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**Notice of Appeal to Supreme Court.**

(Filed July 28, 1925.)

**HUDSON COUNTY CIRCUIT COURT.**

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ELIZABETH KELLY, by next friend,  
ANNA MCTIGUE and ANNA MCTIGUE, individually,

*Plaintiffs,*

*vs.*

JOSEPH STERN,  
*Defendant.*

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Action at  
Law

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To:

MESSRS. WARREN, BRITT & STANTON,  
Attorneys of Plaintiff.

SIRS:

TAKE NOTICE that the defendant appeals to the  
New Jersey Supreme Court from the whole of  
the judgments entered in this cause. 30

Respectfully,

COLLENS & CORBIN,  
Attorneys of Defendant.

Dated, July 17, 1925.

Service acknowledged July 27, 1925.

40

WARREN, BRITT & STANTON,  
Attorneys of Plaintiffs.

**Grounds of Appeal.**

(Filed July 29, 1925.)

**HUDSON COUNTY CIRCUIT COURT.  
HUDSON COUNTY.**

10

ELIZABETH KELLY, by next friend,  
ANNA MCTIGUE and ANNA MCTIGUE,  
individually,

*Plaintiffs-Respondents,**vs.*

JOSEPH STERN,

20

*Defendant-Appellant.*

Action at  
Law.

The appellant states the following grounds of appeal:

30 1. The trial judge refused to nonsuit the plaintiffs when thereunto moved by counsel for the defendant, whereas, said motion should have been granted on the ground that there was no evidence of any negligence on the part of the defendant as alleged in the complaint, which was the proximate cause of the breaking of the needle or the proximate cause of its being in its then position.

40 2. The trial judge refused to direct a verdict in favor of defendant when thereunto moved whereas said motion should have been granted on the ground that the undisputed evidence in the case disclosed that there was no negligence on the part of the defendant as charged in the complaint which was the proximate cause of

*Grounds of Appeal.*

the breaking of the needle or the proximate cause of its being in its then position.

3. The following question was admitted:

To the witness, Elizabeth Kelly:

“Q. Did it have any guard on, did you see any guard on it?”

10

4. The court charged the jury:

“This action is brought by Elizabeth Kelly, a young woman under 21 years of age, and by her mother, Anna McTigue individually, as plaintiffs against Joseph Stern, defendant, to recover damages which these plaintiffs allege they sustained by reason of Elizabeth Kelly, an infant, having been injured, through the breaking of a needle in the course of the administration of an anaesthetic by this defendant on July 2, 1921, and by reason of negligence following the breaking of this needle wherein it is alleged that because of the negligence of the defendant the needle became further imbedded in the jaw of this girl plaintiff.”

20

5. The court charged the jury:

“Now, the plaintiffs in this case claim that this young girl Elizabeth Kelly was a patient of this defendant, who was a dentist or a dental surgeon, on July 2, 1921, and that in preparation for the extraction of a tooth this defendant endeavored to administer an anaesthetic by way of a needle, and the charge is that the dentist, who is the defendant here, through his negligence broke off this needle in the gum or jaw of the girl and that in his effort to take the needle out he negligently caused the needle to be imbedded deeper in the jaw; so that the plaintiffs charge this defendant with negligence.”

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40

6. The court charged the jury:

“That the defendant did not use due and proper care or skill in performing said work

*Grounds of Appeal.*

10 or service—referring now to this injection and what followed—upon the said Elizabeth Kelly, but on the contrary so negligently and unskillfully conducted himself in performing the work or service above referred to that while attempting to administer a local anaesthetic in the rear part of her jaw he negligently broke off the needle, by means of which he was attempting to administer the said anaesthetic, in such a way that a part of the needle remained imbedded in her jaw, and defendant having broken off the needle in such a way that part of it remained imbedded in her jaw, thereupon attempted to remove said broken part from her jaw, and he made these attempts to remove the broken portion so carelessly and negligently that he caused the needle to be  
20 imbedded more deeply in her jaw.

“Now, gentlemen, those are the specifications of negligence upon which the plaintiffs in this case rely, and they are bound by those specifications.”

## 7. The court charged the jury:

30 “Negligence presupposes a violation of some duty or care which the defendant owed to the plaintiffs, and so it becomes very important in this case to ascertain what duty and care this defendant owed to the plaintiff, Elizabeth Kelly, as his patient in the administration of the anaesthetic by means of the needle preparatory to the extraction of her tooth, and which he owed to her after the needle broke off in her gum or jaw, for the law does charge dentists, surgeons and other professional men of that character in the performance of their work and the treatment of their patients with a defined degree  
40 of care, and that defined degree of care, as applied to a dentist or dental surgeon, may be expressed by following as nearly as possible the language used in a recent case in our Supreme Court and saying that the skill and care of a dentist or dental surgeon is

*Grounds of Appeal.*

required to give a patient is that ordinarily possessed and exercised by others in the profession."

## 6. The court charged the jury:

"Negligence may consist in either the doing of something which is not permitted by the rule of care which I have just given you, or the failure to do something which that rule requires, and so it becomes very important for you to ask yourselves and answer from the evidence produced in this case alone, whether the defendant with respect to the charges made against him by these plaintiffs did anything or failed to do anything with respect to the administration of this anaesthetic by means of this needle, or what was done with respect thereto after the needle lodged in the jaw, which a dentist or dental surgeon possessed of and exercising the care and skill ordinarily possessed and exercised by others in the profession would not have done or would have done under the same circumstances, and if your answer is that he did do something or that he failed to do something which a dentist or a dental surgeon possessed of and exercising the care and skill ordinarily possessed and exercised by others in the profession would not have done or would have done under the same circumstances, then he was negligent: but if on the other hand, he did exercise such care and skill then he was not negligent even though the girl still carries this needle in her gum or jaw, and you will end your duties right there, for in such an event your verdict would be in favor of the defendant and against the plaintiffs."

## 8. The Court charged the jury:

"Now then, for the mother: If you find that she is entitled to a verdict at your hands she too is entitled to be compensated for the injuries which she sustained. The law

*Grounds of Appeal.*

casts upon the mother, where the father is dead, the duty of maintaining and supporting a minor child, and as a sort of recompense for that the law gives that parent the earnings of the child during minority or until the child is emancipated; and so in this case this mother would be entitled to be compensated for the expenses which she necessarily incurred as the natural and proximate result of the injury to this girl. That would include doctor's bills, hospital bills, bills for medicines and for X-rays, and you will recall the various amounts have been given here. It is unnecessary for me to repeat them all, because they are very voluminous, in detail; and the mother would also be entitled to be compensated for any loss of earnings on the part of the girl. Now, you will recall that she said when she had to give her time for the X-rays and for treatment as to the so-called injury that she was compensated just the same. I do not understand that she had said she was compensated for those weeks following the accident during which she says she was incapacitated from work. However, you have the evidence before you, gentlemen, and if you find from the evidence that the mother is entitled to a verdict at your hands and you also find that by reason of this injury she lost the earnings of this girl as a natural and proximate result of such injury, then for such time as she did lose earnings and to the amount thereof she would be entitled to be compensated."

Dated July 27, 1925.

COLLINS & CORBIN,  
Attorneys of Defendant-Appellant.

Service acknowledged July 27, 1925.

WARREN, BRITT & STANTON,  
Attorneys of Plaintiff-Respondents.

**Complaint.**

(Filed April 11, 1922.)

Plaintiffs, residing in the City of Jersey City, in the County of Hudson and State of New Jersey, say that:

**FIRST COUNT.****10**

1. The plaintiff, Anna McTigue, has been admitted by this court to prosecute as the next friend of the said Elizabeth Kelly.

2. On or about July 2nd, 1921 and for some time prior thereto, the defendant, Joseph Stern, was a dentist practicing in Jersey City, Hudson County, New Jersey.

3. On July 2nd, 1921 or at some time shortly prior thereto, plaintiffs employed defendant as a dentist to perform and to do certain dental service or work upon the plaintiff, Elizabeth Kelly and to perform the said service and do the said work in a careful and proper manner and for that purpose the defendant for reward, undertook as a dentist to perform the said service and do said work for plaintiff, Elizabeth Kelly. 20

4. Defendant did not use due and proper care or skill in performing said work or service upon said Elizabeth Kelly, but on the contrary, so negligently and unskillfully conducted himself in performing the work or service above referred to, that while attempting to administer a local anaesthetic in the rear part of her jaw, he negligently broke off the needle by means of which he was attempting to administer the said 30

**40**

*Complaint.*

anaesthetic in such a way that a part of the needle remained embedded in her jaw.

10 5. Defendant, having broken off the needle in such a way that part of it remained embedded in her jaw as stated aforesaid, thereupon attempted to remove said broken part from her jaw. Defendant made these attempts to remove the broken portion so carelessly and negligently that he caused the needle to be embedded more deeply in her jaw.

20 6. By reason of the negligence aforesaid, the portion of the needle aforesaid is still deeply embedded in the jaw of the plaintiff, Elizabeth Kelly, and though repeated attempts have been made by physicians and surgeons and dental surgeons to remove the same, it has not been possible to do so.

30 7. By reason of the negligent acts aforesaid of the defendant, plaintiff, Elizabeth Kelly, has been permanently injured and disabled and has undergone great pain and suffering and in the future will continue to undergo great pain and suffering. As a further result of the negligent acts of the defendant, it is probable that in the future the portion of the needle aforesaid which is embedded in her jaw, might course through her body in such a way as to cause her serious and greater disability and probably bring about her death.

## SECOND COUNT.

40 1. Plaintiffs repeat all the allegations contained in the First Count of this complaint and make them part of this Count.

2. Plaintiff, Anna McTigue, is the mother of the plaintiff, Elizabeth Kelly and by reason of the negligent acts of the defendant, has been for a long time deprived of her services and earnings and will in the future be deprived of her services and earnings; that she has been put to a great expense and will in the future be put to a great expense for hospital bills, doctors' bills, dentist bills, medicine bills and bills for X-ray  
 KELLY 4— \*\*

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pictures and examinations in endeavoring to effect a cure of her said daughter, Elizabeth Kelly.

Plaintiffs demand judgment in the sum of Twenty-five thousand (\$25,000) dollars on the First Count and Five thousand (\$5,000) dollars on the Second Count.

WARREN, BRITT & STANTON,  
 Attorneys of Plaintiffs.

20

### Answer.

(Filed May 6, 1922.)

The defendant, residing in the City of Jersey City, County of Hudson and State of New Jersey, says that:

30

#### DEFENSE TO FIRST COUNT.

1. He has no knowledge as to paragraph 1.
2. He admits paragraph 2.
3. He denies paragraph 3.
4. He denies paragraph 4.
5. He denies paragraph 5.
6. He denies paragraph 6.
7. He denies paragraph 7.

40

## DEFENSE TO SECOND COUNT.

1. He repeats all of his answers to the allegations in first count.

2. He has no knowledge as to the relationship of Anna McTigue to Elizabeth Kelly. He denies the remaining allegations in paragraph 2.

10

COLLINS & CORBIN,  
Attorneys of Defendant.

We conset to filing as of time.

WARREN, BRITT & STANTON,  
Attorneys of Plaintiff<sup>s</sup>.

20

**Rule for Judgment.**

(Entered June 29, 1925.)

## HUDSON COUNTY CIRCUIT COURT.

30

ELIZABETH KELLY, by next friend,  
ANNA MCTIGUE and ANNA MCTIGUE,  
individually,

*Plaintiffs,*

*vs.*

JOSEPH STERN,

*Defendant.*  
*Action at*  
*Law.*

40

This cause having duly come on for trial on the 1st day of June, 1925, before Hon. Henry E. Ackerson, Jr., and a jury, and the jury having

*Rule for Judgment.*

heard the evidence adduced by the respective parties, returned its verdict in favor of Elizabeth Kelly by Anna McTigue, next friend, and Anna McTrigue, individually, and against the defendant Joseph Stern, and assessed damages in the sum of Fifteen hundred dollars (\$1500) for Elizabeth Kelly, by next friend, Anna McTrigue, and One hundred dollars (\$100) for Anna McTigue, individually. 10

It is hereby ordered on this 2nd day of June, that the plaintiffs have and recover against the defendant, the sum of Fifteen hundred dollars (\$1500) for Elizabeth Kelly, by Anna McTigue, next friend, and the sum of One hundred dollars for Anna McTigue, individually, with costs to be taxed, and this judgment be entered accordingly. 20

HENRY E. ACKERSON, JR.,  
Judge.

On motion of  
WARREN, BRITT & STANTON,  
Attorneys of Plaintiffs.

Rule actually entered,  
June 29, 1925.

30

40

**Judgment Final.**

(Entered June 29, 1925.)

## HUDSON COUNTY CIRCUIT COURT.

10	ELIZABETH KELLY, by next friend, ANNA MCTIGUE and ANNA MCTIGUE, individually,  <div style="text-align: right;"><i>Plaintiffs,</i></div>	} <i>Defendant.</i> Action at Law.
	<i>vs.</i>  JOSEPH STERN,	

20

Judgment entered June 29, 1925.  
 Damages \$1600.00.  
 Costs  
 Total

WARREN, BRITT & STANTON,  
 Attorneys.

30 Judgment on verdict in the above entitled cause was entered in this court on the 29th day of June in the year of our Lord One Thousand Nine Hundred and 25 in favor of the plaintiffs, Elizabeth Kelly, by her next friend Anna McTigue, and Anna McTigue, individually, and against the defendant Joseph Stern in a plea of action at law for the sum of sixteen hundred dollars and            cents damages and            cents costs of suit.

40 Judgment entered and signed this 29th day of June, 1925.

HENRY S. ACKERSON,  
 Judge.

**Testimony.**


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ELIZABETH KELLY, *et al, etc.*,  
*Plaintiffs,*

*vs.*

JOSEPH STERN,  
*Defendant.*

---

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Before:

HON. HENRY E. ACKERSON, JR., Judge, and  
 a jury.

Jersey City, N. J., June 1, 1925.

20

ALEXANDER SIMPSON, Esq., for the plaintiffs.  
 COLLINS & CORBIN, Esqs., for the defendant.

---

ELIZABETH KELLY, sworn.

DIRECT EXAMINATION BY MR. SIMPSON:

30

Q. Where do you live? A. 211 Second Street,  
 Jersey City.

Q. How old are you? A. Twenty.

Q. Do you know the defendant, Dr. Stern  
 dentist, on Jersey Avenue? A. Yes.

Q. When did you first see him professionally,  
 when did you first have anything done by him?  
 A. Some time in May, 1921.

Q. What did you say to him and what did he  
 say to you? A. I just asked him for how much  
 will you fix my teeth? And then he looked them

40

*Elizabeth Kelly—Direct.*

over and he told me. Then he told me to come back, to start coming to him, and I went to him until July 2nd.

Q. How many times did you go to him up to July 2nd? A. I only went about four times, I guess.

10 Q. On July 2nd what happened? A. On July 2nd he was going to pull the tooth and then he broke the needle in it.

Q. He said he was going to pull the tooth? A. Yes.

Q. What did he do, did he tell you to sit in the chair? A. Yes.

Q. And you sat in the chair? A. Yes.

Q. Did he tell you to open your mouth? A. 20 Yes, to extract the tooth.

Q. Did he put anything in your mouth to keep it open? A. Yes.

Q. What did he put in your mouth to keep it open? A. Put something to keep it open until he injected the needle.

Q. What did he do with the needle? A. Put it in the tooth.

Q. What part of your jaw or gum or mouth did he put the needle in? A. Here, in the back.

30 Q. What did he do with it. press it in your gum? A. Yes.

Q. What part of your gum, at the tooth or at the jaw bone or where? A. Inside the bone.

Q. How far did he push it, did he push it as far as it would go or not?

MR. BROADHURST: I object as leading.

Q. How far did he push it in with reference to how far it would go?

*Elizabeth Kelly—Direct.*

MR. BROADHURST: I object as calling for a conclusion.

THE COURT: All she can say is how far it went in.

Q How far did the needle go in your mouth?

A. He pushed it right in until he pressed the thing down. 10

Q. Then he pressed the bulb? A. Yes.

Q. How near was the bulb to your jawbone when he pressed it? Was it touching your jawbone, or was any part of the bulb touching your jawbone? A. I don't know.

Q. Then he pressed the blub? A. Yes.

Q. What was the next thing he did? A. When the needle broke he worked on it. 20

Q. Tell us about the needle breaking first. What was the next thing he did; after he pressed the bulb what happened the next thing before he started to work on your jaw, did the needle break or didn't it break? A. The needle broke.

Q. How did it break, did you see the broken part when he took it out of your mouth? A. He showed me the part that was left, and he said the other part was broken in.

Q. He showed you the broken part in his hand and said the other part was broken off? A. Yes. 30

Q. What did it look like that he showed you? A. Just a little piece—the long thing he had in his hand.

Q. The bulb in his hand? A. The long thing that he pushed, I don't know what they call it.

Q. Was it steel, or what was it? A. It was steel.

Q. Did it have any guard on, did you see any guard on it? A. No, sir. 40

*Elizabeth Kelly—Direct.*

MR. BROADHURST: I object as immaterial. There is no allegation in the complaint that it did not have a guard.

10 MR. SIMPSON: It is not necessary to have it pleaded. The original pleader pleaded negligence, that he negligently and unskillfully broke this needle off in the jaw. Isn't it negligence to use a needle without a guard?

THE COURT: I think that probably covers it. It says he negligently conducted himself. I will allow it.

MR. BROADHURST: Exception.

Q. Could you tell whether this was a steel needle or what the material was? A. No, sir.

20 Q. When he told you it was broken off what was the next thing he did? A. He worked on it till about five o'clock.

Q. What time was it it brooke off? A. It could be about three o'clock, I guess.

Q. So he did not call in a doctor or a surgeon, but he worked himself about two hours on it, is that it?

MR. BROADHURST: I object as leading.

THE COURT: How long did he work?

30 THE WITNESS: Two hours on it.

Q. Did he work alone over it for two hours?

A. Yes.

Q. What did he do to it, get it out or push it further in?

MR. BROADHURST: I object as leading.

THE COURT: Objection sustained.

40 Q. Tell us what he did to the neelle, as to whether he pushed it in further or got it out?

*Elizabeth Kelly—Direct.*

MR. BROADHURST: I object as leading and calling for a conclusion.

THE COURT: Objection sustained.

MR. SIMPSON: Exception.

Q. Did the position of the needle change when he worked on it? A. He was shoving it in instead of out. **10**

MR. BROADHURST: I object and ask that it be stricken out. It is not responsive.

THE COURT: It calls for a yes or no answer.

Q. Did the position of the needle change as he worked on it? A. Yes.

Q. In what way did it change? A. He was pushing it back instead of out. **20**

Q. Could you tell how far he pushed it back? A. No, I could not tell.

Q. After that, after about two hours, what did he do? A. He called in Dr. McLoughlin.

Q. He is a physician? A. Yes.

Q. What did Dr. McLoughlin do? A. Then Dr. McLoughlin tried to get it out. He worked over it for about an hour, until eight o'clock.

Q. McLoughlin came at five, is that right? **30**  
A. No. Stern worked on it until five.

Q. What happened after five? A. Dr. McLoughlin came in.

Q. At what time? A. As soon as Stern went out for him.

Q. That would be about half past five? A. Yes.

Q. Then Dr. McLoughlin worked on it until eight? A. Yes.

Q. Did he get it out? A. No. **40**

*Elizabeth Kelly—Direct.*

Q. Then where were you taken? A. Dr. Stern told me to come back Sunday. He worked on it all day Sunday himself and could not get it out.

10 Q. Dr. McLoughlin having worked on you until eight on Saturday, Dr. Stein told you to come back to his office on Sunday? A. Yes. I got there until ten o'clock and he worked on me until two, and he told me to go home and come back again. I came back again and he worked on me——

Q. What time did you come back again? A. About three, and he worked on me until about eight again.

20 Q. Could you tell what effect he had on the needle all day Sunday?

MR. BROADHURST: I object.

A. No, sir.

Q. You could not tell what effect? A. No, sir.

Q. But he kept working on it? A. Yes.

Q. Could you tell how far it had gotten in your jaw when you got out of his office on Sunday, how far it had gotten in your jaw? A. No, sir.

30 Q. What did you do after Sunday? A. Sunday night he called in Dr. McLoughlin. Dr. McLoughlin told me to go to St. Francis Monday morning and he would have it out in five minutes.

Q. You went to St. Francis? A. Yes.

Q. What happened at St. Francis's Hospital? A. Then Dr. McLoughlin kept me there and he operated on me Tuesday evening.

Q. You got there Monday? A. Yes.

40 Q. And stayed till Tuesday? A. Tuesday night at five he operated on me.

*Elizabeth Kelly—Direct.*

Q. How did he operate on you? A. He gave me ether.

Q. You don't know what happened? A. No.

Q. He gave you ether and you came out of the ether? A. Yes.

Q. Do you know whether the needle was still in your jaw or not? A. It was still in there. 10

Q. Then what happened? A. He kept me there a week in St. Francis. Then after I came out of that I worked a while and then I went to Dr. Howard on Montgomery Street, and he cut it there and he told me to go to the City Hospital.

Q. He did not get it out? A. No, sir.

Q. Then you went to the City Hospital? A. Yes. When I went to the City Hospital they told me he was on his vacation and did not show up. 20

Q. There was nothing done at the City Hospital? A. No, sir.

Q. Who was the next doctor or dentist you saw? A. Dr. Howard, and he recommended me to Dr. Davidson in Newark.

Q. Did you go to Dr. Davidson? A. Yes.

Q. Who is he, a specialist?

MR. BROADHURST: I object.

