

1982

# Jonathan Little and Hannah Little v. Utah State Division of Family Services : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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JONATHAN LITTLE and HANNAH	)	
LITTLE,	)	
	)	
Plaintiffs-	)	
Respondents,	)	Case No. 18113
	)	
v.	)	
	)	
UTAH STATE DIVISION OF	)	
FAMILY SERVICES,	)	
	)	
Defendants-	)	
Appellants.	)	

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BRIEF OF RESPONDENTS

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APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL  
DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE  
OF UTAH, THE HONORABLE KENNETH RIGTRUP, JUDGE

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FILED

MAY 14 1982

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Clark, Supreme Court, Utah

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BRIEF OF RESPONDENTS

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NATURE OF THE CASE

Plaintiff-Respondents, JONATHAN and HANNAH LITTLE, filed an action in the District Court of Salt Lake County, for the wrongful death of their natural daughter, JENNIFER, as a result of the negligence of the Defendant-Appellant, Utah State Division of Family Services.

DISPOSITION IN LOWER COURT

The case was tried to the District Court, sitting without a jury on August 12 and 13, 1981. The District Court found that the Division of Family Services had a duty to protect JENNIFER LITTLE from harm they knew or should have known was likely,



that the Division of Family Services breached such duty, and that JENNIFER'S death was the direct and proximate result of Defendant's breach of said duty. The Court entered judgment against the Defendant in favor of the Plaintiffs in the amount of \$20,000.00, plus funeral expenses and costs.

#### RELIEF SOUGHT ON APPEAL

Plaintiffs seek to affirm the District Court's ruling and its judgment entered in favor of JONATHAN and HANNAH LITTLE.

#### STATEMENT OF THE FACTS

The Statement of Facts presented by the Appellant does not fairly and accurately describe the evidence at trial, and Respondents therefore submit their own Statement of Facts.

On March 16, 1977, a Warrant and Order of Temporary Placement directed to JENNIFER LITTLE was issued by the Second District Juvenile Court based upon a Petition filed by LOIS M. RUDD of the Division of Family Services. JENNIFER'S parents, JONATHAN and HANNAH LITTLE, appeared at the Juvenile Court hearing on April 6, 1977, without counsel and admitted the allegations of the Petition. The Utah State Division of Family Services was granted custody and guardianship of JENNIFER LITTLE pursuant to an Order of the Second District Juvenile Court. The Juvenile Court made the following findings:

Said child is dependent through no fault of the parents in that: (1) said minor has not developed properly and manifests autistic behavior; (2) said minor is in need of specialized assistance



which the parents are emotionally unable to provide. (Exhibit 1)

On April 25, 1977, JENNIFER was placed in the home of RUSSEL and PEARL MEIK, therapeutic foster parents for handicapped children and children with special problems. The MEIKS had insufficient special training for caring for children with autistic behavior. (R. 323, 61). Upon placement in the MEIK foster home, JENNIFER began periodically hitting her head against the floor and walls, and pulled hair from her scalp causing herself constant injury (R. 297). Mrs. MEIK would keep JENNIFER nearby and hold her during head-banging episodes. This conduct was reported by Mrs. MEIK to CONNIE COWLEY, the Division of Family Services case worker who had been assigned responsibility for JENNIFER'S case. CONNIE COWLEY observed bruises on JENNIFER'S face (R. 235). The foster care worker, however, did not instruct Mrs. MEIK to take any further precaution (R. 225). Mrs. LITTLE also expressed her concerns about JENNIFER'S condition to CONNIE COWLEY (R. 235). JENNIFER LITTLE, two and one-half ( $2\frac{1}{2}$ ) years old, died on June 4, 1977, as a result of injuries to her head (R. 280). At the time of her death, JENNIFER had bruises on her face and body which were of various ages and in various stages of healing. (R. 286). On that day, JENNIFER had been left in the care of another foster child living in the home, FLOYD HOOTEN, a mildly retarded seventeen (17) year old boy (R. 217). According to the police reports which were admitted as evidence, FLOYD HOOTEN may have hit JENNIFER several times on the head on the day she

died because she was fussing about going to the bathroom. No charges, however, were ever brought against him. (Exhibits 27 & 28).

In December, 1978, JONATHAN and HANNAH LITTLE, Respondents, filed suit against the Utah Division of Family Services, alleging a course of negligent conduct upon the part of the Appellant which culminated in the death of their daughter. The Appellant's Motion to Dismiss (April 5, 1979), based in part on the Governmental Immunity Act, was denied as to the Division of Family Services, the District Court finding that the discretionary function exception did not apply. (R. 62-64). After a two day trial, the District Court found that the Division of Family Services had a duty to protect JENNIFER, that the duty was breached, and that her death was proximately caused thereby. Judgment was entered for Plaintiffs and damages awarded in the amount of \$20,000.00, plus funeral expenses and costs. (R. 457-463, 158-162).

#### POINT ONE

TRIAL COURT CORRECTLY DENIED  
THE APPELLANT DIVISION OF FAMILY  
SERVICE'S MOTION TO DISMISS BASED  
ON THE UTAH GOVERNMENTAL IMMUNITY  
ACT.

Appellant, Division of Family Services, seeks absolute immunity for negligent actions performed by its employees and agents in the foster care program. Such a narrow interpretation of the Utah Governmental Immunity Act, Section 63-30-1 et seq.,

is neither necessary or desirable. This Court has noted that the legislature, in drafting the Act, intended "to allow the Court flexibility and adaptability in fashioning consistent and rational limits to governmental immunity." Staniford v. Salt Lake City Corp., 605 P.2d 1230, 1232 (Utah 1980). Such a recognition is fully consistent with the need to balance the injury suffered by the individual citizen against the effect which the burden of recovery places upon the effective administration of government. Weighing these considerations, Respondent contends:

1. The foster care program of the Division of Family Services does not perform a governmental function within the meaning of the Utah Governmental Immunity Act.

2. Even if the foster care program is recognized as a governmental function, the discretionary function exception to the general waiver of immunity for negligence does not apply in this case.

A

THE MAINTENANCE OF A FOSTER CARE PROGRAM IS NOT A GOVERNMENTAL FUNCTION WITHIN THE MEANING OF THE UTAH GOVERNMENTAL IMMUNITY ACT.

Section 63-30-3 of the Utah Governmental Immunity Act, states:

Except as may be otherwise provided in this Act, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function, governmentally owned hospital, nursing home, or other governmental health care facility.

In Staniford v. Salt Lake City Corp., supra, this Court held that the test for determining whether a particular state or municipal activity was a governmental function, depended upon if it was "of such a unique nature that it can only be performed by a governmental agency or that it is essential to the core of governmental activity." 605 P.2d at 1237. The Court pointed out that while the new standard broadened governmental liability, the Governmental Immunity Act did authorize the procuring of governmental insurance protection, the cost of which could be included within the budget of governmental entities, Id at 1237.

