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TRIAL AND ACQUITTAL

OF

JOHN E. HATHAWAY, M. D.
OF WORCESTER,

IN AN ACTION FOR

ALLEGED MALPRACTICE,

BEFORE THE SUPREME JUDICIAL COURT IN BOSTON,
JANUARY 13, 1857.

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TRIAL FOR MALPRACTICE.

Supreme Judicial Court. November Term, 1856. AUGUSTUS VOLMUTH versus JOHN E. HATHAWAY. Action of Tort for alleged Malpractice. Ad damnum, \$10,000.

For the Plaintiff—H. W. PAINE and L. GRAY, ESQRS.

For the Defendant—R. H. DANA, JR. and W. W. WINTHROP, ESQRS.

THIS was an action brought against a physician and surgeon of Worcester, Mass., to recover damages for alleged malpractice in the treatment of a fracture of the bones of the fore-arm. The trial, which took place in Boston, before his Honor Judge MERRICK, commenced in the forenoon of January 13th, extended through that day and the next, and on the following morning was brought to a sudden conclusion, in a manner so striking and unusual in itself, as well as triumphant to the defendant, that the case has been invested with a peculiar interest, both to the profession and to the community. This was the first trial of the kind in this Commonwealth, since the enactment of the law of June, 1856, providing that parties may be witnesses. The clear and convincing statement of the defendant, as well as his admirable bearing on the stand, during a thorough examination and cross-examination of more than two hours, contributed in great part to the favorable and decisive result of the action. The material evidence in the case, as taken from the notes of the defendant's counsel, was in substance as follows.

PLAINTIFF'S TESTIMONY.

*Augustus Volmuth (German).—*Have lived six years in this country. Live in Boston—did live in Worcester. Am 23 years old. Did not know Dr. H. before accident. Was exercising and fell. Put my hands behind me and fell on them. Was taken to a house near by. Dr. H. came first. Dr. Kelly came when arm was set. Dr. H. came in twenty-five minutes or half an hour after bones broken. Arm not swollen any when Dr. H. came. He set arm, put it in a sling, and took me to boarding-house and put me in bed. They pulled on my arm, and Dr. H. put on two boards, shingles, one and a half inches wide, from elbow to ends of fingers. Thumb was all squeezed in—shingle went over thumb. In eight weeks or so, thumb all dried up and skin loose. Doctor cut off

dry skin. Cut off skin at his office. He put cloth between wood and thumb. After nine weeks, he cut off end of one board, it hurt me so much. At first dressing, the bandage was as tight as he could put it on. Hand swelled to ends of fingers. Fingers twice as thick as usual. I suffered pain—not much—in fingers, as too tight. First felt pain in fingers on second day. Began to swell first day. On second night so much pain in fingers I couldn't stand it. I told doctor, and he said it made no odds—it was nothing—would be over in a few days. Doctor came first, second and third day, then told me to get up. Then he opened arm, took everything off, and looked at it, felt of it, and put on bandage, &c., as before. Gave me no particular directions. On fifth day opened arm as before, and examined it. Opened arm six or seven times in first two weeks. Then I began to go to his office. I asked if I could go to his office, as it would cost less. He said "all right." Went to office three times a week for a while. Arm opened first time. Some weeks he opened it twice a week. Said it "would get along well by and by." He always felt of it and examined it. Arm was cracked for seven or eight weeks after broken. Told me, as often as I came to office, to eat as much meat as I could, and arm would unite. He said I didn't eat meat enough. Treated me twelve weeks, about. When last at office told me to go to work, for a week, or fortnight, or month, and then, if not better, to call again at office. He would then take out the splinter, as there must be a splinter there, and arm would unite better. Said nothing else. Went home and told friends, and all said best I could do was to go to Dr. Roesler. When last at office could not move fingers, were all stiff; could only bend them a little. There were some small blisters on back of hand. That was all. Could not raise arm to head. Could not turn arm then as much as now. When I went to New York could only bend fingers a little, except with other fingers. Flesh was all gone on arm. Arm wasted to half size. Was skin and bone. Had been so ever since Dr. H. had treated arm. Was so about two weeks after treatment began. Arm tied so tight, became all blue. Showed Dr. Roesler my arm. Stayed with him three months. Had been in New York twelve or fourteen days when he performed operation. Dr. Fischer, Dr. Katzenmeyer and some others present. On return from New York, stayed about a week in Worcester, then came to Boston. Did no work after accident. Used arm for no purpose. Both shingles were on nine weeks—then one only. When last at doctor's office had starch bandage on. He removed the starch bandage one week after put it on, cut it open and felt of arm, and slipped it on again. Skin went all off back of hand about four weeks after accident. Had arm in sling twelve weeks. No one else touched it. I followed doctor's directions. My Society thought it best to have watchers. Hand was swollen for nine or ten weeks after breaking. About two

