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the test in slander cases. In addition, there appears to be confusion over whether the extrinsic-fact test was a determining factor in those cases in which it was stated as the applicable law. These areas of confusion should be clarified in the next appropriate case to insure that plaintiffs are able to foresee recovery with some reasonable degree of certainty and to make clear whether the extrinsic-fact test will always be applied when oral statements are not actionable on their face.

LANNY B. BRIDGERS

Torts—Liability of Physicians for Violation of Certification Requirements in Commitment Process

The right of a mentally ill woman not to be restrained against her will was the concern of the court in *Di Giovanni v. Pessel.* In affirming an award of punitive damages against a physician whose false affidavit was a substantial factor in the commitment of the plaintiff to a mental hospital, the court aptly reflected intolerance toward the willful and injurious dereliction of a statutorily imposed duty. Unfortunately, convoluted reasoning obscured the expression of this judicial intolerance.

The civil rights of the mentally ill have received close scrutiny in recent years, and legislation has reflected concern for those rights. Generally, statutes authorizing involuntary commitment require a judicial hearing before commitment can be effected; commonly, these statutes require medical certification as to the insanity of the individual involved before commitment can be ordered. In case of an emergency whereby the individual must be restrained immediately and there is insufficient time for

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a hearing, judicial review is required shortly after hospitalization. For one who is successfully committed, mandatory periodic review of his condition by medical authorities or habeas corpus assures that his confinement is not continued after he regains his sanity.⁴

Despite this concern for the rights of the mentally ill, courts have found inherent difficulties in disposing of suits against doctors whose alleged nonfeasance or misfeasance of statutory examination provisions has resulted in an unjustified constraint, for the individual right of freedom must be balanced with the public interest and medical realities. Moreover, fitting the particular facts to a traditional cause of action may be difficult. False imprisonment at first glance would seem to be an appropriate action since it evolved as a means to protect individual freedom of movement.⁵ However, as will be demonstrated, this theory is limited by the effect of a court order in those cases involving judicial hospitalization. Malicious prosecution,⁶ abuse of process, conspiracy, and defamation are other traditional theories upon which a plaintiff might rely in seeking relief against a doctor who abuses his authority during a commitment proceeding. But these actions also have inherent limitations,⁷ the discussion of which is beyond the scope of this note.

Another difficulty is that involvement by the judiciary in the commitment process can raise a problem of privilege. For example, some courts have accorded the certifying physicians an absolute immunity from any

⁴ See Lindman & McIntyre 15-40; Rock 41-46.
⁵ W. Prosser, Law of Torts § 12, at 54 (3d ed. 1964) [hereinafter cited as Prosser].
⁶ Malicious prosecution is similar to, and sometimes confused with, false imprisonment. It comprehends the malicious institution of a groundless action and is directed against the one who instituted that action. To recover under malicious prosecution, the plaintiff not only must show that the defendant instituted the groundless action, but he also must prove that the former proceeding terminated in his favor and that the defendant maliciously and without probable cause instituted the action. See Prosser § 12, at 61-62, § 113, at 853-55, § 114, at 870-75. See generally Byrd, Malicious Prosecution in North Carolina, 47 N.C.L. Rev. 285 (1969). The dissenting opinion in Di Giovanni scored the majority for failing to distinguish between malicious prosecution and false imprisonment; the majority opinion asserted that it was improbable that Dr. Pessel could be held liable for malicious prosecution since he did not initiate or instigate the proceedings. 104 N.J. Super. at 564-68, 577, 250 A.2d at 763-65, 771.
civil action by virtue of their participation in a legal proceeding, and others have granted a qualified immunity. The act of examination has been held on at least one occasion to be a prerequisite to acquiring any immunity. One court has characterized the nature of charges involving alleged nonfeasance or misfeasance of the certification requirement as a libel action from which the physicians would be absolutely immune by virtue of their privileged status as witnesses in a judicial proceeding.

Di Giovanni spawned difficulties even though the facts were undisputed. The plaintiff, Mrs. Di Giovanni, had suffered from a deteriorating mental condition for over a year. During this period, she had been examined and treated on several occasions by Dr. Pessel, an internist, who last saw her in March, 1965. Aware that her condition was growing worse he suggested to plaintiff’s family in July, 1965, that she be hospitalized for psychiatric treatment. The family instituted commitment proceedings shortly thereafter.

One of the New Jersey statutes governing hospitalization of the mentally ill requires examination of the patient by two physicians at the institution of the action for commitment. The physicians must certify that the patient is insane; and, of critical importance in the Di Giovanni case, every certificate must “set forth the date of the making of the personal examination of the subject of the action, which must be made in every case by the physician signing the certificate not more than ten days prior to the admission of such person to the institution . . . .” In addition the observed condition must be described in the certificates.

