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Torts -- Physicians and Surgeons -- Liability for Signing a Certificate of Insanity Without Proper Examination of the Alleged Lunatic

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It appears that the facts of the principal case bring it clearly within Category III discussed above; *viz.*, the peril of the plaintiff was not actually discovered by the defendant, but should have been; the plaintiff was physically unable to prevent his injury through the exercise of due care. That being the case, both the weight of precedents and the sounder reasoning would seem to have required a reversal of the nonsuit which was granted below. The weight to be given to the contrary result, considering the court's orthodox statement of the rule,[31] must await further decisions.

LUKE R. CORBETT

Torts—Physicians and Surgeons—Liability for Signing a Certificate of Insanity Without Proper Examination of the Alleged Lunatic

In *Bailey v. McGill*[1] the North Carolina Supreme Court held that two physicians in signing certificates of insanity under G.S. § 122-43[2] were absolutely immune from civil liability to an alleged mentally disordered plaintiff.[3] The rationale of the court was that the defendant physicians were protected by the absolute privilege given to witnesses for statements made by them in a judicial proceeding.

The plaintiff alleged that the defendant physicians did not make an

[31] "Liability on the new act arises after the defendant has had sufficient opportunity, in the exercise of ordinary care, to discover and to appreciate the plaintiff's perilous position in time to avoid injuring him." 247 N.C. at 498, 101 S.E.2d at 317.

[1] 247 N.C. 286, 100 S.E.2d 860 (1957).

[2] N.C. GEN. STAT. § 122-43 (1952). This statute provides: "When an affidavit and request for examination of an alleged mentally disordered person has been made, . . . the clerk of the superior court . . . shall direct two physicians . . . to examine the alleged mentally disordered person . . . to determine if a state of mental disorder exists and if it warrants commitment to one of the State hospitals or institutions for the mentally disordered. If the said physicians are satisfied that the alleged mentally disordered person should be committed for observation and admission into a hospital for the mentally disordered, they shall sign an affidavit to that effect . . . ."

The institution of the lunacy proceeding is provided for by N.C. GEN. STAT. § 122-42 (1952): "When it appears that a person is suffering from some mental disorder and is in need of observation or admission in a State hospital, some reliable person having knowledge of the facts shall make before the clerk of the superior court of the county in which alleged mentally disordered person is or resides, . . . an affidavit that the alleged mentally disordered person is in need of observation or admission in a hospital for the mentally disordered . . . ."

[3] The court held as to a third defendant physician that the plaintiff had stated a cause of action for abuse of process under N.C. GEN. STAT. § 122-42 (1952), because it was alleged that this physician through ill will and malice toward the plaintiff persuaded the plaintiff's parents to institute the lunacy proceeding and state that plaintiff was suffering from a mental disorder and was in need of observation and admission to a mental institution. However, on retrial of the issue in the Cleveland County Superior Court the case against this physician was dismissed after the close of plaintiff's evidence, evidently on the ground that the evidence was insufficient to go to the jury. It is not known whether an appeal was taken from this decision.

examination of him as required by G.S. § 122-43; or if an examination were made, it was a hasty and superficial one and not a bona fide examination as required by the statute. As a result of these certificates of insanity and this allegedly wrongful and negligent conduct on the part of the defendants, plaintiff was committed to the State Hospital for the Insane by the Clerk of the Superior Court of Cleveland County and forced to remain there for thirty days, at the end of which time it was concluded that he was not insane and never had been. For his humiliation in becoming known as a mental case, plaintiff demanded both compensatory and punitive damages. The supreme court held that the trial judge correctly sustained the defendants' demurrer for failure to state a cause of action.

Plaintiff conceded that the allegations in his complaint did not set out a cause of action for malicious prosecution,[4] abuse of process,[5] or false imprisonment;[6] however, he maintained that he had stated a cause of action for "a false certificate of insanity made by two of the defendants," and another cause of action for "a certificate of insanity negligently made without proper and ordinary care and prudence, and without due examination and inquiry and proof."[7] But the court, without stating its reason, rejected this contention, and said, "The nature of his allegations and charge against these two physicians would seem to be that of libel."[8] The court then proceeded to hold that the defendants were witnesses in a proceeding of a judicial nature before an officer clothed with judicial powers and were therefore absolutely privileged, because "a defamatory statement made by a witness in the due course of a judicial proceeding, which is material to the inquiry, is absolutely privileged, and cannot be made the basis of an action for libel or slander, even though the testimony is given with express malice and knowledge of its falsity."[9] The construction of G.S. § 122-46,[10] which gives the clerk

[4] Barnette v. Woody, 242 N.C. 424, 431, 88 S.E.2d 223, 227 (1955), where the court said "the plaintiff must prove malice, want of probable cause and termination of the prosecution or proceeding in plaintiff's favor." *Accord,* Fisher v. Payne, 93 Fla. 1085, 113 So. 378 (1927); Brandt v. Brandt, 286 Ill. App. 151, 3 N.E.2d 96 (1936).