weeks after it, doctor gave me medicine. No dressing ever put on; but doctor put on shingles, splinters, and drew a blister where arm was broken. This blister was after eight or nine weeks. Kept on two days. Doctor gave no reason for it. When he took off blister, he cut the places with scissors and let out water. After return from New York, saw Dr. H. in Worcester. He asked me how arm was. I said not much better, and he asked to look at it. He asked what the cut in the arm was. Told him doctors in New York operated on it. He said, "didn't I tell you to call at my office, if your arm was no better? I could have cut on it as well as those doctors in New York." He said he was sorry for the accident. This was all that was said. I was very healthy before accident.

Cross-Examined.—Born in Bavaria. Am gunsmith. Worked in Allen & Thurber's pistol shop at time of accident. Boarded at Mayberger's two weeks. Belong to Turnverein Society. Can't tell at what end doctor began to wind bandage. He cut end of splinter off to ease thumb, eight or nine weeks after accident. Never paid doctor anything for services. He did not send me a bill. Doctor put no liniment or salve on arm. He gave me some bark after about two weeks. Friends sat up ten nights with me. I only drank once, on Fourth of July. Then Mayberger and me drank a little beer. Went to New York by steamboat, Norwich and Worcester line. Friends said Dr. Roesler was the best doctor—they knew him in the old country. He advertised when he moved from Broadway to Canal St. Boarded and lodged with him three months. No other patients did so. In bed four weeks, and three months before went out of house. Dr. R. said it was a poor-looking arm, and was not set. He called other doctors, and all agreed on operation. No one advised me to bring this suit. I live now at 602 Washington St., at Fred. Siegler's. Keeps a boarding-house and has lager beer for boarders. At last visit doctor told me to do light work. Never tried to lift with my hand. Allen & Thurber did not turn me away. Made no charge against me. Searched my trunk, but found nothing stolen. Members of Turnverein believe in God and the Bible. Know of no votes or propositions on religion or churches, &c. Came to Boston because had friends here. Sued Dr. H. here. Came here partly for the purpose of bringing suit. Didn't pay Dr. H., because he didn't make up my bill. I then went to New York, because friends advised it. Didn't do a little work, as Dr. H. advised.

Dr. Roesler (German. This witness and the next were examined through *S. Urbino*, as interpreter).—Physician for seventeen years at Wirttemberg, and then for four years at New York. First saw plaintiff in September, 1855, at my office. Investigated injury. Saw no external wound. The skin was kind of peeled away, but there was no regular wound. There was a *gangrenous ulceration*