A. He is a dentist in Newark. 30

Q. Is he a dentist or a corn doctor or what is he? A. He is a specialist in Newark, a dentist.

Q. Did he work over you? A. Yes, he gave me gas and tried to get it out.

Q. Is the needle still in your jaw? A. Yes.

Q. Were you X-rayed? A. Yes, by Dr. McLoughlin in St. Francis and Dr. Perlberg in the City Hospital, and I had X-rays in the City Hospital. 40

Q. Were you working at the time you were hurt? A. Yes, in the National Surety.

*Elizabeth Kelly—Direct.*

Q. How much time did you lose from your work? A. I was off about two months.

Q. What did you earn a week or a month? A. Fifteen dollars a week.

Q. You were off about two months? A. Yes.

10 Q. Did this needle in your jaw give you any pain at any time? A. Yes, two weeks ago I was up to Dr. Koppel up on the hill, and he told me I should have it taken out right away.

MR. BROADHURSTS I object.

THE COURT: Do not tell what he said.

Q. You consulted the Doctor because of pain in your jaw because of this needle? A. Yes, Dr. Koppel, about two weeks ago.

20

THE COURT: Did you have pain then?

THE WITNESS: Yes.

Q. Point out to the jury what part of your jaw it is? A. It is the inside.

Q. Point on the outside what portion of the jaw it is in.

THE COURT: Put your finger on it.

THE WITNESS: Right there.

30

Q. Where you have your finger? A. Yes.

MR. BROADHURST: The lower right jaw?

THE WITNESS: Yes.

Q. It is swollen? A. Yes.

Q. You can see it is swollen? A. Yes.

Q. Show the jury where it is swollen.

MR. BROADHURST: Show them the other side.

40

MR. SIMPSON: Please conduct your own examination.

*Elizabeth Kelly—Direct.*

Q. Was that swelling there before? A. No, sir.

Q. Was that swelling there? A. No, sir.

Q. From the time he broke this needle off in your jaw have you or have you not been troubled with pain at any time? Have you had pain? A. No, sir.

Q. Up to this last time? A. No, sir. 10

Q. The only time you had pain was two weeks ago. is that right? A. Yes.

Q. You never had any pain with it, is that so? A. I cannot use that side.

MR. BROADHURST: I object. She has answered that five or six times.  
KELLY 8— \*\*

THE COURT: Did you have any pain? 20

THE WITNESS: Yes, sir, that side.

THE COURT: How long did it continue?

THE WITNESS: On and off, mostly in damp weather; that is the time it hurts me the most.

Q. You said something about not being able to use that side?

MR. BROADHURST: I object as leading.

THE COURT: Objection sustained. 30

A. I do not use that side.

Q. Will you state whether or not you have trouble in using that side? A. It hurts me to use that side, it is all cut where I was operated on.

Q. They cut you there? A. In the inside.

Q. Can anybody see that, where you were cut, if you open your mouth? A. I do not know. It is all healed up, it is inside of the teeth. 40

Q. The needle is still there? A. Yes.

*Elizabeth Kelly—Cross.*

Q. You say that from the time he broke it off, off and on you have pain in damp whether. What kind of pain do you have there? A. It is like a jumping pain in the gum.

Q. Did you have any expenses at all in trying to get this needle out? A. Yes.

10 Q. Who had the expenses? A. My mother paid it.

Q. Your mother, and not you? A. Yes.

Q. Your mother is Mrs. McTighe? A. Yes.

## CROSS EXAMINATION BY MR. BROADHURST:

Q. How old are you? A. Twenty.

Q. Twenty now? A. Yes.

Q. At the time this occurred how old were you?  
20 A. Sixteen.

Q. You were employed by the National Surety as a typist, I understand? A. Yes.

Q. You did not take shorthand? A. No sir.

Q. Your earnings were fifteen dollars a week?  
A. Yes.

Q. And I believe that while you were out from your work you received your salary? A. Yes.

Q. Immediately after July 2nd, how long were you out of work consecutively before you went back at all to do any work? Do you understand what I mean? A. Do you mean after the operation at St. Francis?  
30

Q. Yes. how long after the needle broke was it before you went back to work at all—a matter of three or four weeks? A. I have been off a lot going around and taking X-rays, and to different doctors.

Q. I understand that was after you had re-  
40 turned to work? A. Yes, from St. Francis.

*Elizabeth Kelly—Cross.*

Q. Then subsequent to that you went on different days to see various doctors? A. Yes.

Q. You lost about how many days going to see different doctors? A. Quite a few days.

Q. Can you give us any idea about how many days—about twenty days, was it? A. Here lately I lost some more, too. 10

Q. I mean going to see doctors, first? A. Yes.

Q. About how many days do you recollect did you lose? A. It could be twenty or twenty-five days.

Q. After July 2nd did you stay home for a number of weeks entirely without going back to work? A. No, sir.

Q. About how many weeks did you stay home like that? A. Two weeks. 20

Q. Is your father living? A. No, sir.

Q. And Mrs. McTighe is your mother? A. Yes.

Q. I suppose she has been married subsequently? A. Yes.

Q. Do you live home? A. Yes.

Q. Will you step down so that the jury can look at the other side of your jaw? First show them the one side. This is the side where the needle is? A. Yes.

Q. Show them the other side. Turn your head from side to side, so that they can see both sides. This is the good side? A. Yes. 30

Q. And this is the one that has the needle? A. Yes.

Q. Take the stand please. As I understand it you first saw Dr. Stern some time in May, 1921? A. Yes.

Q. Prior to the day the needle broke you had visited him three or four times? A. Yes. 40

*Elizabeth Kelly—Cross.*

Q. On those prior occasions you had had a tooth or two extracted, and one temporarily filled? A. Yes.

Q. On these teeth that had been extracted on the other days he used the needle also, did he? A. Yes.

10 Q. That is, a needle. I do not suppose you know whether it was the same one or not? A. No, sir.

Q. But he did use a needle to deaden the pain? A. Yes.

Q. Do you recollect about how long it was prior to July 2nd, 1921, that you had these other teeth taken out? A. No, sir.

Q. You do not remember? A. No, sir.

20 Q. It was some time between May and July? A. Yes, sir.

Q. How frequently did you go to see him, once every other week or so? A. Once every week—Sunday.

Q. Did you pay the doctor for his services? A. I paid him thirteen dollars.

Q. On this day that the needle broke, July 2, that was a Saturday afternoon, wasn't it? A. Yes.

30 Q. About what time did you get to the dentist's office? A. About three o'clock or a quarter to three, I guess.

Q. About what time? A. Three o'clock.

Q. Was he there when you first got there, do you remember? A. No, I went earlier than that, but he was not home.

Q. Then you went back again? A. Yes.

40 Q. As I understand it he looked at this molar—it was one of the teeth in the back? A. Yes.

*Elizabeth Kelly—Cross.*

Q. And he told you it could not be filled? A. Yes.

Q. And you told him to take it out then? A. Yes.

Q. These other molars, or teeth, that had been taken out were they on the other side of the face? A. On the opposite side. 10

Q. The left side? A. Yes.

Q. And the one that the needle broke in is the right side? A. Yes.

Q. Then he put you in the dentist chair? A. I was in the chair.

Q. I suppose you were lying back in the chair, were you? A. Yes.

Q. Could you see the various things that the Doctor did as he prepared for you, or were you lying too far back? A. I was lying back. I did not see what he was doing. 20

Q. As I understand it he opened your mouth, or had you opened your mouth? A. Yes.

Q. And you say he put something in your mouth to hold it open? A. Yes.

Q. So then your mouth was open as wide as it could be? A. Yes.

Q. You do not know whether you had your eyes open or not? A. I don't remember. 30

MR. SIMPSON: I have two doctors I would like to get away. They are both Jersey City men and very busy men. I would like to withdraw this witness and put them on.

MR. BROADHURST: I am willing.

(Witness withdrawn.)

*Harry J. Perlberg—Direct.*

HARRY J. PERLBERG, sworn for the plaintiff.

DIRECT EXAMINATION BY MR. SIMPSON:

Q. You are a practicing physician and surgeon in Jersey City? A. Yes.

10 Q. And have been for how long? A. Twelve years.

Q. You make a specialty now of X-ray work? A. Yes.

Q. And how long have you made a specialty of X-ray work? A. Five years.

Q. What is the taking of X-ray pictures, is it the taking of pictures of the interior of the human body with a machine that correctly portrays the condition? A. A machine that will portray  
20 most conditions.

Q. Of the human body? A. Yes.

Q. Did you take an X-ray picture of this girl's jaw with an X-ray machine, this Miss Kelly, this young lady? Did you take an X-ray of her jaw? A. I do not remember the young lady.

Q. How do you identify the X-ray then? A. The number on this X-ray is 2961, which corresponds with the name in my records. of a Miss  
30 Elizabeth Kelly; X-ray of the right lower jaw taken July 21, 1921, for Dr. Howard.

Q. What kind of machine did you take it with? A. X-ray machine.

Q. Was your machine such a one as would correctly portray the interior of that jaw, showing a foreign substance in it? A. Yes.

Q. Is that the X-ray you hold in your hand? A. Yes.

40

*Harry J. Perlberg—Direct—Cross.*

MR. SIMPSON: I offer it in evidence.  
Admitted and marked Exhibit P-1.

Q. What does it show? A. It shows the presence of a foreign body having the appearance of a front part of a needle, lying in the soft parts of the right lower jaw.

10

Q. About where is it with reference to the teeth? A. It is behind the wisdom tooth.

Q. How far behind? A. I cannot give you an exact idea.

Q. Is it beneath the wisdom tooth? A. Behind the crown of the wisdom tooth.

Q. Does it show any other position it was originally in, or does it simply show the position of a foreign body? A. I do not understand that question.

20

Q. Does the picture show it was ever in any other position and has been moved, or does it simply show the presence of a foreign body? A. I only note the position as it is in this picture.

CROSS EXAMINATION BY MR. BROADHURST:

Q. The crown of the wisdom tooth is what part? A. The upper portion.

30



40

*Frank J. McLoughlin—Direct.*

FRANK J. MCLOUGHLIN, sworn for the plaintiff.

DIRECT EXAMINATION BY MR. SIMPSON:

Q. You are a practicing physician and surgeon?

10 A. Yes.

Q. And have been so for how long? A. Eleven years.

Q. Were you called in to attend this Miss Kelly at the office of Dr. Stern, about five o'clock on the 2nd of July, 1921? A. I happened to be passing the Doctor's office and he asked me to come in and look at the patient.

20 Q. What did you do when you got in? A. I did not do anything at that time.

Q. You just looked at it? A. Yes.

Q. You did not render any services at all at that time? A. No.

Q. When you looked what did you see? A. I looked at an X-ray picture that had been taken by Dr. Stern that day or so.

Q. What did that show? A. It showed the presence of a needle on the inner side of the right jaw.

30 Q. You did not do anything on the 2nd, did you? A. No.

Q. What did you do after that? A. I was not satisfied with the X-ray picture, so the patient was referred to St. Francis Hospital for another plate.

Q. When did she go to St. Francis Hospital? A. Within a few days afterwards.

40 Q. The following Monday? Here is the record, does this help you at all? A. The patient was X-rayed and an attempt was made to remove the foreign body with the hope that the needle would be lying superficially, near the surface, and could

*Frank J. McLoughlin—Direct.*

be easily extracted. It was found the needle was lying very deeply, near the bone, and no great attempt was made to remove it, because we felt the needle in the position it was would not give the patient a sufficient amount of trouble to require its removal and necessary dissection to get it out.

Q. Could you determine how it had gotten in that deep position in the bone; were there any marks to indicate it had been in a superficial surface and then been removed to the position it was in? A. There were no marks on the jaw.

10

Q. You could not tell how it got to that position? A. No.

Q. When you first suggested an operation you thought it was in a superficial part?

MR. BROADHURST: I object as leading.

20

MR. SIMPSON: Withdraw it.

Q. Why did you suggest an operation, with reference to the position of the needle? A. We felt if the needle was easily removed the patient would be better off with it out.

Q. Then you examined and found it in this position in too far? A. Yes.

Q. And you felt it would not give enough trouble to warrant the operation of taking it out? A. Yes.

30

Q. Would it be a serious operation to cut it out? A. It would require going down underneath the muscles on the inner side of the jaw, to cut it out.

Q. Did you do anything beside that operation? A. No.

Q. What was your bill for services? A. I did not render any bill.

40

Q. What would be a fair bill for the services you rendered? A. Fifteen dollars.

*Frank J. McLoughlin—Cross.*

Q. That is the only time you saw the patient?

A. That is the only time I saw the patient.

CROSS EXAMINATION BY MR. BROADHURST:

10 Q. Do you recollect the time when Dr. Stern called you in, the day it happened, whether you made any effort in his office to get it out by probing? A. No, I made no effort then.

Q. Your only effort was in St. Francis's Hospital? A. Yes.

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CHARLES CRONIN, sworn for the plaintiff.

20 DIRECT EXAMINATION BY MR. SIMPSON:

Q. What is your position? A. Interne, St. Francis Hospital.

Q. Did you produce the record of the girl's case this morning, under subpoena? A. I produce a record of Elizabeth Kelly, July 4, 1921—Sixteen years old.

Q. You did not have anything to do with the case? A. No, sir.

30 Q. Do the records show anything more than Dr. McLoughlin has testified to? A. The record shows an X-ray report was taken at St. Francis Hospital.

Q. But it does not show anything about her etherization or anything of that kind? A. No, no more than Dr. McLoughlin has testified to.

MR. SIMPSON: I offer that in evidence.

MR. BROADHURST: I object to it.

40 THE COURT: Objection sustained.

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*Elizabeth Kelly—Cross.*

ELIZABETH KELLY. recalled.

CROSS EXAMINATION BY MR. BROADHURST, resumed.

Q. You do not remember whether you had your eyes open or not? A. No, sir. **10**

Q. What was the next thing the Doctor did; do you remember when he put his finger in your mouth? A. Dr. Stern?

Q. Yes. You are in the chair now with your mouth wide open, and this thing holding it open? A. Then he injected the needle in it, to take the tooth out.

Q. The tooth that was coming out as I understand it, was on the lower right hand side? A. Yes, sir. **20**

Q. Near the back? A. Near the back.

Q. Do you remember which particular tooth it was? A. It is in there yet, I still have the tooth.

Q. It was one of those large teeth in the back? A. Yes.

Q. The Doctor put the needle in the gum; you felt that? A. Yes.

Q. I do not suppose you could see the needle at that time. A. No, sir. **30**

Q. Then he inserted it in, is that right? A. Yes.

Q. Did he squeeze the bulb? A. Yes.

Q. And I suppose you could feel the liquid go into your jaw, is that right? A. Yes.

Q. As I understand it, after he had done that he pulled the part of the needle that was still all right out? A. Yes.

*Elizabeth Kelly—Cross.*

Q. Then he told you that the needle was broken? A. Yes.

Q. After that I suppose he kept this thing in your mouth, kept your mouth open while he tried to get the part of the needle that was still in the gum? A. No, sir, he did not keep anything in the mouth when he tried to take it out.

Q. After he told you the needle was broken did he take this thing out of your mouth? A. Yes, then he tried to take the part of the needle out.

Q. How long after this was it that he showed you the needle itself and the bulb—that is the part that had broken? A. Right after he broke it he showed it to me.

Q. You say there is part of the needle still there? A. Yes.

Q. At these other times when he extracted your other teeth and he pushed the needle in your gum, did that hurt any at all? A. Yes.

Q. In the other side too, did that hurt you before he shot the stuff in? A. Yes.

Q. As I understand it on this particular time so far as you were able to tell he put the needle in just about the same as he had done it at other times, did he? A. He put it back further than he did the other times. It was in the bone more.

Q. That is, you believe the needle was pushed in further? A. He put it in a harder place than he did the last time.

Q. He put it in a more difficult place than he did the other times? A. Yes.

Q. That is the other teeth were further forward, were they? A. Right here (indicating).

Q. On the other side? A. Yes.

*Elizabeth Kelly—Cross.*

Q. This was a more difficult place to get at, on the side where it broke? A. Yes, sir.

Q. So far as the pain was concerned it was just about the same as it was on the other teeth?

A. Yes.

Q. After the Doctor had told you the needle had broken, and he showed you the broken part, then he made attempts to get the needle out? A. Yes. **10**

Q. Could you see what he used to get that out? A. No, sir.

Q. Or attempt to get it out? A. No, sir.

Q. And I suppose you were lying back with your mouth wide open? A. Yes.

Q. I think you told us on your direct examination that when Dr. McLoughlin came in he also tried to get the needle out? A. He did try to get it out. **20**

Q. Well, he may have forgotten about it; but he did, that is your recollection? A. Yes.

Q. And he worked on it a couple of hours? A. Yes.

Q. Then the next day was a Sunday and you went back to Dr. Stern? A. Yes.

Q. And it was on Sunday that the X-ray was taken? A. I don't remember him taking an X-ray. **30**

Q. They worked on it Sunday? A. Yes.

Q. On Sunday night I believe Dr. McLoughlin came in again? A. Yes.

Q. And he told you to go to St. Francis Hospital? A. That he would have it out in five minutes. He did not say he was going to operate on ray.

*Elizabeth Kelly—Cross.*

Q. He did not say he was going to operate on you? A. No, sir.

Q. After you left St. Francis Hospital you went to another doctor, Doctor Howard? A. I worked for a little while and then I went to him.

10 Q. When you went to Dr. Howard did he look at your mouth? A. Yes, he cut it, in the office.

Q. And did he try to get it out? A. He tried to get it out too.

Q. After that he referred you to the City Hospital? A. Yes.

Q. When you went there he was on his vacation? A. He was on his vacation.

Q. As I understand it the next doctor you went to was Dr. Davidson, in Newark? A. Yes.

20 Q. About how long after you had seen Dr. Howard was it that you saw Dr. Davidson? A. The night I saw Dr. Howard he gave me a letter to go to Davidson in Newark.

Q. About how long was it before you actually went to see him? A. It was about a week after I was in Howard's.

Q. And Dr. Davidson tried four or five times, did he not? A. Yes.

30 Q. At first he tried by a local anaesthetic? A. By gas.

Q. Did he subsequently want you to take ether or another kind of anaesthetic? A. No, just the gas.

Q. Did he subsequently ask you to take ether? A. No, sir.

Q. The next Doctor you saw was Dr. Norten in Jersey City? A. Yes.

40 Q. And he referred you to Dr. Stewart, in New York? A. Yes.

*Elizabeth Kelly—Cross.*

Q. Did Dr. Stewart see your jaw? A. Yes, but he did not guarantee getting the needle out.

Q. As I understand it you had an appointment to go to St. Vincent's Hospital to have Dr. Stewart attempt to take the needle out? A. Yes.

Q. As I understand it you did not keep the appointment? A. Yes, I went to the hospital, but at the time of the operation when he did not guarantee to get the needle out I did not wait. 10

Q. In other words, you went to the hospital, but because he would not guarantee to get the needle out you would not wait? A. No, sir.

Q. Did you go to Dr. Stewart again at all after that? A. No, sir.

Q. How tall are you, do you know? A. I do not know. 20

Q. Do you know about how tall you are? A. No.

Q. About how much do you weigh? A. About one hundred and twenty-five.

Q. Will you stand up so that we can see what your height is about? (Witness stands up.)

THE COURT: I understand you to say you noticed some difference between the injection of the needle when he put it in to go after the other teeth? 30

THE WITNESS: Yes.

THE COURT: Than when he did it for this tooth?

THE WITNESS: Yes.

Q. Won't you describe what you mean by the difference? A. Well, he pushed it right into the bone, the hard part; and in the other cases—

MR. SIMPSON: Talk up. 40

*Elizabeth Kelly—Cross.*

A. (Continuing)—he put it in the gum.

THE COURT: How do you know it went into the bone?

THE WITNESS: It was so hard; the needle did not go in; that is why it snapped.

10 THE COURT: Did you feel that?

THE WITNESS: Yes.

THE COURT: You mean to say by that that you felt it strike the bone?

THE WITNESS: Yes.

THE COURT: How did it strike the bone? Describe the sensation.

THE WITNESS: When it touched the bone it hurt something terrible, and then the crack of the needle; when it touched it, it snapped.

20 THE COURT: You could hear that?

THE WITNESS: Yes.

BY MR. BROADHURST:

Q. I understand you then, that on the other injections of the needle for the other extractions it did not hurt you as much as it did on this occasion? A. As on the other side.

30 Q. When you say the needle struck the bone, I suppose that is your supposition; you do not know of your own knowledge that it struck the bone, do you? A. No, sir.

Q. That is what you think? A. Yes.

Q. Any way, when it was being put into your gum on this occasion it hurt more than on the other? A. Yes.

Q. And you say that was sort of a sharp pain? A. Yes.

Q. How sharp was it?

40

*Elizabeth Kelly—Re-Direct.*

MR. SIMPSON: I object to that.

Q. How sharp was it. did it make you move or anything? A. Yes.

MR. SIMPSON: I object to that. How can an ordinary lay witness tell how sharp the pain was? 10

THE COURT: Objection sustained.

Q. How did the pain react on you; did it make you start? A. It made me jump.

Q. Then when you jumped, or after you jumped, you heard the snap of the needle? A. Already I heard the snap.

THE COURT: Before you jumped? A. Yes.

THE COURT: Won't you describe the action of the doctor when he pushed it in to what you say was the bone? 20

MR. SIMPSON: Can't I bring that out?