Accordingly, the family of Mrs. Di Giovanni obtained certification from a psychiatrist, Dr. Borrus, who stated that she needed hospitalization...
"for her welfare, observation, and treatment." Because of difficulty in arranging another examination by any local psychiatrist, they prevailed upon Dr. Pessel to provide the other certificate. He agreed to furnish it without examining her, on condition that a psychiatrist confirm his diagnosis. In August he falsely certified that he had examined Mrs. Di Giovanni within the requisite period and had found her in need of immediate restraint for her own safety and the safety of her relatives.

The family then obtained an order of temporary commitment from a local municipal court, and the seventy-three-year-old lady was committed to a mental hospital operated by Carrier Clinic. She was discharged about one month later and subsequently brought actions against the clinic and the two doctors for malpractice and false imprisonment. The trial judge, after the presentation of all evidence, granted Carrier's motion for summary judgment, dismissed the malpractice claims against the two doctors, but ruled as a matter of law that the doctors were liable for false imprisonment. He further ruled that the plaintiff's indisputable need for psychiatric treatment preempted recovery of compensatory damages and that the jury would be asked only to determine the amount of punitive damages.

On appeal the Superior Court affirmed the judgment for Carrier, affirmed the dismissal of the malpractice claims, and reversed the ruling against Dr. Borrus while affirming judgment against Dr. Pessel. One justice wrote the court opinion for all holdings except the ruling against Dr. Pessel, from which he dissented (dissenting opinion). Another wrote the court opinion affirming the ruling against Dr. Pessel (majority opinion), and the third justice wrote an opinion concurring in the result (concurring opinion).

Since the facts were undisputed, it remained for the justices to determine whether the trial judge was correct in finding false imprisonment

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18 Id. at 556-58, 568, 250 A.2d at 759-60, 766.
20 Id. at 554-55, 250 A.2d at 758.
21 Id. at 554, 559-61, 250 A.2d at 758, 761-62. The court found no proof of negligence and no false imprisonment because the municipal magistrate authorized the confinement.
22 Id. at 563-64, 250 A.2d at 763. Defective notarization of the affidavit was held insufficient to impose liability.
23 Id. at 568, 250 A.2d at 766.
as a matter of law. In contemplating the issue of false imprisonment, the court followed the Restatement (Second) of Torts which defines the elements of the action in this manner:

An Actor is subject to liability to another for false imprisonment if
(a) he acts intending to confine the other or a third person within boundaries fixed by the actor, and
(b) his act directly or indirectly results in such a confinement of the other, and
(c) the other is conscious of the confinement or is harmed by it.\(^{24}\)

The majority summarily declared that "'[i]t can scarcely be denied that the essential elements of this tort thus defined in the Restatement have been established in the case of Dr. Pessel.'"\(^{25}\)

The court then faced the question whether any legal justification for the constraint of Mrs. Di Giovanni's person existed. Legal justification, of course, would defeat recovery under false imprisonment.\(^{26}\) To discount the possibility of this defense, the court advanced two theories. First, it stated that Dr. Pessel's conduct in knowingly making a false certificate was legally indefensible and sufficient of itself to justify the award of punitive damages.\(^{27}\) Second, it asserted that the plaintiff's condition was not sufficient as a matter of law to justify involuntary commitment. In reference to the latter theory, New Jersey courts have narrowly limited the degree of mental illness warranting immediate involuntary restraint. As described in the majority opinion, "'[t]he general test as to the nature of the insanity warranting immediate involuntary restraint is whether there is a danger that the patient may injure herself or some other member of the public.'"\(^{28}\) The proof did not manifest this degree of

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\(^{24}\) *Restatement (Second) of Torts* § 35 (1965).

\(^{25}\) 104 N.J. Super. at 571, 250 A.2d at 767-68.


\(^{27}\) 104 N.J. Super. at 571, 250 A.2d at 768.

\(^{28}\) Id. N.J. Stat. Ann. § 30:4-37 (1964) merely demands the doctor to exercise his judgment whether the condition of the patient is sufficient to warrant restraint. Under N.C. Gen. Stat. §§ 122-63 to -64 (1964), *need of observation and treatment* is the standard for commitment. These statutes are typical of the vague guidance legislatures have provided for determining the degree of mental illness that warrants involuntary commitment. This vagueness is disturbing in a libertarian sense, for freedom is too precious to be subjected to the caprice of ambiguity. Significantly, the United States Congress has authorized the District Court for the District of Columbia to order involuntary hospitalization only if a
insanity in Mrs. Di Giovanni's case although she obviously needed certain treatment; but, according to the majority opinion, the fundamental inquiry was whether the treatment needed necessitated involuntary confinement. Dr. Borrus did not indicate such a necessity in his affidavit; neither did the record of her hospitalization, which was considered to be of controlling significance. Since involuntary restraint was not necessary and the doctor's conduct was legally indefensible, there was no legal justification for the restraint, the court seemed to reason.

