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Résumé de l'article

Cet article est une contribution aux rares documents historiques canadiens traitant de patients qui ont poursuivi des médecins pour faute professionnelle. Il examine un long procès tenu au Nouveau-Brunswick, Key c. Thomson, dans lequel un jury de Saint Andrews accorda les dommages-intérêts pour faute professionnelle les plus élevés dans toute l'Amérique du Nord britannique et au Canada au cours du 19^e siècle. Cette étude contextualisée donne un aperçu des forces culturelles qui influaient sur les lois, montre comment des individus s'y retrouvaient dans les procédures judiciaires, illustre la complexité et les nuances de certains litiges en matière de faute professionnelle, et met en lumière l'attitude de la profession médicale envers les efforts de patients demandeurs qui utilisaient la loi pour obliger les médecins à rendre des comptes.

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This article contributes to the scant Canadian historical literature on patients suing doctors for malpractice. It examines a lengthy New Brunswick case, Key v. Thomson, in which a jury in Saint Andrews granted the largest damage award in a malpractice suit anywhere in British North America/Canada during the 19th century. This contextualized study provides insight into cultural forces affecting the law, shows how individuals navigated legal processes, demonstrates the complexity and nuances of some malpractice disputes, and sheds light on the attitude of the medical profession to efforts of patient-plaintiffs to use the law to keep doctors accountable.

CANADIAN MEDICAL HISTORIANS HAVE DRAWN SUBSTANTIAL ATTENTION to the efforts of 19th-century physicians to employ the law and the state to protect the profession's interests. Historians of medicine, for instance, have explored how “regular” doctors pushed out competing kinds of practitioners, often through claims of professionalism and superior education as well as licensing requirements enforced by statute.¹ Scholars have paid little attention, however, to

1 On the efforts of regular doctors to push out competitors in the Maritimes, see Douglas Baldwin and Nancy J. MacNeill MacBeath, “Physicians, Quacks & Opium Eaters: The Professionalization of Medicine in the 19th Century,” *The Island Magazine* 26 (1989): 13-19; Peter J. Mitham, “For ‘the Honor and Dignity of the Profession’: Organized Medicine in Colonial New Brunswick, 1793-1860,” *Canadian Bulletin of Medical History* 13, no. 1 (Spring 1996): 83-108; Peter L. Twohig, “The ‘Celebrated Indian Herb Doctor’: Francis Tumblety in Saint John, 1860,” *Acadiensis* XXXIV, no. 2 (Summer/Autumn 2010): 70-88; Colin D. Howell, “Reform and the

R. Blake Brown, ““A more disgraceful case it has seldom fallen to our lot to comment upon”: Medical Malpractice in 19th-Century New Brunswick,” *Acadiensis* XLVII, no. 2 (Summer/Autumn 2018): 5-25.

how patients used the law of medical malpractice against doctors in Canada in response to poor treatment.² In the *Osgoode Hall Law Journal* I recently provided a survey of when and why malpractice emerged as an issue in English Canada.³ I suggest that the medical profession considered malpractice to be an “American problem” until the last third of the 19th century, when doctors began to rail against a perceived increase in litigation. Physicians claimed that lawsuits damaged reputations and forced them to spend lavishly on defending themselves with little chance of recovering their legal costs from most plaintiffs. Doctors blamed lawyers for drumming up spurious lawsuits, and argued that jurors tended to side with plaintiffs. Other factors encouraged litigation beyond those identified by doctors. Medical professionals in rural areas sometimes avoided lengthy travel, leading to

Monopolistic Impulse: The Professionalization of Medicine in the Maritimes,” *Acadiensis* XI, no. 1 (Autumn 1981): 3-22; and Colin D. Howell, “Elite Doctors and the Development of Scientific Medicine: The Halifax Medical Establishment and 19th-Century Medical Professionalism,” in *Health, Disease and Medicine Essays in Canadian History*, ed. Charles G. Roland (Toronto: Hannah Institute for the History of Medicine, 1984), 105-122. This research was supported by the Social Sciences and Humanities Research Council of Canada. Thanks to Kirby Ross for her work as a research assistant, and to the staff of the Charlotte County Archives. An earlier version of this paper was presented at the Canada’s Legal Past: Future Directions in Canadian Legal History conference at the University of Calgary in July 2017.

- 2 Jacalyn Duffin’s assertion in 1993 that “there are few histories of medical malpractice in North America” remains essentially true in Canada, though several scholars have since analyzed the history of medical malpractice in the United States; see Jacalyn Duffin, *Langstaff: A Nineteenth-Century Medical Life* (Toronto: University of Toronto Press, 1993), 221. For works dealing with the history of medical malpractice in Canada, see Peter J. Mitham, “‘Very Truly and Undisturbedly Yours’: Joseph Workman and a Verdict of Malpractice against John Galbraith Hyde,” *Canadian Bulletin of Medical History* 13, no. 1 (Spring 1996): 139-49; Iain McCormick, *Practical Sympathy: The Malpractice Trial of Dr. J.M. Conerty and the Formation of the Canadian Medical Protective Association* (Ottawa: Canadian Medical Protective Association, 2002); and R. Blake Brown and Magen Hudak, “‘Have you any recollection of what occurred at all?’: *Davis v. Colchester County Hospital* and Medical Negligence in Interwar Canada,” *Journal of the Canadian Historical Association* n.s., 26, no. 1 (2015): 131-62. There are some studies that consider coroners’ inquests, which often entailed the questioning of physicians’ abilities and decisions. For examples, see Jacalyn Duffin, “The Death of Sarah Lovell and the Constrained Feminism of Emily Stowe,” *Canadian Medical Association Journal* 146, no. 6 (April 1992): 881-8, and Jacalyn Duffin, “In View of the Body of Job Broom: A Glimpse of the Medical Knowledge and Practice of John Rolph,” *Canadian Bulletin of Medical History* 7, no. 1 (Spring 1990): 9-30. For examples of American work on malpractice, see Kenneth Allen De Ville, *Medical Malpractice in Nineteenth-Century America: Origins and Legacy* (New York: New York University Press, 1990); James C. Mohr, *Doctors and the Law: Medical Jurisprudence in Nineteenth-Century America* (New York: Oxford University Press, 1993); Allen D. Spiegel and Florence Kavalier, “America’s First Medical Malpractice Crisis, 1835-1865,” *Journal of Community Health* 22, no. 4 (August 1997): 283-308; Chester R. Burns, “Malpractice Suits in American Medicine Before the Civil War,” *Bulletin of the History of Medicine* 43, no. 1 (January-February 1969): 41-56; James C. Mohr, “American Medical Malpractice Litigation in Historical Perspective,” *Journal of the American Medical Association* 283, no. 13 (April 2000), 1731-7; and Neal C. Hogan, *Unhealed Wounds: Medical Malpractice in the Twentieth Century* (New York: LFB Publishing, 2003). For a study of malpractice in Britain, see Kim Price, *Medical Negligence in Victorian Britain: The Crisis of Care under the English Poor Law, c.1834-1900* (London: Bloomsbury, 2015).
- 3 R. Blake Brown, “Canada’s First Malpractice Crisis: Medical Negligence in the Late Nineteenth Century,” *Osgoode Hall Law Journal* 54, no. 3 (Spring 2017): 777-803.

allegations of malpractice when patient health declined despite calls for attendance. Some physicians may also have encouraged lawsuits against local competitors. Late-19th-century claims to professionalism played a role as did patient expectations for better outcomes, especially in orthopaedics – the specialty that comprised many of the reported instances of malpractice in the period.

This article supports the claims made in my *Osgoode Hall Law Journal* article about the causes of the growing concern with malpractice by examining a New Brunswick case: *Key v. Thomson*. This case study also illustrates how individuals navigated legal processes and demonstrates the complexity and nuances of some malpractice disputes.⁴ In addition, an examination of this litigation augments the work of historians of medicine who have undermined an older literature that celebrated heroic doctors. Even recent scholarship on the history of the medical profession tends to highlight the willingness of doctors to undertake difficult travel to assist patients in rural areas.⁵ But malpractice cases demonstrate that house calls could be delayed or intermittent for various reasons despite the risks posed to patient health.

Key v. Thomson makes an excellent subject for a contextualized case study because archival records contained at the Charlotte County Archives in St. Andrews, New Brunswick, provide a rare view into the operation of a 19th-century malpractice trial. The archive possesses the extensive papers of one of the lawyers involved, Benjamin Robert Stevenson, which includes over 500 pages of trial transcripts, correspondence, financial data, and legal documents related to *Key v. Thomson*. These documents, combined with newspaper and journal articles as well

4 On the value of contextualized case studies, see A.W.B. Simpson, *Leading Cases in the Common Law* (Oxford: Clarendon Press, 1995), 1-12, and Debora L. Thredy, "Legal Archeology: Excavating Cases, Reconstructing Context," *Tulane Law Review* 80, no. 4 (March 2006): 1197-238. For a sample of Canadian works using the case study approach, see Eric Tucker, Bruce H. Ziff, and James Muir, eds., *Property on Trial: Canadian Cases in Context* (Toronto: University of Toronto Press and the Osgoode Society, 2012); Judy Fudge and Eric Tucker, eds., *Work on Trial: Canadian Labour Law Struggles* (Toronto: University of Toronto Press and the Osgoode Society, 2010); Robert J. Sharpe and Patricia McMahon, *The Persons Case: The Origins and Legacy of the Fight for Legal Personhood* (Toronto: University of Toronto Press and the Osgoode Society, 2007); and James W. St. G. Walker, "Race," *Rights and the Law in the Supreme Court of Canada: Historical Case Studies* (Waterloo, ON: Wilfrid Laurier University Press and the Osgoode Society, 1997).