EXAMINATION BY MR. SIMPSON:

Q. You have a pain in your jaw? A. Yes.

Q. You think you would know if anybody stuck anything into it? A. Yes.

Q. Then just tell these men what you felt when this man, as you say, put it in harder than he did the other times; what did you feel against your jawbone? A. It felt like a stick, and then it gave me an awful shock. 30

Q. What did you feel in the bone? A. The point of the needle, when he stuck it right in.

Q. What did it feel like; did it feel pleasant or as if something was going into your jawbone? A. It did not feel pleasant. 40

*Elizabeth Kelly—Re-Direct.*

Q. Like something was going into your jawbone? A. Yes.

Q. You say like a stick, what do you mean? A. Sharp.

10 Q. And the other times you say the Doctor simply put the needle into your gums? A. Yes, sir.

Q. The only sensation you felt was the prick of the needle in your gum? A. Yes.

Q. This last time you have described what occurred; it was entirely different, it was going into your jawbone, you heard the crack of the needle and then you jumped? A. Yes.

MR. BROADHURST: I object as leading and ask that it be stricken out.

20 THE COURT: That should be stricken out.

Q. Just describe what happened the last time with reference to what you felt in your jawbone, what you heard and what you saw. Just describe that? A. Well, he pushed the needle right in to the bone, in the back of the tooth.

30 THE COURT: Was there any difference in the way he pushed it in this time than he had the other time? A. Yes, he pushed it back farther, and the other times he just pushed it up into the gum.

Q. Now, you having described the first operations, and the last—that the first was only in the gums and was the prick of the needle, and the second was right into the bone, will you describe what he did when he pushed it into the bone—how did he put it in?

40 MR. BROADHURST: I object to the summarization of the first part of the question.

THE COURT: It is not necessary to the question. You were interrupted—

*Elizabeth Kelly—Re-Direct.*

MR. SIMPSON: Is that question overruled or admitted?

THE COURT: I interrupted her right in the midst of an answer. She was then about to describe the sensation when the needle was pushed against the bone. Now describe that please. You said it went in further, and then you were interrupted. After it went in further, describe the sensation and what occurred, so far as you know. A. Well, it gave me a stick, like a pin, or a needle, and then I jumped, and then the snap had gone before I jumped, and then he showed me the piece of the needle. 10

Q. What did you feel like; it was your mouth, you know it wasn't mine. How did you feel in your mouth when this thing happened? A. It felt sore. 20

Q. How sore? A. It was pretty sore.

Q. Did you say in your previous answer anything about having felt sick when he pressed it in? A. No, sir.

Q. You said a "stick" not "sick"? A. Stick.

Q. When you jumped after the thing snapped and he showed it, did he tell you why it snapped? A. No, sir. 30

Q. He did not tell you it snapped? A. No, sir.

Q. You said that Dr. Stewart examined you—in response to a question—what did Dr. Stewart say to you? A. He said he would not guarantee getting the needle out, that he might have to cut three or four places before he would get it out and so I did not let him go ahead then.

Q. Where did he say he would have to cut? 40

*Elizabeth Kelly—Re-Direct.*

MR. BROADHURST: I object to this.

MR. SIMPSON: He brought it out on the cross examination. He said "Didn't you go to Dr. Stewart and didn't this thing happen?"

10 Q. Didn't you testify that Dr. Stewart said he would not guarantee he could get it out and you would not stay? A. Yes.

MR. BROADHURST: I concede that, but we did not go into the conversation with Dr. Stewart.

MR. SIMPSON: I submit I am entitled to the rest of this conversation.

20 MR. BROADHURST: I object to it on the ground I did not go into any conversation. I just went into the fact that no operation was performed.

THE COURT: I will sustain the objection.

Q. Did Dr. Stewart guarantee to get it out?

A. No, sir, he would not guarantee to get it out.

Q. Then you came away? A. Yes.

Q. Were you etherized and ready to be operated on? A. Yes, I was all ready for the operation.

30 Q. Up to the time he would not guarantee it you had seen how many doctors? A. Dr. Koppel, on the hill, and Dr. Morris, on the Boulevard, and I was to Dr. Singer, the dentist.

Q. Dr. Howard and Davidson—all those you had seen before you went to New York to Dr. Stewart? A. Yes.

Q. That is you did the best you could to get this needle out? A. Yes.

*Elizabeth Kelly—Re-Direct.*

THE COURT: You have said that this needle went as you say up against the bone—the jawbone?

THE WITNESS: Yes.

MR. SIMPSON: She said it went into her jawbone.

THE COURT: Whatever was said in that respect. Did you have any sensation as to how that needle came in contact with your jaw, whether it was a gradual push or a sudden push? 10

THE WITNESS: A sudden push.

THE COURT: You are sure about that?  
A. Yes.

THE COURT: Any difference in that respect than there had been when the injection had been made for the other teeth? A. Yes. 20

THE COURT: In what respect?

THE WITNESS: On the other side it went slow. On this side he just pushed it back and it come off—after when he came back from the Dempsey-Carpentier fight.

Q. You say he had been at the fight? A. Yes.

THE COURT: What has that got to do with it? 30

MR. BROADHURST: I do not see the materiality of that.

A. When he came back he was in a hurry.

BY MR. BROADHURST:

Q. Did I undersand you to say that when Dr. Stern and McLoughlin were probing for the needle after this occurred, that you felt pain in the jaw? A. Yes. 40

*Anna McTighe—Direct.*

Q. You had the anaesthetic in the jaw? A. Yes.

Q. And you still felt pain there? A. Yes.

Q. In spite of the anaesthetic being in it? A.

10

ANNA MCTIGHE, sworn, for the plaintiff.

DIRECT EXAMINATION BY MR. SIMPSON:

Q. Is this your daughter? A. Yes.

Q. Is she living with you? A. Yes.

Q. Was she living with you on the 2nd of July?

A. She was only sixteen years old then.

20 Q. Are you married again? A. Yes.

Q. She is living with you and her stepfather?

A. Yes.

Q. Did she bring her wages home to you? A. Yes, always.

Q. Did you have any expense about these X-rays or medical treatment? A. I had all expenses.

MR. BROADHURST: Have you those items, Senator?

30

A. That is the book of expenses.

Q. Can you tell us what your expenses were? You say you paid them all? A. I can't exactly tell.

Q. Is this your book? A. My daughter can see. I can't see without my glasses. Elizabeth can.

40

THE COURT: Was your daughter's father dead at the time of this accident?

THE WITNESS: Yes. Her father is dead since December a year and a half. I was

*Anna McTighe—Direct.*

about to become a mother when this accident happened, and Dr. McLoughlin would not perform the operation.

MR. SIMPSON: We will read these in: Expenses, X-ray, ten dollars, City Hospital one hundred and fifty dollars, wearing apparel fifteen dollars, medicine three dollars, wearing apparel fifteen dollars, carfare eighty cents, carfare eighty cents, one week St. Francis Hospital fifteen dollars, carfare one dollar sixteen, carfare eighty cents, telephone calls, one dollar, carfare fourteen cents, loss of time from work two months one hundred and twenty dollars—fifteen dollars a week—services of Dr. Stewart twenty dollars, X-ray two dollars, two days St. Vincent's, eighty dollars, carfare, fifty cents wearing apparel ten, telephone calls two dollars, sixteen dollars still due—I do not know what this is—

THE WITNESS: That is for Dr. Davidson.

Q. You still owe Dr. Davidson sixteen dollars?

A. Yes. It has been paid now.

MR. SIMPSON: X-ray two dollars, St. Vincent's and Dr. Norton two dollars.

*Elizabeth Kelly—Direct.*

ELIZABETH KELLY, recalled.

BY MR. SIMPSON:

Q. You have some expenses for clothes, what is that for? A. Getting ready for the operations, different things.

10 Q. Did your mother have to pay anything that is not on here? A. Yes, I went to Dr. Koppel and Dr. Marris.

Q. One at a time? A. Dr. Koppel, three dollars.

Q. Who else? A. Dr. Marris, up on the Boulevard, two dollars.

Q. Those are the only things that are not in here, is that it? A. Then I went to Dr. Norton a couple of times after that.

20 Q. What did you pay Dr. Norton? A. Two dollars a visit.

Q. That is in that list? A. But I went later too.

Q. You paid Dr. Norton something that is not in this list? A. Yes, our family doctor.

Q. How much? A. About three times, two dollars a time, six dollars.

30 Q. Was it about this injury you went to Dr. Norton? A. Yes.

THE COURT: You have been working steadily since the time you went back to your employment?

THE WITNESS: No sir; a number of days I went to have X-rays taken, I went to see the doctors.

40 THE COURT: Since the last X-ray you have been working?

*Elizabeth Kelly—Cross.*

THE WITNESS: Yes sir.

THE COURT: How long ago was that?

THE WITNESS: About two months ago.  
And that X-ray was five dollars, up in the  
City Hospital.

THE COURT: Did you get the same em- 10  
ployment you had before?

THE WITNESS: No sir. I have a new job  
since the accident.

BY MR. BROADHURST:

Q. How long did you continue to work for the  
National Surety after the accident? A. I worked  
up until June the following year, 1922.

Q. Then you went to work for what company?  
A. For the Maryland Casualty Company in June 20  
the following year, 1922.

Q. Then you went to work for what company?  
A. For the Maryland Casualty Company.

Q. You have been working for them since? A.  
No; I took days off there.

Q. How long did you work for the Maryland  
Casualty Company? A. A year. and now I am  
working for John Maris.

Q. As a typist? A. Yes.

Q. Do you do stenography yet? A. No sir. 30

Q. How long have you been working for him?  
A. Since November.

Q. In the various places that you have worked,  
when you have had to take a day off now and then  
for your X-rays, did they pay you? A. Yes.

Q. They paid you for your time? A. Yes.

*Joseph J. Stern—Direct—Cross.*

JOSEPH J. STERN, sworn for the plaintiff.

## DIRECT EXAMINATION BY MR. SIMPSON:

Q. You are the defendant? A. Yes.

10 Q. Were you examined as a witness before trial June 27, 1923 at the office of Collins and Corbin, by Mr. Stanton? A. I was examined as a witness.

Q. Did you swear at that examination—page 4—in reference to this needle and this operation, “It could not go further than it did go?”

20 MR. BROADHURST: I object to the question on the ground Senator Simpson has called this Doctor as a witness for him, and he cannot attempt to contradict or ask him specific questions as to what he said on certain other occasions. It seems to me that we are entitled to have the examination conducted as the examination of any other witness in chief.

MR. SIMPSON: I simply want the admission from him.

30 THE COURT: You may ask him if he did not at a certain time say that, but do not read it to him.

Q. Didn't you say at this examination about this needle that it could not go any further than it did go? A. Yes.

## CROSS EXAMINATION BY MR. BROADHURST:

40 Q. Doctor, what did you mean by that statement? A. By that statement I mean that in anaesthetizing the area I endeavored to—

*Joseph J. Stern—Cross.*

MR. SIMPSON: What is that?

A. In anaesthetizing the area, deadening the area to make it painless, my efforts were to reach a certain spot at which I deposit the balance of the solution.

Q. What spot was that, Doctor? A. That spot is a certain concavity, a depression, situated in the lower jaw just where the nerve which supplies these teeth enters, in order to block the nerve so that impulses, feelings, from the teeth should not reach back to the main centre. 10

Q. What kind of anaesthetic do you call that?  
A. Conductive anaesthesia.

MR. SIMPSON: I object to that as not proper examination. They are not entitled to go into what he did at the time, wise or unwise. I object to anything but that which is proper on cross examination. 20

MR. BROADHURST: It seems to me it is material to know whether the admission has any weight or not. It may be that under one method it was perfectly proper to go in till the needle would not go any further.

THE COURT: This is the party himself. I will allow it. 30

MR. SIMPSON: Exception.

Q. In conductive anaesthesia what is the method that you use and did use on this occasion?

MR. SIMPSON: I object. I have asked him nothing about what he did on this occasion.

MR. BROADHURST: Withdraw the question.

Q. In conductive anaesthesia is it or is it not proper according to the medical science for the 40

*Joseph J. Stern—Cross.*

needle to go into the bone that you mentioned in your explanation? A. It is proper.

Q. Will you indicate on this model here that point? A. This is not a model, this is an actual jaw.

10 Q. The point you mentioned as being the point the needle went through and could not go any further? A. In order to reach the spot and to know you are at the spot, the needle must assume this direction and touch about there (indicating).

Q. Will you turn around so that the jury can see that? A. With the barrel at approximately between these two teeth, so that we assume that position and arrive there. Otherwise the needle would be apt to go way past there into muscle and  
20 through to the back of the jaw and into the back of the head.

Q. Then do I understand that it was perfectly proper according to medical science for you to put the needle in to the point that it did go? A. Yes.

MR. SIMPSON: I object as not proper cross examination.

THE COURT: I will allow it.

30 MR. SIMPSON: Exception.

PLAINTIFF RESTS.

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*Motions for Non-Suit.**Joseph J. Stern—Direct.*

MR. BROADHURST: I move for a non-suit on the ground there is no evidence of any negligence on the part of the defendant as alleged in the complaint, which was the proximate cause of the breaking of this needle or the proximate cause of it being in the position it is in now. 10

THE COURT: I feel in the present state of the proofs it is not a court question but is for the jury to decide, so I will deny your motion.

MR. BROADHURST: Exception.

JOSEPH STERN, the defendant, recalled testified in his own behalf. 20

## DIRECT EXAMINATION BY MR. BROADHURST:

Q. Where do you live? A. 560 Jersey Avenue.

Q. What is your profession? A. Surgeon dentist.

Q. What school are you a graduate of? A. New York College of Dentistry.

Q. When did you graduate? A. 1913

Q. How long have you practiced in New Jersey? 30  
A. Since 1916.

Q. Did you practice previous to that anywhere else? A. In New York City—Brooklyn.

Q. When did you start practicing there? A. About six months after I graduated.

Q. Some time in 1913? A. Yes.

Q. Where is your office? A. 560 Jersey Avenue.

*Joseph J. Stern—Direct.*

Q. Do you recall the first time you saw Miss Kelly or applied treatment to her tooth? A. Yes, I recall seeing her.

Q. When was that? A. Approximately May, 1921.

10 Q. Did you examine her at that time? A. I did.

Q. Did you find that there was some work to be done? A. I did.

Q. What work was there to be done on the teeth, do you recollect? A. I do not recollect exactly.

Q. Had you treated her several times before July 2nd 1921? A. Yes.

20 Q. Do you recollect July 2nd, 1921, having treated her in your office? A. Yes.

Q. About what time did you see her at that time? A. It was late in the afternoon.

Q. That was the day of the Carpentier-Dempsey fight? A. Yes.

Q. It was Saturday, was it not? A. Yes.

Q. Had you been to see the fight? A. No.

Q. Did you examine her mouth at that time? A. Yes.

30 Q. What did she ask you to do on that occasion? A. I recommended that she have that tooth extracted.

Q. Which tooth are you referring to? A. It was either the first or the second lower right molar.

Q. Can you indicate on this jaw what tooth about that would be? A. Either this one or that one, (indicating).

40 Q. What did she say when you recommended that she have that out? A. She agreed.

*Joseph J. Stern—Direct.*

Q. She was in the dentist chair, I suppose, in your office? A. She was in my chair.

Q. Did you have any assistance or not? A. No.

Q. In order to extract the tooth what did you do? A. I prepared my anaesthetic solution and prepared my needle, sterilizing both.

Q. What kind needle did you prepare? A. A Schimmel needle made by a firm in Chicago, Ransom & Randolph, I think. **10**

Q. Can you tell whether or not that is a needle that should qualify according to the dental profession? A. It is. It is largely used.

Q. How long is this needle? A. It is one and five eighths inches long.

Q. Is it hollow or solid? A. It is hollow so that the liquid can pass through it. **20**

Q. What is it made of, do you know? A. Yes. steel.

Q. Is there a bulb on it? A. There is a plunger handle and barrel with two prongs so that they can be held, and use the thumb on the plunger handle to press the liquid out through the inside.

Q. The needle is on the other side of this barrel? A. Yes.

Q. Is there any guard used at all on the Schimmel needle? A. There are no guards. The needle comes with a hub, and the needle proper—if you call the hub a guard. **30**

Q. That goes with the needle? A. Yes.

Q. Is there any guard that is used other than that, any separate guard? A. No, no separate guard.

*Joseph J. Stern—Direct.*

Q. What did you do to sterilize the needle? A. I put it in a glass flask, a little Florence flask, and boiled it over a Bunsen burner.

Q. What kind of solution did you use? A. A solution of novocaine, two per cent.

10 Q. Do you know who that is manufactured by? A. Herman A. Metz, New York City.

Q. Is that a standard recognized solution for this kind of work? A. It is.

20 Q. After you got the needle and the solution ready what did you do? A. I felt for the area with my fingers, and when I located the area in the back of the jaw I inserted the needle and put it back—put it in about one quarter inch and deposited several drops of the solution to anaesthetize that area so that it would be numbed for the further progress of the needle, and also for the purpose of deadening the nerve which supplies the gum lying along the inner side of the tooth. After the deposit of that small quantity I brought the needle, the plunger, over to the left side so as to go further back, and gradually pushed the needle in until I felt for the bone—that hollow area. There I deposited the balance of the solution.

30 Q. Doctor, is there known to the medical profession more than one way of inserting the needle to give anaesthetic?

MR. SIMPSON: I object on the ground he is not qualified as a doctor.

Q. Change it to "Dental profession." A. You mean conductive anaesthesia?

40 Q. What is the other method? A. Infiltration anaesthesia.

*Joseph J. Stern—Direct.*

Q. Which method were you following? A. Conductive anaesthesia.

Q. What is the difference in the effect between the infiltration method and the conductive method? A. In the infiltration method the area immediately surrounding the tooth is anaesthetized—numbed, but in the conductive method, or nerve blocking—they block the nerve before it reaches the area, so a greater area, and also the upper area which you wish to anaesthetize, is covered. 10

Q. Which method were you using on this occasion? A. The conductive method.

Q. So as I understand it your objective was to get back to the point on the jaw where the nerve enters? A. Yes. 20

Q. What is that point called in the dental science? A. Mandibula sulcus—sulcus mandibularis. “Sulcus” is hollow; “mandibula” means lower.

Q. Is that this little hollow here? A. Yes, there is one on each side.

Q. Is that the point where the nerve enters? A. Yes.

Q. As I understand it, that is the point where you wanted to get the point of your needle? A. Yes. 30

RECESS.

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*Joseph J. Stern—Direct.*

AFTERNOON SESSION.

Trial resumed at 2 P. M., June 1, 1925.

JOSEPH STERN, resumes.

10 DIRECT EXAMINATION BY MR. BROADHURST, continued.

Q. I think before we went to lunch you had told us that the point where you wanted to get your needle was against the jawbone there where the nerve enters? A. Yes.

Q. What do you call that again? A. Mandibula sulcus.

Q. What does that mean—hollow? A. Hollow in the mandible.

20 Q. This (indicating), is the mandible? A. Yes.

Q. I think you had told us before I interrupted you you had inserted the needle at the point where you had determined to insert it, about a fifth of an inch, and had dropped a couple of drops of fluid? A. Yes.

30 Q. Then what did you do after you had dropped the couple of drops of fluid at this point? A. Then I brought the barel of the syringe over more toward the left so as to be in more of a direct line towards the mandibula sulcus and inserted the needle further in towards the sulcus until I felt the bone.

Q. Felt the bone with the point of the needle? A. Yes.

Q. And that was the objective, I understand? A. That was the goal I sought.

40 Q. Up to that time was there any indication that the needle had broken at all? A. None.

Q. Then what did you do when you got it to

*Joseph J. Stern—Direct.*

that point? A. I deposited the balance of the solution.

Q. How did you do that? A. By pressing on the plunger.

Q. You held the barrel with the hooks with your two fingers? A. The two prongs of the barrel, with the index and middle finger, and with the thumb pressed on the barrel. 10

Q. And that caused the liquid in the barrel to go through the needle and in the jaw, is that it? A. Exactly.

Q. What happened while you were doing that, or had you got that done before anything happened? A. No, nothing happened until I was about through with the injection.

Q. Then what happened? A. The needle snapped. 20

Q. You held it? A. Yes.

Q. Then did you pull the balance of the needle out of the mouth? A. Yes. It snapped at just about the point where the needle had entered.

Q. About how long was the needle, did you say? A. One and five eighths inches.

Q. How much of the needle, do you know, was left in the barrel when you brought it out? A. About one quarter, or perhaps three-eighths in the barrel was in the jaw. 30

Q. In the barrel?

THE COURT: You say it broke off at about the outer surface of the gum?

THE WITNESS: At the outer surface of the gum, just about at where the point of insertion began.

*Joseph J. Stern—Direct.*

Q. Was this on the inside of the jaw or the outside that this insertion was made? A. The inside.

Q. Were you in any hurry when you did this at all? A. No.

10 Q. Were you excited or anything, as has been intimated, because of the Carpentier-Dempsey fight? A. No.

Q. Doctor, you had extracted a tooth or two for this young lady on a prior occasion? A. Yes.

Q. Where were they located? A. If I recall rightly, the upper jaw—upper left side.

Q. On the other side from where this one was? A. Yes.

20 Q. When you extracted those teeth which system did you use? A. The infiltration method.

Q. In the infiltration method of injecting the anaesthetic what is the procedure that you follow there? A. As far as sterilization is concerned, the same procedure, except that I used a shorter needle, and the point of insertion is at or near the tooth, also into the gum, endeavoring to reach the solution into the bone—that is so near to a bone that the solution travels into the bone by infusion and anaesthetizes it.

30 Q. In putting in your needle do you put that in more or less straight into the gum as distinguished from the conductive method, or are they inserted the same way? A. No, it is inserted into the gum; you do not look for any point like this objective point.

Q. Is there any difference between the density of the upper jaw and the lower jaw which would make the infiltration method all right for the upper jaw? A. Oh, yes.

