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Geraldine Huggins v. N. Frederick Hicken : Brief of Appellant

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

GERALDINE HUGGINS,
Appellant,

vs.

N. FREDERICK HICKEN,
Respondent.

No. 8497

BRIEF OF APPELLANT

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No. 8497

STATEMENT OF FACTS

This is an appeal from the Order of the lower Court setting aside a verdict of the jury for the Plaintiff and dismissing the action.

Many of the facts are disputed. However, since they are to be considered in the light most favorable to the Plaintiff, they will be set out in that manner:

The Appellant, an unmarried female of the age of 31 years, first consulted Appellee, Doctor N. F. Hicken, a practicing physician and surgeon in Salt Lake City, Utah, on July 26, 1954, regarding a complaint of severe pain in the upper part of her chest area. Appellant first experienced pain after eating

Mexican food while traveling in Old Mexico with her cousin, Alta Huggins, who was studying nursing at the L. D. S. Hospital. Late in the afternoon of the the day following the trip to Mexico, Appellant went to the office of Dr. Hicken. Appellant consulted with Dr. Hicken, but he did not examine her. (Record 58). However, Dr. Neel Huckleberry was called in for consultation. Kidney studies were made by Dr. Huckleberry the following day, and on July 28th, Appellant returned for gall bladder studies, and it was concluded that she was suffering from a non-functioning gall bladder. She was so advised by Dr. Hicken. On that day he recommended surgery for the removal of the gall bladder. Appellant stated that she did not feel well enough to undergo surgery, and couldn't afford it. (Record 63) Dr. Hicken advised her that her gall bladder condition was acute. (Record 63).

From the time Appellant first went to Appellee's office, on July 26th, until July 28th, when she was advised to have her gall bladder removed, Dr. Hicken made no examinations, personally, of the Appellant. (Record 63).

Appellant was admitted to the L. D. S. Hospital in Salt Lake City, on July 31, 1954, as a patient of Dr. Hicken, for the purpose of having her gall bladder removed by him. An intern made an examination of Appellant on the day of admission. (Record 67). Appellant saw Dr. Hicken only once after admission to the Hospital and prior to surgery. (Record 69), and she testified that he did not examine her on any occasion prior to surgery. (Record 70).

On August 2nd, she was taken to surgery and there were present Dr. Hicken, Dr. A. J. McAllister, Dr. Clayton, a resident at the L. D. S. Hospital, and Dr. Calvin Buhler, an intern at the L. D. S. Hospital. Dr. Hicken opened the incision and excised the gall bladder, put it in a pan and then left the operating room as soon as the gall bladder was removed. (Record 184). Alta Huggins, Appellant's cousin, who was in the operating room observing, was called out in the hall by Dr. Hicken who then advised Alta that Appellant was a hypochondriac and that Alta should not listen too much to her aches and pains, and that in connection with the operation, Dr. Hicken had also freed Appellant's uterus. (Record 184). Dr. Hicken did not return to the operating room after he removed the gall bladder, (Record 184), and the resident and the intern closed the incision. (Record 185).

Dr. Hicken testified that immediately following, and for some time after upper abdominal surgery, such as gall bladder operations, it is necessary to turn, cough and to induce deep breathing to prevent the onset of pulmonary complications. Dr. Hicken testified that abdominal muscles normally are used to breathe with, and that after an operation where these are cut, abdominal or belly muscles are used to get the air in and out (Record 51). "When we hurt we don't take a deep breath, . . . and the fact after an operation you get a limitation naturally of the amount of air going in. There is part of the lung that does not expand. Well, if the lung doesn't expand and the air in these little air sacs in the lungs is absorbed, then the little air sacs keep coming closer and closer together

until we get hyperexhalation, we get a smaller amount of air going in and out of these little linings to keep them from expanding. It's possible, if this condition goes on long enough these little sacs may collapse because all of the air has been absorbed by the blood stream and they come together. That is what we call a collapsed lung, and the purpose of deep breathing and making the patient turn over in bed is just for the express purpose of getting fresh air down in these sacs that have not been used in ordinary respiration." (Record 51-52). Dr. Hicken testified that he was familiar with the standard of care which physicians in this community render to their patients following upper abdominal surgery. (Record 39). He testified that there were standing rules. "The patient is turned every two hours." "The patient is encouraged to cough." (Record 39-40). He testified that this rule of having the patient turned and deep breathed every two hours, following upper abdominal surgery, was the standard in force in this community August 19, 1954 (Record 40 and 42); and that the two hour period is routine procedure at the L. D. S. Hospital.