5 For example, see how David A.E. Shephard describes Dr. John Mackieson of Prince Edward Island: "His priority was to provide his patients with medical care, whatever the difficulties; he frequently travelled on rough, often muddy or snowy roads to visit them, staying with his patients for hours if it seemed necessary"; see Shephard, *Island Doctor: John Mackieson and Medicine in Nineteenth-Century Prince Edward Island* (Montreal and Kingston: McGill-Queen's University Press, 2003), 121. Also see Duffin, *Langstaff*, 40-2. The "Making Medicare" website of the Canadian Museum of History suggests that in the early 1900s most of Canada's doctors "were general practitioners who made house calls at any time of the day or night"; see <http://www.historymuseum.ca/cmc/exhibitions/hist/medicare/medic-1h04e.shtml>. Sasha Mullally has examined the durability of the country doctor archetype, and she notes portrayals of country doctors often emphasized that the physicians ventured out to the homes of patients "at all hours of the day and night and in all weather"; see Sasha Mullally, "Unpacking the Black Bag: Rural Medicine in the Maritime Provinces and Northern New England States, 1900-1950 (PhD diss., University of Toronto, 2005), 1.

as reported appellate decisions, permit a detailed recreation of this malpractice case. This article begins by describing how the patient, John Key, became injured and the treatment he received. It then examines his efforts to sue his doctor and considers what this litigation shows us about late-19th-century malpractice law as well as the attitude of the medical profession to efforts by patient-plaintiffs to use the law to keep doctors accountable.

In December 1865 John Brenton Key was a robust and healthy man in his late 30s. He was married to Eliza, and had a young family.⁶ He and Eliza had come to North America from Tavistock in Devonshire, England, in 1863 with their eldest daughter (also named Eliza). He worked as the mining engineer of a small copper mine opened in L'Etete, Charlotte County, in the 1860s.⁷ Charlotte County is nestled in the southwestern corner of New Brunswick, with Maine to the west, and the Bay of Fundy to the south.⁸ Key's position paid him approximately £400 per year, and provided him and his family the use of a house rent-free.⁹

On the morning of 23 December 1865, he travelled by horse and sleigh to the town of St. George on a business trip. He consumed some alcohol while in St. George, two to three drinks he claimed, prior to heading back home, although he asserted he was not drunk. He left St. George at 5:00 pm under a bright moon wearing a cap, mittens, and an overcoat, and tucked under a buffalo robe. Key had a substantial trip ahead of him – approximately ten miles – on a very cold and windy night. A report on mining operations in the county described the road linking St. George to L'Etete as lightly travelled and “tolerable, but like all in Charlotte County, rather hilly and rocky.”¹⁰ Having come from southern England, Key perhaps failed to appreciate the dangers of winter travel. Approximately four miles into his journey, Key stopped and tried to stand in his sleigh. His legs were numb and he tumbled to the ground. His horse then ran off. Key tried to follow his ride, but he fell repeatedly and lost his cap and his mittens. He became lost and soon grew fearful as he realized that the moon would set

6 Minutes of trial of *Key v. Thomson* (August 1869), MC 42, MS 5/252; *Key v. Thomson* (1869), Evidence of Samuel Gove, Charlotte County Archives, St. Andrews, New Brunswick.

7 1871 Census of Canada, New Brunswick, Charlotte County, Saint Andrews, p. 72, http://data2.collectionscanada.ca/1871/pdf/4396592_00098.pdf; 1901 Census of Canada, New Brunswick, Charlotte County, <http://data2.collectionscanada.ca/1901/z/z001/pdf/z000025326.pdf>; L.W. Bailey, *Report on the Mines and Minerals of New Brunswick, with an Account of the Present Condition of Mining Operations in the Province* (Fredericton: G.E. Fenety, 1864), 23, in *Journal of the House of Assembly of the Province of New Brunswick, 1864* (Fredericton: G.E. Fenety, 1864): Appendix 7. A directory for 1865-1866 lists nine men employed as miners in L'Etete, including John B. Key and his younger brother Joseph; see Thomas Hutchinson, *Hutchinson's New Brunswick Directory for 1865-66: Containing Alphabetical Directories of Each Place in the Province, with a Post Office Directory and an Appendix Containing Much Useful Information* (Saint John: Thomas Hutchinson, 1865), 518. John and Joseph appear in the 1851 English census; see 1851 English Census, class HO107, piece 1884, folio 123, roll 221033, p. 20, https://search.ancestry.com/search/db.aspx?dbid=8860&geo_a=r&geo_s=us&geo_t=us&geo_v=2.0.0&o_xid=62916&o_lid=62916&o_sch=Partners.

8 Paul Craven has recently examined the operation of “low law” in Charlotte County; see Craven, *Petty Justice: Low Law and the Sessions System in Charlotte County, New Brunswick, 1785-1867* (Toronto: University of Toronto Press and the Osgoode Society, 2014).

9 *Key v. Thomson* (1867), 1 *New Brunswick Reports* (NBR) 295 at 297.

10 Bailey, *Report of the Mines and Minerals of New Brunswick*, 23.

by midnight, meaning he might be stranded all night in the dark and cold. He began to perspire despite the low temperature as he searched for help. Realizing that his limbs were at risk of freezing, he rubbed his hands with snow and struck his hands and feet to encourage circulation. He wandered about for four or five hours before he came to the house of William Gamble. Gamble, however, refused Key entry. Key moved on to the home of James Murphy, who offered him shelter for the night. Key was in a bad state by the time he entered Murphy's home. He knew his hands had become very cold (they sounded like "hard substances when they were knocked together," although he thought his feet were fine. His hands were placed in cold water to allow for gradual thawing. Scales of ice appeared on his hands while in the water, and blood flowed from under his fingernails. His boots were removed, and Key realized that his feet also suffered from frostbite. His feet were placed in cold water, and blood flowed from the ends of his toes. His feet and hands were then wrapped in warm flannels. Key tried to sleep but his hands and feet swelled, and he began to suffer substantial pain.¹¹

On the morning of 24 December Key's brother, Joseph, arrived at Murphy's home. Murphy sent word to St. George to ask for the attendance of Dr. Robert Thomson. Dr. Thomson was a very experienced physician, having practiced for almost 40 years. Born in Ireland in 1803, he had received a medical degree from the University of Edinburgh in 1826. His family was prominent in Charlotte County. His brother, Samuel, was the Anglican rector for St. George. Another brother, Skeffington, became rector of St. Stephen.¹² The *St. Andrews Standard* described Dr. Thomson as "universally esteemed as a gentleman and a physician."¹³ Like many doctors in the mid-19th century, Dr. Thomson developed business interests beyond his medical practice. He served for many years as a member of the New Brunswick legislative assembly. Thomson did well for himself financially; the *Canada Medical Journal* described him in 1869 as "independent in circumstances,"¹⁴ and probate records reveal that Dr. Thomson possessed an estate valued at \$50,000 at his death.¹⁵ As his interest in politics and business increased, Dr. Thomson spent less time practicing medicine. In 1868 he said that he had practiced for 40 years, but for the previous eight or ten years he had "not been doing much except casually."¹⁶

11 Details on Key's injury and the initial treatment he received can be found in the following minutes of trial in the Charlotte County Archives: *Key v. Thomson* (August 1867), MC 42, MS 5/252; *Key v. Thomson* (1867), Evidence of John B. Key; *Key v. Thomson* (August 1868), MC 42, MS 5/252; *Key v. Thomson* (1869), Evidence of John B. Key; *Key v. Thomson* (August 1869), MC 42, MS 5/252; *Key v. Thomson* (1869), Evidence of John B. Key; *Key v. Thomson* (1867), 1 NBR 295 at 296.

12 Gail Campbell, "'Smashers' and 'Rummies': Voters and the Rise of Parties in Charlotte County, New Brunswick, 1846-1857," *Canadian Historical Association Historical Papers* 21, no. 1 (1986), 92.

13 "Circuit Court," *St. Andrews Standard*, 21 August 1867.

14 "Case of Malpractice at St. John, N.B.," *Canada Medical Journal* 5, no. 8 (February 1869): 369.