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*Joseph J. Stern—Direct.*

Q. Is the upper jaw more dense—is it more easily susceptible to the anaesthetic? A. The jaw bone has an outer covering which is more dense than the centre of the bone That applies to the upper and lower, but in the lower it is very dense, and the solution—if one would attempt to deposit the solution outside of the tooth there is very little likelihood of diffusing and penetrating into the tooth, whereas in the upper jaw it does. 10

Q. In using the solution on the upper jaw the solution will penetrate and deaden the pain whereas in the lower jaw, due to the increased density, you do not get the same effect? A. With infiltration, no.

Q. Was that the reason you used the conductive method on the lower jaw in this case? A. 20 Yes, that is the reason.

Q. Have you in your experience as a dentist in giving anaesthetics ever had any needles break? A. No.

Q. You personally have not? A. No.

Q. Have you in your experience as a dental surgeon heard of other dentists who have had needles break during the giving of anaesthetics? A. Yes. 30

MR. SIMPSON: I object as incompetent.

THE COURT: Objection sustained.

Q. From your experience in the profession have you come in contact with cases where needles have broken before? A. Yes.

Q. Have you come in contact with them frequently, or are they rare? A. They are quite frequent, especially if one happens to be in personal 40

*Joseph J. Stern—Direct.*

contact with a specialist in oral surgery, he will have many cases, because they receive all these cases.

MR. SIMPSON: I object.

THE COURT: Objection sustained.

10 Q. You know from your experience in the profession that the occurrence is more or less common? A. Yes. There is a strong likelihood of it breaking.

Q. What is your degree; are you just a dentist, or surgeon dentist? A. Doctor of dental surgery.

Q. And as a dental surgeon have you prepared yourself for such operations as attempting to remove needles that may get into the patient's gums, or other foreign substances? A. Yes, I have that knowledge.

Q. After you found the needle had broken did you make any effort to get it out? A. I did.

Q. What effort did you make on this night? A. I made an incision perpendicular to the course of the needle—up and down.

Q. How was the needle in there? A. Forward-backward.

30 Q. In other words the needle was running along this way? A. Yes.

Q. And your incision was up and down? A. Yes. Then I took a small ball pointed probe and felt up and down along the wall of the bone, along the line of the incision, to see whether I could come across any needle lying in that direction, transversely.

Q. If you did come across the needle in that  
40 upward and downward movement you would

*Joseph J. Stern—Direct.*

touch the side of the needle? A. Yes, intending if I would meet the needle that way to get hold of it and draw it back. Whether I could get it back in exactly the same spot it went in or a spot close by would make very little difference as long as I got hold of it and drew it out.

Q. In other words, when you would touch it with the probe the idea was to put the pliers in the incision, get hold of it and move it back out the way it had gone in? A. Exactly.

Q. Were you able to get it out? A. No, sir.

Q. Did you try? A. I tried.

Q. About how long did you try in the way you have described? A. Perhaps twenty or twenty-five minutes.

Q. What did you do then? A. Then I immediately went two doors away to Dr. McLoughlin and called him in an attempt to see what he could do to help me.

Q. What is your recollection as to what Dr. McLoughlin did; did Dr. McLoughlin probe for it on this night? A. Yes.

Q. What method did he use? A. The same.

Q. Did he make another incision? A. The same incision.

Q. How long did Dr. McLoughlin work on it? A. Possibly a half hour.

Q. After that did the patient go home? A. After that the patient went home.

Q. The next day did you have her come back? A. I had her come back the next day.

Q. Do you recollect whether you took X-rays the next day? A. I did, several.

Q. Have you an X-ray in your place? A. I have.

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*Joseph J. Stern—Direct.*

THE COURT: Did you take any X-rays that day?

A. The same day.

Q. What time did she come on the next day, do you recall? A. Morning.

10 Q. Did you take this X-ray then? A. Yes, that is one of the last. I took several. I gave her one.

Q. This is one of the last ones? A. One of the last ones.

MR. BROADHURST: I offer that in evidence.  
(Admitted and marked Exhibit D-1.)

20 Q. Does that show the needle? A. It does not very plainly, but it can be seen. Right there, up against the jaw, you can see that. Metal shows white through the X-ray because it does not transmit the rays.

Q. When you hold it up to the light this white streak in here is the needle? A. Yes.

Q. Do you read X-rays? A. I do.

Q. I show you the X-ray taken by Dr. Perlberg and ask you if you will indicate where the needle is there. A. Right here.

30 Q. Can you tell us from your experience with the anatomy of the jaws and heads of individuals whether the needle is in the same place in his picture as in this? A. Yes, you can see by relation to the molar. There is one molar there. It is in the same place.

Q. After you took the X-ray did you make further attempt to remove the needle on Sunday? A. I did.

40 Q. About how long did you attempt to remove

*Joseph J. Stern—Direct.*

the needle on Sunday? A. I anaesthetized the area—drugged the area in the same way.

Q. By the conductive method? A. Yes, by the conductive method, using a similar needle.

Q. That needle did not break, I take it? A. No.

Q. You used the same method? A. The same method. 10

Q. Then you attempted to get out the needle that had broken? A. Exactly.

Q. How long did you have the patient on that day? A. I do not recall exactly. It might have been an hour and a half or two hours.

Q. Did you make any other incision, or use the same incision? A. The same incision.

Q. Did Dr. McLoughlin see the patient again on that day? A. That I do not recall. 20

Q. How did she come to go to St. Francis Hospital, do you know? A. Yes, Dr. McLoughlin told her that day, Sunday, that he could not very well use that picture, the X-ray, that he could not read that X-ray well enough, that he would rather have her there and they would X-ray her there, that he had better facilities there and that he would remove it there in a few minutes.

Q. Subsequent to that did Miss Kelly ever come back to you again? A. No. 30

Q. Were you paid for your services, Doctor do you remember? A. Yes, I was paid as we went along. She made various payments.

Q. In the formation of the jaw bone, the mandibula sulcus, can you tell us whether or not the surface in the inside of the mandibula is the same in each individual, in other words has it exactly the same ridges and grooves and so forth? A. No. 40

*Joseph J. Stern—Direct*

Q. They differ then in individuals? A. Yes.

Q. And in some individuals there are ridges that are not present in others? A. Not so pronounced, others more pronounced.

10 Q. In inserting the needle on this occasion did you have to insert the needle so that it ran along the mandibula to the point where you wanted it to stop or just how did you insert it? A. The point of insertion is generally ascertained by putting the finger—feeling this ridge of bone, the external oblique line, and then getting the finger up about level with the biting surfaces of the teeth, then putting your finger there, that way.

Q. Over the biting surface to the inner side? A. Not exactly over it, but the effort is to get  
20 the finger into the center of the mouth, then with the needle about the middle of the finger, move it until it is about one quarter inch higher than the biting surface of the teeth, then insert the needle parallel with the outside surface of these teeth; in other words the plunger originally would be in this position, then run it in about one quarter inch, deposit several drops and then bring the barrel over to about this point.

30 Q. Over on the other side? A. Yes, and then bring the plunger progressively backward until that touches this bone, the mandibula sulcus.

Q. What do you use as a guide? A. The side of the jaw as a guide for your needle to go along.

Q. And is that the proper practice? A. The proper practice. That is how I have been taught.

Q. Is that the way you have done in your work? A. Yes, and still continue to do it.

40 Q. Do you know from your experience in the breaking of needles what could cause needles to

*Joseph J. Stern—Direct.*

break in giving the conductive anaesthetic? A.  
How do you mean?

Q. What causes are there? A. If I have any  
knowledge of probable causes?

Q. Yes. A. Yes, it might be due to false crys-  
tallization at that particular point.

Q. You mean crystallization of the steel itself? **10**  
A. Yes.

Q. That is the make of the needle? A. Yes.  
It might also be caused—it might also be caused  
by a patient moving suddenly.

Q. You mean a voluntary movement or an in-  
voluntary movement, or both? A. Either.

Q. Do patients have involuntary movements in  
the treating of them for things of this kind? A.  
Yes. **20**

Q. That is they start with pain? A. Yes, or  
some psychic effect.

Q. Is there such a thing as a muscular con-  
traction at all in the giving of an anaesthetic in  
this way which would cause the breaking? A.  
Yes, the effect of the chemical on the muscle would  
also cause pain and cause an involuntary reflex  
motion, a shock.

Q. How about the formation of the mandibula **30**  
itself, would that in some patients cause you to  
unexpectedly strike a ridge, which might make  
the needle break? A. Yes, because there is a dif-  
ference in the formation of the jaws. Some are  
narrower.

*Joseph J. Stern—Direct.*

Q. Is there any way of knowing in advance about that? A. No. It is all covered. Even an X-ray would not disclose that.

Q. In the conductive method are you near the surface or do you have to go down deep for that?

10 A. Deep, alongside the bone, the object being to avoid the muscles. If you go away from the bone you strike muscles.

Q. Are there several sets of muscles located in here? A. There are, attached to the inner surface of the bone. You have to avoid those.

Q. And get to the point where this nerve ends? A. Yes.

Q. Is that a sensory nerve or a motor nerve?

A. A sensory nerve.

20 Q. When you inject the fluid there does that prevent the pain from going up? A. That prevents the pain from going up because the pain is originally at the periphery, at the end, and travels toward the center.

Q. For how far does it prevent the pain? A. To the medium line—back.

Q. On the side on which you have injected it?

A. Yes. The other side has its own nerves.

30 Q. Can you tell me whether or not in addition to your regular course of study at college you attended any lectures or study relative to the removing of broken needles; do you remember? A. Well, at one time I was very active in the Kings County Dental Society and we had lectures on and off; sometimes we would have a lecture on that subject.

40 Q. In your opinion, based on your experience, did you in the performing of this work exercise the reasonable care and skill of your profession

*Joseph J. Stern—Cross.*

in the work that you were doing under the circumstances as you have told us? A. Yes.

Q. And in your opinion, did you exercise the degree of skill, learning and knowledge which was ordinarily exercised by men in your profession at the time and place and in the light of the then stage of scientific knowledge in the doing of the work you were doing, that is extracting the molar and administering the local anaesthetic? **10**

A. I did.

Q. Did you in your opinion properly administer the anaesthetic on the occasion in question? A. Yes.

Q. The Schimmel needle, is that one of recognized standard in the dental profession? A. Yes.

Q. Doctor, in your opinion was it proper for you in the practice of your science after this needle was broken to attempt to extract it by probing in the manner that you have described? A. Yes. **20**

Q. The manner you have described, is that the recognized standard manner of probing for this character of needle? A. Yes.

CROSS EXAMINATION BY MR. SIMPSON:

Q. You say this operation was done with the usual skill and science commonly known to the dental profession? A. Yes. **30**

Q. Can you give us the name of any other patients walking around the streets with a part of a needle in the jaw? A. No.

Q. How long have you been practicing dentistry? A. Since 1913.

Q. How long had you had this needle which broke at the time it broke? A. It was a brand new needle. I had never used it. **40**

*Joseph J. Stern—Cross.*

Q. Where did you get it? A. I bought it from a dental supply company on 42nd Street.

Q. Have you got it here today? A. The broken needle, no.

Q. You haven't got it here? A. No.

10 Q. Have you had it examined by any steel expert that you have produced here today to show what the condition of it was? A. No.

Q. You speak of a crystallization. You have not got the broken part here so that we could see whether there was any crystallization? A. No.

Q. Doctor, if you had done as this young woman says you did, if you had pushed that needle in with great force and struck the jaw bone, would that have broken it off? Yes.

20 Q. And that would not be the proper way to do the operation? A. No.

Q. The proper way would be to feel in gradually until you got your seat and then put your anaesthetic in? A. Yes.

Q. Does this X-ray show the needle is at the point where you wanted it to reach or has it changed at all? A. It has not changed.

30 Q. The X-ray shows it to be at the point where you wanted it to be to deliver the anaesthetic? A. The same relative position I reached.

Q. You probed you say for two hours and you brought in Dr. McLoughlin and he probed and then you probed all the next day. Do you say that did not change the position of this fragment at all? A. It never changed the position.

Q. You never reached the fragment? A. Never reached it.

40 Q. Although you had an X-ray and he had an X-ray you never reached the fragment? A. No.

*Joseph J. Stern—Cross.*

Q. Doctor, you never saw this woman after Sunday, did you? A. No.

Q. You knew she was going up to St. Francis Hospital? A. Yes.

Q. Did you ever go up to see her at St. Francis Hospital to examine her jaw and see whether you could do anything? A. No. 10

Q. You never did that? A. No.

Q. This needle was what, a steel needle? A. Steel needle.

Q. Is there such a thing as a steel needle with a guard on it so that if the breaking occurs you can pull out the point with the guard? A. No, I have never seen one.

Q. You have never heard of it? A. No.

Q. Is there such a thing as a platinum needle? A. Yes. 20

Q. What is the advantage if any of the platinum needle over the steel needle? A. A platinum needle can be used over and over again, sterilized over and over again, whereas a steel needle cannot.

Q. You can only use it once? A. Yes.

Q. But platinum you can use over and over again? A. Yes.

Q. But steel you can only use once. A. Yes. 30

Q. You do not know of any steel needle that has a guard on it to act as I have indicated at all? A. No.

Q. What is the relative expense, is the platinum less expensive than the steel?

MR. BROADHURST: I object as immaterial. There is no question in the complaint of an improper needle having been used. 40

*Joseph J. Stern—Cross.*

MR. SIMPSON: It is not necessary. You do not have to plead your evidence, you plead negligence, and then the evidence comes in.

THE COURT: Objection sustained.

10 Q. Is a platinum needle considered to be better or less good, or the same thing as the steel?

A. As far as results are concerned the same.

Q. Will platinum break? A. It will break too.

Q. Just as likely to break as the steel? A. Yes, just as likely.

Q. When was it you called in Dr. McLoughlin?

A. I do not know the exact time, but about twenty-five minutes after I tried myself.

20 Q. You tried for about two hours? A. No.

Q. She says you worked on her, as I remember, from three to five, or from two to four, or something of that kind. A. No.

MR. BROADHURST: I object.

Q. Did you work over her from three to five?

A. No, about twenty or twenty-five minutes.

Q. Then you went and got the doctor? A. Yes.

30 Q. Did you have your X-rays at the time you got the doctor? A. No.

THE COURT: Did you consider it proper practice in view of your preparation for this kind of work to continue to probe for this needle for that length of time? A. Yes, I consider any method justified if I could only get at it.

40 Q. You are not a surgeon are you? A. Surgeon dentist, yes.

Q. You are not a surgeon, you do not amputate

*Joseph J. Stern—Cross.*

limbs and arms? A. No, I practice surgery in the mouth, the extraction of teeth is surgery.

Q. Do you practice surgery on the head—trephining and so on? A. If you mean do I specialize in surgery, I have not.

Q. You just do the general dental practice? A. Exactly. 10

Q. Filling, extracting and things of that kind? A. Yes.

THE COURT: Would the removing of a needle such as this come within the line of your profession? A. It would.

Q. If a man walked into you with a needle in his jaw the way this woman had it in her jaw, would you send him to a regular surgeon or would you as a dentist try and get it out? 20

MR. BROADHURST: I object to that as immaterial.

MR. SIMPSON: Your Honor has already asked the question whether it came within the line of his work.

THE COURT: That would be very much different.

MR. SIMPSON: Withdraw the question. 30

Q. Have you ever removed a needle from any jaw bone at all in your profession? A. No.

Q. Have you ever gone into the jaw bone and removed any foreign substance as a dentist, like a piece of steel—you have never done that, have you? A. No.

Q. As I understand you, you have never seen this young woman since the day this needle broke 40

*Joseph J. Stern—Cross.*

off in her jaw—except in court? A. Since that Sunday.

Q. You do not know what the condition of her jaw is, or whether the needle is still there, or is it not, do you? A. No, I do not.

10 THE COURT: Does the usual practice of your profession call upon you as a dental surgeon to remove substances that have got into the jaw bone or any part of the bone during the process of extracting teeth? A. If you mean by that, am I empowered—

THE COURT: No, I do not mean empowered, is that the usual practice? A. No, that is not the usual practice.

20 THE COURT: What is the usual practice? A. Well, in an event of this sort it is the practice for a man to make a reasonable attempt and use all the knowledge and skill in his power to endeavor to help the patient. I am permitted to do that.

THE COURT: Is it the practice to send for a regular physician? A. No; to use his own efforts first.

30 Q. This young woman says that she could feel you pushing it further and further in. What have you to say about that?

MR. BROADHURST: I object.

THE COURT: Objection sustained.

Q. Did you push it further and further in? A. No.

Q. Did you touch it, did you ever reach it at all? A. No, I did not reach it.

40 Q. You never reached it at all? A. No.

*Joseph J. Stern—Re-Direct.*

Q. Never could reach it? A. No.

Q. And you worked you say only twenty-five minutes on it? A. About twenty or twenty-five minutes.

Q. Where was the broken needle the last time you saw it? A. I did not see it except by means of this X-ray plate. 10

Q. The top part that you took off, where is that? A. I had it laying about the office for quite a while, I do not know where it is now.

Q. How long is the needle about? A. The needle is one and five eighths inches. About three eighths of an inch remained in the syringe.

Q. What was the length of the needle? A. One and five eighths inches.

Q. About how much broke off? A. About three 20  
quarters, or a little more.

Q. Did it break off flush with the gum? A. Do you mean if I could just see the edge of it?

Q. How does the X-ray show it now? A. Just the way I put it in, in a horizontal position.

Q. It is lying in just the position you pushed it in? A. Yes.

## RE-DIRECT EXAMINATION BY MR. BROADHURST:

Q. Is that the proper position if the needle had 30  
not broken, to make the injection of the anaesthetic, the way it appears in the X-ray plate? A. Yes.

Q. The needle is in the proper position, the position it should be? A. Yes.

*C. F. Alfred Hane—Direct.*

C. F. ALFRED HANE, sworn for the defendant.

## DIRECT EXAMINATION BY MR. BROADHURST:

Q. What is your profession? A. I am a dentist—dental surgeon.

10 Q. From what school are you a graduate? A. From the New York College of Denistry.

Q. How long have you been practicing in your profession? A. About forty years.

Q. In Jersey City? A. Yes.

Q. Have you in the course of that practice treated many patients? A. Yes, quite a considerable number.

Q. Have you in the course of that practice given an anaesthetic for the removing of teeth?  
20 A. I have.

Q. Have you in the course of that practice used the conductive method? A. I have.

Q. And the infiltration method? A. I have.

Q. How old are you, doctor? A. 64 years old.

Q. Doctor, assuming that on July 2, 1921 a  
30 girl 16 years of age, apparently in good physical condition and in good health, except that she was suffering from a decayed molar tooth in the right hand lower jaw, called on a practicing dentist in the city of Jersey City and requested him to extract the tooth in question, that the dentist after examining the tooth decided that it ought to be extracted, and in accordance with the patient's request proceeded to do so; that the patient was in the ordinary dentist's chair and that dentist before extracting the tooth administered an anaesthetic by the method known as the conductive method; that for the  
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*C. F. Alfred Hane—Direct.*

purpose of administering the anaesthetic he took a Schimmel needle one and five eighths inches in length, manufactured by Ransom and Randall Company, which he sterilized by putting in a small florence flask which contained water, which was in turn boiled on a Bunsen burner, and after having thus sterilized the needle he put it in a Fisher syringe which contained a solution of novocaine hydrochloride manufactured by Herman Metz; that he then requested the patient to open her mouth widely, and having determined the position of the external oblique line with his finger, and also the internal oblique line, he proceeded to inject the solution into the tissues and the jawbone, the mandibula sulcus, inserting the needle in the jaw about the internal oblique line, or opposite this finger, until it was in to the extent of about one quarter inch, when he injected several drops of the solution and then without removing the needle and while it was still in the soft tissue he directed it much further in along the mandibula sulcus until about three quarters of an inch of the length of the needle was inserted, that then he felt it was against the point of his objective and he proceeded to empty the remaining portion of the solution, when the needle broke, three quarters of an inch of the length of the needle remaining in the jaw, and as soon as it was discovered that the needle had broken he immediately started to probe for it; that the dentist's probing consisted in making a laceration and inserting the probe into the tissues slightly below where the needle appeared to be and trying to determine

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*C. F. Alfred Hane—Direct.*

its position with the intention of after finding the position of the needle inserting a pair of pliers in an attempt to remove the needle, but that he was unable to feel the needle or remove it, and that finding he could not feel the needle or remove the broken portion he called in a doctor practicing in Jersey City, a medical doctor, who also probed for the needle but could not remove it; that the following day an X-ray was taken by the dentist and again he probed for the needle and attempted to remove it without success; that before probing on the following day he again administered a local anaesthetic in the same way as heretofore described, and finding he was unable to remove it on the second day, which was July 3, 1921, he again called in a medical doctor who told the patient to go to the hospital on the fifth day where the medical doctor took charge of the treatment. Doctor, assuming those facts, did the dentist exercise the reasonable care and skill of his profession at the time and place stated in the work that he was doing under the circumstances above delineated and described? A. He did.

Q. Doctor, in your opinion did the said dentist exercise that degree of skill, learning and knowledge which was ordinarily exercised by members of his profession at that time and place in the light of the then stage of scientific knowledge in doing the work that he was doing, that is extracting a molar tooth and administering of a local anaesthetic by the conductive method? A. I did not get that last part.

Q. In your opinion did the said dentist exercise that degree of skill, learning and knowledge which was ordinarily exercised by members of

*C. F. Alfred Hane—Direct.*

his profession at that time and place in the light of the then stage of scientific knowledge in doing the work that he was doing, that is extracting a molar tooth and administering of a local anaesthetic by the conductive method? A. He did.