about lower part of thumb. Skin of back of hand between fingers had a *gangrenous* appearance. The radius was separated. The ulna was as if broken and cured again, but was not in regular shape, and as it ought to be. He could not move his thumb and fingers, but I could. The first thing was to heal the gangrenous ulcerations. Then the first thing was an operation, as it was impossible to replace the arm; it was too late. Made the operation seven, eight, or ten days after I saw him. Operation was a re-section. Three surgeons present. It was necessary to cut off two ends and set them together again, as they were sick. I have the pieces cut off. (Two pieces of bone, of a dark color, between an inch and a half inch in length, were here produced; one quite conical, with the apex well rounded, the other also conical, with a pointed apex, but on one side presenting a rough, jagged surface, as if an irregular fragment had been broken off.) If we had not cut these off, the arm would never have healed again. One was beginning to be attacked by caries, and if that has taken place, arm never can be joined together again. Pieces of bone look now of same color as when taken out. At incision, courses of *fistules* were found next the bone, which the surgeon must take out. They were destroyed. After operation, put on bandage to keep parts in regular form and position. The bone (radius) was united before he left New York. He had a fever and was very sick, and we gave him medicine. When he came to me the ulna was twisted. There was a want of rotary motion in the radius, because it had not been united. The want of it now is because the soft parts were destroyed near the broken part, and because of the fistules. Fistules were occasioned by bones not uniting, then when bones ulcerate, the fistules appear. If bandage too tight, circulation becomes impossible and ulcers come forth. If pieces of bone had not been cut off, the result would have been that the caries would have increased, and amputation become necessary. In case of fracture, bandage should be neither too tight nor too loose, but one which prevents all movement. A little swelling of hand not improper. Hand will swell without bandage. The two ends of bone were found to be half an inch apart. The fracture was not difficult to cure, if no other circumstances made it difficult. In a healthy patient, of twenty-one years, five or six weeks is the ordinary time for a cure. The bandage should not be removed until five, six or eight days, unless extraordinary circumstances require it. Should not be often removed, unless there is a wound, or swelling, or pain. If both bones are broken, good practice requires four splints. Plaintiff's arm very much now as when he left me—bones a little stronger. When he came to me, the arm was of full size, except broken part of radius, which was swollen by the bandage, but it was possible easily to feel the broken part through the flesh. In the operation I was assisted by Drs. Fischer, Katzenmeyer and Schuberg.

Cross-Examined.—Keep an apothecary shop in New York, Canal St., corner of Allen St. Advertise only when I change my residence. Not a member of New York State Medical Society. Am only a member of a German Medical Society. Practise entirely among Germans. Perform a great many operations—few do as many as I do. Do not know what previous treatment of arm was. It was in a miserable condition when it came to me. There was inflammation, which began to be gangrenous on lower part of arm and fingers. Arm somewhat swollen. Could not see fracture from outside. After bone is cut off, the blood in it grows darker. I use four splints for fractures. The operation has shortened the arm three fourths of an inch. When he came, there was no opening in the arm. Gave him medicine for the fever which followed operation—quinine, phosphoric acid and cinchona. Gave cooling medicine during fever; when fever declined, and he was weak, gave strengthening medicines. After first week of fever, applied warm chamomile poultice, and put salves on wound. He was so sick he remained in bed four weeks; then I let him go about the room. He was two months in one room. The third month he went out into the open air. Have not been paid for the operation and nursing, but the Turnverein Society paid his board. While I had a hospital, I had boarders; only took plaintiff to board, because very interesting case. By gangrene I mean destruction and festering of the soft parts, where the upper part is sick, and separates from the lower. “Brandig” is the German word for gangrene. Soreness of the thumb was probably occasioned by too strong bandaging. Might be caused by splint pressing against it. I made only one cut. Found only one breaking of radius. Nothing materially wrong in ulna; direction a little wrong. After an operation of cutting off bone, arm always deformed. Radius and ulna can always be kept from coming together by a bandage. Arm cannot be better than it is now. He can pronate but not supinate. This is because the radius is shorter and callus has thickened; and because ulna not in right direction and bent a little. In similar cases of cut bone, patient cannot supinate. I never performed this operation before. The operation resulted better than I anticipated, though full strength will never come back to fingers. Am not disappointed with result. Plaintiff was in danger of his life about six days after operation. Continued so about a day and a half. Was twice out of his mind—a full night and a day. Friends inquired about him every day. Had a very high fever; was quiet and very weak. At place of cut, *common festering* came out. At time of operation, plaintiff was a “healthy patient,” so called. Pasteboard is better for splints than wood. Where both bones are broken once, and ulna unites in usual time, and radius not, it is an extraordinary case. Have kept tables of my operations. Ulna and radius generally unite together—do not