In Johnson v. Salt Lake City Corp., 629 P.2d 432 (Utah 1981), the Plaintiff brought suit against a city when her daughter's sled collided with an upright timber implanted in concrete on a golf course used for sledding during the winter. The District Court dismissed the case on the basis of governmental immunity. This Court, in reversing that dismissal, reaffirmed the validity of the "uniqueness test" for determining that scope of governmental function. The Court further clarified the parameters of the test by noting:

The first part of the Standiford test - activity of such a unique nature that it can only be performed by a governmental agency - does not refer to what government may do, but to what government alone must do, 629 P.2d at 434 (emphasis added).

In both Standiford and Johnson, the Court held that recreational activities maintained by a municipality were not of such a unique nature that they could only be conducted by a governmental ag-

ency.

Whether the maintenance of a city sewer system was essential to the core of governmental activity was at issue in Thomas v. Clearfield City, No. 17338, filed February 24, 1982 (Utah 1982). In this case, a blockage in the sewer line caused sewer water to collect in the Plaintiff's basement. The District Court granted the city's Motion for Summary Judgment on the basis of governmental immunity. In reversing the ruling of the District Court, the Court noted that even though the legislature had provided municipalities with the option to enforce mandatory hookups into city sewer systems, "it does not follow from this that the function automatically qualifies for governmental immunity as 'essential to the core of governmental activity.'" The Court noted, "(i)t is not even mandatory that a governmental entity perform these functions." No. 17338 at 3,4.

Utah's Governmental Immunity Act is similar to that of the State of Michigan. Staniford v. Salt Lake City Corp., 608 P.2d at 1236. In Robison v. City of Sterling Heights, 290 N.W.2d 43 (Mich. App. 1979), the Plaintiff was injured while working on a water main construction project for the Defendant municipality and brought action for damages. The trial Court granted Summary Judgment for the Defendant on the ground of governmental immunity. The Court of Appeals reversed the trial Court:

We conclude that . . . the operation of a municipal water system is not a governmental func-

tion. Since the government is not the only entity involved in supplying the public with drinking water, it is not an operation that can be effectively accomplished only by the government.

290 N.W. 2d at 45

The Court further went on to note that allowing tort liability would not result in an impermissible interference with effective government. Potential liability should simply be taken into consideration as a cost of performing the particular service. . . . .  
290 N.W. 2d at 45.

The Michigan Court of Appeals refined the governmental function test in Churchwell v. Board of Regents of the University of Michigan. 296 N.W.2d 75 (Mich. App. 1980). In this case the Plaintiff filed a Complaint alleging she sustained injuries through negligent treatment of the University of Michigan Hospital, and the trial Court dismissed on the basis of governmental immunity. The Michigan Supreme Court in Parker v. Highland Park, 404 Mich. 183, 272, N.W.2d 413 (1978), had held that the daily operation of a hospital does not constitute a governmental function. The Defendant sought to distinguish Parker by arguing that the University of Michigan Hospital was a teaching hospital affiliated with a legislatively mandated medical school, and had no counterpart in the private sector. 296 N.W.2d at 78. The Court of Appeals did not agree:

We do not find that the purpose, planning and carrying out of the day to day operation of the University Hospital can be effectively accomplished only by the Government. We recognize that,



from an economic standpoint, perhaps the operation of a medical school can only be so effectuated. This, in itself, is controvertible, however, when one considers that private institutions for the training of other health care professionals, such as dentists and nurses, do exist in the state. In any event, in applying the definition of governmental function, we must focus upon the precise operation sought to be held immune rather than overall or principal departmental operation.

296 N.W.2d at 78 (emphasis added).

The test for determining whether a particular governmental activity falls within the governmental function category hinges upon whether the activity is of such a value that it must be performed by the government. The criteria used to determine if the function must be performed by the government relates to whether the service being performed has any equivalent in the private sector and whether it is mandatory that the government perform the service. In the case before the Court, these criteria are not established. It is not mandatory that the State perform all foster care and other agencies also provide such care. There are at least three private agencies in Utah that maintain established foster care programs: Childrens Service Society of Utah, LDS Social Services, and the Catholic Community Service. Section 78-3a-39(11) U.C.A. (1953 as amended) specifically empowers the Juvenile Court to release children to the care of an individual or to a private agency or institution.

This Court should focus its analysis upon the precise governmental activity sought to be held immune rather than the



overall departmental operation. Respondent does not argue that every activity of the Division of Family Services does not fall within the category of a governmental function. The operation of the foster care program by the Division of Family Services is not "so essential to the core of governmental activity" that it "must" be performed by the state government. The foster care program is not a uniquely governmental activity, and has counterparts in the private sector. It does not meet the criteria needed to establish it as a governmental function within the meaning of Utah Code Annotated, 63-30-3. Mere legislative recognition does not automatically qualify the activity for governmental immunity, Thomas v. Clearfield City, supra, at 3.

B

EVEN IF THE FOSTER CARE PROGRAM  
IS RECOGNIZED AS A GOVERNMENTAL FUNC-  
TION, THE DISCRETIONARY FUNCTION  
EXCEPTION TO THE GENERAL WAIVER OF  
IMMUNITY FOR NEGLIGENCE DOES NOT  
APPLY IN THIS CASE.

The immunity from suit for the negligent performance of a governmental function is not absolute. The grant of immunity is limited by Section 63-3-10(1) of the Utah Code Annotated which states:

Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of his employment except if the injury:

(1) arises out of the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused.

In deciding whether any particular governmental function is discretionary and hence immune to suit, this Court has adopted the planning-operational test, Carroll v. State Road Commission, 27 Utah 2d 384, 496 P.2d 888 (1972). In applying this test, the Court, "has followed the lead of cases interpreting the Federal Tort Claim Act." Frank v. State, 613 P.2d 517, 519 (Utah 1980).

The United States Supreme Court first analyzed the discretionary function exception in Dalehite v. United States, 346 U.S. 15 (1953). The case arose from a fire and explosion in Texas which killed more than 500 persons. With two members of the Court not participating, and over the strong dissent of Justice Jackson, a four member majority concluded that discretion "includes determination made by executives or administration in establishing plans, specifications or schedules of operation. Where there is room for policy judgment and decision there is discretion." 346 U.S. at 35-36.

The broad definition of discretion pronounced by the Court in Dalehite was narrowed somewhat two years later in Indian Towing Co. v. United States, 350 U.S. 61 (1955). Plaintiff sought to hold the government liable for the negligent failure to maintain a lighthouse with the result that a ship and barge went aground and were damaged. In reversing the lower Court's dismissal on the basis of governmental immunity, the Supreme Court held that the original policy decision to implement the operation

of the lighthouse was discretionary. Once parties began to act in reliance on the lighthouse, however, the government was obligated to use due care in the maintenance of the light or to give warning that it was not functioning. 350 U.S. at 69.

In Doe v. McMillan, 412 U.S. 306 (1972), the Plaintiffs claimed that the Public Printer and the Superintendent of Documents invaded their privacy by publishing certain derogatory documents for use by congress and others. The Court held that while the Defendants were acting within the scope of their duties, the performance of these duties was not a discretionary function. The Court reasoned that mere affiliation with legislative action did not confer immunity. 412 U.S. at 323-24. To determine what areas of governmental conduct should be considered discretionary, the Court advised "a discerning inquiry into whether the contribution of immunity to effective government in particular context outweighs the perhaps recurring harm to individual citizens." 412 U.S. at 320.

