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FALCONBRIDGE, C.J.

MAY 26TH, 1902.

TRIAL.

TOWN v. ARCHER.

*Medical Practitioner—Malpractice—Limitation of Actions—Onus of Proof of Want of Care—Carelessness of Patient.*

Action by plaintiff against the defendants, who are physicians and surgeons in the village of Port Perry. In May, 1899, the plaintiff fell and sustained injuries in her left ankle and foot, and she alleges that the defendants negligently, improperly, and unskillfully treated her, and her foot has become distorted and twisted, and she has been rendered permanently lame. The plaintiff is 60 years of age. The writ was issued on the 1st December, 1900.

N. F. Paterson, K.C., and S. S. Sharpe, Uxbridge, for plaintiff.

A. B. Aylesworth, K.C., J. H. Moss, and W. H. Harris, Port Perry, for defendants.

FALCONBRIDGE, C.J.—The action fails under R. S. O. ch. 176, sec. 41, not having been brought within a year from the termination of the defendants' services. It is clear that when the plaintiff called at the offices of the defendants on the 21st December, 1899, and on the 11th January, 1900, she did not go in the continued relation of patient, but as a person who had a grievance and was dealing with the defendants more or less at arms' length. She had called in another doctor to look at her foot on the 13th December, 1899, and had consulted a solicitor during the same month, and her conduct was tantamount to a dismissal of the defendants. On the merits, in an action of this kind, the onus of proof is on the plaintiff to shew that there was a want of due care, skill, and diligence on the part of the defendants, and that the injury was the result of such want of care, etc. The general rule is summed up by Erle, C.J., in *Rich v. Pierpont*, 3 F. & F. at p. 40. See also *Lamphier v. Phipos*, 8 C. & P., per Tindal, C.J., at p. 479. The dislocation of the astragalus sustained by plaintiff is admittedly infrequent, difficult of diagnosis, especially where there is a swelling of the parts, and one in which perfect restoration