Q. Assuming the facts already stated, did the dentist properly administer the anaesthetic in the conductive method? A. He has administered it in a proper method. 10

Q. Assuming the facts already stated and the breaking of the needle in the manner narrated, and assuming the exercise of due care on the part of the dentist, what would be the probable cause or causes that would lead to the breaking of the needle under the circumstances in question? A. The cause may be a manufacturer's defect in the needle; it may be a defect in the steel that the manufacturer has not controlled, has not been tested properly, or it may be by encountering some obstacle on the surface on the bone, some nodule, some substance into which the head of the needle would not go, and find such an obstacle that it would snap. 20

Q. Are there any other causes that the patient herself might contribute to? A. A voluntary, or involuntary movement might throw the line of the needle in such a way that it could snap. 30

Q. In your experience of forty years have you ever had any needle break? A. I have had four needles break in my experience of forty years.

Q. In your experience in the dental profession could you tell us whether or not it is a common thing or a rare thing to have dentists break needles when giving anaesthetics? A. Well, it is not exactly a common thing and it is not 40

*C. F. Alfred Hane—Direct.*

a rare thing either, but we hear of them quite frequently.

Q. Can you tell us whether or not in the four instances that the needle broke with you were you at the time in the exercise of care in the performance of your duties professionally towards  
 10 the patients? A. As far as I can examine my conduct I think I exercised all the care that I could, that I am required to in my practice.

Q. And they broke nevertheless? A. They broke.

Q. Can you tell us whether or not the fluid itself after the needle had reached the objective in the conductive method—whether or not in inserting the fluid itself that would have any  
 20 effect either upon the muscles or the patient herself that might cause a contraction of the muscles or a twitching of the patient that would probably break the needle? A. Well, the injection of the fluid would not have that effect, but the injection of the needle would naturally. You have to puncture the mucous membrane, and that is always painful no matter what you do. There is nothing that can overcome that. In  
 30 order to administer the anaesthetic you have to puncture the mucous membrane, then a few drops are inserted to make the feeling less, then the needle is pushed in further and you feel your way along.

Q. Along the jaw to the point where you want to go? A. Yes, you feel your way with the left hand and insert it with the right.

THE COURT: Is that a slow process?

THE WITNESS: It is a slow process, yes.

*C. F. Alfred Hane—Direct.*

THE COURT: The requirement of reasonable skill would not be met by forcing it in precipitately?

A. No, it could not be forced in precipitately because the external oblique line of the bone goes in this direction; the internal oblique line in that direction. You have to insert your needle from left to right. Then you have to turn this corner and go in from the right to the left in order to get over that oblique line as it is called in this bone here. 10

THE COURT: That is to meet the requirement of reasonable care?

THE WITNES: Yes. You cannot insert your needle here because you have muscles that are attached here. You insert your needle in this line, feel your way along the bone and when you get to this corner you twist your syringe so that it will go along in this line until it strikes this hole where the nerve goes in. 20

Q. Then in your opinion can that be done with a jab or quickly? A. It cannot be done because if you jabbed it in it would come out of the wrong side of the jaw. 30

Q. Have you had any experience in reading X-ray plates? A. I have. I take X-ray plates myself.

Q. I want you to look at the X-ray plate Dr. Stern took on the day subsequent to the breaking of this needle and tell us whether or not you can see the needle there? A. Yes. I can see that needle.

Q. Is the position of that needle as it appears in that plate in the correct position that it 40

*C. F. Alfred Hane—Direct.*

should be for the giving of this anaesthetic? A. It is absolutely in the situation where that foramen would be, that opening in the bone.

10 Q. Look at the X-ray plate of Dr. Perlberg, taken July 21 and tell us whether or not it appears in that picture to be in the same relative position as the one that Dr. Stern took. A. This is a very hard one to read by this light. I would not want to commit myself; but as far as I can see, it is in about the same position, because I see there is an unelucted molar there. That gives you a line, and the needle is right back of it, so it must be in the position that it was before.

20 Q. In your opinion do you think the point of the needle in this case could have gotten in the position where these X-ray plates show it was if the dentist had jabbed this in with force, quickly and hurriedly? A. I do not think so.

Q. Can you tell us what reputation the Schimmel needles hold in the dental profession so far as their good quality goes? A. The Schimmel needles are used uniformly as a steel needle; that is they are used here in the United States; I do not know what they use on the other side.

30 Q. Are they more likely to break than platinum needles? A. No. A platinum needle is more likely to break than a steel needle. It is not a pure platinum needle, it has irridium with it to give it stiffness, and it is so stiff it has not the elasticity that steel would have.

Q. Is there any method of test in the dental profession other than external examination of the needle as to their fitness? A. The only test

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*C. F. Alfred Hane—Cross.*

for the Schimmel needle is to take a new needle every time you perform an operation.

Q. From your knowledge of the profession is it your opinion that where a dentist such as Dr. Stern here has broken the needle in attempting to give the anaesthetic—is it proper practice for him to probe it to attempt to extract it in the manner I have put in my question? A. I think he did his duty. It was the proper thing to try to get it out. 10

Q. In your opinion was it the proper thing for him when he found that he could not get it out himself to call in the assistance of specialists or medical doctors? A. It certainly was.

## CROSS EXAMINATION BY MR. SIMPSON:

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Q. What position do those X-ray plates show that part of the needle to be in with reference to the bone? A. They show it in the position where the mandibula foramen would be.

Q. Is it against the bone? A. It is against the bone as far as you can judge from an X-ray, but you do not get the picture in such a way that you can judge what the distance is.

Q. Do you say in your opinion as far as the pictures go it is against the bone? A. I do. 30

Q. If a dentist in doing this operation had suddenly shoved that needle with too much force against the bone would that have a tendency to break it? A. It would have a tendency to break it, certainly.

Q. Is this operation one requiring care and skill? A. It certainly requires great care and skill.

Q. To what extent? A. To the extent that 40

*C. F. Alfred Hane—Cross.*

you simply do what you have been taught to do. That is, you have a proper technique in other words.

Q. What is the proper way to do it, would you go in slow, feel your way along until you got your right point and then put in the drug? A. 10  
The proper way is to insert the needle slowly until you get, as in this case, to the external oblique line, to the corner. You have to turn a corner. Then you swing your syringe over. If you inject on the right side of the jaw you swing it to the left. You do that because your tissues are soft there, you are in the mucous membrane, you can shove that aside a little and you can follow that until you get to the foramen, 20  
and you can feel when you strike this; it is like getting into a hole.

Q. It is open? A. Yes.

Q. If it is struck by a steel needle of this kind with excessive force is that apt to snap off the needle? A. It certainly would snap any needle.

Q. You say it was all right for Dr. Stern to try to get it out. Was it all right for him in your opinion after he had called in a physician 30  
and surgeon who could not get it out to work the next day, Sunday, on it himself to try and get it out, do you think that was all right too? A. I think it was. He tried in every way to do what he could.

Q. After he had called in a surgeon wouldn't it have been better to have a surgeon try to remove this foreign body than a dentist who is practicing general dentistry? A. It would not.

40 Q. You think a dentist who is in the general

*C. F. Alfred Hane—Cross.*

practice of dentistry— A. Has more knowledge than the average surgeon, of that region.

Q. Wait a minute. Do you think a dentist who is in the general practice of dentistry is a better man for a surgical job than a man who makes a specialty of surgery? A. That question I cannot answer that way. What do you mean, dental surgery or surgery in general? 10

Q. Surgery in general. I will not use the word dental surgery—use the words, a man practicing general dentistry who admits he has never taken a foreign body out of a jaw bone before. Do you understand the question? A. Please repeat that.

MR. SIMPSON: I will reframe the question. 20

Q. You think it is better for a man practicing general dentistry, who admits that he has never removed a foreign body from the jaw of this nature before, to himself try to remove it rather than to call in a surgeon who makes a specialty of surgery? A. I think it is, because in a great many cases you cannot remove it.

Q. You have answered it.

MR. BROADHURST: I object to interrupting him. 30

Q. You practice dentistry in Jersey City? A. I do, at 175 Carteret Avenue.

Q. Do you know Dr Stern? A. Yes.

Q. For how long have you known him? A. Possibly three or four years.

Q. You are fellow dentists in this community? A. Yes.

Q. You belong to the same dental society that 40

*C. F. Alfred Hane—Re-Direct.*

he does? At whose request are you testifying to-day?

MR. BROADHURST: I object as immaterial.

THE COURT: It is cross examination. I will allow it.

10 Q. Are you testifying at anybody's request?

A. At the request of the—Collins and Corbin.

Q. Of no one else? A. No.

MR. BROADHURST: I object as immaterial.

Q. You have never examined this woman's jaw? A. I have not.

Q. You do not know where the needle is except so far as the X-ray is concerned? A. That is all.

20 Q. You have not noticed this swelling that she has? A. I cannot notice the swelling without an examination.

## RE-DIRECT EXAMINATION BY MR. BROADHURST:

Q. What did you mean, you cannot tell about the swelling without an examination? A. In order to make an examination for swelling on any part of the face it has to be done by manipulation on both sides first so that you can see whether there is any part as to the right or the left which is not equal with the other. If they are equal there is nothing wrong. If they are unequal there is something wrong.

Q. In other words the mere fact that it may appear, if it does appear, that one jaw is a little larger than the other, when you come to actual examination you may find that that does not actually exist? A. It does not constitute a swelling, no.

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*C. F. A. Hane—Re-Cross—Re-Direct—Re-Re-Cross.*

RE-CROSS EXAMINATION BY MR. SIMPSON:

Q. So the needle is really an improvement to the jaw. This girl carrying this needle around, has really improved the jaw? A. (No answer.)

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RE-DIRECT EXAMINATION BY MR. BROADHURST:

Q. Is there any danger in regard to the needle in this position where it is? A. The only danger in regard to needles is when they are placed in muscular tissue, then they travel and you never know where they are going to.

Q. Has this needle traveled at all? A. It has not, according to the X-ray.

Q. Isn't it common in your profession and in the medical profession that where foreign objects are located in a part of the body and not causing any apparent difficulty and discomfort, to leave them there? A. There are quite a number of those that are carried around by individuals for years.

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RE-CROSS EXAMINATION BY MR. SIMPSON:

Q. You said the X-rays do not show the needle is traveling. Do you realize the X-rays were taken immediately after this? This one of Dr. Perlberg's is the 22nd of July, 1921, and the date of the other is prior to that. Those X-rays would not show anything about the position now, would they? A. They would not, no.

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Q. What do you mean by traveling; do these foreign bodies sometimes get in the muscles? A. If they are in the muscles they will travel through muscular action.

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*C. F. Alfred Hane—Re-Direct.*

Q. What effect would that have on the person—any? A. You may have a needle inserted in the arm and it might come out somewhere else in the body.

Q. Might it attack the heart? A. I have never known of a case of that kind.

10 Q. Now the four broken needles that you had in forty years, did you take the pieces out yourself? A. I took the pieces out myself, yes.

Q. And at the same time the person was there? A. The same time the person was there.

Q. You have no one wandering around with a souvenir in their jaw bone, have you? A. They were totally different cases from this one.

20 Q. You have had four in forty years, but not one of those four has such a souvenir as this girl has? A. I have heard of cases—

Q. Your four? A. Not my four. My needles were removed.

Q. When they were broken you took them out? A. Yes.

## RE-DIRECT EXAMINATION BY MR. BROADHURST:

30 Q. Is this needle in muscular tissue, can you tell from the X-rays? A. From the position as shown in the X-rays, as far as anybody can tell—X-rays are deceiving; there is not anybody can give a perfect opinion on that—it is in a position right close to the bone where it would not travel, not move.

## BY THE COURT:

40 Q. Doctor, let me ask you this: If the doctor in this case exercised the degree of care usually exercised by the profession in an effort to remove this needle, assuming he did, would you expect

*C. F. Alfred Hane—Re-Direct.*

to find that the needle had gone farther into the bone? A. That is a question that I cannot answer, Judge, because we have no way to start from to know where that needle was when he probed.

Q. Assuming it did go in further, as a result of the efforts to get it out. A. As a result of the probing it may have gone in further, I do not know. 10

Q. Would you have expected to find that condition existing if the usual care and skill prevailing in your profession had been exercised?

A. I think it would, because I have known of other needles that have not been removed to this day. There are several cases that we can bring on the record. 20

BY MR. SIMPSON:

Q. Would you say the dentist used ordinary care and skill if in his probing he pushed the thing in—would you say that was ordinary care and skill? A. It has not been proven that he pushed it in.

THE COURT: Assuming he has.

A. Assuming he has pushed it in, yes, it is usual skill, because it can happen to anybody. If you probe for a bullet you may push it in further. 30

Q. You think the farther he pushed it in the better dentist he was? That is all. A. (No answer.)

*C. F. A. Hane—Re-Direct—W. J. Webster—Direct.*

RE-DIRECT EXAMINATION BY MR. BROADHURST:

Q. Even with the exercise of all reasonable skill in the profession in probing the object may be pushed in further? A. It may change its position.

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THE COURT: It may also indicate a lack of care in doing it?

A. Yes, it may. Both ways.

WALTER J. WEBSTER, sworn for the defendant.

DIRECT EXAMINATION BY MR. BROADHURST:

Q. Where do you live? A. 2556 Boulevard.

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Q. What is your profession? A. I am a dentist.

Q. What school are you a graduate of? A. Philadelphia Dental College.

Q. How long have you been practicing dentistry? A. Twenty years.

Q. In Jersey City? A. Eighteen years in Jersey City and two years in Philadelphia.

Q. You are a duly licensed dentist in New Jersey? A. Yes, and Pennsylvania too.

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Q. During the 20 years of experience have you had any experience in giving anaesthetics by the infiltration method and the conductive method? A. I have, quite some.

Q. During that experience have you ever had needles break in giving them? A. Yes I have had several needles break.

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*Walter J. Webster—Direct.*

Q. Are you a member of the dental society of the county? A. I am.

Q. Doctor, assuming that on July 2, 1921 a girl sixteen years of age and apparently in good physical condition and in good health except that she was suffering from a decayed molar tooth in the right hand lower jaw, called in a practicing dentist in the city of Jersey City and requested him to extract the tooth in question, that the dentist after examining the tooth decided that it ought to be extracted, and in accordance with the patient's request proceeded to do so; that the patient was in the ordinary dentist's chair and that the dentist before extracting the tooth administered an anaesthetic by the method known as the conductive method; that for the purpose of administering the anaesthetic he took a Schimmel needle one and five eighths inches in length, manufactured by Ransom and Randall Company, which he sterilized by putting in a small Florence flask which contained water, which was in turn boiled on a Bunsen burner, and after having thus sterilized the needle he put it in a Fisher syringe which contained a solution of novocaine hydrochloride manufactured by Herman Metz; that he then requested the patient to open her mouth widely, and having determined the position of the external oblique line with his finger, and also the internal oblique line, he proceeded to inject the solution into the tissues and the jaw bone, the mandibula sulcus, inserting the needle in the jaw about the internal oblique line, or opposite this finger, until it was in to the extent of about one quarter inch, when he injected several drops of the solu-

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*Walter J. Webster—Direct.*

tion and then without removing the needle and while it was still in the soft tissue he directed it much further in along the mandibula sulcus until about three quarters of an inch of the length of the needle was inserted, that then he felt it was against the point of his objective and

**10** he proceeded to empty the remaining portion of the solution, when the needle broke, three quarters of an inch of the length of the needle remaining in the jaw, and as soon as it was discovered started to probe for it; that the dentist's probing consisted in making a laceration and inserting the probe into the tissues slightly below where the needle appeared to be and trying to determine its position with the intention of after

**20** finding the position of the needle inserting a pair of pliers in an attempt to remove the needle, but that he was unable to feel the needle or remove it, and that finding he could not feel the needle or remove it, and that finding he could not feel the needle or remove the broken portion he called in a doctor practicing in Jersey City, a medical doctor, who also probed for the needle but could not remove it; that the following day an X-ray was taken by the dentist

**30** and again he probed for the needle and attempted to remove it without success; that before probing on the following day he again administered a local anaesthetic in the same way as heretofore described, and finding he was unable to remove it on the second day, which was July 3, 1921, he again called in a medical doctor who told the patient to go to the hospital on the fifth

*Walter J. Webster—Direct.*

day where the medical doctor took charge of the case. Doctor, assuming those facts, did the dentist exercise the reasonable care and skill of his profession at the time and place stated in the work that he was doing under the circumstances above delineated and described? A. I say he did.

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Q. Doctor, in your opinion did the said dentist exercise that degree of skill, learning and knowledge which was ordinarily exercised by men of his profession at that time and place in the light of the then stage of scientific knowledge in doing the work he was doing? A. He did.

Q. Doctor, assuming the facts already stated, did the dentist properly administer the anaesthetic in the conductive method? A. I would say he did.

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Q. Assuming the facts already stated and the breaking of the needle in the manner described, and assuming the exercise of due care on the dentist's part, what in your opinion would be the probable cause or causes that would lead to the breaking of the needle under these circumstances? A. It might have been defect in the steel or it might have been caused by some movement of the patient, involuntary, or it might have been voluntary, and then again the formation of the jaw bone is not always the same; there are irregularities that we encounter, and unfortunately we have no way of ascertaining just exactly where those irregularities may be located—little nodules, sometimes they are larger than at other times, and in inserting a needle we may unexpectedly hit one of these nodules, and that would be a possible cause of breaking a needle.

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*Walter J. Webster—Direct.*

Q. Is there any method you know of to overcome the involuntary movement of the patient's head or spasmodic movement of the patient? A. No.

10 Q. I believe you said you have had needles break in your practice? A. I have had a number of needles break.

Q. Can you tell us on occasions when needles have broken with you, were you at the time in the exercise of care and skill ordinarily exercised by your profession? A. I was, as far as I remember, I was exercising all the skill I had, but the needles broke just the same, to my surprise.

20 Q. In your experience in the dental profession, do you know of instances or cases of needles breaking with other dentists? A. Yes.

Q. Is that a very rare thing or not? A. No. it is not very rare. It is fairly common since conductive anaesthetic has come into general practice.

Q. Is conductive anaesthetic a recognized standard method? A. It is a recognized standard method, because it gives us so much longer time to perform our operations.

30 Q. Will you just describe to us the objective in making this insertion of the needle in this type of administering the anaesthetic? A. Yes. After locating the ridge with our finger we use the needle and by the delicate sense of touch which we develop from constant operation we follow along the ridge of the bone and we know our locations by that, until we get into this depression. Then we have to reverse our needle, bringing it out to the left side, to get into the point of insertion.

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*Walter J. Webster—Direct.*

THE COURT: Do you stretch the muscle along?

A. Yes, stretch it.

Q. Looking at the X-ray plate that Doctor Stern took on the following day, will you see if you cannot say where the needle is? A. I can see a foreign substance that looks like a needle. 10

Q. Can you tell us in your opinion if that is the correct position for the needle to be in? A. By the picture I would say it is approximately.

Q. As I understand it, in X-rays you cannot tell with absolute accuracy? A. Not with absolute certainty, but it is in the field.

Q. Can you tell us whether or not it is in the same relative position in Dr. Perlberg's plate? A. Yes, it seems to be, although there is a difference in the picture, but it seems to be in the same location, in the angle of the jaw. 20

Q. In your opinion is the upper jaw more susceptible to the infiltration method of relieving pain than the lower jaw? A. Much more, because the bone in the lower jaw is very dense, and that is why we prefer to use the conductive method in the lower jaw.

Q. Doctor, in your opinion and based on your experience, is it probable that needles would break in the giving of a conductive anaesthetic with the exercise of all reasonable care and skill on the part of the dentist? A. Yes. 30

Q. Doctor, assuming that the needle broke as outlined in my statement of the facts in the first part of the examination, after it had been inserted the way that was described, and while the fluid was being injected through the jaw or 40

*Walter J. Webster—Direct.*

immediately after, or just during that process, would in your opinion it be proper for the dentist to make reasonable endeavors to remove the needle? A. I believe it was his duty.

10 Q. Bearing in mind the assumed facts in my question as to the character in which he did the work, is it your opinion he exercised reasonable care and the skill ordinarily exercised by men in his profession by the manner and method in which he did the probing? A. I think so, yes.

20 Q. Assuming the needle in the probing was touched and caused to go further than it originally was, assuming that to be the fact, can you tell us in your own opinion whether that could happen even if he exercised all reasonable care and skill that ordinarily is exercised in your profession? A. I would say that could very readily happen, because in the attempt to locate the needle you may just strike it in the direction in which it would go a little further in.

Q. Can that be guarded against or avoided? A. Not at all.

30 Q. What is your opinion as to the Schimmel needle with reference to its standing in the dental profession? A. It is recognized as a standard needle and I think more Schimmel needles are sold in the United States than any other brand.

Q. Is there any method of making a test by the dentist of the Schimmel needle to see whether there is any defect in it? A. I do not know of any.

Q. Are the platinum needles superior to the Schimmel needles so far as withstanding break-

*Walter J. Webster—Cross.*

ing is concerned? A. No, they seem to break just as readily. The only advantage is you can use them for a longer time—they can be re-used.

Q. In your opinion did the dentist in this case—in your opinion was it proper for the dentist in this case when he found he could not remove the broken portion of the needle to obtain expert assistance from a specialist or medical man? A. If he failed in his attempt I think it was justice to himself and his patient to seek for other help.

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CROSS EXAMINATION BY MR. SIMPSON:

Q. Do you practice in Jersey City? A. Yes.

Q. Do you know Dr. Stern? A. Not until two or three months ago.

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Q. Do you belong to the same society? A. I think he belongs to the society I do.

Q. This operation is one calling for considerable skill, is it not? A. Every dentist is supposed to possess that amount of skill.

Q. This operation calls for a dentist, it calls for a man who practices dentistry, with the usual skill? This operation could not be done by a carpenter or a shoemaker? A. It has to be done by a dentist.