The most critical period following upper abdominal surgery is when the patient is under sedation, and gall bladder surgery requires considerable sedatives for pain "because you are working high," (Record 50) and also because when the patient first returns from surgery, they are still under the effects of the anesthetic. (Record 216).

The hospital records show that the Appellant returned from surgery at 3:25 P.M. on August 2nd.

The first indication that Appellant was turned is a note made at 11:00 P.M. of the same day. (Exhibit 21 P, pages 23-24). This is corroborated by Alta Huggins who was with Appellant from the time she returned from surgery until around midnight, and she wasn't turned until about 11:00 o'clock that night (Record 186); and that in all that time, no one came in and attempted to deep breathe Appellant, nor to induce coughing.

The next record of Appellant having been turned was at 12:15 P.M. on August 3rd. (Exhibit 21 P., 23).

The record shows at 8:15 A.M., on August 4, Appellant was bathed. (Exhibit 21 P.23).

The next note appears at 12:00 midnight August 4th when Appellant was turned on left side, and at 1:10 A.M., August 5th, the Record shows that Dr. Clayton visited and patient was turned and deep breathed. (Exhibit 21 P. 24).

On August 3rd, the day following surgery, Appellant began running a high temperature. (Temperature Chart, Exhibit 21 P.).

On August 4th, Appellant began to feel pain up in the shoulder area, in a different location from where the operation was performed, and it became difficult for her to breathe. (Record 75).

In the afternoon of August 4th, Nurse Betty Harman noticed Appellant had an ash gray color and she had very labored breathing. (Record 238) The duty Nurse, later in the day, advised Nurse Harman that Appellant was very ill. (Record 240).

Alta Huggins, who was a registered nurse at the time of the trial testified that she saw Appellant about

4:45 p.m. on August 4th and observed that Appellant was very dusky and that her finger nails were blue. (Record 187). Alta took Appellant's pulse and found it to be 140 then, and her respiration was very shallow and labored. (Record 187). Alta advised Mrs. Briggs, the duty nurse, to call an intern and have someone look at her. Dr. Buhler, the intern came about 15 or 20 minutes later, and when asked by Alta if there was something wrong with Appellant's chest, if she might have atelectasis, and "he said he would make that diagnosis right then" (Record 188). Appellant's condition did not improve, so about 7:00 P.M., Alta went out to the duty nurse and asked that Dr. Hicken be called, which was done. (Record 189). Dr. Hicken did not come, but Dr. McAllister came about 10:00 P.M. A steam tent was put up and oxygen was started. (Record 189).

Dr. McAllister asked her to cough, and asked Appellant if she knew what atelectasis was, which he stated was a collapsed lung. (Record 76), and advised Appellant, "you will never be this sick again as long as you live." (Record 76).

At about 5:20 P.M. of the same day, the intern examined Appellant and found a temperature of 103°, pulse of 154 and with a gallop rythm in the heart, with breath sounds at the right base slightly lower. (Exhibit 21 P., page 17). Dr. McAllister made a clinical diagnosis of atelectasis. (Exhibit 21 P. page 17.) Low in the right side he was unable to hear any breath sounds. (R 289, 290).

Dr. Ed Scott, Anestheologist in surgery was called in to aspirate Appellant at 7:00 A.M. on August 5th, which was done, with fair results. De-

creased breath sounds in the right lower chest were noted by Dr. Scott. (Exhibit 21 P. page 18).

On August 5th, Appellant's pulse decreased from 152 to 120, breath sounds were still reduced and there was dullness in the right, lower quadrant of the chest. (Exhibit 21 P., page 18).

From the 5th of August until the date of discharge, on August 13th, Appellant suffered constant chest pain, and difficulty in breathing. (Record 78, page 82-3), which she reported to the nurses and to the medical visitors.

An X-Ray of Appellant's chest was taken on August 6th, and it was the opinion of the Radiologist that the right side of the diaphragm was very slightly more elevated than usual and the lower position of the right lung was slightly hypoariated, probably as a result of shallow respiration, rather than actual atelectasis. (Exhibit 21 P., page 8).

Appellant felt ill the day of discharge. (Record 86.)

Appellant was discharged from the hospital and taken to the home of her sister, Mrs. Betty Harman, a registered nurse, who lives in Granger, Utah.

From August 13th, Appellant suffered severe pain in the chest area, together with vomiting, and reported it to her sister, Mrs. Harman, and her cousin, Alta. (Record 133). The pain in the chest area increased. Calls were made every day, from the 13th of August to the 20th of August to the office of Dr. Hicken. (Record 245).