differ in time of union by a week. Do not know a single case where radius has not united, when bones are rightly put together. Will unite in five to seven weeks. Longest time I have known in effecting union in properly-set radius is seven to eight weeks. Determined on an operation the first day I saw him. He told me his physician had dismissed him to go to work. I understood it as a dismissal. I did not communicate with defendant relative to the case. Object of cutting is to find new and healthy bone, with vitality. If there is caries in fractured bone, an operation is necessary beyond a doubt. This was a case of simple fracture of radius. Have had not less than twenty cases of simple fracture of both bones of fore-arm. I do generally correspond with the prior surgeon; but did not in this case, for reasons I prefer not to mention. The muscles which moved the thumb were affected or destroyed by ulceration and festering. No sound muscle was cut by me. I only cut out the sick parts of upper muscle. I used a chain saw. *Gangrenous ulceration* took place because the nourishment of hand and thumb had suffered, and the pressure on the thumb was so great that festering or ulceration took place, and scars were formed, and the muscles became weak. Ulceration and festering are the same thing. Extensor of thumb was pierced through with fistules. I did not cut it. Before I cut, there was no possibility of movement in the thumb, but there was movement afterwards. None before, because the nourishment of the lower arm had ceased. Present partial motion of extensor is owing to present soundness of muscles, which were sick before. Sick before, because the *joining of the fixing* of the muscles was not in order before. Knew this, because both ends of bone could be easily felt through flesh, which led to conclusion that there was a festering in the part of the muscle which moves the thumb.

Dr. Katzenmeyer (German).—Was educated at Munich; afterwards assistant physician at Heidelberg. Have practised two years here and one in Europe. Was present at operation. External appearance of arm atrophous—place of fracture slightly inflamed. Hand stiff and swollen, with traces of *gangrenous blisters*. Found one fracture of radius, and ulna united by callus—not united in direction of axis. From external appearance, came to conclusion that bone was not rightly set (*eingerichten*), and that the ends of the bone were carious. Concluded there was caries from the fluctuation and crepitation. Concluded that there should be a re-section, or an amputation of arm. I should have proposed amputation, but was convinced by the learning and experience of Dr. Roesler, that the cutting off the ends should be first tried. Assisted at operation. Bone was laid open, and saw put to sick ends. After removing ends of bone, wound was drawn together and left open in the middle to allow of the efflux of fistula. Muscle of arm and ends of bone attacked by festering. No muscle

removed from arm. Dr. R. took out about a spoonful of festering or matter. After operation, there was efflux of matter for several days. Saw plaintiff almost daily after operation. After operation, arm bound up with splints, and dressed, beginning from elbow. To prevent ulna and radius coming together, graduated compresses used. Arm placed in sling. Broken ends could not have been united without re-section. Could not have been a ligamentous union between ends. Impaired motion of thumb owing to weakening of muscles by festering. Fracture of radius simple. Simple fractures of fore-arm are easy to be known and treated. When plaintiff came to New York, not possible for him to attempt to labor. Arm not previously treated with care. In my opinion, radius never rightly set, for ulna not in right direction. As fracture was simple, could not but have been easily cured with proper treatment—*therefore*, I think it was not well treated. I ascribe the gangrenous appearance to tightness of bandage. Before operation, no motion of thumb. Present imperfect motion owing to shrinking and growing together of muscles. No part was cut or divided in the operation. Atrophous state of arm owing to too tight bandaging, which hinders circulation. Arm will never be restored to full use.

Cross-Examined.—Am physician, accoucheur and surgeon—office in Second Avenue, in New York. Do not sell medicines. Not a member of New York State Medical Society—belong to a German Medical Society. Have performed such an operation once, seen it several times. I use four splints for simple fracture of fore-arm—splints of pasteboard or gutta percha. Splints to be placed on four sides of arm. Greater safety in four splints. Not partner of Roesler; called at his house almost every day, because intimate with him. After operation, bandages, &c. removed ten times in three months. First removed in six weeks after operation. Took away portion of bandage every day to clean arm. At operation three splints were used, with a fourth divided across. The gangrene or festering on plaintiff's thumb and fingers, when I first saw him, was of dark color, and went through flesh to muscles. Dr. R. cured this, before operation, by external treatment only. Whole arm atrophous, caused by too tight bandaging. One of the fragments of bone was carious, the other resorbed. I should certainly have amputated on strength of external appearance of arm; because of atrophous condition of arm, because I knew there was caries, and because I knew there was formation of matter, or festering, in arm. All the bone that was affected with caries was cut off. Usual in surgery to amputate, or re-sect, for caries. Resorption shows bad putting together of bones. In case of caries in hip, would re-sect, under most favorable circumstances. The German word for fistula is *eiterung*. Operation of re-section does not of itself produce bad effects on muscles.