15 Charlotte Co. Probate records, RS63: Robert Thompson [*sic*] (1870), Provincial Archives of New Brunswick, Fredericton; W. Brenton Stewart, *Medicine in New Brunswick* (Moncton: New Brunswick Medical Society, 1974), 95.

16 Minutes of Trial of *Key v. Thomson* (August 1868), MC 42, MS 5/252; *Key v. Thomson* (1869), Evidence of Robert Thomson, Charlotte County Archives.

Dr. Thomson examined Key and determined that he suffered from severe frostbite. The affected parts of Key's hands and feet were discoloured and covered with blisters. Dr. Thomson ordered the blisters drained and the application of poultices made of ingredients including flour, hop yeast, and charcoal. Key asked Dr. Thomson to evaluate the extent of his injuries and his chances of recovery. What Dr. Thomson said in response was contested at trial. Key claimed Dr. Thomson said he "would not lose a joint, and would be all right in about six weeks." Dr. Thomson denied this, suggesting that he instead told Key he "would be well enough yet."¹⁷

Key returned to his home on Christmas Day, but his health worsened and he suffered from intense pain. His blisters refilled with fluid and his nails fell off. He frequently sent word to Dr. Thomson asking him to visit. Dr. Thomson promised to come, but he instead sent orders for the application of poultices with new ingredients such as turpentine, alcohol, and lime-water. These poultices caused unbearable pain. "I was nearly mad," Key reported.¹⁸ Dr. Thomson finally visited Key on 6 January – 13 days after his initial visit. He left some medicine, applied a white powder, and ordered the continued use of poultices.¹⁹

Key requested frequently that Dr. Thomson visit him, sending for him up to eight times before Dr. Thomson finally appeared again, 12 days later, on 18 January. This time he returned with another physician, his nephew Dr. Robert C. Thomson from St. Stephen. The doctors determined that Key's fingers and toes were dead. Lines of demarcation between living and dead tissues had appeared, his hands and toes had created a stench, and some areas of the flesh had receded thus exposing bone.²⁰ The doctors had forgotten to bring medical instruments, so they cut off Key's fingers and toes with a pocketknife sharpened with a whetstone. Key later recalled the doctors sharpening the knife at his bedside "just the same as a butcher would sharpen his knife to slaughter with."²¹ The doctors left the bones on Key's fingers protruding, as Dr. Thomson believed that a full and final amputation should be delayed for about ten days to allow for the granulation tissue to form and to make flaps to cover the exposed bones. He promised to return on 28 January. Key continued to suffer great pain, and he was alarmed at the deteriorating condition of his feet and hands. The protruding bones turned black, as did flesh on his hands and feet. He thus appealed another three times for Dr. Thomson to return. When Dr. Thomson did not appear, Key finally sent for other medical help. Two experienced physicians arrived: Dr. Samuel Tilley Gove and Dr. Luther P. Babb. Dr. Gove had practiced in St. Andrews for a quarter century after having trained in London, England, and then practicing in Sussex and Gagetown. Dr. Babb was an American physician from the community of Eastport, Maine.²² They

17 *Key v. Thomson* (1867), 1 NBR 295 at 296.

18 Minutes of Trial of *Key v. Thomson* (August 1867), MC 42, MS 5/252: *Key v. Thomson* (1867), Evidence of John B. Key, Charlotte County Archives.

19 *Key v. Thomson* (1867), 1 NBR 295 at 296-297.

20 According to official Supreme Court case report, the fingers were "only hanging by the tendons"; see *Key v. Thomson* (1867), 1 NBR 295 at 297.

21 Minutes of Trial of *Key v. Thomson* (August 1869), MC 42, MS 5/252: *Key v. Thomson* (1869), Evidence of John B. Key, Charlotte County Archives.

22 *St. Andrews Beacon*, 4 February 1892; *St. Andrews Beacon*, 29 April 1897; Stewart, *Medicine in New Brunswick*, 167.

amputated Key's hands between the wrists and the knuckles and his feet at the instep. Dr. Gove suggested using chloroform, but Key said he was an Englishman and he could take it.²³ The operation took 80 minutes, and Key reported suffering a "great deal."²⁴

Key's injuries meant that he lost his position with the copper mine. His employer stopped paying his salary in February 1866. By late May 1866, Key tried to collect an unpaid debt so that he could go to Boston to get artificial hands.²⁵ He also decided to sue Dr. Thomson for malpractice, demanding \$40,000 in compensation. The case went to trial in August 1867 in St. Andrews. This started what became an expensive four-year legal odyssey. Both sides drew on substantial legal expertise. Key employed lawyers David Shank Kerr and George Skeffington Grimmer. Kerr had been born in Parrsboro, Nova Scotia, in 1809. After becoming an attorney in Nova Scotia in 1835 he moved to New Brunswick, where he became an attorney in 1835 and a barrister in 1837. He focused on his practice, only dabbling in electoral politics. According to Greg Marquis, Kerr was "a lawyer's lawyer, devoted to the promotion of the bar as an independent, learned and honourable profession."²⁶ Grimmer was a local lawyer. Born in St. Stephen in 1826, he studied law in St. Andrews with James W. Chandler and in Saint John with Kerr. He became an attorney in 1847 and a barrister in 1849, and practiced in Charlotte County. A 19th-century commentator described him in modest terms as having "a fair share of legal business" in Charlotte County, as "well read in his profession," and as possessing "a highly creditable standing among the fraternity in this section of the province."²⁷

Dr. Thomson employed an even more impressive legal team consisting of Benjamin Robert Stevenson and the doctor's nephew, Samuel Robert Thomson. Stevenson was the most junior of all the lawyers involved. Born in St. Andrews in 1835, he received a BA from the University of New Brunswick in 1854 and then became a lawyer. He established a successful practice in his hometown and went on to win a seat in the provincial legislature, eventually becoming speaker of the assembly.²⁸ The most prominent lawyer involved in the case in 1867 was Samuel Thomson. Born in 1825 in St. Stephen, Thomson became an attorney in 1846 and joined the bar in 1848. He practiced most of his career in Saint John, where he became a prominent barrister, eventually representing the defendants in the Caraquet Riot cases and serving as one of the counsel at the 1877 Halifax Fisheries Commission. A 19th-century commentator suggested that "hardly an important cause has been tried in the Province of New Brunswick for years in which he was

23 Minutes of Trial of *Key v. Thomson* (August 1868), MC 42, MS 5/252; *Key v. Thomson* (1869), Evidence of Samuel Gove, Charlotte County Archives.

24 Minutes of Trial of *Key v. Thomson* (August 1868), MC 42, MS 5/252; *Key v. Thomson* (1869), Evidence of John B. Key, Charlotte County Archives.

25 John B. Key to Robert Benjamin Stevenson (25 May 1866), MC 42, MS 3/B/140, Charlotte County Archives.

26 Greg Marquis, "'A Hard Disciple of Blackstone': David S. Kerr, 1809-1886," *University of New Brunswick Law Journal* 35 (1986): 187.

27 *The Canadian Biographical Dictionary and Portrait Gallery of Eminent and Self-Made Men; Quebec and the Maritime Provinces Volume* (Toronto: American Biographical Publishing Company, 1881), 602.

28 *Canadian Biographical Dictionary and Portrait Gallery of Eminent and Self-Made Men*, 620-1.

not engaged on one side or the other” and that “he stood, with scarcely a rival, at the head of the New Brunswick bar.”²⁹ According to one observer of the 1867 trial, the lawyers exhibited substantial skill in arguing the case. “Much ability was displayed by the counsel on both sides,” concluded the *Saint Croix Courier*.³⁰

John Campbell Allen presided over the August 1867 jury trial. Born in Kingsclear Parish, New Brunswick, in 1817, Allen became an attorney in 1838, was called to the bar in 1840, and set up a practice in Fredericton. In 1856, Allen joined the House of Assembly, serving as speaker, solicitor general, and attorney general. He remained in the assembly until his appointment to the Supreme Court of New Brunswick in 1865. At the time, he was deemed New Brunswick’s “most credible judicial candidate, irrespective of political consideration”³¹ although one contemporary regarded him as merely a “fair lawyer.”³² He was relatively new to the bench and some years away from full-time legal practice when he heard the litigation involving Key and Dr. Thomson.

The case, according to the *St. Andrews Standard*, excited “a great deal of interest.” The newspaper noted the voluminous testimony at trial (which took place over six days), including conflicting medical testimony, meaning that it was “no easy matter to arrive at a correct opinion.”³³ Key alleged malpractice on the part of Dr. Thomson. Dr. Thomson’s lawyers referenced the test for medical malpractice outlined in Francis Hilliard’s *The Law of Torts or Private Wrongs*: “In general a physician or surgeon is responsible only for *ordinary* or *reasonable* care and skill, and the exercise of his best judgment in matters of doubt; not for want of the highest degree of skill.” There was no guarantee to provide a cure: “The implied contract of a surgeon is not to cure, but to possess and employ, in the treatment of a case, such reasonable skill and diligence as are ordinarily exercised in his profession, by thoroughly educated surgeons.”³⁴

Key described how the accident happened, the treatment he received, the pain he suffered, and his efforts to get Dr. Thomson to visit him more regularly. Some witnesses gave evidence to show that Key had been sober the day of the incident to

29 *Canadian Biographical Dictionary and Portrait Gallery of Eminent and Self-Made Men*, 588, 590. His biographer in the *Dictionary of Canadian Biography* agrees, concluding that Thomson “enjoyed an unusually high reputation as a barrister both in New Brunswick and abroad”; see Bernard Pothier, “Samuel Robert Thomson,” *DCB Online*, <http://www.biographi.ca>.