The Supreme Court clearly considers the initial decision making and implementation of high level policy judgment to be a protected discretionary function. A charge in the course of the Missouri River, Coates v. United States, 181 F.2d 816 (8th Cir. 1950), or a decision to conduct tests of nuclear explosions, Bartholomae v. United States, 135 F.Supp. 651 (S.D. Calif. 1955), are examples of such policy judgments which have been granted immunity. The distinction between the planning

and preparation of governmental programs and the subsequent operation of those programs has been concisely summarized by the Ninth Circuit in United Airlines, Inc., v. Weiner, 335 F.2d 379 (9th Cir. 1964), cert denied 375 U.S. 951, 85 S.Ct. 452, 13 L.Ed.2d 549:

discretionary to undertake firefighting, lighthouse, rescue, or wrecked ship marking services, but not discretionary to conduct such operations negligently; discretionary to admit a patient to an army hospital, but not discretionary to treat the patient in a negligent manner; discretionary to establish a post office at a particular location, but not to negligently fail to install handrails; discretionary to establish control towers at airport and to undertake air traffic separation, but not to conduct the same negligently. . .

335 F.2d at 393, footnote omitted. Also see Prosser on Torts. 4th Ed., pp. 972 - 74.

The Federal Courts have applied the planning - operational test to a variety of factual circumstances in an attempt to determine what constitutes a discretionary function. In Griffin v. United States, 505 F.2d 1059 (3d Cir. 1974), the Plaintiff became a quadrapalegic as a result of ingesting live virus polio vaccine which - though it had been subjected to testing for safety - had been approved for release to the public in a manner inconsistent with H.E.W. regulations. The Court of Appeals upheld the District Court's finding that there was no discretionary function involved and stated:

The fact that judgment of government officials occur in areas requiring professional expert evaluation does not necessarily remove those judgments from the examination of courts by classifying

them as discretionary acts. . . This Court is fully capable of scrutinizing the processes and conclusions of the decision-makers by the usual standards applied to cases of professional negligence.

500 F.2d at 1066-67, citations omitted.

In Downs v. United States, 522 F.2d 990 (6th Cir. 1975), a passenger plane being hijacked to the Bahamas, stopped to refuel in Jacksonville, Florida. The FBI initiated a gunbattle with the hijacker which provoked the hijacker to shoot a woman, the pilot and himself. A survivor brought suit and the District Court found for the Plaintiffs, holding that the "discretionary function" exception was not applicable. The Court of Appeals, in upholding the ruling of the District Court, rejected the argument that the exercise of "judgment" during the performance of a governmental activity was the crucial factor "which immunizes the United States from the liability for the torts of its employees." 522 F.2d at 995. The Court instead focused its inquiry upon whether the conduct of the FBI agents was involved in the making of policy. The Court noted that FBI hijacking policy had been formulated before the hijacking and it did not consider the actions of the chief agent in directing the handling of the situation as ad hoc formulation of government policy. 522 F.2d at 997.

Case workers for the foster care program exercise their duties with reference to a pre-existing set of policy guidelines: the guidelines for Substitute Care (Children) contained in the "Direct Services Section" of the Family Services Manual (April,

1980). These guidelines are far from nebulous. For example, Section VSCF 310 Pre-Placement and Placement Activities, states: "When the placement appears to be in the best interest of the child, the workers perform the following activities." After this statement there are listed twenty (20) activities the case workers should perform, including . . .

6. Determine and select with parents, as far as possible, the kind of substitute care placement to best suit the child's needs, using the guidelines for placement. . . .
14. Make an application for a medical card on Court adjudicated children . . .
17. Shares information with the foster parents to enable them to provide appropriate care, to understand and be able to deal with the child's behavior, and meet the child's needs. (emphasis added).

The decision for placement of a child in "special foster care", as was the case with JENNIFER LITTLE, does not rest with the judgment and discretion of the case worker. When a case worker makes a recommendation for special foster care, Section VSCF 320 Screening for Special Care (1), informs us: "The district staff reviews the request and approves or denies the placement."

The treatment accorded a foster child is also not based solely on the discretion and judgment of the case worker. Section VSCF401 Treatment Plan, states:

1. Within 30 days of receiving a case, the worker, with the family, will make a treatment plan to be shared with the Court. . .



2. The treatment plan should specifically state what parents are to do, what the child is to do, and what the worker is to do to resolve the problem. The plan shall state the time limit for accomplishing this objection of the plan, resources to be used, and shall indicate the proposed behavioral outcome of the services. (emphasis added).
3. The plan is to be the basis of all services to the child and family. . .

The implementation of a treatment plan is provided for in Section VSCF 402 Supervision, which states:

1. During the time that the child is in foster care, the worker will carry out the provision of the treatment plan.
2. The worker helps the foster parent, child and natural parents resolve the problems which arise during care. . .
3. The worker maintains ongoing contact with the foster parents at a minimum of once a month.
4. The worker reviews progress toward goals of the treatment plan, and reviews the plan as needed.

Case workers for the foster care program perform their duties with reference to a published and clearly articulated set of guidelines, and thus do not engage in formulating departmental policy goals.

This issue of the discretionary nature of a professional's supervision of human beings in accordance with government promulgated guidelines is admittedly a difficult one. The various dimensions of this problem, however, were carefully explored by the Fifth Circuit Court of Appeals in Payton v. United



States, 636 f.2d 132 (5th Cir. 1981). The Plaintiffs, the husband and children of a murder victim, alleged that a federal prisoner had been released from custody in disregard of medical reports confirming him as a homicidal psychotic, and that shortly thereafter, he brutally murdered the victim. The Court of Appeals, in reversing the District Court's dismissal, called for a balancing test is assessing the nature and quality of the discretion involved in the planning-operational distinction. Applying this test to the facts before it, the Court concluded:

The question then becomes, where does the discretion of the Parole Board lie? It is important to note at this point that the allegations attack only the application of the Parole Boards guidelines to Whisenhart, and not the guidelines themselves. The exercise of policy making discretion by the Board occurred in formulating and implementing the guidelines criteria . . . Such "policy" decisions, whether good or bad, are probably exempt under Dalehite. But surely the application of their guidelines to Whisenhart is not. Such an act has none of the political policy overtones that exist in certain law enforcement situations, such as enforcing integration . . . The choices involved in applying the guidelines and releasing a particular person are of another sort. Whether characterized as "operational", "day-to-day" or some other label, they do not achieve the status of a basic policy evaluation and decision.

636 F.2d at 146-47, citations omitted (emphasis added).

The Court also noted that Plaintiff's loss could be described as severe and isolated, and that such a loss was difficult to justify as the risk of almost any governmental activity. 636 F.2d at 1145.

