in actions of this kind it is always difficult to obtain professional testimony at all. It will not do to lay down the rule that only professional witnesses can be heard on questions of this character, and then, in spite of the fact that they are often unwilling, apply the rules of evidence with such stringency that their testimony cannot be obtained against one of their own members." See *Tadlock vs. Lloyd*, 173 Pac. 200, 65 Colo. 40. In considering the amount of testimony to show that prolonged or continued suffering and pain of Gene was the proximate result of the abandonment of Dr. Georges, there must be taken into consideration the difficulty, if not the actual impossibility, of conclusively demonstrating the cause of such pain and suffering. There was ample evidence of facts from which such an inference could be drawn.

To paraphrase Justice Wolfe in *Ricks v. Budge*, 64 Pac. 2d 208, 91 Utah 307, as to whether the abandonment and delay in treating Gene made recovery more difficult

or resulted in additional pain and suffering is for the jury. Witnesses testified to his prolonged suffering by the delay and the change in the size of the hernia and the increase in infection, and on that element the jury found him entitled to damages.

In the *Ricks v. Budge* case the patient was without medical attention at most only two hours. In Gene's case, on advice of the doctor to let it "go a little longer", Gene, waiting for further advice and attention from the doctor, was without any medical attention for over a month.

What kind of justice would it be to now deny Gene any recovery unless he can produce causation testimony from the guilty doctor, or from one of his own professional members whose code in effect bars the doctors from offering such positive testimony as to causation. The authorities hold that no such evidence is required in abandonment cases. We submit that nevertheless there is ample testimony in this case, both professional and lay, to justify a submittal to the jury. To argue that although medical attention is necessary, that when not furnished under necessitous conditions, that no damage or injury occurs, is to argue that the furnishing of medical attention is a vain and useless act. Both Dr. Georges up to September 30th and Dr. Miller, by their words, acts and deeds, assumed the need for medical attention to Gene. Both professional and lay testimony clearly showed the need for medical attention. Gene's condition, and his pain and suffering having been described to the jury, and the jury knowing that Gene was

without medical attention for over a month, although needing same, the jury could draw a proper inference that abandonment was the cause of the pain and suffering. As was said by this Court in the Budge case, *certainly no court could say as a matter of law that Gene suffered no damages by reason of the abandonment*. This being true, the matter was properly submitted to the jury.

Reduced to simple terms, appellant's argument on causal connection seems to be that when it comes to pain and suffering caused by a doctor, the doctor is the only one who can testify to it and what caused it. At least on that subject most patients would disagree with appellant's proposition. The patient is the expert and the doctor is the one who is informed. The medical profession has a special term for it called, "subjective symptoms", and the doctors not only accept it as the basis of diagnosis and treatment but frequently will testify to an injury on the basis of "subjective symptoms" in the face of negative pathological findings. Appellant is trying to establish, in the realm of pain and suffering caused by a physician's abandonment, the same monopoly of evidenciary right that they enjoy as to skill and diagnosis in other types of malpractice cases. So far the courts, including this Court in the Budge case, have denied them this added immunity. This Court has said, along with other courts that have had the question, that it is a jury question.

Counsel says there are not many malpractice cases based on abandonment. There are sufficient to establish

the law. In addition to those already cited we give the following:

*Lathrope, et al. v. Flood* (Cal.), 63 Pac. 1007.

The above case is very much like the Budge case in this Court.

*Mehigan vs. Sheehan* (N.H.), 51 Atl. 2d 632.

The above case expressly holds that abandonment cases come within the exception to the rule relating to the necessity of expert evidence in abandonment cases. Most of the propositions argued by appellant are answered by the Mehigan decision.

*Gross vs. Partlow* (Wash.), 68 Pac. 2d 1034.

The Washington court expressly held that in abandonment cases expert evidence is not necessary. Abandonment cases fall within the exception to the rule requiring expert evidence, the same exceptions that apply in sponge cases and injuries that have nothing to do with diagnosis and skill. In that regard the decisions of this Court in the following cases are applicable:

*Fredrickson vs. Maw*, ..... Utah ....., 227 Pac. 2d 772.

*James vs. Robertson*, 39 Utah 414, 117 Pac. 1068.

*Peterson vs. Richards*, 73 Utah 59, 272 Pac. 229.

In all of those cases this Court held that it was not necessary for plaintiff to prove the negligence and causal

connection by direct evidence, but only facts and circumstances from which such an inference could be drawn. This is axiomatic. See Prosser on Torts, page 325. You don't have to diagram it or spell it out.

As was so aptly said by Justice McDonough in the very recent case of *Morby vs. Rogers*, ..... Utah ....., 252 Pac. 2d 331, "It is not a new or novel principle that acts of negligence may be proved by circumstances." The same is true of proximate cause. It is not presumed but it may be inferred from proven facts.

In the case at bar it really went beyond inference. There was direct and positive evidence of the abandonment and the pain and suffering from the increased herniation and infection that followed. Pain and suffering may be good for a patient, but no one testified that it did Gene any good.

As was stated by appellant there are two annotations in A.L.R. We concur in the suggestion that they be read:

60 A.L.R. 664.

56 A.L.R. 818.

They confirm the views expressed herein and adopted by the trial court.

In *Meiselman vs. Crown Heights Hospital, et al*, 34 N.E. 2d 367, the Court of Appeals of New York reversed



an abandonment case where a directed verdict had been granted for failure to have expert witnesses. The discussion of the principles argued by appellant in this case is well answered in that case.

On the proposition as to the doctor being the only one who can testify as to pain and suffering and the right of a physician to be the only one who can testify as to its cause, we suggest that counsel and the court read Wigmore on Evidence, 3rd Edition, Sec. 1718 and 1719. The poem on page 67 is most appropos to the argument that the doctor is the sole witness on that subject.