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Q. If the dentist in doing that hits this needle against the bone suddenly with force is that apt to break the needle? A. Yes.

Q. How many breakages have you had? A. I think I have had seven or eight.

Q. Have you taken out all of those? A. I have been lucky enough. I have taken them out myself.

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*Walter J. Webster—Cross.*

Q. No one of your patients is walking around Jersey City with a souvenir in his jaw in the shape of a needle? A. No, not in the shape of a needle.

BY THE COURT:

10 Q. Assuming the physician possessed the degree of skill required to remove this needle and it was found that the needle had been pushed in further, would you say the ordinary skill had been used in attempting to withdraw it? A. You said a physician. Do you mean a physician or a dentist?

20 Q. A dentist—a dental surgeon? A. I would say that he used the skill, your Honor. The needle is so small, and when we make the incision, which is usually transverse—the incision—to get access to where we think the needle is, in probing we have to use a blunt instrument to probe and that blunt instrument may possibly just strike the broken end of the needle and push it a little further in.

BY MR. SIMPSON:

30 Q. Suppose, as in this case, the dentist found he could not get it, and then he sent for a doctor, a surgeon, and the doctor did not get it, you think it was all right for him to bring the woman back to his office the next day instead of using a surgeon or doctor, and work on her the next day after he found the surgeon could not get it? A. Yes, I think so; and I will explain why I think so.

Q. You need not explain to me. You say yes? A. I think it is proper, because a dentist—

40 Q. I do not want the cause. He will get the cause; he is a "cause" specialist.

*Walter J. Webster—Re-Direct—Re-Cross.*

## RE-DIRECT EXAMINATION BY MR. BROADHURST:

Q. Now will you give us the cause? A. Because a dentist is very much more qualified to perform all operations around about the mouth than a general surgeon. That is his specialty, and he is qualified to practice more than any surgeon. 10

## RE-CROSS EXAMINATION BY MR. SIMPSON:

Q. If he is qualified more to practice than any surgeon and he is better than any surgeon—  
A. For the mouth.

Q. (Continuing.) — for the mouth, can you conceive why he went out and got a surgeon who was not as good as himself? A. He failed like any human being. 20

Q. Why didn't he go out and get another dentist? A. He might have done so.

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*Nicholas F. Feury—Direct.*

NICHOLAS F. FEURY, sworn for the defendant.

DIRECT EXAMINATION BY MR. BROADHURST:

Q. You are a practicing physician and surgeon of New Jersey? A. Yes.

10 Q. And you are a graduate of what institution? A. Lehigh University.

Q. How long have you been practicing? A. 28 years.

Q. Are you connected with any of the medical societies? A. I am.

Q. Which one? A. Hudson County Medical Society, Medical Society of the State of New Jersey, American Medical Society, Medical Society Francaise.

20 Q. Do you hold any official position as medical advisor or director? A. Yes, I am surgeon general of the State of New Jersey.

Q. Did you have any experience in the late war in the treating of patients? A. I did, quite a number.

Q. Where were you located? A. I was in France most of the time.

30 Q. What was your position over there? A. The first eight months I was in France I was doing front line duty as regimental surgeon with the 47th Infantry, U. S. Regular Army, and after I was relieved there I was put in charge of hospital 38.

Q. During the course of your experience there and in your general practice have you ever examined people with foreign substances in their body? A. I have.

*Nicholas F. Feury—Direct.*

Q. Did you examine this young lady, Elizabeth Kelly recently at our request? A. I did.

Q. Do you remember when that was? A. I examined her on the first day of April this year in my office.

Q. Did she point out to you the place where the needle was located or that she claimed it was located? A. She did. 10

Q. Could you tell from external examination whether there was a needle there or not? A. No, there was nothing to be gained from my examination. I could not determine there was any foreign body at the point indicated to me. There was no swelling there, no enlargement of any kind as compared with the normal side. There was no evidence of any inflammatory process going on there. There was really nothing elicited from my examination. 20

Q. The absence of inflammatory process would indicate its causing no trouble there at present? A. No inflammation.

Q. If it was causing trouble there would be some inflammation there? A. If there was an inflammatory process going on you would get the swelling.

Q. In your experience of treating patients with foreign bodies in their systems, assuming that this needle is at the point indicated by these X-rays, can you tell us from your experience whether in your opinion it will migrate? A. It is my opinion that this needle, from the fact that it is not in active muscular tissues—I mean by active muscular tissue such as you get in the arm, the leg, the back—there is muscular tissue lining the mandibulum here, but it is not 30 40

*Nicholas F. Feury—Direct.*

what we call active muscular tissue; it is not moving, and therefore I do not think that this needle will migrate to any great extent. I say to any great extent, I mean possibly if it migrated at all it would not extend over a quarter of an inch, if it did do that.

10 Q. Doctor, have you done any surgery? A. I have.

Q. In the course of the surgery you have done have you ever had any needle break? A. I have had numbers.

Q. Can you tell us, based on your experience, whether that is a very rare thing, to have a needle break? A. No, it is not.

20 Q. The times you were unfortunate enough to have a needle break can you tell us whether or not you were then in the exercise of that degree of care and skill and knowledge ordinarily possessed by men in your profession? A. I used all that I possessed.

Q. The plaintiff testified that during rainy weather this part pained her. Is there any way known to the medical profession of testing that, other than her own statement? A. Not that I know of.

30 Q. That is what is called a subjective symptom? A. Only so.

Q. Nothing that can be seen objectively? A. No.

Q. From your examination of the girl did she seem to be well nourished? A. She is a well nourished type of girl—firm muscles.

40 Q. She testified here there was pain on that side when she would masticate food. From your general observation of her, considering her

*Nicholas F. Feury—Cross.*

height, and weight do you think that she is able to get sufficient nourishment from her food to keep her in good physical condition? A. She is masticating her food and getting nourishment.

## CROSS EXAMINATION BY MR. SIMPSON:

Q. Is there a foreign body in the jaw? A. From the radiographs, that is the only way I can decide it, Senator. 10

Q. You did not make an X-ray on your examination? A. I did not.

Q. Does the X-ray show where this foreign body is and what it is? A. After hearing it is a needle, you can see the fine line running along there, along inferior maxillary bone or mandibulum as it is sometimes called, it is right here. 20

Q. Where your small finger is? A. Right there.

Q. Would the removal of that require an operation? A. Yes.

Q. And what do you say, as Surgeon General of New Jersey, do you think a dentist is a better man for surgery than a surgeon? A. I would send her to a dentist, I would not monkey with it. 30

Q. Do you think, as surgeon general, that a dentist is a better surgeon than a surgeon? A. For oral surgery, yes.

Q. To take this thing out? A. Yes.

Q. You would not call in a surgeon if you had somebody who had an accident of this kind, you would get a dentist instead of a surgeon? A. Yes, I would.

Q. But he would have to be a man who made 40

*Motion for Direction of Verdict.*

a specialty of dental surgery? A. Yes, if I were picking him out I would pick one who had a great deal of experience.

Q. It would not be an ordinary dentist, it has to be a specialist? A. Yes. If it was out on a desert—just an ordinary dentist—I would send  
10 him to the dentist in place of a surgeon.

TESTIMONY CLOSED.

MR. BROADHURST: I wish to move for a direction of a verdict in favor of the defendant on the ground that the undisputed evidence in the case shows there was no negligence on the part of the defendant as  
20 charged in the summons and complaint, which was the proximate cause of the happening to the plaintiff, and the proximate cause of her present condition.

THE COURT: I will deny your motion and allow you an exception.

MR. BROADHURST: Exception.

(Adjourned to June 2, 1925.)

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**Charge.**

June 2, 1925.

The court thereupon charged the jury as follows:

THE COURT: Gentlemen of the Jury:

This action is brought by Elizabeth Kelly, a young woman under 21 years of age, and by her mother, Anna McTigue individually, as plaintiffs,  
40 against Joseph Stern, defendant, to recover dam-

*Charge.*

ages which these plaintiffs allege they sustained by reason of Elizabeth Kelly, an infant, having been injured through the breaking of a needle in the course of the administration of an anaesthetic by this defendant on July 2, 1921, and by reason of negligence following the breaking of this needle wherein it is alleged that because of the negligence of the defendant the needle became further imbedded in the jaw of this girl plaintiff. So you will note at the outset that there are two causes of action joined together here in this one suit; one is an attempt to recover damages which the girl Elizabeth Kelly says she sustained personally, and the other is an attempt to recover damages which it is alleged her mother sustained by reason of the injury to the girl and because of the duty which the law casts upon the mother—the father being dead in this case—to support, educate and maintain a minor child, in consideration for which the parent is entitled to the earnings of the child until that child reaches 21 or is sooner emancipated.

Now, the plaintiffs in this case claim that this young girl Elizabeth Kelly was a patient of this defendant, who was a dentist or a dental surgeon, on July 2, 1921, and that in preparation for the extraction of a tooth this defendant endeavored to administer an anaesthetic by way of a needle, and the charge is that the dentist, who is the defendant here, through his negligence, broke off this needle in the gum or jaw of the girl and that in his effort to take the needle out he negligently caused the needle to be imbedded deeper in the jaw; so that the plaintiffs charge this de-

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*Charge.*

defendant with negligence. That is the ground work of this suit. It is based upon a charge of negligence.

The defendant comes into court and says that he was not negligent. He says that he exercised that degree of knowledge and skill which is ordinarily possessed and exercised by others in the profession, and that therefore he is not responsible for the needle breaking off nor for its present position in this girl's mouth.

Now, gentlemen of the jury, it will be necessary for you to give me your closest attention for you to understand and apply exactly to the facts as you find them in this case the rules of law which I am about to give you, because unless you get these rules firmly in mind you are likely to make a mistake in the rendition of your verdict. In the first place you must always bear in mind that the defendant as a dentist or a dental surgeon was not an insurer of the success of the operation and can only be held responsible in damages if he is found to have been negligent and further you find that such negligence was the proximate cause of the injury complained of, and the duty rests upon the plaintiffs in this case before they can have a verdict at your hands to satisfy you by a fair preponderance of the evidence in this case that the defendant was negligent and that his negligence was the proximate cause of the injury which is complained of in this suit. And so in this case—I repeat it—the plaintiffs cannot recover unless they have proven to your satisfaction by a fair preponderance of the evidence that the de-

*Charge.*

fendant was negligent and that his negligence was the proximate cause of the injury complained of. And so we must have in mind the specific charges of negligence against this defendant, and they are expressed in the plaintiff's complaint as follows:

That the defendant did not use due and proper care or skill in performing said work or service—referring now to this injection and what followed—upon the said Elizabeth Kelly, but on the contrary so negligently and unskillfully conducted himself in performing the work or service above referred to that while attempting to administer a local anaesthetic in the rear part of her jaw he negligently broke off the needle, by means of which he was attempting to administer the said anaesthetic, in such a way that a part of the needle remained imbedded in her jaw, and defendant having broken off the needle in such a way that part of it remained imbedded in her jaw, thereupon attempted to remove said broken part from her jaw, and he made these attempts to remove the broken portion so carelessly and negligently that he caused the needle to be imbedded more deeply in her jaw.

Now, gentlemen, those are the specifications of negligence upon which the plaintiffs in this case rely, and they are bound by those specifications.

Negligence presupposes a violation of some duty or care which the defendant owed to the plaintiffs, and so it becomes very important in this case to ascertain what duty and care this defendant owed to the plaintiff Elizabeth Kelly

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*Charge.*

as his patient in the administration of the anaesthetic by means of the needle preparatory to the extraction of her tooth, and which he owed to her after the needle broke off in her gum or jaw, for the law does charge dentists, surgeons and other professional men of that character in the performance of their work and the treatment of their patients with a defined degree of care, and that defined degree of care as applied to a dentist or dental surgeon, may be expressed by following as nearly as possible the language used in a recent case in our Supreme Court and saying that the skill and care a dentist or dental surgeon is required to give a patient is that ordinarily possessed and exercised by others in the profession.

Negligence may consist in either the doing of something which is not permitted by the rule of care which I have just given you, or the failure to do something which that rule requires, and so it becomes very important for you to ask yourselves and answer from the evidence produced in this case alone, whether the defendant with respect to the charges made against him by these plaintiffs did anything or failed to do anything with respect to the administration of this anaesthetic by means of this needle, or what was done with respect thereto after the needle lodged in the jaw, which a dentist or dental surgeon possessed of and exercising the care and skill ordinarily possessed and exercised by others in the profession would not have done or would have done under the same circumstances; and if your answer is that he did do something or

*Charge.*

that he failed to do something which a dentist or a dental surgeon possessed of and exercising the care and skill ordinarily possessed and exercised by others in the profession would not have done or would have done under the same circumstances, then he was negligent, but if on the other hand did he exercise such care and skill then he was not negligent even though the girl still carries this needle in her gum or jaw, and you will end your duties right there, for in such an event your verdict would be in favor of the defendant and against the plaintiffs. So, for example, if the needle broke off in Elizabeth Kelly's gum or jaw or became more deeply imbedded therein for any reason or cause not arising out of or due to any negligence on the part of this defendant, using the rule of care which I have already given you, then he would not be liable therefor, because as I have already emphasized, a dentist is not an insurer of the success of the work which he undertakes as such dentist and can only be held for negligence, and he cannot be classed as negligent if he possessed and exercised that degree of care and skill ordinarily possessed and exercised by others in the profession with respect to the actions concerning which he is charged to have been negligent, for to hold otherwise would be to put an unwarranted and unbearable burden on the dental profession. But, gentlemen, even though you should find after carefully applying the rule which I have given you that this defendant was negligent, there is still an important matter for you to dispose of before you can find a verdict against the defendant, and that is

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*Charge.*

whether such negligence, if any, was the proximate cause of the injury which this young woman now complains of; and remember that the burden here also rests upon the plaintiffs to prove that any such negligence, if found, was the proximate cause of such injury.

10 Now, what do we mean by "proximate cause"? It has been expressed by a case in this court in the following manner: "Proximate cause is that cause which naturally and probably led to and which might have been expected to produce the result. It is the efficient cause, the one that necessarily sets all other causes in operation." And so, as I have already intimated, if the needle broke off and became imbedded in this girl's jaw  
20 due to a cause or causes for which negligence on the part of the defendant should be found not to have been a proximate cause, then there could be no recovery.

Now, I have mentioned, gentlemen, in connection with the burden cast upon the plaintiffs to produce a certain quantity of proofs here, the phrase, "Preponderance of the evidence". Now, what do we mean by "preponderance of the evidence" when applied to the requirement exacted  
30 of the plaintiffs to sustain their cause of action? This does not mean necessarily, gentlemen, the greater number of witnesses on the one side or the other, but it does mean the greater weight of the evidence and refers to quality rather than to quantity.

Now, you are to confine yourselves in your deliberations to the evidence in this case. You cannot go outside the evidence and import into  
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*Charge.*

it matters which may through conjecture arise in your minds. So, if after weighing all of this testimony, gentlemen, you find that the defendant was not negligent, using the rule with respect to the care required and the skill required of a dentist or a dental surgeon which I have already given you, or even if you find that he was negligent but nevertheless you also find that such negligence was not the proximate cause of the things complained of here by the plaintiffs, then there could be no recovery on the part of the plaintiffs and your verdict in that event would be in favor of the plaintiffs and against the defendant for no cause of action. But, gentlemen, if on the other hand after weighing this testimony carefully you find that this defendant was negligent and that his negligence was the proximate cause of the injury complained of, then the plaintiffs would be entitled to a verdict at your hands.\*

If you find that the plaintiffs are entitled to a verdict at your hands, then this girl Elizabeth Kelly is entitled to be compensated for the injuries which she personally sustained. Now, mark you, we use the word "compensated" for a very definite reason, and that reason is that the law seeks to give compensation by way of money, realizing that it can never put back the conditions which existed prior to the happening of the events complained of, so therefore the law is dealing with a money compensation. Now, that would include, gentlemen, so far as this young girl is concerned, any pain and suffering which she has undergone or is undergoing, for so long a time as you find she will undergo pain and suffering.

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*Charge.*

It would include any deformity by way of a swelling if you find there is any such. It would include any impairment of the use of the jaw in the process of masticating food, if you find there is any such impairment or any such failure to have the free use of the jaw on that side. The girl says that she experiences some difficulty in reference to chewing on that side. The law, gentlemen, seeks to give by way of a money compensation what it cannot do in any other way, by putting the party back in the condition in which the party was prior to the accident. That we know cannot be done actually, so you have got to base your verdict upon compensation, putting its value upon a dollar basis.

Now then, for the mother: If you find that she is entitled to a verdict at your hands she too is entitled to be compensated for the injuries which she sustained. The law casts upon the mother, where the father is dead, the duty of maintaining and supporting a minor child, and as a sort of recompense for that the law gives that parent the earnings of the child during minority or until the child is emancipated; and so in this case this mother would be entitled to be compensated for the expenses which she necessarily incurred as the natural and proximate result of the injury to this girl. That would include doctors' bills, hospital bills, bills for medicines and for X-rays, and you will recall the various amounts have been given here. It is unnecessary for me to repeat them all, because they are very voluminous, in detail; and the mother would also be entitled to be compensated

*Charge.*

for any loss of earnings on the part of the girl. Now, you will recall that she said when she had to give her time for the X-rays and for treatment as to the so-called injury that she was compensated just the same. I do not understand that she has said that she was compensated for those weeks following the accident during which she says she was incapacitated from work. However, you have the evidence before you, gentlemen, and if you find from the evidence that the mother is entitled to a verdict at your hands and you also find that by reason of this injury she lost the earnings of this girl as a natural and proximate result of such injury, then for such time as she did lose such earnings and to the amount thereof she would be entitled to be compensated.

During the course of the trial motions were made, first for a non-suit, and secondly for the direction of a verdict in favor of the defendant, both of which were denied by the court. Now, gentlemen, you are starting out on the first week of your service, and possibly are not as familiar as you will later become with the court procedure, but with respect to the court's denial of those motions you are not to draw any inference whatsoever as to what the court may feel your verdict in this case should be. It is nothing more than the court's action in passing upon the question of whether in this case there was evidence of a conflicting nature which should be submitted to you as the arbiters of the facts to decide, leaving you as such arbiters to decide the facts, but also charging you with the duty of applying the

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*Charge and Exceptions thereto.*

10 law which is now given you to the facts as you find them. That is your peculiar duty in this case. So that, gentlemen, in arriving at your verdict your first duty will be to find what are the facts and circumstances surrounding the matters complained of in this case. Having found the facts, then apply the law which the court has given you, and in doing so, gentlemen, you should not let any sympathy or passion or prejudice sway you, but observe the oath which you have taken and the rules of law which the court has given you. If you do that exactly you will have done complete justice, no matter for which side your verdict may be.

(The jury then retired.)

20 MR. BROADHURST: I ask an exception to that part of your Honor's charge in which you told the jury in substance that the issue to be submitted to them was whether or not the defendant was liable by reason of negligence following the breaking of the needle and in the breaking of the needle, the treatment following the breaking of the needle, resulting in the imbedding of the point of the needle in the jaw. The point I have in mind in substance is that there was no  
30 evidence of either negligence in the breaking of the needle or in probing subsequent which imbedded the needle in her jaw, to go to the jury on either one of the issues at all.

THE COURT: You may have your exception.

MR. BROADHURST: I want to take an exception to your Honor's quotation of the degree of care owed by dentists to patients. I appreciate that you read from the Supreme Court opinion, but  
40 the point I have in mind is that the degree of

*Exceptions to Charge.*

care is not only that ordinarily exercised by professional men in the dental profession, but that ordinarily exercised by dental men in the profession in the community in which the defendant holds himself out to practice.

THE COURT: That was especially held otherwise in the case of *Smith against Corrigan*.

MR. BROADHURST: That was a Supreme Court opinion. 10

Then your Honor reiterated that several times in the charge in different ways, and I take exception to each and every time you reiterated it and the manner in which you reiterated it.

I take an exception to your Honor's leaving to the jury the right to assess damages for loss of earnings. My understanding was that the undisputed testimony showed that there was no loss of earnings in the sense of salary at all. 20

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The jury returned to court for further instructions.

THE FOREMAN: The jury wish to be cleared up on one point. Was it brought out in the testimony of the defendant that he struck the bone in inserting the needle? 30

(The testimony of Dr. Stern was thereupon read to the jury.)

THE COURT: I will allow Mr. Broadhurst an exception, as he is not present.

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**Opinion.**

(Filed Feb. 24, 1926.)

**NEW JERSEY SUPREME COURT.**

No. 48, Oct, T., 1925.

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 ELIZABETH KELLY, *et al*
*vs.*

JOSEPH STERN.

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- Appeal from Hudson Circuit Court.
- 20 Argued before Gummere, Chief Justice, and Justices Kalisch and Campbell.
- For the appellant, Collins and Corbin.
- For the respondents, Alex. Simpson and Warren, Britt & Stanton.

**PER CURIAM.**

- 30 Elizabeth Kelly, one of the plaintiffs, a young woman twenty years old, went to the office of the defendant, who was a dental surgeon to have a tooth treated. He attempted to inject a local anaesthetic in the jaw, using a hypodermic needle for that purpose; and, according to the story of the girl, suddenly jammed it in against the bone, causing the needle to break off. A part of the needle was left in the jaw, and still remains there, notwithstanding the attempts of the defendant and of other surgeons to remove it. The
- 40 suit was brought to recover compensation for the injury sustained by the girl by reason of the alleged carelessness of the defendant in his use of

*Opinion.*

the needle, the girl's mother being also a plaintiff in the suit. The jury rendered a verdict in favor of the plaintiffs, and from the judgment entered thereon the defendant has appealed.