DEFENDANT'S TESTIMONY.

John E. Hathaway, M.D.—Am 29 years of age. Have been in practice four and a half years. Was student at Medical College in Boston, four years as house-apothecary at Massachusetts General Hospital, and six months as house-physician. Paid particular attention to surgery, and saw nearly all the operations while at the Hospital. Have been City Physician in Worcester. On 30th of June, 1855, was called to plaintiff. On examination, found ulna broken once about the middle transversely, and radius broken in two places, at both obliquely; once nearly opposite fracture of ulna, and again rather more than an inch below. Found a wound in arm whence blood was issuing, evidently made by end of bone protruding through. Cleansed blood from arm and stopped bleeding. Placed lint on wound, and put adhesive plaster upon it, to retain it in place, and to shut out external air. Padded splints and arranged bandages, reduced bones by extension and counter-extension with assistance of bystanders, kneading bones into position with hand. Placed one splint on back of arm from elbow to tips of fingers; the other on front, from bend of elbow to middle of palm. Before applying lint, however, put finger into wound and took out two or three fragments or splinters of bone. While adjusting apparatus, Dr. Kelly came in. Seeing that bystanders appeared to recognize him, thought he might be their physician, so offered to give up case to him. He declined, but kindly offered to assist me. Took off splints, and let Dr. K. examine arm, and re-applied splints as before. Dr. K. and I got the bones into what we thought excellent position. Then applied roller bandage from fingers up to, and above, elbow. Bent arm (back splint having joint at elbow), placed it in sling, and suspended from neck. Placed plaintiff in my chaise and took him to his boarding-house. There had him undressed and put to bed. Took off sling and rested his arm on a pillow, in an easy position. Expressed himself easy and free from pain. Left him, with directions to keep quiet and avoid all stimulant. Told him, if arm felt hot and uncomfortable, he might apply cold lotions to ease it. Called next morning, found him sitting up; had been free from pain, but had applied cold water to arm in the night, to make it feel easier. Saw beer mugs all about room, with beer in some of them; also, on table near bed, a tumbler containing, apparently, port-wine sangaree. Reminded him of my directions to abstain from stimulant, and told him it was not safe to venture in that way. He said he had not drunk much. Examined arm, though not removing dressings. No swelling, such as often takes place; fingers not swollen. Think I called again at night. Called next day, and next. Secured bandage with pins. On third day, removed apparatus. Wound was healing by granulation; washed arm and redressed wound; some slight oozing of matter from wound, with slight odor. Visited patient about once every day and a half, for ten or fourteen

days; then three or four times a week. On sixth day, removed apparatus to dress wound. Found it nearly healed; closed, but not cicatrized; replaced splints, &c. After third or fourth week, patient visited me at my office. Up to this time, arm doing very well. No particular action, however, and I feared high fever, but there was not so much of this as I expected. By third week, fracture of radius had become simple, by healing of wound. Union, in ordinary cases, takes place in four to five and a half weeks. At end of five weeks, began to be anxious for union in ulna. Conferred with Dr. Gage and other surgeons about case. At end of four and a half or five weeks, found ulna firmly held together, and in six, or six and a half weeks, there was union. Of course it had not yet become solid bone, but such that splint could be moved in a week. Showed arm to Dr. Gage, asked him to examine it. Made patient hold up arm, and we looked across it. Arm in excellent shape. So little distortion in any part, that one could not tell, by sight, where fracture had been. Could find seat of fracture by feeling. After this conference, appointed early day for patient to come again. Then applied starch bandage. Patient called three or four days after. Cut up bandage in usual way, and took out the limb. Applied a stimulating liniment to arm; tincture of camphor, soap, and volatile oil, with a little capsicum. Also used friction. Repeated use of liniment with friction, for three or four next visits. After eight or nine weeks, radius had stiffened a little—at one place rather stiff; at the other, not so much so. Had in mean time given him a tonic, to be taken daily, before meals, known as "compound iron mixture." At this time applied, over seat of fracture of radius, to excite action, a blister. At next visit opened it and let out matter, and told him to exercise in the open air, to get appetite, and to eat meat and nourishing food. At the end of another week, found indications of improved action; washed arm, applied alcohol, and re-adjusted starch case. At end of about a week, patient came again. This was his last visit. Examined arm, and found ulna very firm. Found some union of upper fracture of radius. His health was improving. Told him months, and even years sometimes, elapsed before perfect union in cases of compound, comminuted fractures—that he must not be discouraged, if he recovered slowly. Told him to flex his fingers, which were stiff from long disuse, and to lift light weights, and employ muscles of arm, in order to improve action. If he wanted an object, he might do some light work. Directed him to come again at end of ten days or a fortnight, and let me examine arm, and to continue calling, from time to time, till well. Informed him that, if treatment did not result favorably, and Nature refused to work a cure, there was a last resort in an operation. At present, sufficient time had not elapsed, nor was his health strong enough to bear it. He assented, as if he understood my views. I had, in fact, taken pains from beginning, to explain