On the 14th of August, Alta Huggins called Dr. Hicken about Appellant's condition and advised him

that she was complaining of severe pain in her chest and suggested that there might be some infection, or that the atelectasis Appellant had in the hospital might still be bothering her, and was advised that it was gas, and to make Appellant walk, and that Alta was a dumb student nurse who didn't know everything. (Record 199).

Appellant, herself, called Dr. Hicken on the 15th of August and advised him of a terrific amount of pain in her upper chest and that she was vomiting and that she had been vomiting since she left the hospital and asked if there were any way he could see her, or if there were some way he could help her. He advised a medication to empty her bowels and also to take fruit juices and to keep eating to see if the nausea might not be helped. (Record 133-34) Dr. Hicken further advised her that the pain was associated with gall bladder operation. (Record 134).

In response to the call by Nurse Harman, on the 16th, and upon being advised how very ill Appellant was, and about having a pain in her right chest area, Dr. Hicken asked if Appellant could be brought into the office. Nurse Harman advised that she was too ill. Dr. Hicken was asked by Nurse Harman if he could make a trip out there. He answered that it was too far. (Record 242).

In response to a call to Dr. Hicken's office on the 17th of August, Dr. McAllister came out to Granger on the 17th and checked Appellant. When asked if it could possibly be her lungs, he said "no, pleurisy" and then prescribed steam and medication. (Record 243). He further advised Nurse Harman

to get Appellant up, walk her around and get her out in the yard. (Record 243). Dr. McAllister stated that he never found at any time that appellant wouldn't do as she was asked, or that she didn't try in every way to cooperate. (Record 297).

Dr. Hicken was called by Nurse Harman on the 18th of August and was told that Appellant seemed to get little relief from pain and that Appellant was still very ill and that Nurse Harman was worried and thought there should be some kind of help, but did not know what else to do. Dr. Hicken advised that she just keep doing what he told them to do. (Record 243).

On the 19th of August, Appellant called Dr. Hicken's office and talked with Dr. McAllister, advising him that she wasn't any better and felt like that she just couldn't go on any more (Record 136) and asked him to come out to Granger, and Dr. McAllister advised her that he said that he had been there previously and that he felt that she had pleurisy and for Appellant to continue instructions with steam and medication. (Record 137).

Appellant then called her parents in Wyoming and advised them that she didn't feel like she could hang on much longer and to come and get her and take her some place where she could get some care. (Record 137).

Dr. Hicken did not see Appellant from the date of discharge, on August 13th, until August 20th.

Appellant's parents arrived on the morning of the 20th to see if they couldn't get Appellant in the care of the family physician at home, Dr. E. W. Mc-

Namara, of Rawlins, Wyoming, and Appellant advised them that because of the long ride, Dr. Hicken's office should be called to get medication for pain, and were advised that he was in the operating room at the L.D.S. Hospital. Appellant's parents, together with Alta, took Appellant to the L.D.S. Hospital where Appellant advised Dr. Hicken again of the terrific pain in her chest, that she had been vomiting for eight days and nights and Dr. Hicken inquired why she hadn't come into the office. Appellant advised him she had been too ill to come to the office. Appellant's temperature was taken at the Hospital and was found to be 102°, which was reported to Dr. Hicken. (Record 197). Appellant reported the pain in her chest to Dr. Hicken. Dr. Hicken advised her parents that she was addicted to drugs. (Record 198).

On August 20th, Appellant was no longer in the care of Dr. Hicken. (Record 139).

Appellant's testimony was that Dr. Hicken never personally examined her prior to admission to the hospital, nor during her stay in the hospital, nor at any time thereafter. (Record 140).

Dr. Hicken did not object to Appellant's parents taking her home, (Record 232) when he saw them on the 20th of August and did not advise them that she should enter the hospital. (Record 232).

Appellant was taken in the back seat of her automobile to Rawlins, Wyoming on August 20th by her parents. She was very nauseated and vomited very often. (Record 232).

During the early morning of the 21st of August,

Appellant was very ill and Dr. E. W. McNamara was called and came to attend Appellant. (Record 233).

On the 21st of August, Appellant was admitted to the Carbon County Memorial Hospital in Rawlins, Wyoming under the care of Dr .McNamara.

Appellant was complaining of pain in the right side of her chest and was experiencing difficulty in breathing, (Record 235 and 144) on the 21st, 22nd and 23rd of August. She experienced extreme difficulty in breathing three or four days after she was admitted to the hospital. (Record 144) and each day thereafter that Appellant was in the hospital, the pain diminished in her chest. (Record 146).