Nowhere in the majority opinion is there a discussion of the effect of the court order of temporary commitment, but it should have been of threshold concern because a valid court order negates the unlawfulness of restraint essential in an action for false imprisonment. Such an order provides legal justification for confinement, and hence a resulting imprisonment is not false; it is legitimate. For this reason, involuntary hospitalization resulting from a valid court order will not give rise to an action for false imprisonment, even if the order had been obtained by giving false information to the court. The concurring justice concluded without elaboration that the magistrate's order of temporary commitment should not insulate Dr. Pessel from responding in damages for false imprisonment. The dissenting justice disagreed strongly and asserted that the majority was rejecting the settled rule. And indeed, mentally ill person, because of his illness, is likely to injure himself or others if allowed to remain at liberty. D.C. Code Ann. § 20-545 (1967). For a view that a fixed standard should not be developed, see Rock, supra note 2, at 256-60. Liedman & McIntyre, supra note 2, at 40, conclude that statutes should clearly express the degree of mental illness justifying involuntary hospitalization. For a general discussion of this problem, see Ross, Commitment of the Mentally Ill: Problems of Law and Policy, 57 Mich. L. Rev. 945, 954-60 (1959).

104 N.J. Super. at 573-74, 250 A.2d at 768-69.

10 Id. at 571-74, 250 A.2d at 767-69 (semble).


104 N.J. Super. at 577, 250 A.2d at 771.

10 Id. at 564, 250 A.2d at 763. The dissent also disputed the matter of plaintiff's condition and concluded that the proofs did evince a need for confinement. Id. at 566-67, 250 A.2d at 765.
by focusing on the indefensibility of Dr. Pessel's conduct and the actual condition of Mrs. Di Giovanni to the exclusion of the effect of the court order, the majority does appear to reject the great weight of authority and to establish its own notion of legal justification. Perhaps the prevailing justices felt that the role of the magistrate was too perfunctory to be considered a judicial act of the kind that should protect the doctor from false imprisonment. If so, they could understandably ignore the court order, but they did not articulate this view except possibly inferentially by the general tone of their opinions.

The court perhaps could have shown absence of legal justification for the confinement by asserting that the court order was invalid because of the inadequate certification of Dr. Borrus. His certificate did not manifest any emergency conditions justifying the immediate confinement of Mrs. Di Giovanni; therefore, because of the previously discussed judicial limitation on immediate involuntary restraint, his certificate was insufficient to support an order of temporary commitment. The magistrate could not validly issue the order without two proper affidavits. Hence his order arguably was invalid and did not provide legal justification for the imprisonment. But this line of reasoning could lead to other complications. If it were accepted, Dr. Pessel could plausibly contend that the magistrate's impropriety constituted an intervening, superseding cause of the false imprisonment. Since the certificates, in addition to the order, constitute the warrant and authority for admission and detention for a temporary period, Carrier Clinic might not be so readily freed

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85 LINDMAN & McINTYRE, supra note 2, at 23; cf. Sukeforth v. Thegen, — Me. —, 256 A.2d 162, 163 (1969). Just how much discretion the magistrate has under N.J. STAT. ANN. § 30:4-37 (1964) is not clear. Technically, his order of temporary commitment institutes the inquiry into the sanity of the individual involved, but his order follows in sequence the certification by the physicians. It seems logical that he would not issue an order of temporary commitment without probable cause to do so. Significantly, the plaintiff conceded, and the court apparently agreed, that the magistrate's order authorizing the initial confinement of Mrs. Di Giovanni was sufficient for Carrier to act upon. Although the majority felt that Dr. Pessel could not rely on that order as a defense since he was aware of the defect in procedure, the status accorded the order in regard to defendant Carrier indicates that the magistrate's discretion is sufficient to constitute a meaningful judicial proceeding and is not perfunctory. 104 N.J. Super. at 559, 563, 577, 250 A.2d at 761, 763, 770.

86 104 N.J. Super. at 573, 250 A.2d at 768.


88 See Pennell v. Cummings, 75 Me. 163, 166-67 (1883); Niven v. Boland, 177 Mass. 11, 12-13, 58 N.E. 282, 282-83 (1900).

from liability.\textsuperscript{40} Furthermore, one could argue that the magistrate should be liable because he acted without legal authority by virtue of the same defect.\textsuperscript{41} These arguments serve to emphasize the need for legislative attention in elucidating the degree of mental illness warranting involuntary hospitalization of the mentally ill.