A similar balancing test was used by the Tenth Circuit Court of Appeals in an attempt to delineate the mode of discretion exercised at the operational level from true policy formulation. In Jackson v. Kelly, 557 F.2d 735 (10th Cir. 1977), the Plaintiff brought action for medical malpractice against an Air Force physician alleging that the Defendant had negligently treated her for conditions relating to her pregnancy. The Court of Appeals, in reversing the District Court's dismissal, followed the lead of the Supreme Court in Doe v. McMillan, supra, and directed its analysis first to deciding if Defendant's actions were discretionary, and then to balancing the redress of the harm suffered by the individual against the burden this places on effective government. 557 F.2d at 737. The Court adduced the following test to distinguish discretionary from operational functions: "Generally speaking, a duty is discretionary if it involves judgment, planning or policy decisions. It is not discretionary if it involves enforcement or administration of a mandatory duty at the operational level, even if professional expert evaluation is required." 557 F.2d at 737-38. The Court was careful to distinguish the type of discretion exercised by a professional during the course of his or her official employment, and the type of departmental policy formulation which is granted immunity:

Plaintiff's Complaint merely charges Defendant with the negligent practice of medicine; it does not ask the District Court to review a federal health policy. We recognize that medical treat-

ment by a government doctor involves judgment and discretion. This does not resolve the matter, however, because medical treatment by a government doctor does not necessarily involve governmental discretion.

557 F.2d at 738 (emphasis added).

The Court next focused on the competing interest between the citizen's recovery for harm and the burden of their recovery upon the government. The policy consideration which the Court felt weighed heaviest in favor of recovery was the gravity of harm to the individual citizen. Where this is sufficiently grave, it should preclude immunity. In evaluating the detrimental effect which the disallowing of immunity would have upon governmental action, the Court observed:

Effective government would not suffer excessively if monetary compensation were permitted because the alleged wrongful conduct does not involve politically sensitive judgment or discretionary governmental acts. Granting damages to Plaintiff would not tend to constrict governmental functioning in an area where prompt governmental action and snap governmental judgments are necessary.

557 F.2d at 739.

As the Court noted in Payton, the loss of a loved one is a severe and isolating injury, and under the balancing test as developed by the federal courts, such a harm as suffered by JONATHAN and HANNAH LITTLE should preclude immunity. The Respondents are not asking the Court to review state foster care policy. What the LITTLES do assert is that the acts and omissions which brought about JENNIFER'S death resulted from the negligent application of the foster care policy guidelines, and that as such, these choices can only be characterized as operational.



The California Courts have so held. In Elton v. County of Orange, 3 Cal. App. 3d 1083, 84 Cal. Rptr. 27 (1970) a Court reversed a dismissal of a Complaint and ruled that a cause of action was stated by a child against a county, the Department of Social Welfare, and the Probation Department of negligence in placing the child in a home where she was beaten and that certain regulations had not been complied with, resulting in injury to the child. The Court noted:

Decision for the maintenance, care, and supervisions of a dependent child, or in connection with the child's placement in a particular home, may entail the exercise of discretion in a liberal sense, but such determinations do not achieve the level of basic policy decision and thus do not, under Government Code Section 820.2 preclude judicial inquiry into whether negligence of public employees was involved . . .

It was noted above that the planning-operational test, as it evolved in the federal courts, was adopted by Utah in Carroll v. State Road Commission, 27 Utah 2d 384, 496 P.2d 888 (1972). Plaintiffs had alleged that they accidentally drove on to an abandoned highway and suffered injury as a result of the negligence of the road commission in using earthen beams to block the abandoned road. The trial Court held that the discretionary exception to the Governmental Immunity Act was not applicable. This Court, in upholding that ruling, decided that the road supervisor's decision to use beams to block the road "was not a basic policy decision essential to the realization or accomplishment of some basic governmental policy, program or objective . . . His determination may properly be characterized as one at the

operational level of decision making . . ." 496 P.2d at 891-92.

The planning-operational test was applied again in Andrus v. State, 541 P.2d 1117 (Utah 1975), when the Plaintiffs brought suit for property damage resulting from negligent construction of a highway project. The Court, in upholding the liability of the state, noted that while the decision to build the highway and specifying its general location were discretionary functions, the preparing of plans and specifications and the supervision of the manner in which the work was carried out could not be labeled discretionary. 541 P.2d at 1120.

This Court, however, in Epting v. State, 546 P.2d 242 (Utah 1976), chose not to apply the planning-operational test. The Plaintiffs were the children of a murder victim and brought suit against the state alleging it was negligent for allowing a prisoner on its work-release program to escape. The majority opinion, rested upon both the discretionary function exception and the exception in Utah Code Annotated Section 63-30-10(10) which retains immunity if the injury "arises out of the incarceration of any person in any state prison, county or city jail or other place of legal confinement. . . ." In summarily denying relief to the Plaintiffs the Court did not discuss Carroll or Andrus. Justice Maughan, however, in a forceful dissent, made the following observation:

Whether we have work release programs, or not, is a basic policy decision, and discretionary with the state, insofar as they are constitutionally permissible. No question is raised against that proposition. But, it does not follow that the escape of the prisoner from the work release program is also discretionary with the State. When we commend the work release program we commend a discretionary act taken at the planning level, the basic policy making level. Here we are not concerned with decisions made on that level, we are concerned with circumstances occurring and decisions made on the operational level. This Court has clearly made that distinction in Carroll v. State Road Commission.

546 P.2d at 245.

Faced with a similar fact situation, the Nevada Supreme Court applied the planning-operational test in State v. Silvia, 478 P.2d 591 (Nev. 1970). The Plaintiffs, husband and wife, brought suit to recover damages resulting from the rape of the wife by an escaped inmate of a state run honor camp. In upholding the trial verdict for Plaintiffs, the Court observed: "Although the selection of inmates for honor camp service may primarily be a discretionary act, the manner in which the camp is supervised and controlled is mainly operational in nature." 478 P.2d at 593.

In a series of recent cases, Utah has again relied upon the planning-operational test. When the State Tax Commission sold the Plaintiff's motorcycle without notifying him, after the motorcycle was impounded and being held as evidence against the person charged with its theft, this Court in Morrison v.

Salt Lake City Corp., 600 P.2d 553 (Utah 1979), held that the decision to sell the motorcycle did not involve an exercise of basic policy evaluation, but was rather operational, 600 P.2d at 555. In Bigelow v. Ingersoll, 618 P.2d 50 (Utah 1980), the Plaintiffs, injured in an automobile accident, brought suit against the state claiming that the state had negligently designed the traffic control light at the intersection. This Court, applying the planning-operational test, reversed the trial Court's ruling that the state was immune. The Court concluded:

Although the act of the State involved in designing the traffic control system involves some degree of discretion as to almost all acts, the design of the traffic control system does not involve the basic "policy making level".

618 P.2d at 53.

As can be observed from the preceding cases, where the issue of a discretionary function arises out of a technical program rather than a program concerning the care and safety of human beings, the line drawing between the planning and operational levels is less complicated. The Utah Code, however, specifically withdraws certain non-technical governmental programs from judicial scrutiny in this regard. The government is exempt from liability for any injury arising out of the incarceration of any person in a penal custodial program, Utah Code Annotated, Section 63-30-10(10). The planning-operational test has little impact on this area of governmental activity.