[5] Barnette v. Woody, *supra* note 4; Ledford v. Smith, 212 N.C. 447, 193 S.E. 722 (1937). There was no allegation that the defendants had an ulterior purpose or that they committed an act in the use of the process not proper in the regular prosecution of the proceeding.

[6] Fisher v. Payne, 93 Fla. 1085, 113 So. 378 (1927); Ussery v. Haynes, 344 Mo. 530, 127 S.W.2d 410 (1939); Dyer v. Dyer, 178 Tenn. 234, 156 S.W.2d 445 (1941). It was not alleged that the commitment was without lawful authority. *But see* Bacon v. Bacon, 76 Miss. 458, 24 So. 968 (1899), where two physicians were held liable for false imprisonment in a lunacy proceeding; however, the proceeding was not held to be judicial in nature and the court did not discuss the elements of false imprisonment.

[7] 247 N.C. at 290, 100 S.E.2d at 860.

[8] *Id.* at 293, 100 S.E.2d at 866.

[9] *Id.* at 293, 100 S.E.2d at 866. *Accord,* Jarman v. Offutt, 239 N.C. 468, 80

of the superior court the judicial authority to hold a hearing, to examine the certificates and affidavits of the physicians and any proper witnesses, and to commit the alleged mentally disordered person to a mental institution, was the foundation upon which the application of the witness privilege rule rested. Examining the certificates of the physicians submitted pursuant to G.S. § 122-43 was necessary to the performance of this judicial authority; therefore, the physicians were deemed to be witnesses before a judicial hearing and were absolutely privileged in their testimony. The court said the defendants "were not engaged in the ordinary practice of their profession. Their role and function in examining the plaintiff and signing the affidavits in respect to his mental condition are those of witnesses."[11]

In holding the defendants' affidavits absolutely privileged, the court placed North Carolina in accord with the weight of authority in this area.[12] Since insanity is often hard to determine with certainty, public policy and the administration of the law require that the certifying physician be protected rather than the injured plaintiff who has been negligently committed to a mental institution as a lunatic.[13] The courts feel that public policy requires that the witness physician be allowed to testify without fear of being sued by one whose interests may be adversely affected by his testimony.[14] It would tend to extend litigation if the matter could be reexamined in a new action, thereby causing multiplicity of suits.[15]

In addition to public policy, some courts say that the plaintiff can

S.E.2d 248 (1954); RESTATEMENT, TORTS § 588 (1938).

The witness privilege rule applies to affidavits submitted to the court as well as to testimony given orally in court. Perry v. Perry, 153 N.C. 266, 69 S.E. 130 (1910).

[10] N.C. GEN. STAT. § 122-46 (Supp. 1957).

[11] 247 N.C. at 292, 100 S.E.2d at 866. *Accord,* Dunbar v. Greenlaw, 128 A.2d 218 (Me. 1956); Niven v. Bolan, 177 Mass. 11, 58 N.E. 282 (1900).

[12] Fisher v. Payne, 93 Fla. 1085, 113 So. 378 (1927) (absolute privilege as to affidavit); Corcoran v. Jerrel, 185 Iowa 532, 170 N.W. 776 (1919) (absolute privilege as to oral testimony); Dunbar v. Greenlaw, *supra* note 11 (absolute privilege); Mezullo v. Maletz, 331 Mass. 233, 118 N.E.2d 356 (1953) (absolute privilege as to affidavit); Jarman v. Offutt, 239 N.C. 468, 80 S.E.2d 248 (1954) (absolute privilege, but negligent examination not alleged). *Cf.* Niven v. Bolan, *supra* note 11 (conditional privilege); Perkins v. Mitchell, 31 Barb. (NY) 461 (1860) (conditional privilege).

[13] Brandt v. Brandt, 286 Ill. App. 151, 3 N.E.2d 96 (1936); Dunbar v. Greenlaw, *supra* note 11; Niven v. Bolan, *supra* note 11.

