

which I have cited, and was first made in *Kempfer v. Conerty*, 1901, 2 O.L.R., page 658 (note); and the same intimation was given in *McNulty v. Morris*, 1901, 2 O.L.R. 656. In both these cases it was stated in the judgment that this intimation was not intended to fetter the discretion of the trial judge in this regard. And so it comes about that this case is tried by me without a jury, the parties having practically consented to my so doing.

The injury which the plaintiff sustained, namely, dislocation of the astragalus, is one which is admittedly not of frequent occurrence; difficult to diagnose, especially when there is swelling of the parts; and one in which perfect restoration is not, at the plaintiff's time of life, to be expected. I was strongly pressed by counsel in the argument to find as a fact that David Archer and Dr. Windell did not make a correct diagnosis, or recognize the dislocation of the astragalus at all. Much stress was laid upon the somewhat different accounts given by these two, of the extent and position of the alleged fracture of the fibula. I think that the comments on this subject were somewhat hypercritical; and I fail to see their cogency in this regard. Technically speaking, the breaking or carrying away of portions of the periosteum constitutes a fracture; and I find, on the preponderance of the evidence, that such a fracture cannot be expected to be disclosed after the lapse of two years by the aid of the X-ray or sciagraph. The sciagraph is not a photograph; it is a shadow, and it is, in the present state of the science, not an infallible guide in fractures, to this extent, at least, that it will not always disclose the line of fracture; and the possibility is that the bony covering being reunited might not show at all. I, therefore, attach much less importance to what is now claimed to be shewn by the sciagraph than the plaintiff's counsel wishes me to do. On the whole case, and having regard to the burthen of proof, I find myself unable to determine this point in plaintiff's favour.

The next point in the case is, assuming the diagnosis to have been correct, whether the treatment adopted was in accordance with good surgery. Two medical men were called to say that it was not. Having already been examined as witnesses they were recalled at the very end of the plaintiff's case to criticize the treatment that was adopted. One of them was, apparently, a very respectable country practitioner of eighteen years' standing; the other was the gentleman who produced the sciagraph and gave evidence based thereon. These two witnesses found fault with the treatment in this respect that, in their opinion, the particular injury in question having been diagnosed, a bandage should have been applied with some form of angular splint before putting the leg in a box; and they said that the treatment actually adopted, namely