Appellant was in the Memorial Hospital ~~and~~^{at} Rawlins for 33 days, being discharged on September 24, 1954. (Record 141). Appellant also engaged the services of Dr. A. E. Cashman while a patient at the Rawlins Memorial Hospital.

Appellant's bill for hospitalization in the Rawlins Memorial Hospital was \$809.55. Dr. E. W. McNamara's charges were \$215.00 Dr. A. E. Cashman's charges were \$55.00. All three bills were admitted into evidence. (Record 146).

X-Rays showing condition of Appellant's chest while in the Memorial Hospital, covering a period from August 23, 1954 to September 11, 1954, were received in evidence, (Exhibit 7 P, through and including 16 P.) which, prior to their being received and in the absence of the jury were interpreted by Dr. William Rummell as showing a very gross opacity throughout the major part of the right lung field,

and which, even to a lay man, showed an abnormality to the right lung. The X-Ray Technician, Henry Arnold, said that all during the time that he took the X-Ray pictures of the Appellant, she appeared ill on each occasion, (Record 273) and appeared to have difficulty in breathing. (Record 272).

Mrs. Betty Harman saw Appellant while in the Memorial Hospital at Rawlins and observed that Appellant's breathing was shallow and she was still having oxygen. (Record 245).

About a week after Appellant was admitted to the Memorial Hospital in Rawlins, Alta Huggins visited with her for the period of a week. (Record 199). Every day that Alta saw Appellant she observed that Appellant's breathing was shallow and rapid and her pulse rapid, and that she had difficulty in breathing. (Record 200). She had "poor color," which was "kind of grey," and complained of pain in her right chest. (Record 200).

Appellant was invalided because of pulmonary complications for approximately eight months after her discharge from the Memorial Hospital at Rawlins, (Record 147) and went to work on a part-time basis for nine months. (Record 147). During this period, Appellant had difficulty breathing and became very easily over exerted. (Record 148).

Appellant claimed a loss in earnings as an insurance agent for the eight months she was unable to work, in the amount of \$200.00 per month and she claimed a loss of earning capacity of \$100.00 per month during the period of nine months of partial activity. (Record 150).

The Appellant was examined by Dr. William E. Rummell, chest expert, on June 13, 1955, in his office in Salt Lake City. (Record 88-89). The only abnormality, based upon physical examination and the fluoroscopic studies, was a very slight decrease in mobility in the lower part of her chest and diaphragm. (Record 90). At the time of trial, which began on January 9, 1956, Appellant claimed to be almost completely recovered.

At the trial, before the Honorable Martin M. Larson, the jury returned a verdict for Appellant in the sum of \$7,589.00 whereupon the court ruled upon a motion for a directed verdict which it had previously taken under advisement, and set aside the verdict and then dismissed the action.

ARGUMENT

POINT NO. I

THERE WAS COMPETENT EVIDENCE TO GO TO THE JURY ON THE QUESTION OF NEGLIGENCE OF DR. HICKEN, AND UNLESS ALL REASONABLE MEN MUST DRAW THE SAME CONCLUSIONS FROM THE FACTS AS THEY ARE SHOWN THE COURT COMMITS ERROR IN DIRECTING A VERDICT.

Whatever classical, medical term might be given to Appellant's lung complications is immaterial, since it was not disputed that Appellant suffered pulmonary difficulties, and as a result thereof, was caused a very substantial amount of pain and suffer-

ing and a substantial financial loss. The sole question remains as to whether or not there was any evidence for the matter to go to the jury, as to whether or not Dr. Hicken was negligent in any particular, and whether such negligence the jury might reasonably find to have been a legal cause of Appellant's condition.

The negligence and carelessness charged by the Plaintiff and Appellant in this action did not necessarily imply a lack of skill or capacity, but simply a disregard of ordinary prudence. The negligence and carelessness of Dr. Hicken may be divided into two periods: First, in connection with the period involved in the hospitalization of the Appellant in the L.D.S. Hospital, and second, in connection with the period following her release from the Hospital and until August 20, 1954. In connection with the negligence charged in the first period, the standard of care came from the mouth of Dr. Hicken when he was called as an adverse witness. Such testimony is material. Plaintiff is entitled to any favorable testimony given.

Anderson vs. Sharp. 109 P.2d 1027

Huffman vs. Lindquist. 213 P.2d 106

Dr. Hicken testified that immediately following, and for some time after upper abdominal surgery, such as gall bladder operations, it is necessary to turn, cough and to induce deep breathing to prevent the onset of pulmonary complications. (Record 39). Dr. Hicken testified that he was familiar with the standard of care which physicians in this community render to their patients following upper abdominal

surgery. (Record 39). He testified that there were standing rules. "The patient is turned every two hours. The patient is encouraged to cough." (Record 39-40). He testified that this rule of having the patient turned and deep breathed every two hours, following upper abdominal surgery, was the standard in force in this community August 19, 1954 (Record 40 and 42); and that the two hour period is routine procedure at the L.D.S. Hospital.