[14] Niven v. Bolan, 177 Mass. 11, 14, 58 N.E. 282, 283 (1900), where the court said: "It is more important that the administration of the law in the manner provided should not be obstructed by the fears of physicians that they may render themselves liable to suit than it is that the person certified by them to be insane, or a diposomaniac, or inebriate should be a right of action in case it turns out that the certificate ought not to have been given." See Mezullo v. Maletz, 331 Mass. 233, 118 N.E.2d 356 (1953); Godette v. Gaskill, 151 N.C. 51, 65 S.E.2d 612 (1909).

[15] Niven v. Bolan, *supra* note 14; Godette v. Gaskill, *supra* note 14.

get redress in a criminal court if the physician commits perjury.[16] Some of the cases mention state statutes which provide for criminal punishment if the plaintiff is wrongfully committed as a result of a conspiracy between the physician and a third person.[17]

Some other opinions join with the majority view and hold the physician not liable because there was no proximate cause between the examination of the plaintiff, the signing of the certificate of insanity, and commitment by the officer with such authority.[18] These cases proceed on the reasoning that the committing authority could commit the alleged lunatic even though it did not rely on the affidavits of the physicians; therefore, it cannot be said that the affidavits of the physician caused the wrongful commitment.[19] The commitment was the sole act of the committing authority.[20] However, this reasoning has been criticized and said to be contrary to the theory of proximate cause as set out in *Palsgraf v. Long Island R.R.*[21] by Judge Cardozo.[22]

There is a very persuasive minority view[23] which imposes liability on the physician on the ground that in examining the plaintiff he has assumed a statutory duty to use ordinary care and will be liable to the plaintiff for any breach of the duty.[24] This view is led by the English decisions; however, the commitment statutes in these cases were less protective of the alleged lunatic and therefore there was more reason to hold the physician responsible.[25] The only American decision follow-

[16] Dunbar v. Greenlaw, 128 A.2d 218 (Me. 1956); Godette v. Gaskill, *supra* note 14 (dictum) at 52, 65 S.E. at 613.

[17] Dunbar v. Greenlaw, *supra* note 16; Mezullo v. Maletz, 331 Mass. 233, 118 N.E.2d 356 (1953); Niven v. Bolan, 177 Mass. 11, 58 N.E.2d 282 (1900).

[18] Mezullo v. Maletz, 331 Mass. 233, 118 N.E.2d 356 (1953); Force v. Probasco, 43 N.J.L. 539 (1881); Everett v. Griffiths, [1920] 3 K.B. 163, 1 A.C. 631 (1921) (distinguished in Harnett v. Fisher, [1927] 1 K.B. 402); Brady v. Collom, 68 R.I. 299, 301, 27 A.2d 311, 312 (1942) (dictum).

[19] *Ibid.*

[20] Mezullo v. Maletz, *supra* note 18.

[21] 248 N.Y. 339, 162 N.E. 99 (1928).

[22] Notes, 53 MICH. L. REV. 493 (1954), 23 U. CIN. L. REV. 525 (1954).

[23] Ayers v. Russell, 50 Hun. 282, 3 N.Y. Supp. 338 (1888); Springer v. Steiner, 91 Ore. 100, 178 Pac. 592 (1919) (action for false imprisonment not allowed because plaintiff did not show lack of good faith on part of the physician.); Williams v. Le Bar, 149 Pa. 149, 21 Atl. 525 (1891) (but no recovery allowed because the physician made a mere error in judgment); Harnett v. Fisher, [1927] 1 K.B. 402; Hall v. Semple, 3 F. & F. 337, 176 Eng. Rep. 151 (Q.B. 1862); Miller v. West, 165 Md. 245, 247, 167 Atl. 696, 697 (1933) (dictum). See also Pennell v. Cummings, 75 Me. 163 (1883).

[24] Ayers v. Russell, *supra* note 23 at —, 3 N.Y. Supp. at 341, where the court said: "Their [the physicians] duty must be measured by the trust which the statute reposes in them, and by the consequences flowing from its improper performance. They assumed the duty by accepting the trust. They are not judicial officers, but medical experts. They . . . are chargeable with that negligence which attaches to a professional expert who does not use the care and skill which his profession, per se, implies that he will bring to his professional work."

[25] Harnett v. Fisher, [1927] 1 K.B. 402; Hall v. Semple, 3 F. & F. 337, 176 Eng. Rep. 151 (Q.B. 1862).