After discussing the problem of legal justification, the court next examined the possibility of the existence of any immunity that might protect Dr. Pessel. Where a false imprisonment comprises an element of a legal proceeding, a privilege is accorded the person who institutes that proceeding. The privilege is the same as that of any person charged with malicious prosecution: He is not liable for any confinement, even though illegal, and is shielded from liability for malicious prosecution by the strenuous evidentiary requirements of that action.\textsuperscript{42} The basis of the privilege is the public policy of encouraging private actions to enhance public order. The court reasoned that the doctor did not fall into the category of one who institutes or instigates the action and could not thereby avail himself of the privilege. Neither could he be said to fall within the protected categories of judicial officers and those relying on the judicial process, as Carrier Clinic, since he was cognizant of the fatal defect. Too, public policy would be ill-served by extending an immunity to one who flouted the law as did Dr. Pessel.\textsuperscript{43}

Patently, the inexorable objective of the court was to enforce the statutory provisions for involuntary commitment and to secure the plaintiff's rights under those provisions. It is unfortunate, however, that the court found it necessary to examine false imprisonment at length in relation to the violation of the certification requirement. A prosaic, technical discussion of cause of action, legal justification, and privilege detracts from the court's objective. This methodology raises the spectre of the "forms of action [ruling] us from their graves."\textsuperscript{44} The same end could have been achieved more simply, directly, and clearly by holding the doctor liable for violation of a statutory duty that proximately resulted in an injury—the unwarranted restraint of liberty. The gist of this

\textsuperscript{42} See note 6 \textit{supra}.
\textsuperscript{44} F. Maitland, The Forms of Action at Common Law 2 (1954).
civil action is the familiar concept of duty, violation of duty, injury, and causation. If the legislature intended the statute to protect an individual or class of individuals, an injurious breach of that statute should be actionable. The concept of "negligence per se" is closely analogous in that it affords recognition of a standard of care legislatively designed for the protection of a class of persons, an unexcused violation of which will be considered actionable negligence if it results in the contemplated type of harm.

The dissenting and majority opinions expressed agreement that Dr. Pessel's conduct constituted negligence, and they reflected the idea that an unnecessary confinement could be considered an injury resulting from that negligence. Although "negligence" seems somewhat of a misnomer due to the intentional and designed nature of his violation of the statute, the readiness of the court to so term it is pertinent. Since the majority viewed the doctor's conduct as a substantial factor in causing the confinement and viewed the restraint as unwarranted, the court had an adequate basis to find liability with less effort and superficiality.

The theory of liability just suggested is particularly applicable to the certification statute involved in Di Giovanni inasmuch as its implicit purpose, along with the other relevant statutes, is to assure that only

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48 Id. at 566, 571, 250 A.2d at 762-63, 767.
51 In Jackson v. Parks, 216 N.C. 329, 4 S.E.2d 873 (1939), involving a wrongful commitment to a mental hospital, the court used language that is apropos. It discounted the significance of whether the plaintiff, after arguing malicious prosecution in the court below, had changed his theory to abuse of process. "We do not see how a choice either way in technical nomenclature could shorten the arm of the Court in its attempt to reach justice between the parties. . . . [The complaint] is sufficient . . . however the alleged mistreatment of the plaintiff may be legally tagged. . . ." Id. at 332, 4 S.E.2d at 874. See also Keller v. Butler, 246 N.Y. 249, 254, 158 N.E. 510, 512 (1927); Prosser § 1, at 3-4; Smith, Torts Without Particular Names, 69 U. Pa. L. Rev. 91 (1921).
mentally ill persons in real need of restraint are deprived of their liberty. The importance of requiring doctors to comply with such safeguards demands stringency in enforcement; as the court recognized, an intentional violation is indefensible. Those courts that accord an extensive privilege to certifying physicians notwithstanding their wilful violation of their duty to examine the subjects of the proceedings create a paradox—the law immunizes defiance of the law. Criminal sanctions hardly seem appropriate for conduct similar to Dr. Pessel's, which lacked malevolence or wantonness. Professional discipline from the appropriate state medical organization affords no relief to an improperly committed person. Furthermore, it is very questionable whether courts should leave the enforcement of state law to professional organizations.

Of course, under any theory of liability doctors would be protected from spurious suits in which a negligent examination is alleged by the arduous requirements of proof of medical malpractice. Actual necessity for restraint because of danger to self and others should be a good defense in a suit for wrongful commitment, for restraint would not be unwarranted substantively even if it were obtained by procedural imperfection; hence there would be no significant injury for which recovery would be merited.

Holding Dr. Pessel directly liable for his intentional violation of the certification statute would have provided perspicuous warning to certifying doctors and would have boldly manifested the willingness of the judiciary to enforce legislation protective of individual rights. Such a holding also would have furthered the retreat from the "forms of action"
mentality. Despite its beclouding semantics, the decision is exemplary insofar as it represents judicial intolerance of the wilful and injurious dereliction of statutorily imposed duty; it remains for another court to achieve the same result in a more straightforward manner.

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