There was evidence to go to the jury that the Appellant was not given the standard of care testified to by Dr. Hicken while in the Hospital.

The most critical period following upper abdominal surgery is when the patient is under sedation, and gall bladder surgery requires considerable sedatives for pain "because you are working high," (Record 50) and also because when the patient first returns from surgery, they are still under the effects of the anesthetic. (Record 216).

Alta Huggins stated that the care the patient actually received is written on the nurses' notes, because the nurses carry out orders. The progress notes state the condition of the patient at the time the physician sees her or him. (Record 204). The nurses record on the nurses' notes, every visit of the Doctor, any abnormalities, together with the complaints of the patient, when the patient is coughed, turned and/or deep breathed. (Record 208). This was corroborated by Nurse Betty Harman. (Record 247-248). Dr. Hicken, himself, testified that the physician is supposed to look at the chart daily, (Record 47) and note for danger signs, if the tem-

perature and/or pulse is going up and listen to the breath sounds. Unless a patient's condition remained or progressed favorably, as revealed by the temperature and pulse chart and general appearance, there would not likely be any change in the orders. (Record 296). Had Dr. Hicken observed the temperature chart during the night of August 2nd, when Appellant's pulse went to over 120 beats per minute, with temperature over 100°; and August 3rd, when record shows Appellant's pulse went to 140 and temperature to 101 $\frac{3}{4}$ ° and August 4th, when her pulse was charted at 138 and temperature at 103°, the danger signals, about which he testified, of pulse and temperature would have been noted. Nurses' notes reveal that frequent medication for pain was required and administered, which would require, as Dr. Hicken testified (Record 50) that she be followed closely. Nurse Hale noted, at 3:30 P.M. on August 4th, Appellant had a poor day. (Exhibit 21 P., 24). This, prior to the time that Alta had Nurse Briggs call the intern. (Record 188). The signature of Dr. Hicken only appears on August 2nd, with no note attached. The progress notes show no further notes by Dr. Hicken until at or after discharge on August 30th. Nurses' notes, likewise, show no record of visits by Dr. Hicken. Doctor's orders show that Dr. Hicken, on August 2nd, gave the order to cancel nembutol and on the 10th of August, 1954, Dr. Hicken gave orders that the Appellant might have a shampoo. All other orders were given by the intern, the resident and Dr. Hicken's associate, Dr. McAllister. The record, which records visits by Dr. Hicken on the

10th and 13th of August, without any specific directions being given, coincides with the testimony of Appellant who testified that she was visited by Dr. Hicken the day following surgery, and then on the 10th of August (Record 83) and then on the 13th of August (Record 86), but not in between (Record 74, 80, 81, 82, 84, and 85). On the 10th Appellant complained about chest pain to Dr. Hicken but he did not listen to her chest (Record 84) nor attempt to locate the situs of the difficulty. Ruth McCardle, who was moved in Appellant's room as a patient on August 8th, stated that she saw Dr. Hicken only twice; the first time on the 10th or 11th (Record 264), and then on the day of discharge. (Record 264).

Following the complications reported to the nurses and Dr. Hicken by Alta on August 4th, the record indicates continued danger to be noted: Temperature, pulse, pain, as well as the daily complaints of chest pain by Appellant (Exhibit 21 P., 21) as noted in the nurses' bedside notes 23, 24, 25 and 26 as well as the amount of sedation required to make Appellant comfortable.

X-Rays were taken on only one day of Appellant's stay in the Hospital. It is Appellant's position that further X-Rays should have been taken to locate the situs, and as basis for remedial measures of the severe chest pain about which Appellant complained.

“The use of X-Ray as an aid in diagnosis in cases of fracture or other indicated cases is a matter of common knowledge, and the failure to make use thereof in such a case amounts to

a failure to use that degree of care and diligence ordinarily used by physicians of good standing practicing in this community (Los Angeles, Cal.). The Court in the absence of expert testimony may take judicial notice of this fact."

Agnew vs. City of Los Angeles, 186 P.2d 450.

While Appellant was in the Hospital, Dr. Hicken and his associates, by doing that which he stated was necessary, that is, going over the records daily, could have, and should have, by ordinary prudence, been put on notice of onset and continuation of Appellant's complications by:

1. Observing that vital two hour turning, coughing, deep breathing rule had not been followed, which shows:

(a) No turning from 3:15 P.M. August 2nd, until 11:00 P.M. on August 2nd, a period of seven hours and thirty-five minutes.