my movements to him, in order that he might co-operate. As he went out, he asked how much my bill was. I replied, I had not made it out, but would have it ready for him at next visit. He never came again. At this visit, which was at end of eleventh or twelfth week, the shape of arm was good; fracture only to be found by feeling; arm somewhat reduced in bulk, but not wasted, and with the atrophous appearance which a healthy arm would have, when so long without exercise. Full motion nearly restored to fingers; could bend them, but not quite shut them. I could easily shut them myself. The front splint had been so wide that it had pressed against ball of thumb. Had put my director under it, and cut out a notch to ease thumb, and placed batting under the end. A little skin came off from thumb, where splint rubbed. The operation I referred to was the seton operation. Had seen it tried and succeed. Intended to perform it only as a last resort. Bandages, when first applied, were not tight, but firm. There was no unusual swelling of hand or fingers afterwards; and no complaints of pain from patient. Ulna generally unites sooner than radius, which has a double motion. At last interview, upper fracture of radius considerably united, which was an encouraging symptom for union of lower. Should have waited ten or twelve weeks more before using seton. Regulated his diet, because his health was below par. When he left, there was nothing on thumb but a little eschar; the skin had healed, but was not white. Between fingers, skin had been softened by perspiration. *No sign of gangrene anywhere, as we understand it.* At last interview, no sign of unhealthy bone at seat of fracture, and nothing to make me apprehend it. If there had been decaying bone, there would have been swelling of the limb, accompanied with pain, and an opening would have appeared. Felt no matter at seat of fracture. Matter would not have indicated dead bone. At last interview had no idea patient was going to withdraw himself from my treatment. Had heard no expression of dissatisfaction from himself or his friends. Some time after, asked some of the Germans why he had not been to see me, and was told he had gone to New York. Saw him a few minutes in the street, in Worcester, after his return. Saw scar and redness on his arm, which he said were made by the operation. Felt large callus. Asked him to pronate and supinate. He could do so but little. Expressed no dissatisfaction with my treatment; and I had no idea of any, till surprised by service of the writ in this case.

Cross-Examined.—Hole in integuments large enough for little finger to enter. Did not see the bone—blood constantly discharging. Took out two or three pieces of splintered bone. Think these were all. Took out all I could remove with safety. Pieces removed shaped somewhat like a split pea. Would not have been justified in removing intermediate fragment of radius. This was about an

inch long; though of unequal length, because obliquely broken. Think it could not have been split, without my knowing it; may possibly have been cracked. The bones never got out of apposition after being once set. The intermediate fragment was sometimes moved out of place by the contraction of muscles. Impossible to keep it exactly in place, as least action would disturb it. Examined arm yesterday. Found a little curving out of the ulna, which did not exist when he left me. At that time ulna not perfectly firm and solid, as the perfecting of solidity of bone is a slow process; could probably have been bent at that time. Did not exercise rotary movement of arm, lest I should disarrange coaptation of fragments. When I told him he might do light work, he spoke of filing (at pistol shop). Objected to his filing, but thought he might do some such work as holding pistol locks upon emery wheel. Thought also his employers might employ him to go on errands; as I particularly wished him to be in open air. The starch case, being left on, would prevent rotary motion, and thoroughly protect limb. In case of compound, comminuted fracture, patient may lose limb, if wanting in care. He did not disobey my directions, to my knowledge, in any way, except by using stimulant as before mentioned. Did not preserve splinters of bone taken out by me.