In Hall v. Semple, *supra,* the alleged lunatic could be committed to a mental

ing this view imposed liability on the theory that the privilege should apply only after the physician has exercised ordinary care in examining the plaintiff:[26] "Their privilege is that, so long as they do their duty with the care and skill the statute presumes and requires, they are not responsible to the plaintiff for the consequences, however harsh they may be; for in such a case the law afflicts the plaintiff, but when they do not use such care and skill it is their personal negligence which afflicts him."[27] This type of reasoning separates the testimony or affidavit of the physician from the examination. The testimony is privileged, but the physician is held liable for ordinary negligence in the examination. Under these decisions, the plaintiff is not only given redress at law, but he is less likely to receive a cursory examination, thereby reducing the likelihood of a sane person's being committed to an institution.[28]

In answer to the majority view that public policy requires that the physician be protected, the language of the court in *Bacon v. Bacon*[29] appears to be a pertinent reply:

> A sad, silent, and fragile little lady, now beyond middle life, wrongfully declared a lunatic, and that of the most repulsive style, shut up in a mad house, . . . and with a stigma branded upon her name and character which verdicts of juries and judgments of courts may never wholly efface, and with endurance of such shame, humiliation, and crucifixion of soul as happily does not often fall to woman's lot, has appealed to the courts for redress of her wrongs, and we do not feel authorized to take from her the poor fruits of her victory.[30]

The suit was one for false imprisonment and the court does not consider the witness privilege rule, but the language of the court seems to offer a persuasive argument for balancing public policy in favor of the alleged lunatic.

In the principal case, there does not seem to be any doubt that the lunacy proceeding conducted by the clerk of the superior court was a judicial proceeding.[31] It reasonably follows that the role and function

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institution on the basis of the physician's certificate alone. His case was not reviewed by legal authorities until after the commitment. In Harnett v. Fisher, *supra,* however, a relative of the plaintiff made the petition, a physician signed the certificate, and the justice appointed for that purpose to perform the duty made the reception order. This procedure is more similar to the North Carolina statutes.

[26] Ayers v. Russell, 50 Hun. 282, 3 N.Y. Supp. 338 (1888).

[27] *Id.* at —, 3 N.Y. Supp. at 341.

[28] Note, 53 MICH. L. REV. 493 (1954).

[29] 76 Miss. 458, 24 So. 968 (1899).

[30] *Id.* at 472, 24 So. at 971.

[31] Corcoran v. Jerrell, 185 Iowa 532, 170 N.W. 776 (1919); Perkins v. Mitchell, 31 Barb. (N.Y.) 461 (1860); Jarman v. Offutt, 239 N.C. 468, 80 S.E.2d 248 (1954); Dyer v. Dyer, 178 Tenn. 234, 156 S.W.2d 445 (1941); 33 AM. JUR., *Libel and Slander* § 148 (1941); 53 C.J.S., *Libel and Slander* § 104(b) (1948).

of the physicians in examining the plaintiff and signing the certificates of insanity expressing their opinion as to the mental condition of the plaintiff were those of witnesses. But although the law protects the physician for what he says in the course of a judicial proceeding, the common law also imposes a duty upon him to use due care in the practice of his profession.[32] Surely, the legislature did not intend to clothe the physician with authority to examine the plaintiff as to his mental condition and recommend that he be committed to a mental institution and at the same time abolish this common law duty he owed to the plaintiff to use due care in examining him. It would appear to be more logical to say that the legislature intended to supplement the common law duty with a statutory duty to exercise due care in examining the plaintiff. The defendants should be privileged in whatever they testified to in the lunacy proceeding, but the duty to examine properly the plaintiff under G.S. § 122-43 should be an entirely separable role and function to be performed by them, not as witnesses, but as men of professional skill who are required to use due care in examining the plaintiff as a patient. It is therefore submitted that, although the plaintiff did not state a cause of action for signing a libelous certificate of insanity, he did state a cause of action for *negligence* in preparing the certificate of insanity without first properly examining the plaintiff as to his mental condition.

By allowing a cause of action for negligence the court could have balanced the interests between the plaintiff and the defendants. The physicians would be allowed to testify freely at the hearing before the clerk of the superior court without fear of a vexatious law suit from a dissatisfied party, but the court would impose upon them a statutory and professional duty of exercising ordinary care and skill in examining the plaintiff, thereby rendering it more likely that the plaintiff would not be confined in a mental institution without first being properly examined as to his mental condition. The end result is compliance with the legal maxim that "for every wrong there is a remedy."

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[32] Walden v. Jones, 289 Ky. 395, 158 S.W.2d 609 (1942); Parkell v. Fitzporter, 301 Mo. 217, 256 S.W. 239 (1923); Tvedt v. Haugen, 70 N.D. 338, 294 N.W. 183 (1940); PROSSER, TORTS § 31 (2d ed. 1955); 41 AM. JUR., *Physicians and Surgeons* §§ 73, 79 (1942); 70 C.J.S., *Physicians and Surgeons* § 36 (1951).