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Medical Malpractice in the Absence of a Doctor-Patient Relationship: The Potential Liability of Psychiatric Examiners in New York State

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ABSTRACT: In New York, psychiatrists (and all physicians) have a duty, in every circumstance with respect to such functions as they are required to undertake, to conduct themselves and all their examinations in a thorough and proper manner. Especially in a forensic setting, psychiatrists must bear in mind that they have a legal duty to perform a competent examination before they render an opinion. It is well established that malpractice liability does not require the preexistence of a doctor-patient relationship based on an undertaking for the purpose of treatment. The author discusses a long line of cases in New York State which holds that psychiatric examiners are potentially liable in malpractice for any breach of duty with respect to those functions that are undertaken. Failure to conduct a proper, careful, and competent examination may result in liability in a variety of areas: competency examinations, commitment proceedings, workers' compensation claims, and so on. Limitations on such malpractice liability are discussed. Unlike some jurisdictions, New York does not accord judicial immunity to psychiatric examiners.

KEYWORDS: psychiatry, medical malpractice, doctor-patient relationship

In the usual situation wherein the psychiatrist undertakes to provide treatment to a patient, he thereby creates a *doctor-patient relationship* with corresponding duties of care [*1*]. The creation of a professional duty on the part of the psychiatrist (or any physician), however, is not contingent on the prior establishment of a doctor-patient relationship based on an undertaking for the purpose of treatment. Psychiatrists who conduct examinations (especially in forensic settings) which are not connected to treatment per se, but for the purpose of evaluation only, have a legal duty to carry out a proper, careful, and competent examination before they render a professional opinion. Psychiatric examiners are not immune from malpractice suits in situations in which they fail to conduct themselves and their examinations in a thorough and proper manner.[2]

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[2]This article is restricted to a review of New York State cases and a summary of the applicable legal holdings. Some jurisdictions have reached an opposite conclusion based on the absence of a treating physician-patient relationship or on the grounds that participation as a court officer lent the psychiatrist the cloak of judicial immunity [*2-4*]. Other jurisdictions reject the argument of judicial immunity [*5,6*] in accord with the New York decisions.

In New York State, a line of cases dating back to 1888 holds that an action for medical malpractice may lie even in the absence of a treating doctor-patient relationship. In *Ayers v. Russell* [7], the patient was civilly committed under the prevailing statute of the day, permitting confinement of a psychiatric patient on the sworn certificate of two physicians, provided he is "furiously mad" or "so far disordered as to endanger" the welfare of others [8]. The patient appealed his commitment and, after a jury had found in his favor on the issue of commitment, was discharged from the hospital. He thereupon sued the two examining physicians, alleging they were negligent in the performance of their examinations (upon which the certificate of commitment was based). Their opinions had stated that the plaintiff, Alfred Ayers, a 63-year-old carpenter, was under delusive beliefs with respect to his wife and daughter, and was as a result insane and in need of care and treatment under the provisions of the applicable statute (Chapter 446 of the Laws of 1874).

The physicians claimed that they were immune from such a suit because they had acted in the capacity of *mental health officers*[3] under the statute and could not be charged with a breach of duty in the absence of a doctor-patient relationship. In rejecting the physicians' claim, the court stated:

> The physicians followed the forms of the law. Whether the reasons set forth by them in the certificate for their conclusion that the plaintiff was insane were sufficient or not, is immaterial. The presumption is that they set forth such reasons as in their opinion were sufficient, and such as appeared to them to be true in fact. But the complaint charges that the physicians made the certificate "without proper and ordinary care and prudence, and without due examination, inquiry, and proof into the fact whether plaintiff was sane or insane." We think the physicians owed the plaintiff the duty of making the examination with ordinary care. Their 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 not clothed with judicial immunity and 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 [11].

Similar suits are not infrequent.[4] In *Kleber v. Stevens* [13] the patient was civilly committed under the authority of the Mental Hygiene Law permitting immediate confinement upon a certificate executed by two examining physicians if the patient "is dangerous by virtue of his mental condition so as to render it necessary for public safety that he be immediately confined..." [14]. Alleging that the certificate rendered by the examining physicians was ill-conceived and based on the hearsay of an allegedly vindictive husband rather than on good medical practice and examination (that is, the doctors had made little or no examination of her before commitment), the patient successfully sued the physicians for negligence. In upholding the jury's verdict, the court stated "it is conceivable that a doctor examining for purposes of commitment may comply mechanically with the requirements of the law and without malice and yet fail to utilize the minimal skill required to effectuate this process" [15].

In a nonpsychiatric case, *Twitchell v. MacKay* [16], the court emphasized that for an action to lie in medical malpractice, as opposed to simple negligence, it was not necessarily required that there be treatment or examination for purposes of treatment. In *Twitchell*, the patient went to a physician for purposes of an evaluation requested by his disability insurance carrier. During the examination, it was alleged that the defendant physician was negligent in manipulating the patient's knee, thereby inflicting damage on him. In conclusively

[3]Although New York State does not confer quasi-immunity on psychiatrists who perform legally dictated functions under certain circumstances (such as in commitment proceedings), some jurisdictions hold that a psychiatrist acting as a court witness and participating as an officer of the court may be accorded judicial immunity, even in cases of gross negligence [9, 10].

