

cited, we are not now to try whether this woman might have been cured, for clearly no action will be against a Surgeon for omission or failure to cure *per se*.

We are not either to try whether there was on the part of the Defendant an error in judgment in the treatment of the case, for nothing can be more positive than the rule expressed, not for the first time it is true, but in so lucid and forcible a manner by Lord Chief Justice Tindall in the case of *Launphier vs. Phipos*, 8 c. & p. 475.

"To charge a Surgeon with damages it is *never enough* to show that *he has not treated his patient in that mode, nor used those measures which in the opinion of others, even medical men, the case required,*" because such evidence tends to prove errors of judgment for which the Defendant is not responsible, as he is for the want of ordinary care and skill, alone it cannot be evidence of the latter, and therefore the party must go further and prove by other evidence that the Defendant assumed the character of, and undertook to act as a physician without the education, knowledge and skill which entitled him to act in that capacity, that is, he must show that he *had not* reasonable and ordinary skill, or that having it, neglected to apply it.

This court has to determine whether, according to the evidence adduced, the Defendant treated his patient without ordinary care and skill; and this question must of course involve a consideration of all the circumstances, including as well the general state of health and constitution of the patient, as the peculiar symptoms that supervened after the accident. I am of opinion, after a mature consideration of every part of the evidence, that there is nothing to establish the want of ordinary care and skill imputed by the action to the Defendant. It is proved that he was assiduous in his attendance, one of the witnesses, a member of the family, deposing to his having been there every day. It is indisputable also under the testimony adduced that previous and complicated ailments had impaired the strength of the patient; that during treatment for the fracture of her thigh, she further underwent the enfeebling effect of what appears to have been a severe attack of cholera, and it is proved also in the clearest manner, that she not only implored the doctor to mitigate the necessarily severe treatment of such a case, and save her life at the expense of a more perfect cure of leg, but that she and her husband also have distinctly approved and praised the care and treatment bestowed by the Defendant. I do not here examine elaborately the question whether under all or any conceivable circumstances, a Surgeon is justified in listening and acceding to the wishes of his patient—it is sufficient for the present case to observe that there is no