30 “The Circuit Court,” *Saint Croix Courier*, 23 August 1867.

31 D.G. Bell, “Sir John Campbell Allen,” *DCB Online*, <http://www.biographi.ca>.

32 Jeremiah Travis to S.L. Tilley (3 August 1882), Samuel Leonard Tilley Papers, vol. 21, Library and Archives Canada, quoted in D.G. Bell, “Judicial Crisis In Post-Confederation New Brunswick,” *Manitoba Law Journal* 20, no. 1 (1991): 185.

33 “Circuit Court,” *St. Andrews Standard*, 14 August 1867. A so-called “special jury” of seven men heard the case. Special juries were available to any party in a civil cause that requested one. Once a party selected a special jury, the Clerk of the Peace for the county was to select from the county jury list 28 “indifferent persons” who were “best qualified to try the issue.” Each party then took turns striking off names until 14 names remained. The names of these 14 were then placed on separate pieces of paper and seven names drawn. See *An Act relating to Jurors*, Statutes of New Brunswick 1855, c.24, ss.12, 20.

34 Francis Hilliard, *The Law of Torts or Private Wrongs*, vol. 1, 2nd ed. (Boston: Little, Brown and Company, 1861), 253, 25; see also Charles G. Addison, *Wrongs and Their Remedies: Being a Treatise on the Law of Torts* (London: R. Stevens and Sons, 1860).

rebut the defendant's effort to blame Key for his condition. Dr. Gove, Dr. Robert K. Ross, and Dr. William Tell Black testified on Key's behalf, while Dr. Babb supplied an affidavit. Dr. Ross was a new physician, having practiced for about 18 months. Dr. Black was born in St. Martins, New Brunswick, and had served in the medical staff of the northern army in the American Civil War. He had only recently established a practice in New Brunswick.³⁵ These doctors suggested that Key's limbs might have been saved with better and more attentive treatment. Dr. Black, Dr. Gove, and Dr. Ross also testified that the lengthy use of poultices with the ingredients prescribed by Dr. Thomson might have encouraged mortification, and suggested that a doctor treating such injuries needed to visit frequently to watch the patient's progress. For example, Dr. Black noted that it was up to the discretion of doctors how often to visit patients, but "I would have seen the patient every two days at least" to "watch the changes during the inflammatory state."³⁶ Similarly, Dr. Gove said it was his practice to visit every two or three days in such cases, but admitted that he visited less often if he had to travel a great distance.³⁷

The common law did not prescribe how often a doctor should visit a patient, nor did the medical profession. The first code of ethics adopted by the Canadian Medical Association in 1868, however, indicated that doctors had a duty to visit often: "Frequent visits to the sick are in general requisite, since they enable the physician to arrive at a more perfect knowledge of the disease – to meet promptly every change which may occur, and also tend to preserve the confidence of the patient."³⁸ Dr. Thomson rebutted such an assumption by claiming that his extensive experience with frostbite cases meant that he did not need to attend to Key very often, so long as he received word on any changes in Key's condition. In his view, there was little that could have been done for Key until the line of demarcation formed allowing for a full amputation. He also asserted that he had the discretion to decide how often to visit (even if he had promised to attend), especially when he had more pressing cases needing his attention.³⁹ That may have been true, although one wonders if the winter season and the distance Dr. Thomson had to travel also contributed to his reluctance to visit. Doctors serving rural areas in the 19th century often suffered hardship making house calls. According to his biographer, Ontario doctor James Langstaff dealt with bitter cold winds and broken carriages. Sometimes Dr. Langstaff was unable to return home after a house call, so he would let himself into an open house to sleep by the fire. Such experiences were not unusual; they reflected the "constant danger in solitary travel by horse and the battle with the painful cold of the Canadian elements."⁴⁰ There

35 George Maclean Rose, ed., *A Cyclopaedia of Canadian Biography: Being Chiefly Men of the Time* (Toronto: Rose Publishing, 1888), 808-9.

36 Minutes of Trial of *Key v. Thomson* (August 1867), MC 42, MS 5/252: *Key v. Thomson* (1867), Evidence of William T. Black, Charlotte County Archives.

37 Minutes of Trial of *Key v. Thomson* (August 1867), MC 42, MS 5/252: *Key v. Thomson* (1867), Evidence of Samuel Gove, Charlotte County Archives.

38 Canadian Medical Association, *Code of Ethics* (Canadian Medical Association, 1868), chap. 1, art. I, s. 3.

39 Minutes of Trial of *Key v. Thomson* (August 1867), MC 42, MS 5/252: *Key v. Thomson* (1867), Evidence of Robert Thomson, Charlotte County Archives.

40 Duffin, *Langstaff*, 41.

is also evidence in other legal cases of a reluctance of doctors in rural areas to undertake lengthy travel to visit patients. For example, in *Field v. Rutherford et al.* a patient with a dislocated shoulder alleged malpractice because his physician had not travelled five miles to check on him and adjust his sling.⁴¹ In another case, Michael Ellard sued after a doctor had been called for but refused to attend his ailing wife. The doctor had instead sent medicines.⁴²

Dr. Thomson defended other aspects of his treatment of Key. He argued that the contents of the poultices were acceptable, and emphasized that he sent medicines. He denied telling Key that he would not lose a joint, instead asserting that he told Key that he “would be well enough yet” to help keep up Key’s spirits. He indicated this statement was consistent with his approach of being positive, if dishonest, with patients: “I think it good treatment not to tell patient what you think of him.”⁴³ Dr. Thomson claimed at trial that he had, in fact, known in December that Key would lose his fingers and toes, although he had not been able to tell at that time the extent to which his feet could be saved. Dr. Thomson’s lack of candour with Key was not unusual in the period. In fact, a long tradition existed in western medicine of lying to patients on the ground that the truth might worsen the condition of the patient.⁴⁴ The 1868 *Code of Ethics* approved of white lies to patients. The code provided that a physician “should studiously avoid making gloomy prognostications.” A doctor should only “on proper occasions” give the “friends of the patient timely notice of danger when it really occurs; and even to the patient himself, if absolutely necessary.” Why the reluctance to tell patients the truth? The code indicated that physicians “should be the minister of hope and comfort to the sick,” and thus every doctor had a “sacred duty” to “avoid all things which have a tendency to discourage the patient and depress his spirits.”⁴⁵ Dr. Thomson’s practice of refusing to tell patients the truth about their condition was a long-standing policy. Dr. Gove stated at trial that he had consulted with Dr. Thomson numerous times over the previous 28 years, and he “never knew him give in the presence of patient an adverse opinion.”⁴⁶

Defence witnesses suggested that Key had brought the accident on himself by getting drunk in St. George, and that Key had received acceptable care. Several physicians gave evidence approving of Dr. Thomson’s treatment. They (and Dr.

41 *Fields v. Rutherford et al.* (1878), 29 *Upper Canada Common Pleas* 113. See also *Rickley v. Stratton* (1912), 4 *Dominion Law Reports* 595.

42 “The Spring Assizes,” *Barrie Examiner*, 22 April 1897.

43 Minutes of Trial of *Key v. Thomson* (August 1867), MC 42, MS 5/252; *Key v. Thomson* (1867), Evidence of Robert Thomson, Charlotte County Archives. At the trial in 1868, Dr. Thomson stated: “I did not care to let the man [Key] know how bad he was. I never do tell patients the worst as I think such a course imprudent”; see Minutes of Trial of *Key v. Thomson* (August 1868), MC 42, MS 5/252; *Key v. Thomson* (1869), Evidence of Robert Thomson, Charlotte County Archives.

44 Winfried Schleiner, *Medical Ethics in the Renaissance* (Washington: Georgetown University Press, 1995); Daniel K. Sokol, “How the Doctor’s Nose has Shortened over Time: A Historical Overview of the Truth-Telling Debate in the Doctor-Patient Relationship,” *Journal of the Royal Society of Medicine* 99, no. 12 (December 1999): 632-6.

45 Canadian Medical Association, *Code of Ethics*, chap. 1, art. I, s. 4.

46 Minutes of Trial of *Key v. Thomson* (August 1867), MC 42, MS 5/252; *Key v. Thomson* (1867), Evidence of Samuel Gove, Charlotte County Archives.