An effective application of the planning-operational



test to a non-technical program, however, was clearly demonstrated by this Court in Frank v. State, 63 P.2d 517 (Utah 1980). The Plaintiff in this case brought suit against the state for negligence in the death of his son, Jack Alger. Alger had been undergoing treatment at the University of Utah Medical Center, and, notwithstanding the fact that Alger informed those responsible for his care that he had previously attempted to take his own life, no action was taken to restrain or treat Alger; on the contrary, he was permitted to leave the hospital. Soon after, he committed suicide. The Plaintiff's suit was dismissed by the trial Court on the basis of governmental immunity. This Court reversed and drew the distinction between the exercise of operational level discretion necessary in any non-technical program, and planning level discretion which applies when organizational or program-wide goals are formulated and implemented, concluding:

The Court recognizes the high degree of careful observation, evaluation, and educated judgment reflected in any modern medical prognosis, and makes no suggestion that a large measure of "discretion", as commonly defined, is not involved. The exception to the statutory waiver here under consideration, however, was intended to shield those governmental acts and decision impacting on large numbers of people in a myriad of unforeseeable ways from individual and class legal actions, the continual threat of which would make public administration all but impossible. The one-to-one dealings of physician and patient in no way reflect their public policy making posture, and should not be given shelter under the Act.

613 P.2d at 520 (emphasis added).

As was the case in Frank, no action was taken by those

charged with the duty to care for JENNIFER LITTLE, to adequately protect her when they knew or should have known that harm was likely or to train the foster parents or to provide them with the necessary, proper equipment to handle JENNIFER'S problems. In line with the holding of Frank, Respondents contend that the negligent acts and omissions which resulted in JENNIFER'S death can in no sense be considered "governmental acts and decision impacting on large numbers of people", or as reflecting a "public policy-making posture". The acts and omissions resulted from the performance of policy guidelines and not their formulation, and as such are activities conducted at the operational level.

The Respondents have suffered an egregious and isolating harm. Such a loss as this cannot be justified as incidental to the functioning of the foster care program. The foster care program is not fraught with political or policy overtones and the imposition of liability in this case will not be overly burdensome upon the program. The Governmental Immunity Act authorizes the procurement of insurance protection. The Respondents do not seek to have the Court pass judgment upon the policies of the foster care program. They merely seek just compensation for their loss.

#### POINT TWO

TRIAL COURT WAS CORRECT IN FINDING THAT THE DIVISION OF FAMILY SERVICES HAD A DUTY TO PROTECT AND CARE FOR JENNIFER LITTLE AND THAT THE DUTY WAS BREACHED.

On April 6, 1977, the Utah State Division of Family

Services was granted custody and guardianship of JENNIFER LITTLE pursuant to an Order of the Second District Juvenile Court. Section 78-3a-39(3) U.C.A., gives the Juvenile Court the power to:

(v)est Legal custody of the child in the (State Division of Family Services/State Department of Social Services) or the public agency, department, or institution, or in a child placement agency as defined herein, for placement in a foster home or other facility. . .

Section 78-3a-2(7) of the Utah Code (1953 as amended) defines "legal custody" as:

a relationship embodying the following rights and duties: A right to physical custody of a child; the right and duty to protect, train, and discipline him; the duty to provide him with food, clothing, shelter, education, and ordinary medical care; the right to determine where and with whom he shall live, and the right, in an emergency, to authorize emergency or other extraordinary care. (emphasis added).

This Court stated in Wilson v. Family Services Division Region Two, 554 P.2d 227 (Utah 1976), that once there has been an adjudication depriving the natural parents of the custody of their child and the child is placed in the custody of Family Services, "the latter then has the responsibility and authority to safeguard the welfare of the child, including the placement in a home for that purpose. . . ." 554 P.2d at 229 (emphasis added).

The important policy consideration underlying the "responsibility and authority to safeguard the welfare of the child" was recognized by the Utah Supreme Court in In Re Tanner, 549

P.2d 703 (Utah 1976). In this case a child under the guardianship of Family Services, sought judicial enforcement of his right to dental care. The Court, in upholding the child's right to care, noted that there is a "concept inherent in our law respecting children; that in a civilized society, all children, even those without parents, or a home, should be provided not only food, clothing and shelter, but other basic needs, including necessary medical and dental care." 549 P.2d at 705.

The difficulties of JENNIFER'S head banging, and the fact that she was pulling her own hair out to the extent that she had a bald spot near the crown of her head, were communicated to the supervising care worker. The caseworker herself observed JENNIFER on May 17, 1977 (R. 235, 459). Because of JENNIFER'S special problems, which were known by the Division of Family Services prior to and during placement, the statutory and judicially recognized duties were augmented. This is particularly true where JENNIFER was removed from her parents through no fault of theirs in order to provide her with "specialized assistance." To argue that the State owes a limited duty under these circumstances simply defies logic.

The rule stated by this Court in Wheeler v. Jones, 19 Utah 2d 392, 431 P.2d 985 (1967), relating to the scope of duty where the safety of children is concerned, must certainly be amplified where the child is under a known disability. The Court stated:

Negligence is the breach of the duty to use due care under the circumstances of the situation.

when children are involved, the duty to look out for their safety is increased, and failure to make a given discovery might be negligence when children are involved and not negligence if adults only are affected.

431 P.2d at 988.

JENNIFER LITTLE was known to have autistic tendencies. The Division of Family Services was under a legal duty to place her in a home able to safeguard her welfare. This was not done. Mrs. MEIK, the foster mother, was never informed of the specifics of JENNIFER'S behavioral problem. When she informed the supervising case worker, CONNIE COWLEY, of the difficulty she was encountering, she was simply told that JENNIFER should be evaluated. (R. 209-210). The evaluation eventually took place, but the results of the evaluation were never explained to Mrs. Meik. (R. 211). Furthermore, even though Mrs. MEIK had received some training to become a therapeutic foster parent, her ability to deal with JENNIFER'S head-banging was limited because she had never before had a child with problems like JENNIFERS in her home (R. 207).

The seriousness of JENNIFER'S head-banging cannot be overemphasized. Mrs. MEIK stated that for most of the time JENNIFER was in her home she had bruises on her forehead, on her cheekbones, and below her eyes. (R. 213). When asked why she kept JENNIFER'S potty chair in the hallway, Mrs. MEIK answered: "Because I was afraid she would throw herself forward off that potty chair and hit her face on the tub or the wash basin or the toilet in the bathroom". (R. 214). The head-banging commenc



ed only after JENNIFER'S placement with DFS. (R. 178).

The duty of the Division of Family Services in this instance extended beyond merely placing JENNIFER in a therapeutic foster home. The duty clearly extended to placing her with therapeutic foster parents who were adequately trained to deal with children with autistic tendencies and head-banging problems, and at the least to provide the foster parents with meaningful advice and whatever equipment they might need to prevent harm.

