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Torts—Psychiatric Malpractice: Evidence Required and Limitation Applicable

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PSYCHIATRIC MALPRACTICE: EVIDENCE REQUIRED AND LIMITATION APPLICABLE

When, in an action for malpractice, the acts complained of are clearly incompatible with generally accepted medical theory in the field in which the treatment is being given, it shall only be necessary for the complainant to prove the irregular treatment in order that a prima facie case of malpractice be established. Once this has been done by competent legal evidence then the burden shall be upon the treating physician to justify the acts as proper treatment. Malpractice to an ordinary person, and in common usage generally imports "an improper treatment or culpable neglect of a patient by a physician or surgeon."[14]

The case of *Hammer v. Rosen*[15] was an action for malpractice against a psychiatrist as a result of certain acts committed by him in the course of his treatment of a patient. The patient, suffering from a schizophrenic condition, had been treated by the psychiatrist for some seven years. The cause of action was based on the premise that on several occasions the psychiatrist had "beaten" his patient. The beatings were established through the testimony of three witnesses, but no expert testimony was offered. This action was brought by the patient for damages as a result of injuries sustained; and by her father for fraud and breach of contract. The trial court dismissed the malpractice action at the culmination of the patient's case. This judgment was affirmed by the Appellate Division.[16] The Court of Appeals reversed on the malpractice, finding that the evidence as presented by the plaintiff constituted a prima facie case of malpractice, which, if credited by the jury or unexplained would warrant a verdict for plaintiff. (Note: In the trial court a jury rendered a verdict for the defendant on the fraud and breach of contract actions. This finding was affirmed by the Appellate Division and the Court of Appeals.)

Generally, expert medical opinion evidence is required in an action for malpractice; and the lack of any such evidence in the present case was probably the basis for the dismissal by the trial court. However, expert medical opinion evidence is not required to establish a prima facie case of malpractice.[17] The acts complained of here were physical assaults upon a patient by a psychiatrist, a course of action that the doctor himself admitted would be "fantastic." In an instance where the acts of malpractice are within the experience and observation of the ordinary jurymen, so that they may draw their own conclusions, and are of such a nature that no special skills are needed to understand them, the opinion of experts is unnecessary.[18] This departure from the strict notion that expert medical testimony is necessary to prove mal-

14. Isenstein v. Malcomson, 227 App. Div. 66, 68, 236 N.Y. Supp. 641, 643 (1st Dep't 1929).
15. 7 N.Y.2d 376, 198 N.Y.S.2d 65 (1960).
16. 7 A.D.2d 216, 181 N.Y.S.2d 805 (1st Dep't 1959).
17. Meiselman v. Crown Heights Hosp., 285 N.Y. 389, 34 N.E.2d 367 (1941).
18. Ibid.

practice first occurred in New York in the case of *Benson v. Dean*,[19] and the rule as set forth therein has been applied by the New York Courts ever since.[20] In a situation such as this, the average person through common sense could determine that assaults on a patient such as were alleged here are incompatible with any recognized and valid medical treatment, and therefore expert testimony would not be necessary, and the defendant should have the burden of justifying such acts. The amount of damages could be determined by the jury and would be for injuries sustained, and pain, and suffering which flow from the tortious acts.[21]

Defendant also contends that the malpractice cause of action is barred by the statute of limitations of two years,[22] and further that plaintiff is not entitled to an extension under Section 60 of the New York Civil Practice Act;[23] because although the patient was purportedly still suffering from schizophrenia at the time the action was commenced, she had not been adjudged incompetent and therefore Section 60 would not apply. The Court states that it makes no difference whether plaintiff was legally adjudged incompetent or not if she was in fact insane at the time of the commencement of the action.[24] It would appear then, that a judgment of incompetency will not be necessary in order to receive the extension benefit under Section 60. However, as there was no expert testimony that the patient was still insane at the time of the commencement of the action, it appears that the second argument of the Court in finding that the action was indeed timely was better. This argument was based on the fact that the course of treatment, during which the assaults occurred, had continued up until 1955, the year in which the action was commenced. Where the treatment, out of which the charge of malpractice arises, continues, then the statute of limitations on the cause of action does not begin to run until the treatment ceases.[25]

PRESUMPTION OF PERMISSIVE USE UNDER SECTION 388 (FORMERLY SECTION 59) OF VEHICLE AND TRAFFIC LAW

In New York, when permission to use a motor vehicle is in issue in a

19. Ordinarily, jurors would find difficulty, without the help of medical evidence, in determining the right of a patient to recover against his physician for malpractice based on acts of scientific skill, but the results may be of such a character as to warrant the inference of want of care from the testimony of laymen or in the light of the knowledge and experience of the jurors themselves. 232 N.Y. 52, 56, 133 N.E. 125, 126 (1921).

20. Meiselman v. Crown Heights Hosp., supra note 17; Isenstein v. Malcolmson, supra note 14; Simon v. Frederick, 163 Misc. 112, 296 N.Y. Supp. 367 (City Ct. 1937).

21. Robins v. Finestone, 308 N.Y. 543, 127 N.E.2d 330 (1955).

22. N.Y. Civ. Prac. Act § 50(1).

23. N.Y. Civ. Prac. Art. § 60 provides for an extension of time beyond the Statute of Limitations period, where a party, at the time a cause of action occurs, is insane.

24. Chilford v. Central City Cold Storage Co., 166 Misc. 780, 3 N.Y.S.2d 386 (Sup. Ct., 1938) had taken the reverse position in construing § 60.

25. Sly v. Van Lengen, 120 Misc. 420, 198 N.Y. Supp. 608 (Sup. Ct., 1923); Gillette v. Tucker, 67 Ohio 106, 65 N.E. 865 (1902).