Counsel's argument that failure of Mr. and Mrs. Spendlove to call Dr. Judd or some other physician was the sole cause of the injury as an intervening cause is based upon the assumption that they were told to call Dr. Judd, which was denied, or that the relationship with Dr. Georges was terminated, which was also denied. This was a jury question and was placed with the jury to decide under the Court's instruction No. 5 (R. 49). The jury found against defendant on that issue.

The cases cited by appellant relating to professional skill and diagnosis have no applicability to abandonment cases. We therefore do not find it necessary to further distinguish them. They are not in point in this case.

### POINT NO. III

#### THE TRIAL COURT PROPERLY REFUSED TO APPLY LOCAL CUSTOM TO THE ABANDONMENT ISSUE.

This point is directed to refusal of the trial court to apply the local custom of doctors in Provo to absolve themselves from responsibility for their patients when they (the doctors) become ill, by simply notifying the patient that they are ill. The case of *Stohlman vs. Davis*, supra, is not authority for any such proposition. It said that Dr. Davis was under the general responsibility, when he became ill, to secure the patient's acceptance of the substitute doctor for services during the period of the doctor's illness or to withdraw from the case so that they could secure another doctor. He did neither, nor did Dr. Georges, so it was a case of abandonment for the jury to decide under general principles of law. Local standards apply to skill and diagnosis but they do not supplant general law on the question of abandonment. Local physicians may have a habit of going away on vacations, of hiring "ghost surgeons" to do their surgery, or of having someone else assist in operations, etc., but such local practices have nothing to do with their responsibility to their patients. The trial court properly refused to confuse the jury with such a question.

## POINT NO. IV

THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT ON ISSUES NOT INVOLVED IN THE CASE.

In this point appellants complain because the trial court refused to tell the jury that no complaint was made about the two operations performed by defendant and that they should not consider any damage or injury resulting from those two operations.

There was no issue in the case as to the propriety of the two operations. It would have been error on the part of the trial court to have injected such an issue. In Instruction No. 1 (R. 47) the trial court expressly told the jury that the issue was limited to abandonment and the pain and suffering suffered as a proximate result of the abandonment. Again in Instruction No. 4 (R. 48) the court said that defendant was charged only with having abandoned his patient and for injuries resulting from abandonment. Instruction No. 7 (R. 50) again limits the case to a consideration of the abandonment issue. Again in Instruction No. 8 (R. 51) the court limits the recovery to such damage for pain and suffering as may have been caused by abandonment. The trial court was very careful in Instruction No. 10 (R. 51) to eliminate from the jury's consideration the effect of the mental relapse following the third operation in the L. D. S. Hospital because no physician had tied it into the damages. With all of those instructions limiting the issues to abandonment and pain and suffering resulting therefrom,

the jury was not misled into considering impropriety of the first and second operations. The case was fairly submitted to the jury on limited issues.

## POINTS V AND VI.

THE TRIAL COURT PROPERLY REFUSED TO CHARGE THE JURY THAT DEFENDANT HAD THE RIGHT TO ASSUME THAT SPENDLOVES WOULD HIRE ANOTHER DOCTOR, UNDER THE EVIDENCE IN THIS CASE.

These points are argued together and seem to present the question as to whether the defendant had the right to assume that the parents of plaintiff would employ some other doctor if he walked out on the case and left for a trip to Arizona. There is no such law anywhere. Why would a doctor have the right to assume that patients would employ another doctor as long as the relationship of physician and patient continues? The doctor is trying to shift his burdens as a physician to others. Under all of the decided cases the relationship continues until it is terminated, exactly as the court instructed the jury. The doctor has the right to quit, but he cannot abandon the case while the relationship continues.

Under the evidence in this case the doctor asked if they wanted someone else and they said, "No". He then said he didn't see why they should worry; he would be all right for a little while. His nurse said they would

call, maybe the doctor would be back in the office the following Tuesday. The Spendloves did as they were told. They waited until the condition became so critical, the pain and suffering so severe, and the herniation so extensive that they could wait no longer. Then they heard that the doctor was in Arizona taking a "rest cure" for himself and they then acted. This issue was presented to the jury for determination as to whether the parents had been negligent as an independent intervening cause, and the jury said, "No". In the light of that evidence given by the parties it would have been error for the Court to have instructed the jury that, as a matter of law, the doctor had the right to assume that the parents would, in some way, sense that he had terminated his relationship to the case and hire someone else. The doctor himself had told them to wait. This is plain, everyday grasping at straws.

## POINT NO. VII.

### THE TRIAL COURT PROPERLY DEFINED ABANDONMENT.

This instruction on abandonment is supported by all of the authorities, including the Budge case. Counsel admits such to be the case, but insists that because the doctor got sick he had the right to walk out on his patients. He had no such right. He had the right to quit, or to make proper arrangements for the care of his patients, by and with the consent of his patients. He did neither of these things. He and his office, according

to plaintiff's evidence, corroborated by evidence produced by defendant, did nothing. He didn't even tell his office to inquire before he left for Arizona. It was a plain case of leaving the doubly unfortunate plaintiff, unable to make any decisions for himself, and suffering the agonies of an infected and herniated abdomen, to suffer until it could go no longer. It is fortunate indeed that there was an agency ready to take up the doctor's responsibilities when his dereliction became all too evident.

The doctor had a fair trial, with a jury of his neighbors to judge his conduct and weigh his evidence. They found him wanting in the discharge of his professional duty and their verdict should be affirmed.

Respectfully submitted,

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