The only ground of reversal argued on behalf of the appellant is that the trial court should have nonsuited or should have directed a verdict for the defendant, because of the fact there was no evidence whatever of any negligence on the part of the defendant in the use of the needle. The argument in support of this contention is that the proof conclusively showed that a needle often breaks while being used for the purpose of injecting a local anaesthetic into the jaw, even though due care is exercised; and that there was nothing in the present case to support a finding of lack of due care on the part of the defendant. We think that there was such evidence. It was shown that the proper method of pushing the needle in was by a slow and careful movement. The testimony of the girl was that it was suddenly jammed into the gum, and that she then felt the point of the needle strike the bone, and felt it break off. It was for the jury to say whether her story was true, and, if it was true, whether it did not justify a finding of negligence on the part of the defendant in the use of the needle.

The judgment under review will be affirmed.

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**Judgment of Affirmance.**

(Filed Mar. 12, 1926.)

**NEW JERSEY SUPREME COURT.**

10 ELIZABETH KELLY, by next friend  
ANNA MCTIGHE, and ANNA MCTIGHE,  
individually,

*Plaintiffs-Respondents,**vs.*

JOSEPH STERN,

*Defendant-Appellant.*

On Appeal  
from Hud-  
son Circuit  
Court.

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This cause having been duly submitted on briefs at the October Term, 1925, of this Court, by Messrs. Warren, Britt & Stanton, Attorneys for Respondents, and Messrs. Collins & Corbin, Attorneys for Appellant, and the Court having considered the same and finding no error in the record or proceedings in the Hudson County Circuit Court,

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It is, thereupon on this 12th day of March, 1926, ORDERED AND ADJUDGED that the judgment of the Hudson County Circuit Court reviewed by the appeal in this cause, be affirmed with costs; and that the record be remitted to the Hudson County Circuit Court to be proceeded with in accordance with this judgment and the practice of said court.

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Entered Mar. 12, 1926.

On Motion of ALEX. SIMPSON,  
Of Counsel with Respondent.

**Notice of Appeal.**

(Filed March 27, 1926.)

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ELIZABETH KELLY, by next friend  
ANNA MCTIGHE, and ANNA MCTIGHE,  
individually,

*Plaintiffs-Respondents,**vs.*

JOSEPH STERN,

*Defendant-Appellant.*

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Action at  
Law.

To:

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MESSRS. WARREN, BRITT & STANTON, Attorneys  
of Plaintiffs-Respondents.

S I R S :

TAKE NOTICE that the defendant-appellant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

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Respectfully,

COLLINS & CORBIN,  
Attorneys of defendant-appellant.

Dated, March 24, 1926.

Service acknowledged Mar. 25, 1926.

WARREN, BRITT & STANTON,  
Attorneys of Plaintiffs-Respondents.

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**Grounds of Appeal.**

(Filed Mar. 27, 1926.)

**NEW JERSEY COURT OF ERRORS AND APPEALS.**

10	ELIZABETH KELLY, by next friend ANNA MCTIGHE, and ANNA MCTIGHE, individually, <p style="text-align: center;"><i>Plaintiffs-Respondents,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">JOSEPH STERN,</p> <p style="text-align: center;"><i>Defendant-Appellant..</i></p>	Action at Law. On Appeal from Jersey Supreme Court.
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The appellant states the following grounds of appeal:

The Supreme Court of New Jersey erred in giving judgment for the plaintiffs-respondents instead of for the defendant-appellant for some one or more of the grounds of appeal urged in said Supreme Court.

30 Dated, March 24, 1926.

Respectfully,

COLLINS & CORBIN,  
Attorneys of Defendant-Appellant.

Service acknowledged Mar. 25, 1926.

WARREN, BRITT & STANTON,  
Attorneys of Plaintiffs-Respondents.

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New Jersey Court of Errors and Appeals.

ELIZABETH KELLY, by next friend,  
ANNA MCTIGUE, and ANNA MCTIGUE, individually,

*Plaintiffs-Respondents,*

*vs.*

JOSEPH STERN,

*Defendant-Appellant.*

Action at  
Law.

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**BRIEF IN BEHALF OF THE DEFENDANT APPELLANT.**

(1)

**Statement of the Case.**

This appeal brings before this Court for review a judgment of the Supreme Court affirming a judgment of the Hudson County Circuit Court in an action wherein Elizabeth Kelly, an infant, and her mother, Anna McTigue, sought to recover damages for personal injuries alleged to have been sustained by the former as the result of alleged malpractice by Joseph Stern, at a time when he was performing certain dental work on her teeth. The plaintiffs claim that on July 2, 1921, while the defendant was administering an anaesthetic, he negligently and suddenly "pushed" the needle con-

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taining the anaesthetic into the lower jaw of the plaintiff, Elizabeth Kelly, and as a result caused the needle to break, and that while a fragment of the needle was imbedded in her jaw, he negligently attempted to remove it, and thereby caused it to become more deeply imbedded in her jaw.

10 At the close of the plaintiff's case, counsel for the defendant moved for a direction of verdict on the ground that there was no evidence of any negligence on the part of the defendant as alleged. The motion was denied and exception noted (p. 49, ll. 1-15). At the close of the entire case, counsel for the defendant moved for direction of verdict. That motion was likewise denied and exception again noted (p. 100, ll. 15-30). The case was submitted to the jury and a verdict was rendered in favor of the plaintiff, Elizabeth Kelly, 20 for \$1,500.00, and a verdict in favor of her mother, Anna McTigue, for \$100.00 (p. 11). The Supreme Court affirmed the judgment of the Trial Court on the ground that the question was one of fact for the jury (p. 112). It is from the judgment of the Supreme Court that the present appeal is taken (pp. 112, 115, 118).

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## (2)

*Grounds of Appeal.*

The grounds of appeal are as follows (p. 116):

“The Supreme Court of New Jersey erred in giving judgment for the plaintiffs-respondents instead of for the defendant-appellant for some one or more of the grounds of appeal urged in said Supreme Court.” 10

The grounds of appeal in the Supreme Court were directed not only to the refusal of the trial court to nonsuit or direct a verdict, but also to certain errors in the trial court's charge (p. 2). The alleged errors in the charge were and are waived, and on this appeal the only grounds of appeal to be argued are, first, where the trial court erred in refusing to nonsuit, and second, where the trial court erred in refusing to direct a verdict for the defendant (p. 2). 20

## (3)

*Brief of the Argument.*

## I.

**The trial court erred in refusing either to nonsuit the plaintiffs or direct a verdict in favor of the defendant when thereunto moved because there was no evidence, first, that the defendant was negligent, or second, that the defendant's negligence was the proximate cause of the injury sustained by the plaintiff.** 30

The only witness to the alleged malpractice of the defendant was the infant plaintiff, Elizabeth Kelly, who was only 16 years of age at the time (p. 22, ll. 15-16). On her uncorroborated word as to 40

her sensations while she sat in the dental chair waiting to have one of her teeth extracted rests the entire case of the plaintiffs. On July 2, 1921, she made an appointment with him to extract a tooth. When she arrived at his office he requested her to sit in the dental chair. Then he put the anaesthetic needle in the back of her mouth and pressed it in the gum inside the jaw bone. Then  
10 he pressed the bulb on the end of the needle and the next thing the needle broke. He tried to remove the broken fragment of the needle which remained in her jaw without success, although he worked for two hours. He then called in a Doctor McLoughlin, medical doctor, who tried to extract the broken fragment, but without success. She went back to Dr. Stern on the following day, which was Sunday, and again he attempted to re-  
20 move the broken fragment, but was unable to (p. 14 l. 10 to p. 18, l. 10). Thereafter she went to a number of medical and dental practitioners for the purpose of having the broken fragment removed, without success (p. 18, l. 20 to p. 19, l. 35).

The foregoing is a resume' of her entire testimony on her direct examination. On cross examination, she said that at the time she was lying back in the dental chair, her mouth wide open.  
30 She could not remember whether her eyes were closed or open, and while she was in that position the anaesthetic needle was used. She did not see the needle (p. 31, ll. 1-30). She could feel the liquid leave the needle and go into her jaw (p. 31, ll. 30-40), and it was after the liquid had left the needle that it broke (p. 31, l. 40). She submitted to an anaesthetic for the removal of other teeth on prior occasions, but these teeth were in the front of her mouth; at the time of the accident the  
40 tooth to be extracted was in the back of her mouth. On all of these occasions she had pain

when the needle was being put in the jaw (p. 32, ll. 20-40). The pain at the time of the accident was the same as on previous occasions (p. 33, ll. 1-10). She said that she thought the needle had struck the bone, *although that was merely her supposition, She did not know* (p. 36, ll. 1-40). She said there was a sharp pain and it made her move (p. 36, l. 35 to p. 37, l. 10). The pain made her jump (p. 37, ll. 10-15). Then she said that she jumped when she heard the snap or break of the needle or immediately after (p. 37, ll. 1-20). Finally when interrogated again by the court she said "Well it gave me a stick, like a pin or a needle, and then I jumped, and then the snap had gone before I jumped and then he showed me the piece of the needle" (p. 39, ll. 10-20). Being still further interrogated as to whether she could say how the needle came in contact with her jaw, "whether it was a gradual push or sudden push", she naturally answered "a sudden push" (p. 41, ll. 1-30).

The Supreme Court in its opinion, referring to the foregoing testimony of the plaintiff, interpreted it as follows (p. 112—italics ours):

"Elizabeth Kelly, one of the plaintiffs, a young woman twenty years old, went to the office of the defendant, who was a dental surgeon, to have a tooth treated. He attempted to inject a local anæsthenic in the jaw, using a hypodermic needle for that purpose; and, according to the story of the girl, *suddenly jammed it against the bone, causing the needle to break off*. A part of the needle was left in the jaw, and still remains there, notwithstanding the attempts of the defendant and of other surgeons to remove it. \* \* \* *It was shown that the proper method of pushing the needle in was by a slow and careful movement. The testimony of the girl was that it was suddenly jammed into the gum, and that she then felt*

*the point of the needle strike the bone, and felt it break off.* It was for the jury to say whether her story was true, and if it was true, whether it did not justify a finding of negligence on the part of the defendant in the use of the needle."

As shown above, the infant plaintiff was only sixteen years of age at the time of the happening  
 10 (p. 22, ll. 15-20). Her entire testimony fails to disclose any statement that the defendant suddenly jammed the needle into her gum. Her direct testimony fails to reveal any cause for the breaking of the needle except that the defendant pressed the needle into the gum at the back of her mouth and that after he had pressed the bulb so that the liquid would go into the jaw bone the needle broke (p. 15, ll. 20-30). She could not tell how  
 20 far back the needle was pushed (p. 20). At the time of the happening she was reclining in the dental chair with her mouth wide open and did not and naturally could not see what the defendant was doing. She did not even remember whether her eyes were open or closed (p. 25, ll. 10-20). She reiterated that she did not see the needle (p. 31, ll. 20-30). The pain that she experienced at the time was about the same as on prior occasions when she had  
 30 an anæsthetic administered in a similar manner (p. 33, ll. 1-16). She admitted that when she said the needle struck the bone that was merely a supposition; that she did not know that to be the fact (p. 36, l. 30). She did know that the pain was sharp enough to make her move (p. 37, ll. 1-10). Indeed, it made her jump (p. 37, ll. 10-15). The sensation she experienced when the needle was inserted was "it gave me a stick like  
 40 a pin or needle and then I jumped, and then the snap had gone before I jumped, and then he

showed me the piece of the needle" (p. 39, ll. 10-20). She was then asked the rather dubious question, especially in the light of her previous testimony, as to her sensations; "Did you have any sensation as to how that needle came in contact with your jaw, whether it was a gradual push or a sudden push?" and she answered, "A sudden push" (p. 41, ll. 10-20). She was then asked to describe her sensation as to whether there was any difference between that and some other injection on some other occasion and she answered (p. 41, ll. 20-40): "On the other side it went slow. On this side he just pushed it back and it come off." 10

The foregoing testimony does not support the conclusion as expressed in the opinion of the Supreme Court that the defendant suddenly jammed the needle against the bone, causing it to break. She was not twenty years of age but sixteen years of age at the time. She testified to any number of sensations as shown supra. Whether her start or jump preceded the breaking of the needle or the breaking of the needle preceded the jump would seem to make very little difference in a fair reading of her entire testimony, because as she testified it all happened about the same moment and even if we assume that there was "a sudden push of the needle" rather than "a gradual push" it proves nothing more than the witness' impression of a feeling in her jaw bone because she neither saw nor knew what the defendant was in fact doing. She merely gave her impression of what she felt as she lay in the dentist's chair waiting for her tooth to be extracted. 20 30

Whether or not the needle struck the jaw bone was a mere surmise, as she admitted; even assuming that it did strike the bone, there was no 40

proof that that was improper while in the defendant's case it appeared that that was the objective toward which the needle was properly directed. *There was no evidence that the striking of the jaw bone caused the needle to break.* The defendant's witnesses testified that the position of the broken fragment in the jaw bone was the proper position for it, assuming that it was being properly directed at the time it broke.

We have paused at this point to analyze the plaintiff's testimony because if we assume as proven facts the conclusions of fact stated in the opinion of the Supreme Court, then we admit that the case was properly submitted to the jury.

In this case we are dealing with the technical art of administering an anaesthetic by means of a needle. The question presented is whether the defendant used that degree of care which was ordinarily exercised by men of his profession.

*Ely vs. Wilbur*, 49 N. J. L. 685; 10 Atl. 358;

*Smith vs. Corrigan*, 126 Atl. 680 (N. J. S.);

*Lolli vs. Gray*, 128 Atl. 256 (N. J. E. & A.).

The plaintiff could no more describe the method of administering the anaesthetic than could a person inexperienced in the operation of an automobile tell by riding in it and going down hill whether the speed of the car was being retarded by the application of brakes or by putting the car in low gear. Her entire testimony was based merely on sensation, not on sight; not on what she saw but merely on what she thought she felt. All of which was nothing but supposition based on the pain that she had.

The defendant, called as a witness by the plain-

tiff, was asked whether he had not stated that the needle at the time it broke could not go any farther than it did. He answered in the affirmative (p. 46, ll. 30-40). The very objective which he sought to reach was a cavity or depression situate in the jaw bone where the nerve entered which had to be anaesthetized. It was at that very point that the anaesthetic was to be deposited so as to stop the impulses and feelings from reaching the tooth which was to be extracted (p. 47, ll. 1-20). In conductive anaesthesia the proper method is for the needle to be inserted into the bone at the point where it was and when it reached that point, of course, it could go no farther (p. 47, l. 30 to p. 48, l. 10; p. 25, ll. 20-30).

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No medical or dental expert was called by the plaintiffs to testify that that accepted practice was improper.

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The defendant, called in his own behalf, testified to the exact method in which he prepared the needle for use and the manner in which he inserted it (pp. 49-52). Having properly prepared the needle and syringe attached thereto, he felt with his finger for the area to be anaesthetized. Having found it, he inserted the needle part way (a quarter of an inch) and deposited several drops of the solution in that immediate area, so that it would be numb for the further progress of the needle. Then he proceeded farther with the needle so as to reach the bone and there deposited the balance of the solution (p. 52, ll. 15-30). The tooth to be extracted was one of the lower right molars in the back of the mouth (p. 50, ll. 30-40).

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The plaintiff testified that on previous occasions when she had teeth extracted by the defendant she did not feel as much pain as on this occasion (p. 38, ll. 1-20), although she had previously testified that the pain was about the same (p. 33, ll. 1-10). However, on the other occasions the teeth

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to be extracted were in the upper jaw on the left hand side, and on these occasions the infiltration method of anaesthesia was used because of the position of the teeth (p. 56, ll. 1-20). In the infiltration method the area immediately surrounding the tooth is anaesthetized but in the conductive method the entire area containing the nerve before it reaches the tooth is anaesthetized (p. 53, ll. 1-15). The method used at the time of the accident was conductive anaesthesia. The defendant's purpose was to get to the point on the jaw bone where the nerve entered through a cavity to the tooth. That point is known as the sulcus mandibularis (p. 53, ll. 15-30). When the defendant reached that point the remainder of the solution had been forced from the needle by pressing on the bulb or syringe and it was after the needle was completely empty that it broke, not in the jaw bone but at the point of entry (p. 55, ll. 1-20). The insertion was made on the inner side of the jaw (p. 56, ll. 1-10).

On prior extractions the teeth being in the front in a different part of the jaw, the infiltration method of anaesthesia was used (p. 56, ll. 1-20). In administering that form of anaesthesia a short needle is used for the purpose of injecting the fluid at or near the tooth to be extracted and the fluid travels into the jaw by infusion. The upper jaw differs from the lower jaw in that it is not so dense and is more susceptible to the influence of the anaesthetic. The lower jaw has an outer covering which is quite dense and although the solution would enter the upper jaw when the infiltration method is used, it will not enter into the lower jaw due to the increased density, and therefore the necessity for the conductive method (p. 56, l. 30 to p. 57, l. 10).

It is well known to the dental profession that

needles break, and as a part of their preparation dentists are taught how to remove broken fragments of needles when they break (p. 57, l. 30 to p. 58, l. 15). In his preparation for work as a dental surgeon the defendant had qualified to remove foreign substances from the gums or jaw (p. 58, ll. 20-30).

After the needle broke the defendant made an incision perpendicular to the fragment of the needle and tried to remove it without success (p. 58, ll. 20-40). Finding himself unable to remove the fragment, he called in a medical doctor, namely, Dr. McLoughlin, who also was unable to remove it. 10

Needles break from causes over which the dentist has absolutely no control, as, for example, inherent defect in the steel not apparent to ordinary inspection, involuntary motion on the part of the patient, involuntary muscular contraction caused by the effect of the chemical on the muscles, and the formation of the jaw or mandibula itself, which may have unexpected or unforeseen ridges against which the needle may strike or be pressed, causing the needle to break. These ridges are not discernible even with the aid of an x-ray (p. 63, ll. 1-40). 20

The needle which the defendant used was a new one, never having been used before. An x-ray taken after the needle broke showed it to be in the proper position for the purpose of administering the anaesthetic. His probing did not move the needle at all because it was in exactly the same position as it was at the time it broke (p. 10, ll. 10-30). 30

In addition to the defendant's own testimony, two dental experts, qualified by years of experience, testified that the defendant had exercised the proper degree of care and nothing that he did 40

was contrary to the well settled practice of his profession.

Dr. Hane was graduated from the New York College of Dentistry and had practiced as a dental surgeon in Jersey City for 40 years (p. 72, ll. 10-20). In answer to a hypothetical question which contained all of the facts as summarized supra, he stated that the defendant exercised  
10 the skill and care ordinarily possessed and exercised by others in the dental profession (p. 72, l. 20 to p. 75, l. 5). In his opinion based on the facts as they appear in the testimony, the defendant properly administered the anaesthetic by the conductive method (p. 75, ll. 5-15). Assuming the facts that had been testified to and based on his experience there were a number of probable causes that would lead to the breaking of the needle not due in anywise to the negligence or carelessness or lack of skill of the defendant. Such causes were, first, defect in the  
20 needle caused in its manufacture; second, encountering some unexpected nodule or ridge on the surface of the jaw bone or mandibular which could in no wise be guarded against even in the exercise of the greatest care; third, voluntary motion of the patient's head or body due to pain or nervousness which could not be guarded against and fourth, involuntary motion of the  
30 plaintiff's head or body (p. 75, ll. 15-35). In the course of his practice he had needles break while giving anaesthetics in spite of the fact that he was using all the skill and care that his forty years of experience had endowed him with (p. 75, ll. 30-40). Another probable cause for the breaking of the needle would be muscular contraction due to pain which could not be guarded against when the mucus membrane was  
40 punctured (p. 76, ll. 10-30). In administering

an anaesthetic by the conductive method it is physically impossible to proceed in any manner other than slowly (p. 76, ll. 30-40). If the needle were forced in precipitately it could not be done because the needle would come out on the wrong side of the jaw due to the fact that in the course of the journey it is necessary to turn the needle (p. 77, ll. 1-30). Examination of the x-ray plates that were taken after the accident shows that the broken fragment in the plaintiff's jaw is in the correct position that it should be for giving the anaesthetic (p. 77, l. 30 to p. 78, l. 5). It would be impossible for the point of the needle to have gotten to the position where the x-ray showed that it was if the dentist had shoved it in quickly or hurriedly (p. 78, ll. 15-25). The Schimmel needles, such as used by the defendant in this case, are used uniformly by the dental profession in the United States (p. 78, ll. 25-30). The only test known to the dental profession in order to determine the fitness of a needle before using it is to take a new one every time an anaesthetic is administered (p. 78, l. 35 to p. 79, l. 5). After the needle had broken it was proper practice for the defendant to probe in an attempt to extract it in the manner in which the defendant had testified this was done (p. 79, ll. 1-20). He was asked on cross-examination whether or not, if the defendant had suddenly shoved the needle with too much force against the bone, would that have a tendency to break it to which he answered it would (p. 79, ll. 30-40). The plaintiff's attorney may attempt to rely on that as being some evidence that too much force was used but the answer clearly is first, there is no evidence too much force was used by the defendant; second, the witness testified it was physically impossi-

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ble to get the needle in the position it was if it had been suddenly shoved with force and third, even if this was a probable cause, there still remained four other probable causes for the breaking of the needle, not due in anywise to the negligence of the defendant and before the plaintiff could recover it was her obligation to eliminate the probable causes for which the defendant was not chargeable. It was the witness's opinion that even after Mr. McLoughlin had been called in on the night of the accident and assisted in probing, the defendant properly attempted on the following day to remove the broken fragment (p. 80, ll. 30-40). Even if in probing for the broken fragment the defendant had pushed the needle farther in to the bone than it was at the time the needle snapped, that fact was not incompatible with the exercise of care and skill on his part as it could happen in spite of the exercise of the highest care and skill (p. 84, l. 30 to p. 85, l. 40).