Thomson) also blamed the application of warm flannels as an important cause of the mortification. This claim stemmed from the fact that the standard medical treatment for frostbite at the time was to slowly rewarm affected areas, either by using a friction massage of ice or snow, or by immersing frozen tissues in cold water. Any effort to rapidly warm tissues was judged dangerous.⁴⁷ The defence also offered as evidence a private statement by Dr. Thomson to William Gamble at his December visit to the effect that Key would lose his hands and feet. Justice Allen rejected this evidence when the plaintiff's lawyer objected. Justice Allen also rejected the evidence offered by James Milberry, who testified about his own experience with frostbite in 1864. Milberry indicated that he had been visited only once in three weeks, yet had largely recovered.⁴⁸ The defence also called other doctors to give evidence, including Dr. Neville Parker of St. Andrews, who approved of the use of the poultices and the delay in amputation. The defence tried as well to offer the evidence of Dr. James Rouse on the state of the plaintiff's feet, but Justice Allen rejected this testimony when the defendant's counsel declined to state the purpose for offering this evidence. Unfortunately for Dr. Thomson, almost all the doctors the defence called undermined him in an important way: they acknowledged they would have visited Key more frequently. Dr. Parker indicated he would have visited every four days.⁴⁹ Dr. Rouse stated "I don't think I should allow 13 days to elapse between visits in such a case."⁵⁰ A young doctor, Dr. Thomas Dick, told the court that he would have wanted to see the patient every three or four days.⁵¹

In his charge to the jury, Justice Allen reviewed the evidence and suggested that Dr. Thomson should have seen Key more regularly.⁵² The jury then gave a verdict for the plaintiff for the astronomical sum of \$25,000. It is unclear how the jury came to this figure. In his closing argument, Kerr had asked for £10,000 (one pound was equivalent to approximately four dollars) by suggesting that Key's family had been left destitute and that Key could expect to live another 30 years. Therefore, if the jurors believed he should receive £300 per year, they should award £9,000. Kerr also called for the jury to award a substantial sum on the grounds of fraud and malice.⁵³ After the verdict, Justice Allen posed several questions to the jurors, eliciting

47 Bruce C. Paton, "A History of Frostbite Treatment," *International Journal of Circumpolar Health* 59, no. 2 (2000): 99-107; "Clinical Lecture on a Case of Frostbite, Toronto General Hospital, Session 1880-81," *Canadian Journal of Medical Science* 6, no. 4 (April 1881): 110-11; William Whitla, *A Dictionary of Treatment, including Medical and Surgical Therapeutics* (Toronto: J.F. Hartz, 1920), 295.

48 Minutes of Trial of *Key v. Thomson* (August 1867), MC 42, MS 5/252: *Key v. Thomson* (1867), Evidence of Robert C. Thomson, Charlotte County Archives.

49 Minutes of Trial of *Key v. Thomson* (August 1867), MC 42, MS 5/252: *Key v. Thomson* (1867), Evidence of Neville Parker, Charlotte County Archives.

50 Minutes of Trial of *Key v. Thomson* (August 1867), MC 42, MS 5/252: *Key v. Thomson* (1867), Evidence of James Rouse, Charlotte County Archives.

51 Minutes of Trial of *Key v. Thomson* (August 1867), MC 42, MS 5/252: *Key v. Thomson* (1867), Evidence of Thomas Dick, Charlotte County Archives.

52 Minutes of Trial of *Key v. Thomson* (August 1867), MC 42, MS 5/252: *Key v. Thomson* (1867), Charge of Justice Allen, Charlotte County Archives.

53 Minutes of Trial of *Key v. Thomson* (August 1867), MC 42, MS 5/252: *Key v. Thomson* (1867), Closing argument of David Kerr, Charlotte County Archives.

responses showing that the jurors believed Key would have lost a portion of his fingers regardless of the quality of the treatment, but that Dr. Thomson might have preserved more of his hands.⁵⁴

The size of the award attracted attention. The *St. Andrews Standard* declared that \$25,000 was the “largest award we learn ever given against a medical man in the British Provinces.” Dr. Thomson must have been shocked. He was a well-established leader in his community who had been sued by a recent immigrant, and yet a jury of local men had tagged him with an immense damage award. Perhaps the jury factored in Key’s professional accomplishments. The *St. Andrews Standard* noted that Key was a “man of extensive information,” and was “thoroughly versed in his profession of Assayist chemist and mineralogist.”⁵⁵ We have no evidence of Dr. Thomson’s income in the 1860s, but \$25,000 was many times the annual income of most physicians. Historians of medicine generally agree that the necessity of house calls, modest incomes of patients, and delinquent accounts meant that most physicians made only a comfortable income. For example, a young William Osler made less than \$2,000 per year in the late 1870s in Montreal. Even the relatively prosperous Ontario doctor James Langstaff is estimated to have only billed about \$3,000 in 1880.⁵⁶

Dr. Thomson decided to appeal the jury’s decision. New Brunswick did not have a separate Court of Appeal; instead, all the judges of the Supreme Court sat together to hear appeals (they sat “*en banco*”). In such situations, the trial judge often sat with the other judges but did not vote on the disposition of the case.⁵⁷ The Supreme Court decided to quash the decision of the jury and to order a new trial. New Brunswick’s leading judge, William Johnstone Ritchie, delivered the appeal judgement.⁵⁸ Chief Justice Ritchie’s decision focused on two issues: whether Justice Allen had erred in rejecting evidence offered on behalf of Dr. Thomson and whether the damage award was excessive. The first evidence question concerned Justice Allen’s rejection of the testimony offered by William Gamble that Dr. Thomson had said that Key would lose his hands and feet. Chief Justice Ritchie discussed the effect of rejecting this evidence, while allowing the plaintiff to report that Dr. Thomson had assured him he would heal: it led “the jury’s minds to the conclusion that in the defendant’s

54 *Key v. Thomson* (1867), 1 NBR 295 at 297.

55 “Circuit Court,” *St. Andrews Standard*, 21 August 1867. An assayist was someone who analyzed ore for its components.

56 Michael Bliss, *William Osler: A Life in Medicine* (Oxford: Oxford University Press, 1999), 95; R.D. Gidney and W.P.J. Millar, *Professional Gentlemen: The Professions in Nineteenth-Century Ontario* (Toronto: University of Toronto Press, 1994), 38-9; Duffin, *Langstaff*, 46-58.

57 Philip Girard, “The Maritime Provinces, 1850-1939: Lawyers and Legal Institutions,” *Manitoba Law Journal* 23, no. 1 (1995): 394-5.

58 Justice Ritchie was born in Annapolis Royal, Nova Scotia, in 1813, and had attended Pictou Academy. He was admitted to the Nova Scotia bar in 1837, but soon moved to Saint John, joining the New Brunswick bar in 1838. He eventually established a lucrative practice and won a seat in the provincial legislature. In 1855, he received an appointment to the provincial Supreme Court, and in 1865 he became chief justice. Later, in 1875, Ritchie became one of the first six members of the new Supreme Court of Canada, and from 1879 to 1892 served as Chief Justice of the Supreme Court. See James G. Snell and Frederick Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: Osgoode Society, 1985), 13, 27, and Gordon Bale and E. Bruce Mellett, “Sir William Johnston Ritchie,” *DCB Online*, <http://www.biographica.ca>.

opinion the injury, originally, was not of so serious a character as to jeopardize the plaintiff's limbs," and that "their loss was, therefore, not the natural result of the original injury, under judicious and proper treatment, but the effect of the defendant's inattention." Justice Ritchie suggested this was highly prejudicial to Dr. Thomson since it was "evidence of the opinion of the medical man, who first saw the case, and when there could have been no mismanagement, that there was nothing in the injury as then presented, from which the loss of limb need be apprehended." Moreover, this evidence was given by "no other than the defendant himself." Excluding his statement to Gamble meant that the "burthen of getting rid of his own opinion, and shewing the case incurable, was cast on the defendant." Chief Justice Ritchie also took note of Dr. Thomson's explanation that it was his practice to take a "hopeful and cheering view" with patients. Whether it was ethical to lie to a patient did not concern the court. Instead, Justice Ritchie concluded that Justice Allen should have allowed Gamble's evidence because a "fair and just inference can only be drawn from the whole." After all, Chief Justice Ritchie concluded, Dr. Thomson had no reason to lie to Gamble, though "he may have thought it for the plaintiff's benefit to mislead him."⁵⁹

Chief Justice Ritchie also concluded that Justice Allen should have allowed other evidence in support of Dr. Thomson. This included the testimony of James Milberry, the man who had recovered from frostbite despite only receiving one visit from a physician in three weeks. The only evidence issue raised on appeal with which Chief Justice Ritchie agreed with Justice Allen was the decision to reject the evidence of Dr. Rouse. Chief Justice Ritchie noted that it was within the discretion of the trial judge to require counsel to state the purpose of offered evidence, and to reject it if counsel refused to state the reason.⁶⁰

The appeal court also found the \$25,000 damage award excessive. Justice Ritchie expressed reluctance to intervene on the issue of damages, since doing so would trench upon the right of the jury to determine the amount of damages in such cases. Nevertheless, Justice Ritchie felt this was "a case which imperatively calls us to exercise the controlling power of the Court." He believed that the evidence presented at trial showed that the freezing would have permanently damaged Key's hands and feet. The jury in fact had come to the same conclusion. However, the jury believed better treatment would have produced a better result. This made Justice Ritchie decide that "we cannot avoid the conclusion that \$25,000 was an excessive amount of damages." This amount "carried internal evidence of intemperance in the minds of the jury" – that the jurors were "carried away by their feelings, rather than guided by their judgment."⁶¹

The appeal decision highlighted Justice Allen's challenges in applying evidence rules in complex malpractice cases. Poorly founded decisions about whether to include or exclude evidence inflated the cost of the litigation and helped ensure that the case would drag out for years. The mistakes by Justice Allen (and subsequent trial judges in this litigation, as discussed below) lend credence to legal historian

59 *Key v. Thomson* (1867), 1 NBR 295 at 300, 301.