(b) No turning from 11:00 P.M. August 2nd, until 12:15 P.M. on August 3rd, a period of thirteen hours and fifteen minutes.

(c) No turning from 12:15 P.M. August 3rd, until bath at 8:15 A.M. August 4th, a period of eight hours and fifteen minutes.

(d) No turning from 8:15 A.M. on August 4th until 10:50 P.M. on August 4th, a period of fourteen hours and fifteen minutes, or, including bath, only four times in forty-three hours and twenty minutes.

2. Failing to observe the elevation of pulse and temperature, or having noted the same, failed to take remedial measures.

3. Failing to observe the amount of general dis-

comfort Appellant experienced which necessitated sedation requiring closer attention.

4. Having noted and been advised of continued ~~Appellant was hypochondriacal and that too much~~ complaint of severe pain in Appellant's chest and ~~Appellant was hypochondriacal and that too much~~ having assumed that attention should not be paid to her aches and pains. (Record 184).

5. Failure to take additional X-Rays to determine situs of continued chest pains.

The second period of time relied upon by Appellant to show failure of Appellee to render to her the degree of care required of doctors to their patients in this community is from August 13th until August 20th, 1954.

The neglect consisted in the failure to give the proper care and attention which Appellant's condition required. It is Appellant's position that Dr. Hicken is answerable for the failure to apprise himself of or discover seriousness of Appellant's lung complications, when there was reasonable opportunity for examination, and could have been ascertained by ordinary care.

Tadlock vs. Lloyd, 173 P. 200.

It is further Appellant's position that what Dr. Hicken failed to do so obviously did not involve skill as to not require the opinion of an expert as to the non performance of it.

James vs. Robertson, 39 U. 414, 117 P. 1068
Frederickson vs. Maw 227 P.2d 772.

"Negligent failure to attend and treat a patient at a time when the need of treatment is known to the physician and there is opportunity

to apply proper treatment amounts to the same as negligence, and the physician is answerable for such failure." 21 Am. Jur., page 216.

"The obligation of continuing attention 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." Ricks vs. Budge, 91 U. 307 at 314.

The evidence shows that Appellant was discharged from the Hospital on the 13th of August and went to the home of her sister, a registered nurse, Mrs. Betty Harmon, at Granger (Record 131). That night she experienced difficulty in vomiting, and had pain in her right shoulder and right chest (Record 132). This continued and Alta called Dr. Hicken (Record 199) and suggested that there might be some infection and advised about the chest pain, and was told that it was gas, to make Appellant walk, and that Alta was a dumb student nurse who didn't know everything. (Record 199).

The terrific pain in the upper chest and vomiting continued so much so that Appellant herself called on the next day and advised Appellee of her condition and asked if there were any way he could see her, or some way he could help her. He advised her that the pain was associated with the gall bladder operation. (Record 134).

The next day, on August 16th, Dr. Hicken was advised of the seriousness of Appellant's pain in the chest area, by Nurse Harmon, and was asked if

he could make the trip out to Granger, and he advised that it was too far. (Record 242). Dr. Hicken had reason to pay attention to Appellant's complaint as reported by Nurse Harmon, because of her professional training.

The call to Dr. Hicken's office on the 17th brought Dr. Hicken's associate, Dr. McAllister, who checked Appellant, and when asked if it could possibly be her lungs, Dr. McAllister diagnosed the condition as pluerisy, and "was at a loss to explain her pain or her nausea and vomiting." (Record 296).

The next day when Dr. Hicken was called personally by Nurse Harmon (Record 243) and again advised that Appellant was still very ill, and that she seemed to get very little relief from pain, and that Nurse Harman didn't know what else to do, and that there should be some kind of help, she was told to continue doing what he had previously told them to do. This was on August 18th.

On August 19th when Appellant called Dr. Hicken's office and talked with Dr. McAllister and advised him that she couldn't go on any more (Record 137) she was told that she had pluerisy and to continue with steam and medication.

On August 20th when Appellant saw Dr. Hicken in the out-patient department of the L.D.S. Hospital he was advised of her temperature of 102°. (Record 197) and that she had been vomiting for eight days and nights (Record 139) and Dr. Hicken did not order Appellant into the Hospital, (Record 232), nor did he bother to examine her (Record 138-197) as he failed to do, according to Appellant, every other time he saw her. (Record 140).

With a history of continuous chest pain, difficult breathing, and vomiting, of which Dr. Hicken had been advised, and of a temperature of 102°, ordinary prudence would have required that Dr. Hicken use his skill and knowledge and have done something during days Appellant was at Granger and particularly on the 20th.