In Erickson v. Bennion, 28 Utah 2d 371, 503, P.2d 139 (1972) the Plaintiff brought an action for damages to his home by irrigation water which flooded there after use by the Defendant. The Court stated:

It is to be conceded to the Plaintiff that the degree of care increases in proportion to the hazard to be anticipated; and because of the dangers inherent in the management of flowing water, the concept of ordinary care and prudence under the particular circumstances requires that its management not be left to novices, but should only be entrusted to persons of some experience and skill in the management of such water, who would have an awareness of the various hazards in the failure to properly control them and would therefore exercise the degree of foresight and precaution which people of such experience and skill would observe to avoid injury or damage to others . . .

503 P.2d at 140-41.

The principal articulated by the Court in this case with respect to the degree of care that must be exercised in managing a known hazardous condition, applies with equal if not greater force, where the risk of harm is to a two and one half

year old girl. JENNIFER was not placed in a foster home where the parents were trained specifically to deal with autistic children or to deal with children who were head-bangers. Nor was JENNIFER placed in a therapeutic foster home where the parents were subsequently provided with training to deal with these problems. (R. 211). Behavior modification techniques were not taught to the MEIKS as a means of altering JENNIFER'S behavior (R. 216), and no medication for JENNIFER was ever offered (R. 211). The foster parents were also not provided with any special equipment to deal with JENNIFER'S head banging. Dr. Sargeant testified at trial that a helmet, along with behavioral modification techniques or tranquilizers would have been an effective means of dealing with JENNIFER'S head-banging. (R. 318-319).

Foresight and ingenuity in dealing with a known risk may be necessary. In Boeing Company v. State, 89 Wash. 2d 443, 572, P.2d 8 (1978), the owner of some jet engine brought an action against the state for damages sustained to the engine when, being carried by truck, they struck the underside of an underpass. The verdict at trial was for the Plaintiff. In affirming this verdict, the Supreme Court of Washington carefully analyzed the requirements of reasonable care in light of known risks.

The Appellant contends that because such a system (photoelectric cell device) was not in common use . . . before the accident, to require the city to exercise ingenuity in conceiving such a system is to impose a duty of extraordinary care upon it. . . However, there are extraordinary situations which may call for extraordinary measures in the exercise of reasonable care. .



Here, the Respondent's evidence showed a past history of frequent accidents in spite of the warning sign posted. It further showed the Appellant's awareness of the need for a more effective warning system and that in other similar circumstances, governmental bodies had devised warning system to meet the problem. This evidence was sufficient to take to the jury the question whether the Appellant exercised reasonable care under the circumstances. The jury would reasonably conclude that the situation called for some ingenuity in the solution of the problem presented.

. . .

572 P.2 at 11-12, citation omitted.

JENNIFER'S problem, in a very real sense, called for extra careful measures in the exercise of due care. JENNIFER had been diagnosed as having autistic tendencies and the Division of Family Services was made aware of JENNIFER'S head-banging and thus, of the need for a more effective treatment program. There were treatment options available to the Division of Family Services. The Court, sitting as the trier of fact, could reasonably conclude, given the scope of the duty involved, "that the situation called for some ingenuity in the solution of the problem presented."

The scope of the duty a state agency owes to dependent foster children was considered by the Louisiana Supreme Court. In Vonner v. State 273 So. 2d 253 (La. 1973), the Welfare Department had acted in derogation of its own policies requiring periodic visits and medical examination of foster children, as well as ignoring complaints by the mother and child that the child was being treated cruelly. The court noted that the alleged beatings extended over a period of time and could or should

have been discovered by "conscientious performance of regular visitation and annual medical examination prescribed by the Department's own regulation." The Court concluded:

When the department obtains or accepts the custody of children, it becomes directly responsible for their care and well being. It cannot insulate itself from this responsibility by contracting it out to others to fulfill. For the reason to be noted, the Department is vicariously liable for the acts of the foster parents insofar as they breached the duty of the Department (exercised through them) for the child's well being. ..

It is the Department, not the foster parents, who has the legal custody of the child and, consequently, "the right and responsibility to provide for the physical, mental, moral and emotional well being of the child."

(emphasis added).

A careful reading of Judge Rigtrup's holding discloses no imposition of anything approaching absolute liability upon the Division of Family Services. The Judge stated:

The Court finds that the special problems of the child were known, the risks to the child were known or should have been known by the Division of Family Services. The Court recognizes that the MEIKS were qualified parents, were good parents, were conscientious parents, but they did not receive very straightforward, simple information from the Division which was available and at their disposal and which would have afforded the child a good deal of protection . . .

The Court finds that the Division of Family Services violated its duty to protect the child, given all the existing circumstances. (R. 461).

It was clearly the trial Court's role to determine the scope of Division of Family Services' Duty in light of the

state statute, case law, and the facts presented. As was pointed out by the Colorado Supreme Court in Metropolitan Gas Repair Services v. Kulik, 621 P.2d 313 (Colo. 1980), "whether a Defendant owes a legal duty to a particular Plaintiff is a question of law . . . The Court determines as a matter of law, the existence and scope of the duty - that is, whether the Plaintiffs' interest that has been infringed by the conduct of the Defendant is entitled to legal protection." 621 P.2d at 317, citation omitted.

The Division of Family Services was aware of JENNIFER'S behavioral disabilities, was aware of the risk of harm that was created thereby, and was under a clear legal duty to act with due care considering these circumstances. The Division of Family Services clearly breached their duty.

#### POINT THREE

THE NEGLIGENCE OF THE DIVISION  
OF FAMILY SERVICES WAS THE PROXIMATE  
CAUSE OF THE DEATH OF JENNIFER LITTLE.

In Hillyard v. Utah By-Products Co., 263 P.2d 287 (Utah 1953), the Plaintiff brought an action for the death of an automobile passenger who was killed when the automobile crashed into the Defendant corporations truck which was parked partly in the street. The Court, in discussing the issue of proximate cause, observed:

In addressing the question whether the parking of the truck on the highway was an act of negligence, it should be remembered that an act is not necessarily rendered non-negligent merely because it may be said that no injury would result to another except for some subsequent act

of negligence. One is guilty of negligence where he does such an act or omits to take such a precaution that under the circumstances present as an ordinary prudent person, he ought reasonably to foresee that he will thereby expose the interest of another to an unreasonable risk of harm. When one does so he may be held liable for resulting injuries caused by any reasonably foreseeable conduct, whether it be innocent, negligent or even criminal.

263 P.3d at 290, footnotes omitted.

Thus, the Division of Family Services' failure to provide protective headgear for JENNIFER, or to adequately train the Meiks to cope with JENNIFER'S head-banging is not rendered non-negligent merely because JENNIFER might not have died except for the concurring action of FLOYD HOOTEN, another foster child. The Division of Family Services omitted to take the necessary precaution, the lack of which they should have reasonably foreseen would have resulted in grave risk to JENNIFER'S life. Indeed, Dr. Serge M. Moore, the medical examiner, testified:

There is evidence to the effect that there were bruises on the scalp of various ages, and there were some injuries in various stages prior to the time of death. In all probability, and most likely with such probability as one can say in medicine, these were part of an aggregate episode or episodes that eventually lead to the final injury or contributed to the death as a result of the final injury." (R. 286).