Dr. S. H. Kelly.—Am physician in Worcester. Was present at setting of arm, &c., by defendant. When I came in, he asked me to examine arm, and removed dressing for that purpose. Found fracture of radius in two places, both obliquely—and of ulna in one place, transversely. The fracture of radius was compound, with a wound in the integuments. Assisted at dressing. Made counter-extension, while defendant made extension. Bandage not too tight certainly, and not too loose, but what is called firm. Was struck with skillful and neat way in which everything was adjusted. Patient made no complaint of pain, and appeared to feel easy. Saw defendant drive off with him in a chaise.

Cross-Examined.—Think I put my finger in wound, but took out nothing. Defendant showed me the two splinters of bone taken out by him. Arm was not much swollen. In majority of cases there would be considerable swelling after such an injury. Such swelling would have effect to tighten bandage.

Thomas H. Gage, M.D.—Am Assistant Physician at State Lunatic Hospital at Worcester. Graduated at Medical College in Boston, four years ago. Was House-surgeon one year at Mass. General Hospital. Practised at Sterling three and a half years before going to Worcester. Known defendant since 1849, when we began to study together. Arm was shown to me by defendant at his office. Defendant removed dressing, and bared the arm, and I examined it. Patient held arm up, and I looked carefully across it. Made the remark that it was not possible to detect the place of fracture by the eye. Felt limb carefully with hands—found well-united fracture of ulna, and feebly-united fracture of radius,

which was broken in two places. Found a little callus at fracture of radius. Could distinctly feel intermediate fragment. Traced radius with hand from end to end, and found it in its natural position, especially two larger fragments; the intermediate oblique fragment being very slightly out of line. Very difficult for dressings to make impression upon it. Arm was in excellent and perfectly natural position, and in very good shape. Somewhat diminished in bulk, as would be expected. No swelling at all of arm or hand. Nothing out of the way with thumb. Saw scar on outer side of radius, as of recently-healed wound. Defendant replaced apparatus in my presence. In addition, we applied pads to keep the intermediate fragment in place. Do not know which of us suggested it. Arm appeared as if decidedly correctly treated hitherto. No evidence of bandages having been too tight. Good circulation in arm. Patient made no complaint. Ulna was as firm and strong as could have been expected in four or five weeks. *No sign of anything like gangrene or mortification.* Nothing to excite suspicion of there being dead bone.

Cross-Examined.—We talked together about general means of improving patient's health—also of starch bandage. An operation then would have been entirely improper. Traced ulna down carefully, as I always do, and found whole length in good position and fragments well united.

Winslow Lewis, M.D.—Have heard all the evidence in this case. Defendant's treatment, as described in his testimony, was perfectly correct in every detail. The case was a bad one, requiring unusual surgical skill. All compound fractures are more or less difficult. Air is admitted by external wound, and wound itself requires separate treatment. Fracture more difficult of treatment if comminuted. Fragments are constantly working out of apposition, under the action of muscles; and ends of bone, especially if obliquely broken, are apt to wound the nerves and vessels. Case also more difficult, of course, if both bones are broken. One cannot then serve as a natural splint for the other. The contraction of the pronator muscles would also embarrass the setting of the bone, and would tend to draw the fragments apart when once in apposition. The process by which union is effected is governed by no general law, but depends upon a variety of circumstances. The process consists of an irritation of membranes at ends of bone, which inflame, and a fluid called nature's glue is poured out, which attaches the fragments to each other. This fluid hardens, and becomes callus, which, in time, gives place to solid bone. A fracture like this one would have done well if cured in seven or eight months. Union sometimes delayed a year or more. Sometimes takes place with deformity or shortening of limb. Never heard of using four splints, as advised by German physicians. Even if no union takes place, the limb may be used for certain purposes. An operation is the last resort—is always more or less dangerous.

Should advise seton operation to be first tried, except in case of death of the bone. Presence of dead bone is indicated by inflammation, excessive pain, and a discharge through an opening in the integuments. Dead bone could not exist without such an opening being formed. (Examination not completed.)