The X-Rays taken just three days after Dr. Hicken last saw Appellant, in the Rawlins Hospital, show the deterioration of Appellant's right lung.

In this type of action it is common knowledge that the Defendant has the advantage of knowledge and of proof.

Christie et al, vs. Callahan 124 F. 2d 825

Huffman vs. Lindquist 234 P.2d 34, at 46.

It was proper to receive the X-Rays taken in Rawlins, and for Appellant and others to testify as to her condition as they observed it.

Bower vs. Self 75 P. 1021, 68 Kansas 825.

It was proper for Appellant to state what treatment she was given in the Rawlins Hospital.

Ricks vs. Budge, 91 U. 307 at page 317, 64 P.2d 208.

And it was error against Appellant to deny her the right to testify that in Rawlins a needle was inserted into her body and fluid ran out. (Record 143).

A Plaintiff suing in malpractice *need merely show a state of facts* from which the jury may logically infer negligence, and, where the jury believes plaintiff's evidence from which the inference of negligence may be deduced, the evidence ordinarily sustains a finding of negligence, though the Defendant disputes all of Plaintiff's evidence.

James vs. Robertson 39 U. 414 at 428, 117 P. 1068.

Negligence need not be proved by direct positive evidence, but may be proved by facts reasonably and naturally inferable.

Crouch vs. Wycoff, 107 P.2d 339

Frederickson vs. Maw, 227 P.2d 772 at 780.

Hewitt vs. Wheeler General Tire Co., 284 P.2d 471.

Negligence is a question for the jury, and unless all reasonable men must draw the same conclusion from the facts as they are shown, the court commits error in directing a verdict.

Bates vs. Burns, 281 P.2d 209.

Can the court say in the instant case that in view of the Record and the proper inferences therefrom there is *no* evidence upon which reasonable minds could find Dr. Hicken guilty of negligence.

POINT NO. II

A FINDING OF PROXIMATE CAUSE AS WELL AS NEGLIGENCE MAY BE FOUND-ED UPON AN INFERENCE.

The charged negligence need not be the sole cause, it is sufficient so long as it is a proximate cause.

Champion vs. Bennets 236 P.2d 155.

In malpractice cases evidence need not demonstrate conclusively and beyond possibility of doubt that defendant physicians' negligence was a proximate cause, and substantial evidence which reason-

ably supports the judgment for patient is sufficient.

Mirich vs. Balsinger, 127 P.2d 639,

Moore vs. Belt, 203 P.2d 22

In malpractice cases, physicians as experts are the ones in general permitted to say what is proper treatment, but results, if so pronounced as to be apparent may be testified to by anyone.

Frederickson vs. Maw 227 P.2d 772.

With respect to the cause of Appellant's lung complications it is Appellant's contention that the failure to observe and the failure to heed the danger signs of amount of sedatives, together with quickening of the pulse, and the failure to turn Appellant every two hours, and the temperature rise prior to the crisis on the evening of the 4th of August when the pulmonary complications became evident, could reasonably be said to have been a cause of the complication. This is true in view of the testimony that the patient is to be turned and deep breathed for the "express purpose of getting fresh air down into these sacs that have not been used in ordinary respiration, and which collapse when the air in these little sacs is absorbed." (Record 51-52).

There is yet another basis upon which a proper inference may be made that Appellant's condition was caused by neglect of Dr. Hicken: After the crisis on the 4th of August, the Record showing daily and continuous symptoms of labored breathing and chest pain at a situs different from the operational area, and assuming, but not admitting, that Appellant's condition on the 4th was not caused by any neglect attributable to Dr. Hicken, the failure to take re-

medial measures to locate the origin of, and properly treat the chest pain and labored breathing, which persisted during the balance of Appellant's hospitalization at the L.D.S. Hospital, and every day thereafter until the 20th of August could very well be found to have been a cause of Appellant's chest pain and labored breathing and residual difficulty thereafter. This is especially true since Dr. Hicken was on notice of the crisis on the 4th of August.

The fact that Appellant's condition of severe chest pain, labored breathing and nausea continued throughout the 20th and the fact that Appellant was hospitalized in Wyoming the next day after Dr. Hicken saw her in the L.D.S. Hospital with the same symptoms and complaints and general condition continuing throughout her hospitalization in Wyoming and thereafter raises a reasonable inference of a continuous train of related pulmonary difficulty.