The parameters of what constitutes "reasonably foreseeable" was examined by the Court in Rees v. Albertson Inc., 587 P.2d 130 (Utah 1978). In discussing the liability of a store in selling beer to a minor, the Court stated:

What is necessary to meet the tort of negligence and proximate cause in that it be reasonably foreseeable, not that the particular accident would occur, but only that there is a likelihood of an occurrence of the same general nature. In that connection, it is to be had in mind that the jury is entitled to base its judgment, not only upon the facts shown, but to indulge such reasonable inferences as may be fairly drawn therefrom.

587 P.2d at 133. (emphasis added).

Considering that JENNIFER had been diagnosed as having autistic tendencies and was battering herself to the extent that her face and forehead were constantly covered with bruises (R. 213), it was reasonably foreseeable that she would suffer some severe head injury. The Division of Family Services' breach of its legal duty to protect JENNIFER was the proximate cause of her death. As the Court noted in Anderson v. Red-E-Mix Paving Company, 24 Utah 2d 128, 467 P.2d 45 (1970): "We have indicated our agreement with the well established rule that where one is injured by the concurrent negligence of two wrongdoers, he can recover from either or both, and this includes circumstances where one has previously created a dangerous condition, which combined with a later act of negligence . . ." 467 P.2d at 47.

In Utah, to constitute the proximate cause of an accident, the negligence that is committed must be a substantial factor in bringing about the harm or result. Hall v. Blackham 18 Utah 2d 164, 417 P.2d 664 (1966). The Arizona Supreme Court, in McDowell v. Davis, 104 Ariz. 69, 448 P.2d 869 (1964), held that a trial court erred in instructing a jury that "an act or



omission cannot be a proximate cause if it contributes only slightly or possibly to the result." In evaluating the use of the term "substantial factor" in tort actions, the Court concluded: "It is not how little or how large a cause is that makes it a legal cause, for a proximate cause is any cause which in a natural and continuous sequence produces the injury and without which the result would not have occurred." 448 P.2d at 871-72. (emphasis in original).

Respondent asserts vigorously that absent the Division of Family Services' breach of their legal duty, absent their failure to provide JENNIFER LITTLE with protective headgear, absent their failure to provide proper training and therapeutic drugs, and responsible protection, JENNIFER would be alive today.

In a case such as this, the causal issue is dependent upon the question of the scope of the duty involved. Thode, Tort Analysis: Duty-Risk v. Proximate Cause and the Rational Allocation of Functions Between Judge and Jury," 1977 Utah Law Review 1, 28. The interrelation of these two factors, often glossed over by courts, was explicitly analyzed and used to serve as the basis of liability in Mason v. Bitton, 85 Wash. 2d 321, 534 P.2d 1360 (1975). In this case Bitton was being pursued upon a public highway by officers of the Seattle Police Department and the Washington State Patrol. One police officer attempted to form a moving roadblock ahead of Bitton, who seeing the roadblock, attempted to accelerate past the officer. Bitton crossed over the median and collided with Mason's car. The occupants

of both cars were killed. The Plaintiff brought action against Bitton, the city, and the state. The trial court held that as a matter of law the conduct of the city and state was not a proximate cause of Mason's death, which, in fact resulted solely from the collision with Bitton's car. The Supreme Court of Washington, sitting en banc reversed the holding of the trial judge. The Court first took notice of a state statute covering the duty owed by law enforcement officials to the public in regard to the operation of emergency vehicles. The Court then noted:

Directly connected with the question of duty is the issue of proximate cause. Having erroneously limited the scope of the Defendant's duty, the trial court concluded that the sole and proximate cause of Mason's injuries was his collision with the unlawfully driven vehicle, thereby exonerating the Defendants from liability. The fact that Bitton was obviously guilty of negligent conduct, which had a causal effect on the ultimate injuries incurred by Mason, does not necessarily relieve the Defendants of their potential liability, since the law does not require that there be but one proximate cause for any given event. . .

Washington, like an overwhelming majority of jurisdictions, recognizes that if two individuals commit independent acts of negligence which occur to produce the proximate cause of an injury to a third person, they are to be regarded as concurrent tort feasers, and each is liable as if solely responsible for the injury caused by the concurrent acts of negligence.

534 P.2d at 1363-64 citation omitted (emphasis added).

In the present case, it was not conclusively adduced that the blows FLOYD HOOTEN struck were in any direct sense responsible for JENNIFER'S death. Evidence presented at trial

indicated that JENNIFER did not show any evidence of skull fracture or any laceration. (R. 272). There was evidence of numerous bruises on her face, sustained over a period of perhaps one or two weeks (R. 274). But even granting that JENNIFER'S death was the result of an aggregate trauma induced by her headbanging and FLOYD HOOTEN'S blows, this would not relieve the Division of Family Services of their liability. It was clearly foreseeable that JENNIFER might suffer a harm of the general nature which in fact occurred.

In Cook v. Mortensen, 624 P.2d 675 (Utah 1981), a tenant, attempted to open some windows which had been negligently painted shut by his landlord. To accomplish this, the tenant constructed a platform out of garbage cans and, while barefoot, climbed atop this platform, fell, and sustained some injuries. The Court, in wisely dismissing Plaintiff's claim, noted: "One who is aware of a potentially dangerous condition and fails to take appropriate evasive action, or, as here, affirmatively acts in a manner that actively aggravates the otherwise latent negligence of the Defendant, cannot later be heard to complain against that negligence." (624 P.2d at 670). This admonition is more applicable here to Appellant than Respondent. It was not JENNIFER LITTLE who was aware of a potentially dangerous condition and failed to take appropriate evasive action, it was the Division of Family Services. It was not JENNIFER LITTLE that activated the negligence of the Division of Family Services, it might only

perhaps have been FLOYD HOOTEN. The duty of the Division of Family Services to JENNIFER LITTLE clearly encompassed an affirmative obligation to take into account JENNIFER'S behavioral disabilities and to assure that she would not be cared for by those - the MEIKS, FLOYD HOOTEN, or others - without the ability or training to properly do so. The problem could have been dealt with by placing her in a therapeutic foster home specifically trained to deal with autistic children. Family Services could have trained the MEIKS to deal with JENNIFER'S head-banging, with methods such as behavior modification. The Division of Family Services, aware of the severity of JENNIFER'S head-banging, could have provided the MEIKS with protective head gear - one of the standard protections against injury from head-banging. (R. 321-322). None of these acts were attempted by the Division of Family Services. These omissions were a clear breach of its legal duty to protect JENNIFER and were the proximate cause of her death.

DEAN LEON GREEN has provided some guidance in determining whether the duty incumbent upon a Defendant extends to the harm suffered by the Plaintiff. He states:

The determination of the issue of duty and whether it includes the particular risk imposed on the victim ultimately rests upon broad policies which underlie the law. These policies may be characterized generally as morality, the economic good of the group, practical administration of the law, justice as between the parties and other consideration relative to the environment out of which the case arose. They are found in all decisions whether based on former decisions of the Court or on a fresh consideration of the



factors found in the current environment. It need not be added that the scope or extent of duty in any case can only be resolved by the learning, experience, good sense and judgment of the judge - the molding of law in response to the needs of the environment.