(The Court here adjourned to morning of third day, January 15th; at which time Dr. Lewis gave way to Dr. Hayward, whose engagements made it more convenient for him to be examined at this point.)

George Hayward, M.D.—Heard evidence of defendant. His treatment was entirely proper and correct. It was just such as I should have pursued. Case was a difficult one from nature of accident, plaintiff having thrown his arm behind him and fallen upon it with the weight of his body. Treatment more difficult because fracture was compound, comminuted, oblique, and of both bones. In cases of compound fracture, external wound to be first healed. Permanent bony union does not generally take place sooner than a year. Should not have thought of performing an operation in this case at the end of twelve weeks. Defendant's direction to plaintiff to do light work, &c., at the end of this time, was good. Should have delayed performing an operation in this case till other means failed, and Nature refused to work a cure. If the arm had come under my care in the condition described by German physicians, I should have tried starch bandage and electricity. Should not have attempted an operation. If operation afterwards became necessary, should have performed seton operation as particularly adapted to this case. Nothing in defendant's evidence to indicate dying of the bones. Dead bone always indicated by inflammation and opening in the integuments. The pieces of bone of radius exhibited by the German physician are not decayed. They are perfectly healthy in appearance. There is nothing in their appearance to justify excision. No caries. Fragments also contain medullary substance, and medulla is absorbed, when no union is to take place. Dark color owing to drying of blood by time. Largest fragment shows that a part of it has been united with another part. Think it must have been cut off above the union of the upper fracture. (The witness, in explanation, called the attention of the jury to fragments of bone. He pointed out a slight, but distinct, curve in the larger fragment which, with other marks, indicated that it had been broken at the angle of the curve, and afterwards united. The cutting had been made above this point.) If there were pus or matter in arm; as described by German physicians, it was not a proper time to perform operation. Where pus is small in amount, and gives patient no pain, it does no harm. Would probably be absorbed. Atrophy does not indicate that there has been no proper circulation; but results naturally from the injury, and from necessary confinement of the limb. *No evidence of gangrene in the*

appearance of arm, as described in evidence. I use two splints, with a small one two inches long, sometimes, when fracture is very low in the arm. This, however, is not necessary if front splint extends to palm of hand. Never used four splints. In my judgment the bend in ulna is owing to operation in New York. Think radius would have completely united under defendant's treatment. We have no other method of effecting union than that pursued by him.

Cross-Examined.—The want of power of extension in thumb is, I think, owing to a cutting, or wounding, of extensor muscle, when operation was performed. Can account for it in no other way.

At this stage of the trial, when defendant's counsel were about to recall Dr. Lewis, and were expecting to proceed with the examination of the other medical experts summoned by them, the senior counsel for plaintiff rose and stated to the Court that the prosecution of the case would proceed no farther. Until the opening of the junior counsel for the defence, he had been under a misapprehension as to the nature of the fracture, having been given to understand, after careful inquiry, that it was both simple and not at all serious in its nature. It now appeared in evidence that the fracture was both compound and comminuted, and one very difficult of treatment. It appeared, also, that the defendant's treatment had been skilful and correct. In justice, therefore, to the defendant, the trial should end here. He would consent that a formal verdict should be at once taken for the defendant, unless his counsel desired to call the remainder of their experts, in order to vindicate still more completely the treatment pursued by their client.

In reply, the senior counsel for the defendant acknowledged becomingly the honorable course taken by plaintiff's counsel. He would have been glad to have placed other medical gentlemen upon the stand, whose approbation of the defendant's mode of practice would have been equally signal with that of the two already called; but in the present position of the case, this was in no way necessary. He asked the Court, accordingly, for a verdict.

The Court (Hon. PLINY MERRICK) expressed itself highly gratified by the proceeding of the plaintiff's counsel. The evidence of the plaintiff and of the physicians from New York had, taken alone, made out a case entirely sufficient to justify the counsel in going to trial. The defendant had, however, by his own testimony, clearly acquitted himself of fault; and certainly a junior practitioner of law who should receive from his elder brethren the decided approval which the defendant had met with in this case, would have abundant cause to congratulate himself. The Court expressed itself as unable to understand what had induced the plaintiff to institute this suit.

Whereupon a *verdict for defendant* was ordered and taken.