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Torts—Presumption of Permissive Use Under Section 388 (Formerly Section 59) of Vehicle and Traffic Law

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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).

negligence suit, a statutory presumption establishes permission by the owner to the driver involved.[26] The burden is thus shifted to the owner, if he wants to deny that the vehicle was operated with his permission, to come forward with credible evidence upon that issue. Absent credible evidence to the contrary, the presumption will stand and the jury may rely upon the presumption standing alone to establish consent to operate the motor vehicle.

In *Burmaster v. State*[27] a District Game Protector set out upon a 130 mile trip from Saranac Lake to Massena and back. He was concededly on state business but he took his wife (the instant plaintiff) along to spell him at the wheel in case he became fatigued, as he was 69 years of age. During the course of the trip he had an accident in which plaintiff (his wife) was injured.

The State's defense was that the Game Protector was prohibited by a State directive from carrying members of his family to and from their respective places of work or for other purposes not strictly in the line of duty. The directive permitted, however, the carrying of other persons in the state owned vehicle if their presence in some way tied in with state business. The Court of Claims found that the Game Protector was negligent and his wife (plaintiff) was free from contributory negligence but dismissed the claim on the theory that the directive, above stated, prohibited the transportation of members of the family in state owned vehicles. It concluded that the directive rebutted the presumption of consent, by the owner, which arises under Section 388 of the Vehicle and Traffic Law. The Appellate Division reversed and found that the plaintiff was in the vehicle to aid her husband in his performance of state business, to wit, to drive if he became fatigued.[28] The Court of Appeals affirmed the Appellate Division both as to its construction of the meaning of the directive and its findings of fact.

The Court of Appeals rejected the construction of the State that the directive prohibited the presence of his wife in the vehicle whether on state business or for her personal pleasure. It construed the directive to allow other persons to ride along whether members of the Game Protector's family or not, if such persons "tied in with the work to be performed."[29] The weight of the evidence clearly showed, the Court felt, that the wife went along on the trip to help drive, and that this purpose tied in with her husband's work and was in accordance with the directive.

In view of the fact that state ownership is the same as private ownership under Section 388,[30] there is clear precedent for the instant decision.[31] The case

26. N.Y. Vehicle and Traffic Law § 388.
27. 7 N.Y.2d 65, 195 N.Y.S.2d 385 (1959).
28. 7 A.D.2d 775, 179 N.Y.S.2d 980 (3d Dep't 1958).
29. Supra note 27 at 66, 195 N.Y.S.2d 386 (1959).
30. Winnowski v. Polito, 294 N.Y. 159, 61 N.E.2d 425 (1945).
31. Lamica v. Vollmer, 270 App. Div. 1063, 63 N.Y.S.2d 31 (3d Dep't 1946), aff'd 296 N.Y. 660, 69 N.E.2d 817 (1946).

reaffirms the manifest policy of Section 59 to hold owners liable when some one else operates these vehicles negligently, unless it is clearly and unambiguously shown that it was without their permission.

VIOLATION OF THE BUILDING CODE AS EVIDENCE OF NEGLIGENCE

In New York, a cause of action based upon common law negligence places a burden on the plaintiff to show an absence of contributory negligence.

The State Legislature may, however, create by statute, a standard of care or duty for the protection of a specifically designated class, the infraction of which will be conclusive of negligence. The resultant liability attaches regardless of negligence and is recognized only when the courts find that the statute manifests a legislative intent to that effect. Once this absolute statutory liability has been determined, contributory negligence is of no consequence.[32]

The plaintiff in *Major v. Waverly and Ogden, Inc.*[33] was injured in a fall on stairs unprotected by a handrail and lacking illumination. Both deficiencies were in violation of regulations promulgated by the State Building Commission. The Code had been adopted by the village in which the building, an apartment house, was situated.[34] The defendant, owner of the building, claimed that the plaintiff, a guest of his tenant, was guilty of contributory negligence.[35] The trial court agreed and the plaintiff, upon appeal, reiterated her allegation that the defendant's infraction was conclusive of negligence and objected to the trial court's instruction that it was incumbent upon her to dispel any evidence of contributory negligence.

The regulations of the building code were promulgated by the Building Code Commission under authorization set forth in the Executive Law.[36]

The verdict for the apartment owner was unanimously upheld by the Appellate Division[37] and the Court of Appeals.[38]

The opinion considered and distinguished the case of *Koenig v. Patrick Construction Co.*[39] which had been cited by the plaintiff as an impelling precedent for her contention that proof of a violation of the Building Code was itself conclusive evidence of negligence.

That case held that a failure by an employer to provide safety devices for the injured employee in contravention of specific requirements of the Labor Law made the infraction subject to an absolute statutory liability. The language

32. Koenig v. Patrick Construction Corp., 298 N.Y. 313, 83 N.E.2d 133 (1948).
33. 7 N.Y.2d 332, 197 N.Y.S.2d 165 (1960).
34. Once adopted by the political subdivisions, the Code took the effect of law therein and amendments, additions and revisions by the State Building Commission were automatically incorporated into the local ordinance.
35. The plaintiff was visiting at a friend's apartment in the defendant's building and was watching television in the otherwise darkened livingroom. She rushed to find the bathroom, opened the wrong door and fell down the unlit stairs.
36. N.Y. Executive Law § 374-a.
37. 8 A.D.2d 380, 190 N.Y.2d 526 (2d Dep't 1959).
38. Supra note 33.
39. Supra note 32.