60 *Key v. Thomson* (1867), 1 NBR 295 at 302.

61 *Key v. Thomson* (1867), 1 NBR 295 at 302, 306.

David Bell's suggestion that the New Brunswick Supreme Court "suffered lapses in technical craft" during this period caused by, in part, a tendency to appoint former politicians as patronage appointments to the bench.⁶²

A year passed before the case again went back to trial in Saint Andrews – in August 1868 – before another relatively inexperienced judge, Justice John Wesley Weldon. Justice Weldon had become an attorney in 1825 and joined the New Brunswick bar in 1827. He devoted much of his time, however, to politics. He joined the House of Assembly in 1827 and was re-elected several times, before suffering a defeat in 1850. Thereafter, he focused on his legal career until he received an appointment to the Supreme Court in 1865.⁶³

The second round of *Key v. Thomson* tasked Justice Weldon with overseeing an even more complex and lengthy trial. The trial lasted almost a month, from 4 August to 28 August.⁶⁴ The large award in the first trial likely motivated both parties to prepare more fully for the second. Dr. Thomson this time employed New Brunswick Attorney General Andrew Rainsford Wetmore to help defend him. Born in Fredericton in 1820, Wetmore became an attorney in 1841 and a barrister in 1843, and developed a reputation as "one of the finest trial lawyers in the province."⁶⁵ He won a seat in the New Brunswick in 1865, and became premier and attorney general in 1867, but continued to practice law while holding elected office. In the first trial, Key had called 11 witnesses (in addition to himself) and Dr. Thomson 12 (in addition to himself). This increased to 18 and 18, respectively, in the second trial. The witnesses making their second appearances largely gave the same testimony. New witnesses for Key included his wife Eliza (whose absence in the first trial Justice Allen had noted as strange in his instructions to the jury). Dr. Thomson brought in several new doctors to testify including one of New Brunswick's most distinguished physicians, Dr. William Bayard. Bayard had trained in New York and, like Dr. Thomson, at the University of Edinburgh. He served as the coroner of Saint John for 30 years, chaired the board of commissioners for the Saint John Public Hospital, and chaired the board of health for the city and county of Saint John. He served as president of the New Brunswick Medical Society from 1867 to 1871 (and would serve as president at three other times by the end of the century), and became president of the Canadian Medical Association in 1894. Bayard wrote frequently about medical issues and contributed work to a number of medical journals.⁶⁶ Bayard deemed Dr. Thomson's treatment proper, asserted that doctors should decide how often to visit patients, and said the loss of Key's hands and feet stemmed from

62 Bell, "Judicial Crisis In Post-Confederation New Brunswick," 182.

63 The irascible Harvard-trained lawyer Jeremiah Travis dismissed Weldon as "grossly ignorant of the law," although it is unclear how other lawyers viewed him. See Jeremiah Travis to S.L. Tilley (3 August 1882), Tilley Papers, vol. 21, Library and Archives Canada, quoted in Bell, "Judicial Crisis In Post-Confederation New Brunswick," 185.

64 *St. Andrews Standard*, 5 August 1868; "Local Matters," *Saint Croix Courier*, 6 August 1868; *St. Andrews Standard*, 12 August 1868; *St. Andrews Standard*, 19 August 1868; *St. Andrews Standard*, 26 August 1868; *St. Andrews Standard*, 2 September 1868.

65 T. W. Acheson, "Andrew Rainsford Wetmore," *DCB Online*, <http://www.biographi.ca>.

66 Cheryl Krasnick Warsh, "William Bayard," *DCB Online*, <http://www.biographi.ca>.

the original injury. Despite the efforts of both sides, the jury in the second trial could not agree. A hung jury meant that the case, if Key so chose, could go back to court a third time.⁶⁷

Dr. Bayard's role in the litigation may have helped the case attract attention beyond New Brunswick. In early 1869, the *Canada Medical Journal* of Montreal published an anonymous article on the case. The author's intimate knowledge of the evidence given at trial (as well as the writing style of the piece) suggests Dr. Bayard wrote the article. In discussing *Key v. Thomson*, the author of the *Canada Medical Journal* article stated many of the worries Canadian doctors would voice with increasing regularity in the 1870s and 1880s. This author, for example, suggested that many malpractice cases were unfounded. Medical practitioners were "often the victim of vexatious and vindictive law proceedings." A doctor's best efforts might fail, and then he falls "into the hands of those prompted by greed and malice."⁶⁸

The author also expressed complaints about lawyers and their fees, warning that if a neighbouring physician was consulted who gave an "*unguarded* opinion adverse to the treatment," a greedy lawyer would soon launch a speculative lawsuit. The lawyer "enters into speculation, – for speculation it often is, – by which the medical practitioner, innocent or guilty, is to be mulcted in costs." The author noted the large expenses doctors might incur defending against malpractice claims, even if they eventually won the case. Dr. Thomson had faced two trials and yet the "unfortunate Doctor is saddled with the expenses of his defence" and would "probably be obliged to run the gauntlet of another trial."⁶⁹ Such concerns with legal costs and unscrupulous lawyers were not uncommon in New Brunswick, as Greg Marquis has shown. For example, in 1867 George Day, the editor of the Saint John *True Humorist*, remarked on the ability of lawyers to drain their clients' savings: "Every lawyer's office we regard as a huge trap, into which many an unconscious man is lured to certain ruin. He enters with a pocket full of gold and a suit of good clothes but, if he is fortunate enough to come forth alive, it is with not a penny to jingle upon a tombstone, nor a rag to cover his nakedness."⁷⁰

The *Canada Medical Journal* author also lamented another common annoyance – the willingness of some doctors to give evidence against other physicians: "Medical men in the witness-box are so often found to differ upon points, where difference of opinion should not exist." The article did not deny that doctors should be held responsible for malpractice, or that it was "sometimes the *duty* of one medical man, to express in court disapproval of the treatment followed by another," but that to "justify it, the maltreatment should be clear, and he should be morally certain that *his* opinions are correct." Unfortunately, in Dr. Thomson's case "we find medical men arrayed on either side, differing widely in opinion." The author took particular aim at some of the doctors who gave evidence for Key, for example, complaining about Dr. Gove giving an opinion respecting a surgical operation at which he was

67 Minutes of Trial of *Key v. Thomson* (August 1868), MC 42, MS 5/252: *Key v. Thomson* (1869), Charlotte County Archives.

68 "Case of Malpractice at St. John, N.B.," *Canada Medical Journal* (February 1869), 368.

69 "Case of Malpractice at St. John, N.B." (February 1869), 368.

70 *True Humorist*, 8 June 1867, quoted in Greg Marquis, "Anti-Lawyer Sentiment in Mid-Victorian New Brunswick," *University of New Brunswick Law Journal* 36 (1987): 168.

not present. The author advised Dr. Gove “should he ever again appear in the witness-box, to study his subject, and exercise more caution.” The danger was that ill-thought-out testimony had weight with jurors “incapable of reasoning upon medical subjects.”⁷¹

The author’s concern with jurors was also a common complaint. Doctors were not alone in expressing reservations about juries in this period. Juries seemed less necessary as a bulwark against state oppression after responsible government. In addition, critics of juries alleged that the jury system provided too much local discretion at a time when judges and lawyers believed that the justice system had to be rational and certain. And jurors faced complaints that they tended to side against defendants with deep pockets in civil suits.⁷² Critics of jurors in malpractice cases also alleged that jurors lacked the expertise necessary to weigh medical testimony. The *Canada Medical Journal* author asserted that jurors were unsuited to evaluating medical testimony: “When medical men in the witness-box differ in opinion, jurors as a rule are unable to say who is right.”⁷³

The coverage in the *Canada Medical Journal* resulted in news of the case spreading to England, where the *Medical Times and Gazette* of London published an article on the case. It lamented patients suing physicians even though “the plaintiffs had not a leg to stand upon,” which put “the unfortunate Practitioner to expense, trouble, and anxiety.” The article went on to state “One of the very worst instances of this comes to us from New Brunswick” (referring to *Key v. Thomson*). Despite relying only on the *Canada Medical Journal* for its article, the *Medical Times and Gazette* declared that Dr. Thomson should have been “triumphantly acquitted” and went on to declare “A more disgraceful case it has seldom fallen to our lot to comment upon” and that the journal would “make his case public – and pity him.”⁷⁴

The case, now described as a “celebrated case” by the *St. Andrews Standard*, went back to court for a third time.⁷⁵ The trial was again lengthy – it started on 17 August 1869 and ran until 3 September. Justice Charles Fisher presided. The appeal of the first trial had shown the importance of the judge applying evidence rules

71 “Case of Malpractice at St. John, N.B.” (February 1869), 373, 374.