Dr. Webster had practiced as a dental surgeon in Jersey City for twenty years and was graduated from the Philadelphia Dental College. In his practice he had an extensive experience in administering anæsthetics by both the infiltration and conductive methods (p. 86, ll. 20-35). In the course of that experience needles had broken that he was using (p. 86, ll. 35-40). In answer to a hypothetical question containing all the facts he stated that it was his opinion based on his experience and learning that the defendant had exercised the skill and care ordinarily possessed and exercised by others in the profession (p. 87, l. 1 to p. 89, l. 20). Assuming the facts that had appeared in the testimony it was his opinion that there were a number of probable causes which would lead to the breaking of the needle that

were entirely independent of any lack of skill or care on the part of the defendant. Among these causes were, first, defect in the manufacture of the needle. Second, voluntary motion of the plaintiff's head. Third, involuntary motion of the plaintiff's head. Fourth, irregularity or little nodules on the jaw bone against which the needle would strike in its course and which could not be avoided or guarded against (p. 89, l. 20 to p. 90, l. 10). In the instances in which needles had broken with him he had been in the exercise of care and skill (p. 90, l. 10-20). It was fairly operation (p. 90, ll. 20-30). In administering anæsthetics and particularly since the conductive anæsthesia had been adopted as a general practice in the dental profession. This method is a recognized standard method and produced much better results than the infiltration method due to the fact that it has more lasting effect and gives the surgeon more time to perform the operation (p. 90, ll. 20-30). In administering an anæsthetic by the conductive method it is necessary after locating the ridge of the bone with the finger to follow along the ridge of the bone with the needle until the point reaches a depression in the bone where the needle is reversed to get it in to the point of insertion. This requires a stretching of the muscles (p. 90, l. 30 to p. 91, l. 10). Examination of the x-ray plates shows the fragment of the needle in the proper position (p. 91, ll. 10-20). The upper jaw is more susceptible to the effects of the anæsthetic administered by the infiltration method than the lower jaw due to the fact that the lower jaw is very dense. The conductive method is preferred by members of the dental profession for an extraction from the lower jaw. After the needle had broken it was proper for the

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defendant to probe in the manner that he described for the broken fragment and even if in so doing he had pushed the needle farther than it was at the time it broke, this would not denote negligence or lack of skill, as even with the exercise of all reasonable care and skill in attempting to locate the needle the dentist may strike against it in a direction that would cause it to go in a little farther. This cannot be guarded against or avoided (p. 97, ll. 1-30). The Schimmel needle used by the defendant in this case is recognized in the dental profession as a standard needle and there is no test that can be made against defects in it other than a mere outward examination. On cross-examination the witness was asked whether if a dentist struck the needle against the bone suddenly and with force it was apt to snap and break, to which he replied yes. The plaintiff may attempt to rely on this as being a reason for submitting the case to the jury but it is subject to the same answer given in the summary of Dr. Hane's testimony, supra. It was perfectly proper for the defendant to probe on the following day in spite of the fact that he had called to his assistance a medical doctor (p. 64, ll. 30-40).

Dr. Feury, a practicing physician and surgeon of the State of New Jersey was graduated from Lehigh University and had practiced for twenty-eight years in the State of New Jersey. He is the Surgeon General of the State of New Jersey, and during the war was with the United States Army in charge of a Base Hospital, No. 38, and as regimental surgeon, doing duty on the front line (p. 96, ll. 1-40). In the course of his practice, specializing in surgery he has had needles break many times and it was not a rare thing for them to break (p. 98, ll. 1-20). They would

break notwithstanding the exercise of the skill and care ordinarily possessed by the members of his profession (p. 98, ll. 10-30).

With respect to the claim that the needle was forced further into the plaintiff's jaw by reason of the defendant's probing, there is no evidence supporting that claim, while on the other hand, the evidence is undisputed that the fragment of the needle was in exactly the position where it ought to be, assuming that it was properly inserted, the position of the fragment instead of supporting the plaintiff's claim that it was forced further into the jaw supports the defendant's claim that it was properly inserted. 10

With respect to the main claim that the needle was caused to break by reason of the negligence of the defendant in using too much force in inserting it, we have already shown that that claim is based wholly on the sensation experienced by the infant plaintiff who at the time was only sixteen years of age, and her testimony, when considered as a whole, shows that the sensation consisted of nothing more than pain similar to which she had experienced on other occasions. However, even if we assume that there was more pain than on other occasions, the reason for it is clear, namely, the different method of administering the anæsthetic. 20 30

The testimony of a witness based on supposition or the reasoning power of the patient, which supposition or reasoning power is in turn based solely on the amount of pain or supposed pain experienced by the witness while having a needle inserted in the witness's jaw bone is not competent testimony to prove the fact first as to how much force was used in inserting the needle; second, whether that force was sufficient to break the needle; and third, whether the force used was 40

improper according to dental standards. There is nothing in this case to prove that the amount of force used was sufficient to break the needle. As shown, needles break time and again even in the exercise of proper skill and care. The question was asked of the defendant's experts as to whether if too much force were used, it might not have a tendency to break the needle, and the answer in the affirmative to such question proved nothing in this case because the question assumes that too much force was used.

Even assuming that there was sufficient testimony in the case to indicate that one of the causes for the breaking of the needle was the fact that too much force was used, which we deny, still, giving to the testimony its most favorable aspect, it is undisputed that any number of causes may have resulted in the breaking of the needle, for only one of which the defendant could possibly be charged with negligence, and as to all of the other causes for breaking the needle, no liability would exist. It is well settled that where it appears that the injury may have been occasioned by any number of causes for only one of which the defendant would be responsible, the plaintiff cannot recover.

**30**            *Stumpf vs D. L. & W. R. R. Co.*, 76 N. J. L. 152;  
                   *Chester vs. Cape May R. E. Co.*, 78 N. J. L. 132;  
                   *McComb vs. P. S. Ry. Co.*, 95 N. J. L. 187;  
                   *Maphet vs. H. & M. R. R. Co.*, 98 N. J. L. 369.

**40**            The doctrine of *res ipsa loquitur* does not apply to this case first, because the trial judge did not submit the case to the jury on that theory.

It is well settled that a judgment must be sustained, if at all, on the theory adopted by the trial court in submitting the case to the jury because that is the law of the case.

*Hayes vs. P. R. R. Co.*, 42 N. J. L. 446;

*Hart vs. Cumberland, &c. Ins. Co.*, 44 N. J. L. 478;

*Halsey vs. L. V. R. R. Co.*, 45 N. J. L. 26; 10

*Oakley vs. Emmons*, 73 N. J. L. 206;

*Fritz vs. Sayre & Fisher Co.*, 77 N. J. L. 238;

*Donahue vs. Campbell*, 98 N. J. L. 755, 758.

Secondly, the mere breaking of the needle is not evidence of negligence.

*Vale v. Noe*, 179 N. W. 572 (Sup. Ct. of Wis. Oct. 1920). 20

In the above cited case the mouth and tongue of the plaintiff were cut when an electrically operated stone being used by the defendant, slipped from the plaintiff's tooth. The plaintiff contended that the doctrine of *res ipsa loquitur* applied, but the court held to the contrary. In disposing of the question on appeal, the court said:

“There is no room for the application of the doctrine of *res ipsa loquitur*. Negligence of the defendant cannot be inferred from the fact of injury under the circumstances in this case. This injury may be the result of pure accident; it may be the result of an unconscious involuntary movement on the part of the plaintiff. The finding of the jury that she did not move her head was necessarily based solely on the testimony of the plaintiff. She may have moved her head involuntarily, or the action of her muscles may have been spasmodic. The fact that the cut is in the bottom of the mouth at the juncture of the 30  
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10 tongue with the bottom of the mouth is a circumstance which indicates that the tongue was moved in some way from the position occupied just before the accident. The finding of the jury amounts to a finding that she did not consciously move her head or jerk her tongue, and no more. The burden is upon the plaintiff to eliminate these possibilities and establish affirmatively the fact that the injuries were the result of the defendant's negligence."

20 In *Mandelbaum v. Weil*, 203 N. Y. S. 289, decided by the Supreme Court, Appellate Division of New York, February, 1924, it appeared that the defendant, a surgeon, broke a needle while performing an operation upon the plaintiff's throat. The plaintiff charged negligence in several particulars, but it is interesting to note that the specifications charged as negligence did not include the breaking of the needle. In the opinion of the Appellate Division reversing the trial court in submitting the case to the jury and holding that there was no malpractice established, he court said:

30 "At the trial plaintiff's reliance was principally on the breaking of the hypodermic needle, but no part of the alleged malpractice referred to in the complaint is predicated upon the actual breaking of the needle. The sole expert offered by the plaintiff testified: 'It is possible to happen to anybody that a needle break. Q. And you do not criticize him for that? A. Not for breaking the needle.'"

40 Even if the mere breaking of the needle was some evidence of negligence, the defendant and the dental experts called at the trial, have explained that the breaking of a needle may occur even with the exercise of the highest care. This uncontradicted and uncontroverted proof would totally destroy any presumption in this regard.

*Benson v. Dean*, 133 N. E. 125; 232 N. Y. 52.

In the above cited case the action was brought against the defendant for breaking a needle while performing a surgical operation, and in failing to exercise proper care in the subsequent treatment of the patient. On the charge of negligence in breaking the needle, the defendant requested the trial court to instruct the jury that the mere breaking of the needle alone was not necessarily negligence. The trial court refused to charge the language requested. In reversing the judgment for the plaintiff, the Court of Appeals disposing of this question said (p. 127):

“The plaintiff failed to offer any negligence to refute defendant’s evidence that surgical needles occasionally break, even when the operator uses the highest degree of skill and care. The evidence of the first operation, coupled with the presence of the broken needle in the abscess, standing by itself, might have suggested that proper care had not been taken, and might have been enough to put the defendant to his proof. Common sense suggests that the condition discovered by Dr. Saphir was incompatible with successful surgery and medical treatment. But when the evidence of the defendant’s surgeons came into the case, with a reasonable explanation showing what might happen where the proper degree of skill is actually exercised, the possible inference of negligence from the breaking of the needle alone was driven out, and the jury should have been so instructed. The rule of *res ipsa loquitur* put upon the defendant the burden of going on with the case, but in the absence of medical evidence to the contrary, it must be assumed on this appeal, that the breaking of the needle was not due to negligence.”

Finally, the mere fact that the fragment of the needle still remains in the plaintiff’s jaw is no evidence of negligence. In the first place

there was not a scintilla of evidence that the defendant negligently probed for the broken fragment. It is true that the plaintiff, exercising her powers of imagination again, said that the defendant in attempting to remove the fragment pushed it further in, but if that constitutes evidence of negligence sufficient to justify the submission of the case to the jury, the defendant is an insurer of the success of his treatment, No medical testimony was offered to show that the method he pursued was improper. All of the experts called by the defendant agreed that it was proper for the defendant to probe in the manner in which he did probe and that even with the exercise of reasonable skill and due care, the needle could be pushed farther into the jaw bone. This is true of any foreign substance similar to a needle.

In a case much more favorable to the plaintiff the Supreme Court held that the failure of the treatment to accomplish the result for which it was given was no evidence of negligence. In that case, *Gramaldi vs. Zeglio*, 3 N. J. Adv. Rep. 668, 129 Atl. 475, that court held as follows:

"To permit a jury to pass upon the question of malpractice because testimony is given by physicians that they would have used a different treatment from the one prescribed or followed would be to make a physician or surgeon a guarantor of the success of his treatment in every case. If he fails to restore his patient he must face a law suit with its accompanying annoyances and expenses. If the plaintiff's position be sound a jury must pass upon the question whether the treatment given was correct or not. As the plaintiff did not respond to the treatment given and his arm become restored to its condition prior to the fracture, it could be expected that a jury would reach the conclu-

sion that some other treatment of the condition which arose should have been applied. The result would be a verdict for the plaintiff, notwithstanding the same infection might have followed the other kind of treatment. If such were the law there would be few physicians and surgeons who would undertake to treat a case. For every failure to effect a cure would lay the basis for a law suit." 10

We respectfully submit that the trial court erred in refusing to either nonsuit the plaintiffs or direct a verdict in favor of the defendant when thereunto moved.

## II.

**For these reasons the judgment below should be reversed and a venire de novo awarded.** 20

MAY TERM, 1926.

EDWARD A. MARKLEY,  
CHARLES W. BROADHURST,

Of Counsel.

COLLINS & CORBIN,  
Attorneys of Defendant-Appellant.

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For the reasons stated above, the court is of the opinion that the judgment of the trial court should be affirmed. The evidence is sufficient to support the verdict, and the law is correctly stated. The court is of the opinion that the judgment of the trial court should be affirmed.

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## II

For these reasons the judgment below should be reversed and a venire de novo awarded.

MAY TERM, 1918

CHARLES W. ROBERTS,  
OF COUNSEL.

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Attorneys of Defendant Appellant,  
COLEMAN & COLEMAN.

## NEW JERSEY COURT OF ERRORS AND APPEALS.

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ELIZABETH KELLY, by next friend,  
Anna McTigue, and Anna Mc-  
Tigue, individually,

*Plaintiff-Respondents,*

vs.

JOSEPH STERN,

*Defendant-Appellant.*

Action  
At Law.

On Appeal  
from Hud-  
son County  
Circuit  
Court.

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**BRIEF FOR PLAINTIFF-RESPONDENTS.**

This case is before the Court upon an appeal taken from the judgment of the Hudson County Circuit Court whereby the plaintiff obtained judgment against the defendant for \$1,600; \$1,500 for the infant plaintiff and \$100 for the mother.

There are two grounds of appeal relied on for reversal, which are argued together, one being that the trial Court erroneously refused to nonsuit the plaintiff, and the other being the refusal of the trial Court to direct a verdict in favor of the defendant.

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**Facts.**

The facts which the jury might have found were these. The plaintiff, who was 16 years of

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age at the time, visited the defendant, a dentist, for treatment, and it was necessary to inject a needle into her jaw in the performance of the operation of extracting a tooth. The needle broke off and at the time of the trial it was still in the jaw of the plaintiff (S. C., page 19, line 35). The action was not founded upon the mere breaking  
10 off of the needle, which is a more or less common thing, according to the testimony (S. C., page 90, line 20), but upon the careless manner in which he injected the needle and its consequent breaking off, and the after-conduct of the defendant in endeavoring to extract the needle from the plaintiff's jaw. The plaintiff testified that on the occasion when the needle broke off, the defendant pushed the needle suddenly into her jaw and not  
20 gradually, as he had done on other occasions when he had injected the needle into her jaw (S. C., page 41). This bit of testimony was brought out on questions asked by the trial Court. This in itself was some evidence of negligence, for experts produced by the defendant testified that the operation required great care and skill (S. C., page 79, line 36); that the proper way as brought out by the trial Court (S. C., page 76, line 38) was to insert the needle in gradually and not to force  
30 it in precipitately, and that it is not using reasonable care to force it suddenly into the jaw (S. C., page 77, line 15). Even the defendant himself admitted that the proper way to conduct the operation was to gradually feel the needle in until you reach the desired spot and that if the needle was pushed in suddenly and with force and struck the jaw bone it would cause the needle to break off (S. C., 66, lines 15-24). The defendant contends in his brief, and so did the experts, pro-

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duced by the defendant, testify that involuntary motion on the part of the plaintiff's head or body might cause the needle to break, as well as voluntary motion. This is all very well, but the plaintiff testified that after she heard the crack of the needle she jumped (S. C., pages 38, 39). Here is a positive assertion of the cracking of the needle after he had pushed it with force into her jaw and against the bone, and not a mere supposition as contended by the experts, produced by the defendant, of the voluntary and involuntary motion on the part of the patient's head or body, after the injection of the needle which caused it to break off. This line of testimony was sufficient and ample to justify the trial Court in submitting the question of negligence to the jury. As was said by this Court, speaking through Justice Kalisch, in the case of DELLABELLO vs. CENTRAL RAILROAD CO., 99 N. J. L., on page 350:

“If there was any testimony, *no matter how meagre*, adduced on the part of the plaintiffs tending to show liability of the defendant and no incontrovertible fact was established by the defendant which fact, as established, would constitute an absolute bar to the plaintiff's right of recovery, the defendant was not entitled to succeed on either motion.”

This case comes within the principle enunciated by this Court in the Dellabello case, *supra*, for even though the plaintiff's testimony was meagre, still it tended to show liability on the part of the defendant, inasmuch as the plaintiff testified that the defendant had suddenly pushed the needle against the jaw, and not gradually, and that the

sudden pushing of the needle had the tendency to break it (S. C., page 79, lines 32-35), and that the proper way to use it was to gradually insert the needle.

10 If the jury believed the plaintiff's story, and it was a question for the jury, that he suddenly pushed the needle in instead of doing it gradually, it demonstrated that he did not exercise that degree of care and skill which is ordinarily possessed and exercised by others in the dental profession.

See:

*Smith vs. Corrigan*, 126 Atl., 680;  
*Lolli vs. Gray*, 128 Atl., 256.

20 The after-conduct of the defendant clearly demonstrated that he did not exercise that degree of care and skill that is ordinarily exercised by others in his profession. The plaintiff testified that after the needle broke, the defendant probed for the needle for two hours (S. C., page 16, line 30), and he probed so unskillfully that he shoved it further into the jaw (S. C., page 17, line 20), where it was still lodged at the time of the trial and is still lodged there now. He worked for  
30 two hours that day before he called in a physician and then Dr. McLaughlin worked on it for an hour or so without success. On the following day, which was a Sunday, the defendant worked on her from 10 o'clock in the morning until two o'clock in the afternoon and from three o'clock until eight o'clock (S. C., page 18, lines 1-22). On the following day she was taken to the hospital and a day later was operated upon, but because  
40 the needle had been pushed in so far by the unskillful action of the defendant, they could not get

it out (S. C., page 19). She then went to a specialist in Newark, but because the defendant had pushed the needle in so far that even a specialist could not get it out (S. C., page 19, lines 30-34).

If this was a fact then there was a jury question as to whether his action, subsequent to the breaking off of the needle, showed that he exercised the usual skill and care of a dentist. The experts, produced by the defendant, on cross examination tried to evade answering the question as to whether it was ordinary care and skill, if, by probing, the needle was pushed in further, and it was not until the trial Court asked the question (S. C., page 86, lines 1 to 13), did they admit that pushing the needle in further would indicate a lack of care in doing it. 10

As Justice Parker, speaking for this Court, in the case of *McKITTRICK vs. PUBLIC SERVICE R. R.*, 3 N. J. Adv. R., on page 715, said: 20

“But if the testimony presents disputed material facts, or if reasonably divergent inferences may be drawn by fair-minded men from material facts which are not in dispute, then it is for the jury, not for the Court, to settle the conflict and draw the inference.” 30

There was ample contradictory evidence to have the case submitted to the jury.

What was said by Justice Katzenbach in the case of *SMITH vs. CORRIGAN*, 126 Atl., page 680, aptly applies to this case:

“The case presents the usual features and contradictory testimony of a malpractice case. 40

It was, we think, properly submitted to the jury.”

That the needle was pushed in further because of the defendant’s lack of care and skill in doing this particular work was clearly shown by the defendant’s own testimony. He was asked on cross examination the following questions (S. C., page 10 69, lines 31 to 36):

“Q. Have you ever removed a needle from any jawbone at all in your profession? A. No.

Q. Have you ever gone into the jawbone and removed any foreign substance as a dentist, like a piece of steel—you have never done that, have you? A. No.” 20

Doesn’t it show that because of his lack of experience the needle was pushed in further? Doesn’t it show that he attempted to do something which he had never attempted before, removing a needle or other foreign substance from a jawbone, and that because of that he pushed the needle in such a position that other physicians and specialists could not get it out. Notwithstanding all this, he probed for the needle for two 30 hours one day and almost nine hours the following day. The defendant argues that he did his best to remove the needle and that he was not a guarantor of his work. This is all admitted, but the fact remains that because of his unskillful manner the needle went in further so that it could not be removed. The defendant contends that even when skillfully done the needle *could* have 40 gone in further. But that was a question for the

jury, and as was said in the case of *McKITTRICK vs. PUBLIC SERVICE R. R.*, 3 N. J. Adv. R., 711:

“In negligence cases the resolution of conflicting probabilities as to the cause of the injury is for the jury.”

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“There was ample proof also for a jury to consider, in harmony with the plaintiff’s distinct allegation, that owing to the defendant’s negligence in operating, the needle was suffered to remain in the plaintiff’s hand until finally extracted at the hospital by another surgeon. The weight and credibility of this testimony, when compared with that offered by the defendant, manifestly, is for the jury, and the refusal of the trial Court to direct a verdict, under the circumstance, was therefore proper.”

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*Kapherr vs. Schmidt*, 98 N. J. L., page 805.

“Testimony for plaintiff made a prima facie case for the jury, and on the whole case it remained for the jury to say whether such prima facie case was met by the evidence for defendant, the burden of proof remaining throughout on the plaintiff.”

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*Mannon vs. Odd Fellows*, 97 N. J. L., 218.

This is not a rule to show cause, but a strict appeal, and if there is any evidence to support a verdict, it cannot be disturbed.

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*Loveland vs. McKeever Bros.*, 90 N. J.  
L., 704.

10 An examination of the testimony shows that there was evidence there to entitle plaintiff to recover and the trial Court was justified in denying a motion to nonsuit. When the defendant's case was put in there were enough controverted facts to allow the case to be submitted to the jury and the trial Court was justified in refusing to direct a verdict. This is elementary law and it would be superfluous to cite any cases in support of this proposition.

20 It is respectfully submitted that the judgment below should be affirmed.

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