Green, Duties, Risks, Causation Doctrines 41 Texas Law Review 42, 45 (1962).

#### POINT FOUR

TRIAL COURT DID NOT ERR IN  
PERMITTING DR. JANICE SARGENT  
TO TESTIFY.

Rule 56(2) states:

If the witness is testifying as an expert, testimony of the witness in the form of opinion or inferences is limited to such opinions as the judge finds are (a) based on facts or data perceived by or personally known or made known to the witness at the hearing, and (b) within the scope of the special knowledge, skill, experience or training possessed by the witness.

Facts and data can be "made known to the witness at the hearing" through the use of hypotheticals. Wigmore, in discussing the use of hypotheticals at trial, observed:

The reasoning may be explained in the following proposition: (1) testimony in the shape of inference or conclusion rests always on certain premises of fact. . . (2) These premises, a consideration of which is essential to the formation of the conclusion or opinion, must somehow be supplied to the jury by testimony. The same witness may supply both premises and conclusions; or one witness may supply the premises and another the conclusion . . .

2. Wigmore on Evidence, 792, Section 672. (emphasis in original).



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The testimony of DR. SARGEANT clearly falls within these parameters. The premises relating to autistic behavior were supplied by the findings of the Juvenile Court, which stated that JENNIFER "manifested autistic behavior" (R. 159-160). Further foundation was supplied by the testimony of LOIS RUDD, who filed the original Juvenile Court Petition relating to JENNIFER LITTLE. In response to a question from Plaintiff's attorney as to why she filed the dependency petition, Ms. RUDD answered: "The child exhibited some autistic behavior. the child was -- its on the Petition. I think she was about two years old. She was not talking, she was not potty trained." (R. 197).

Adequate foundation was also established for DR. SARGEANT'S testimony concerning problems arising with children who begin head-banging at age two and one-half. Evidence was produced establishing JENNIFER'S head-banging behavior in the foster home (R. 297). Evidence was also presented at trial that JENNIFER had never exhibited head-banging behavior in her own home (R. 364). That the expert witness, DR. SARGEANT, did not have personal knowledge of these events is, as this Court noted in Fillmore City v. Reeve, 571 P.2d 1316 (Utah 1977), not relevant. In that case, the Defendants were forced to sell their livestock pursuant to an injunction issued by the city. The Plaintiffs objected to the testimony of an expert in livestock management as to the losses Defendant has suffered, claiming the expert witness had no actual knowledge regarding the Defendant's busi-

ness. The Court ruled:

In regard to Plaintiff's specific objection that Mr. Evans did not have first-hand knowledge of the Defendant's operation and therefore should not have been permitted to testify, that objection is without merit because the expert does not need to have any such specific knowledge and he did not pretend that he did so. His testimony was as to matters that would apply to any similar situation.

571 P.2d at 1319 (emphasis added).

Further foundation for DR. SARGEANT'S testimony was established when in response to a question from co-counsel for the Defendant relating to knowledge of JENNIFER'S head-banging which she had obtained independently of any discussion with counsel for the Plaintiff, DR. SARGEANT stated:

"Yes, yes, I do. I read the deposition and there were references to --". (R. 327).

In Stickelvan v. Moroni, 632 P.2d 1159 (Nev. 1981), the Supreme Court of Nevada held that it was not an abuse of discretion for a trial judge to receive the expert witness testimony of an entomology professor who had reviewed depositions and summaries of evidence.

The foundation for DR. SARGEANT'S testimony had an adequate basis in hypotheticals presented by counsel for the Plaintiffs and in her reading of the deposition and was not based on what she was told by Plaintiff's counsel. Where an "adequate foundation" for an expert witnesses' testimony is established, the Court has not required that the expert testify as an eyewitness. Shurtleff v. Jay Taft and Company, 622 P.2d 1168,

1173 (Utah 1980).

In Taylor v. Johnson, 18 Utah 2d 16, 414 P.2d 575 (1966), doubt was cast upon the sufficiency of expert testimony presented by a police officer concerning an automobile accident. The Court stated:

It must be conceded that evidence which amounts to mere guesswork should not be admitted . . . Whether the officer has sufficient background . . . is primarily for the trial court to determine. If in his judgment the evidence will be of [ ] assistance, frailties therein which may be evident from his testimony or from cross-examination, go to the weight of his testimony, rather than its admissibility. The determination made by the trial court should be given some credit and should not be overturned unless it is made clearly to appear that he was in error in his judgment and that it resulted in substantial prejudice.

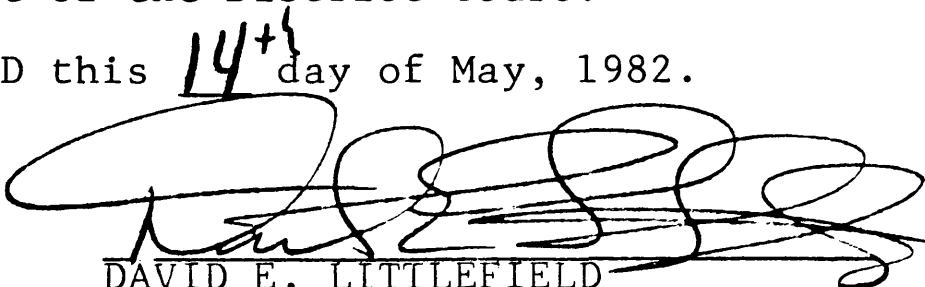
414 P.2d at 578 (emphasis added).

DR. SARGEANT'S testimony had adequate foundation in the record and its admissibility did not result in any undue prejudice.

#### CONCLUSION

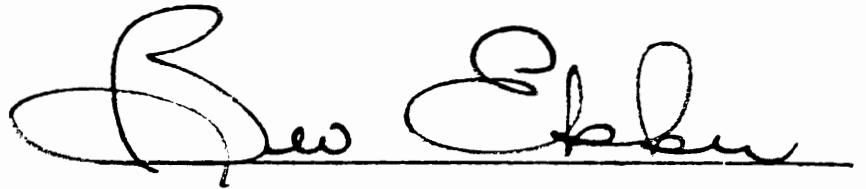
The Respondents, JONATHAN and HANNAH LITTLE, request the Court to affirm the judgment of the District Court.

RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of May, 1982.

  
DAVID E. LITTLEFIELD  
Attorney for Plaintiffs-Respondents.

CERTIFICATE OF DELIVERY

Delivered, via TRS, two copies of the foregoing Brief  
of Respondents to Sharon Peacock and Craig L. Barlow, Assistant  
Attorneys General, 236 State Capitol, Salt Lake City, Utah  
84114, this 14<sup>th</sup> day of May, 1982.

A handwritten signature in black ink, appearing to read "Craig L. Barlow", written over a horizontal line.