72 Brown, “Canada’s First Malpractice Crisis”; R. Blake Brown, *A Trying Question: The Jury in Nineteenth-Century Canada* (Toronto: University of Toronto Press and the Osgoode Society, 2009); Paul Romney, *Mr Attorney: The Attorney General for Ontario in Court, Cabinet, and Legislature, 1791-1899* (Toronto: University of Toronto Press and Osgoode Society 1986), 290-311; R.C.B. Risk, “‘This Nuisance of Litigation’: The Origins of Workers’ Compensation in Ontario,” in *Essays in the History of Canadian Law, Volume II*, ed. David H. Flaherty (Toronto: Osgoode Society, 1983), 445-6.

73 “Case of Malpractice at St. John, N.B.” (February 1869), 374.

74 “An Action for Malpractice, St. John’s [sic], New Brunswick,” *Medical Times and Gazette*, no. 1 (1869): 335, 336. The case also received some notice in the United States. The *American Law Register* published a case report: “Kay [sic] v. Thomson,” *American Law Register* n.s., 19, no. 9 (September 1871): 594-8. In 1877, Dr. Milo A. McClelland included *Key v. Thomson* in his medical malpractice treatise in a section on the treatment of frostbite; see Milo A. McClelland, *Civil Malpractice: A Treatise on Surgical Jurisprudence with Chapters on Skill in Diagnosis and Treatment, Prognosis in Fractures, and on Negligence* (New York: Hurd and Houghton, 1877), 321-7.

75 *St. Andrews Standard*, 8 September 1869.

correctly. Unfortunately, Justice Fisher, like Justice Allen, was relatively new to the bench and much of his professional life had been in politics and not law. Born in 1808 in Fredericton, Fisher received a BA in 1830, and became an attorney in 1831 and a barrister two years later. Fisher began his political career almost immediately after joining the bar, entering the assembly in 1837. During the 1850s, Fisher worked on a consolidation and codification of New Brunswick statutes, and in 1854 he became the first premier under responsible government. His tenure as premier ended in 1861, and in October 1868 he received an appointment to the Supreme Court of New Brunswick, meaning that he had been a judge less than a year when he presided over *Key v. Thomson*. His long political career may have contributed to one contemporary suggesting he would attain only a mediocre reputation as a judge.⁷⁶

Both Key and Dr. Thomson again lined up scientific witnesses. Dr. Gove, Dr. Black, and Dr. Ross gave evidence for Key, now represented only by Grimmer. They continued to criticize Dr. Thomson's use of poultices, and indicated Key's injuries required Dr. Thomson to visit more frequently.⁷⁷ Dr. Thomson had several doctors testify, including Dr. Bayard, to the quality of his treatment. Dr. Thomson's lawyer, Wetmore, urged the jurors to reach a verdict on the evidence rather than any feeling of sympathy they might have for Key.⁷⁸ The jury nevertheless decided in favour of Key, and awarded \$9,000 in damages – less than the award at the first trial, but still a very large sum compared to other 19th-century malpractice cases.⁷⁹

The *Canada Medical Journal*, in another anonymous article probably written by Dr. Bayard, expressed frustration at this result. The article's author again attacked the doctors who gave evidence for the plaintiff, noting that Dr. Gove was a practitioner with many years of experience, yet had claimed that the application of warm flannels was acceptable and that the use of charcoal in a poultice would increase inflammation. The author suggested that Dr. Gove's claims were "*possibly excusable, if made by a student of two months standing,*" but "*almost criminal when made by one whose experience should have taught him better.*" The author declared that jurors could not appreciate such mistakes in medical testimony, and Dr. Gove's erroneous statements seem to have carried "influence with those incapable of judging, or unwilling to be guided by the weight of evidence."⁸⁰

The criticism of doctors who gave evidence for patient-plaintiffs was not unusual in the latter decades of the 19th century. At a time when doctors operated as small business operators, competition could motivate doctors to give evidence against a fellow physician as a means of damaging their reputation. As noted earlier, medical

76 Bell, "Judicial Crisis In Post-Confederation New Brunswick," 185; C.M. Wallace, "Charles Fisher," *DCB Online*, <http://www.biographi.ca>.

77 Minutes of Trial of *Key v. Thomson* (August 1869), MC 42, MS 5/252: *Key v. Thomson* (1869), Charlotte County Archives.

78 Minutes of Trial of *Key v. Thomson* (August 1869), MC 42, MS 5/252: *Key v. Thomson* (1869), Andrew Wetmore closing statement to jury, Charlotte County Archives.

79 Minutes of Trial of *Key v. Thomson* (August 1869), MC 42, MS 5/252: *Key v. Thomson* (1869), decision of jury.

80 "A Case of Malpractice at St. John, N.B.," *Canada Medical Journal* 6, no. 6 (December 1869), 282, 283.

historians have written extensively about the efforts of “regular” doctors during the 19th century to elbow out competitors. This literature has perhaps tended to discourage close attention to the need for regular doctors to compete at a time when the annual incomes of physicians tended to be modest. The leaders of the profession certainly frowned upon efforts by regular doctors to criticize each other or to poach patients. The Canadian Medical Association made this clear in its 1868 *Code of Ethics*. The code included a chapter dealing with the duties of physicians to each other. The code prescribed that a physician interacting with a patient under the care of another practitioner should “observe the strictest caution and reserve. No meddling inquiries should be made – no disingenuous hints given relative to the nature and treatment of his disorder, nor any course of conduct pursued that may directly or indirectly tend to diminish the trust reposed in the physician employed.”⁸¹ The code also included warnings that doctors should not take over other physicians’ patients. If a doctor did assume care, “no unjust, illiberal insinuations” should be made about the treatment provided by the original doctor. This was important since patients often became dissatisfied “when they do not experience immediate relief,” even though many illnesses were protracted and the failure to achieve a good outcome “affords no evidence of a lack of professional knowledge and skill.”⁸² These passages support the conclusion of C.D. Naylor that the *Code of Ethics* was an effort to “weld the regulars together, create attitudes and patterns of doctorly deportment that would demarcate the professional from those in other walks of life, and encourage laymen to accord the profession special status.”⁸³ Malpractice suits in which doctors gave evidence in support of patient-plaintiffs undermined this effort.

Dr. Thomson and an author in the *Canada Medical Journal* again levelled harsh criticism against the jurors. Dr. Thomson alleged they were biased against him, even suggesting privately that some jurors may have been bought off. He told Stevenson that he hoped any subsequent trial would be held in Saint John since there it was possible to get jurors “free from being either bribed or tampered with.”⁸⁴ The *Canada Medical Journal* author blasted the jury for finding that a person’s extremities could be frozen for hours and “yet the unfortunate surgeon in charge of such a case, *must* and *shall* save the parts, or pay the penalty,” notwithstanding the “most positive assurance by competent medical witnesses that, under such circumstances, the *possibility* of saving the parts is very doubtful.” The jury had ordered damages sufficient to keep Key “in comfort and idleness the remainder of his life.” In doing so, the jurors had “done not a little towards destroying confidence in that old institution ‘*trial by jury*’.”⁸⁵

The author concluded by making a claim often repeated by medical periodicals in the late 19th century: that jurors (and the public) failed to appreciate the selfless actions of physicians. He noted that Dr. Thomson had been a “leading and laborious

81 Canadian Medical Association, *Code of Ethics*, chap. 2, art. V, s. 2.

82 Canadian Medical Association, *Code of Ethics*, chap. 2, art. V, s. 4.

83 C.D. Naylor, “The CMA’s First Code of Ethics: Medical Morality or Borrowed Ideology?” *Journal of Canadian Studies* 17, no. 4 (1982-1983): 31.