The same people who observed her condition while she was under the care of Dr. Hicken saw her in the Rawlins Hospital and noted the same complaints. The complaints and symptoms were of such nature and so pronounced as to be obvious to everyone who saw her. Two of those who saw her, Alta Huggins and Nurse Harman, were trained in medical observation. Can the court say that all reasonable minds would conclude that pulmonary complications Appellant suffered did not result from, or were not related to the condition Appellant suffered and complained of, while under Dr. Hicken's care? The X-Rays taken in Wyoming, of Appellant's lungs, show a condition so obvious that no expert is needed to say

that the right lung has deteriorated. That fact is ascertainable by ordinary use of non expert senses.

See Exhibits 7 P through and including 16 P.

There is a reasonable inference that the condition of Appellant's lungs, as shown by the X-Rays taken in the Wyoming Hospital, and the bills incurred by Appellant as a result of the hospitalization and treatment received in the Wyoming Hospital resulted from and were related to the condition of Appellant's lungs while she was under the care of Dr. Hicken. In fact, such an inference is more reasonable than any other.

Counsel for Dr. Hicken urged to the lower court that the jury, in order to find that Dr. Hicken may have been legally responsible for Appellant's condition, would have to find from an inference based upon an inference. This would not defeat Appellant's right to go to the jury on the state of the evidence.

In *Hewitt vs. General Tire & Rubber Company*, 284 P,2d 471, the court discusses the legal validity of an inference upon an inference:

“It has been suggested in decisions from numerous jurisdictions, and sometimes actually enforced, that a fact desired to be used circumstantially must itself be established by direct evidence and that an inference cannot be based upon an inference. Professor Wigmore, 1 Wigmore on Evidence, Sec. 41, criticises this view:

‘There is no such orthodox rule; nor can be. If there were, hardly a single trial could be adequately prosecuted. For example, on a charge of murder, the defendant's gun is found discharged; from this we infer that

he discharged it; and from this we infer that it was his bullet which struck and killed the deceased. Or, the defendant is shown to have been sharpening a knife; from this we argue that the fatal stab was the result of this design. In these and innumerable daily instances we build up inference upon inference, and yet no Court (until in very modern times) ever thought of forbidding it. All departments of reasoning, all scientific work, every day's life and every day's trials, proceed upon such data. The judicial utterances that sanction the fallacious and impracticable limitation, originally put forward without authority, must be taken as valid only for the particular evidentiary facts therein ruled upon.'

'The fallacy has been frequently repudiated in judicial opinions. * * '

Professor Wigmore cites the case of *New York Life Ins. Co. vs. McNeely*, 52 Ariz. 181, 79 P.2d 948, as demonstrating the line which may be drawn to assuage the distrust of inference upon inference and distinguish between mere conjecture and valid inference:

'The principle which is applied by the average man in his own private affairs usually is that no matter how many inferences are piled on each other, it is only necessary that each successive inference should be more probable than any other which might be drawn under all the circumstances. The Courts, however, have always insisted that the life, liberty and property of a citizen should not be taken away on possibil-

ities, conjectures, or even, generally speaking, a bare probability. In criminal cases, they demand that when a conviction is to be based on a chain of inferences, each and every link in that chain must exclude every other reasonable hypothesis. In civil cases, involving only property rights, the rule is not so strict, and it is sufficient, if the ultimate fact is to be determined by an inference from facts which are established by direct evidence, that it be more probable than any other inference which could be drawn from the facts thus proven. But when an inference of the probability of the ultimate fact must be drawn from facts whose existence is itself based only on an inference or a chain of inferences, it will be found that the Courts have, with very few exceptions, held in substance, although usually not in terms, that all prior links in the chain of inferences must be shown with the same certainty as is required in criminal cases, in order to support a final inference of the probability of the ultimate fact in issue * * * the prior inferences must be established to the exclusion of any other reasonable theory rather than merely by a probability of the ultimate fact may be based thereon. This rule is not based on an application of the exact rules of logic, but upon the pragmatic principle that a certain quantum of proof is arbitrarily required when the courts are asked to take away life, liberty or property..’ ”.

CONCLUSION

It is Appellant's position that the Court erred in setting aside the verdict of the jury and in dismissing the action.

In the Court's statement as to why it vacated the award of the jury, (Record 361, 362 and 363), the Court gave certain reasons for its action. Assuming, but not admitting that the Court was correct in its reasons, several of the reasons given, if correct, would have been a basis for the Court's granting a new trial rather than vacating the award of the jury and dismissing the action. It is respectfully requested that this Court reverse the order of the lower Court and reinstate the verdict of the jury as it was rendered by the jury upon the trial of the matter.

Respectfully submitted,

James E. Faust

Attorney for Appellant