84 Robert Thomson to Robert Stevenson, 24 March 1870, MC 42, MS 3/f/215, Charlotte County Archives.

85 “A Case of Malpractice at St. John, N.B.” (December 1869), 282, 283 (emphasis in original).

practitioner” in Charlotte County for upwards of forty years.” During his career, he had “doubtless had many a hard, dreary and perilous ride, to answer the calls and minister to the suffering of those who (now in his declining years, when they can no longer make use of him) refuse him that justice to which all are entitled.” The “severe lesson” to take from this, concluded the author, was that that doctors should expect nothing but “hard work, and hard knocks.”⁸⁶

Dr. William Bayard also publicly criticized the decision of the jury in the third trial. In an address to the New Brunswick Medical Society in Saint John in July 1870 on the subject of frostbite treatment (subsequently published in the *Canada Medical Journal*), Bayard used the legal system’s treatment of Dr. Thomson to warn doctors of the threat of malpractice lawsuits. “Professional standing, character, or rectitude of conduct,” he claimed, would not exonerate a doctor facing a malpractice claim. In fact, “judging from past experience innocent or guilty he *must pay* the penalty.” Dr. Bayard reviewed Key’s injuries and suggested that his badly frozen extremities had been heated too quickly, thus ensuring the loss of hands and feet. Yet the court in the third trial ordered him to pay damages. Dr. Bayard placed part of the blame for this on the doctors who had given evidence for Key – in particular, Dr. Black and Dr. Gove. Dr. Bayard mocked their testimony that the poultices ordered by Dr. Thomson caused the poor medical result: “I will not stop to combat such opinions, but simply state that assertions like these, made in a witness-box, tend to degrade our profession.” Such testimony meant that jurors faced conflicting medical testimony. Jurors thus “lose confidence in medical testimony, and decide the case upon other merits.” Dr. Bayard proposed that the solution was for allegations of malpractice to be evaluated solely by medical experts – “by men capable of pronouncing upon his guilt or innocence.”⁸⁷

Dr. Thomson decided to appeal again to the full bench of New Brunswick Supreme Court. Dr. Thomson had Samuel Thomson handle the appeal (Attorney General Wetmore had joined the Supreme Court, though since he had acted on behalf of Dr. Thomson he took no part in the judgment). The defence argued that Justice Fisher had erred in his decisions regarding the admissibility of evidence, that the jury had come to a verdict against the evidence, and that the damages were excessive. The appeal court’s decision would turn on the evidence issue, particularly the scientific evidence presented by the plaintiff’s medical witnesses. The defence argued that Justice Fisher had allowed the doctors giving testimony for the plaintiff to offer definitive conclusions regarding the cause of Key’s injuries, thus usurping

86 “A Case of Malpractice at St. John, N.B.” (December 1869), 283.

87 William Bayard, “A Paper on Frost-Bite and its Consequences, read before the New Brunswick Medical Society,” *Canada Medical Journal* 7, no. 2 (August 1870), 54, 55, 56 (emphasis in original). In a later address to the Canadian Medical Association, Dr. Bayard would make similar comments. He lamented that different medical testimony “too often places upon the court and jury who are not educated upon medical subjects the responsibility of deciding who is right and who is wrong.” Dr. Bayard thought that local knowledge, long thought the strength of trial by jury, insufficient. Instead, Dr. Bayard called for expertise: “Here the evidence of the expert would largely assist in arriving at a proper conclusion.” Dr. Bayard urged the inclusion of medical men on juries as this would “lessen litigation and advance the cause of justice.” See William Bayard, “President’s Address,” *Montreal Medical Journal* 24, no. 3 (September 1895): 166.

the role of the jury. Chief Justice Ritchie described the rule applicable in such situations: when “scientific men are called as witnesses they cannot give their opinions as to the general merits of the case, but only their opinions on some question of science raised by the facts proved.” Ritchie reported that the appeal court had reviewed over 250 pages of notes taken by Justice Fisher at trial, and the appeal judges “regret to have discovered in many instances clear departures from the prescribed rule, both in the questions proposed and the answers given.” Chief Justice Ritchie quoted several objectionable exchanges between the plaintiff’s lawyer and doctors. For example, Dr. Black was asked: “From the evidence, to what would you ascribe the loss of the plaintiff’s limbs?” This elicited Dr. Black to say: “I would ascribe it, first, to frost-bite; second, to neglect in attendance; third, to want of proper treatment.” Chief Justice Ritchie was unimpressed: “Nothing could be more objectionable than this answer.”⁸⁸ The jury could not be trusted to come to its own conclusions given this testimony. The evidence problem meant that the appeal court would have ordered a new trial.

However, a substantial complication had emerged: Dr. Thomson had died at his home in October 1870.⁸⁹ Chief Justice Ritchie noted that granting a new trial might only “defeat the ends of justice”⁹⁰ so the court refrained from ordering a new trial until the next sitting of the Supreme Court to allow the plaintiff to make any application as to the terms on which a new trial should be granted. The plaintiff’s lawyer then obtained an order that second verdict should stand as security for another verdict if the case went back to trial. This order was then appealed to the full bench of the Supreme Court. Samuel Thomson argued that the court could not impose terms on the representatives of the deceased defendant since the plaintiff had put himself in a precarious position by introducing improper evidence at the third trial. Chief Justice Ritchie, however, allowed for a new trial and ordered the representatives of the late Dr. Thomson to enter a bond, undertaking, or agreement that the previous verdict would stand as security for the result of the new trial.⁹¹

The court battle had lasted four years, and about six years had elapsed since Key had been frostbitten. According to an author in the *Canada Medical Journal*, Dr. Thomson had spent almost \$4,000 in legal bills by the end of the third trial (but before the second and third appellate level rulings).⁹² Dr. Thomson’s representatives likely weighed whether to settle. The ordering of the bond meant that a sizeable portion of Dr. Thomson’s estate was tied up, and there was a real risk that a jury in a fourth trial might again find in favour of Key. Another trial would also result in more legal expenses. In addition, there was less need to protect the professional

88 *Key v. Thomson* (1870), 2 NBR 224 at 227, 228.

89 *Saint Croix Courier*, 13 October 1870; *St. Andrews Standard*, 19 October 1870.

90 *Key v. Thomson* (1870), 2 NBR 224 at 230.

91 *Key v. Thomson* (1871), 2 NBR 386.

92 “A Case of Malpractice at St. John, N.B.” (December 1869), 283. The papers of Stevenson include details on some of the expenses incurred by Dr. Thomson. For example, Stevenson’s tally of costs for the first trial were approximately \$368. This did not include the fee of Samuel Thomson. The jury fees associated with the third trial equalled \$144. See MC 42, MS 5/252: *Key v. Thomson* (1867), Costs, Charlotte County Archives, and MC 42, MS 5/252: *Key v. Thomson* (1869), jury fees, Charlotte County Archives.

reputation of the now-deceased doctor. The case may thus have been settled.⁹³ Little is known about what happened to Key after the litigation. He resided in St. Andrews, and, despite his injuries, he and Eliza continued to add to their family. By 1871, he had two sons – John (age 5) and Henry (age 1) – and two daughters Eliza (age 10) and Elizabeth (age 4). He remained in St. Andrews until his death in 1904.⁹⁴

Contextualized studies of malpractice litigation can shed considerable light on the history of medicine and legal history. Historians of medicine have undermined an older literature that tended to celebrate heroic doctors. However, scholarship on the history of the medical profession still tends to suggest the willingness of doctors to go to great lengths to make house calls. But malpractice cases like *Key v. Thomson* show that the frequency of house calls might be affected by weather, poor road conditions, workload, fatigue, illness, inclination, or a sense that poor patients might not be able to pay. The result was that patients could be left alone and fearful. One can imagine Key's anxiety mounting as the condition of his hands and feet worsened – as tissue died and rotted. He literally watched (and smelt) his ability to support his family disintegrate while waiting for Dr. Thomson to appear.

Key v. Thomson also nicely illustrates many of the medical profession's concerns about malpractice litigation in this period. Doctors complained about unscrupulous lawyers, ignorant or malicious jurors, and dishonest former patients. They worried about the damage malpractice suits could do to their professional reputations. They expressed their disapproval about the cost of defending themselves. Many doctors responded by calling for unity and they criticized fellow physicians who gave evidence for patient-plaintiffs. As time went on, medical professionals would take important steps to protect themselves. For example, they successfully lobbied provincial legislatures to pass special limitation periods in malpractice suits that required patients to launch suits alleging malpractice within a specific period.⁹⁵ And, at the turn of the century, a small number of doctors would form the Canadian Medical Protective Association, an organization created to pool financial resources to help doctors defend themselves in malpractice suits.

93 A local newspaper article suggests that the case was settled, although I have not been able to independently verify this fact. See Amelia C. Blair, "Winter Mishap in the Woods took Doctor to Court," *Saint Croix Courier*, 5 October 1988.

94 1871 Census of Canada, New Brunswick, Charlotte County, Saint Andrews, p. 72, http://data2.collectionscanada.ca/1871/pdf/4396592_00098.pdf; 1901 Census of Canada, New Brunswick, Charlotte County, <http://data2.collectionscanada.ca/1901/z/z001/pdf/z000025326.pdf>; *Lovell's Canadian Dominion Directory for 1871: Containing Names of Professional and Business Men and Other Inhabitants . . .* (Montreal: John Lovell, 1871), 1956.

95 John P.S. McLaren, "Of Doctors, Hospitals and Limitations – The Patient's Dilemma," *Osgoode Hall Law Journal* 11 (1973): 85-102.