[4]Slawson estimated that 13% of malpractice claims against psychiatrists concern involuntary commitment [12].

holding that the fact that the defendant physician was not engaged to treat the patient does not negate the doctor-patient relationship and that the claim sounded in malpractice and not simple negligence, the court stated:

> The plaintiff knew that he was seeing a doctor and must have been aware of the fact that the doctor, after the examination, would express his medical judgment to [the insurance company]. Defendant was acting as a doctor and in doing so he agreed to perform his common-law duty to use reasonable care and his best judgment in exercising his skill, and the law implies that he represented his skill to be such as is ordinarily possessed by physicians in the community. Thus, if he carried out his function in a negligent or improper fashion the fact remains that the legal concept for any malfeasance or misfeasance by defendant would quite properly fall under the label of medical malpractice [*17*].

In *Ferguson v. Wolkin* [*18*], the patient claimed that an insurance company physician who examined her to determine her readiness to return to work was responsible for the subsequent reinjury to her back, because this report had erroneously concluded that she was no longer disabled and returned her to work prematurely. While following the precedent of *Twitchell* and acknowledging that even under the circumstances of an evaluation (which was not for treatment), the defendant was acting as a physician (and consequently owed the patient a duty to exercise due care in his examination), nonetheless the court went on to emphasize a limitation on *Twitchell:* a physician can only be liable for a breach of duty with respect to those functions he was required to undertake. Thus, in this case the defendant was required under law to perform the examination properly, because that was the function he undertook. The patient claimed malpractice not in the *method of examination* (which was found to be proper), but in the physician's *conclusion* with respect to disability. Under the "professional medical judgment" rule, a physician cannot be held liable for mere errors in professional judgment and is not required to achieve success in every case, provided that his decision or opinion is based on a proper medical foundation (that is, a careful and competent examination) [*19*]. The court observed: "an extension of *Twitchell* to recognize a physician-patient duty beyond the conduct of the examination [itself] is improper under these circumstances" [*20*].

On similar grounds, in *Davis v. Tirrell* [*21*], a claim against a psychiatrist for finding the plaintiff to be "emotionally handicapped" was disallowed. The school district had retained a psychiatrist to examine the infant plaintiff solely for the purpose of furnishing an opinion as to whether he should be classified as "emotionally handicapped." Plaintiffs contended that by reaching such a finding, the psychiatrist exposed them to "humiliation and emotional injury." No evidence was adduced to the effect that the psychiatrist had failed to exercise the requisite degree of skill in her examination. The court held that beyond a legal duty to conduct a proper examination, no duty as a psychiatrist was owed that would give rise to malpractice based on a report of the findings and conclusions[5]:

> the defendant was called on to assist the Maine-Endwell Central School District in making the best decision possible for the infant plaintiff's future education. She expressed her honest professional opinion based on what she determined was a sufficient examination of the plaintiff. The fact that such opinion is contrary to the preconceived opinion of the plaintiffs should not subject her to civil liability [*22*].

This line of cases would appear to place the forensic psychiatrist at risk for negligent forensic evaluation, even in the absence of a doctor-patient relationship.

[5]The court noted: "Thus in the instant case, it would require convincing testimony from an expert witness to establish that the defendant failed to exercise the requisite degree of skill in her examination of the infant plaintiff." In the absence of a doctor-patient relationship, the court noted that such a failure might lead to liability on the theory of simple negligence as opposed to malpractice. Assuming a competent examination, a witness' testimony would be privileged against liability. (The court, erroneously, fails to acknowledge the precedent of *Twitchell* and attaches undue importance to the absence of a treating doctor-patient relationship and the immunity of witnesses in a judicial proceeding.)

Conclusion

In New York, psychiatrists who conduct examinations for the purpose of evaluation only have a legal duty to conduct themselves and their examinations in a competent manner. Especially in a forensic setting, psychiatrists have a duty, with respect to such functions as they are required to undertake, to conduct a proper, careful, and competent examination. It is well established that malpractice liability does not require the preexistence of a doctor-patient relationship based on an undertaking for the purpose of treatment. Psychiatric examiners involved in competency to stand trial evaluations, civil commitment, workers' compensation claims, and so on are not immune from potential malpractice liability on the theory that a precondition for malpractice suits is the establishment of a doctor-patient relationship, treatment, or an examination for purposes of treatment.[6] There is no requirement of such a precondition.

Psychiatric examiners who conduct a careful and competent examination are not liable however if their conclusion or opinion is thereafter determined to be erroneous. They are shielded by the "professional medical judgment" rule, which holds that a physician is not liable for mere errors in professional judgment so long as his decision was based on a proper medical foundation.

[6]Moreover, psychiatric examiners in New York are not protected by absolute privilege or accorded a cloak of judicial immunity.

References

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[3] *Mezullo v. Maletz*, 118 N.E. 2d 356 (Mass. Sup. Ct. 1954).
[4] *Dunbar v. Greenlaw*, 152 Me. 270, 128 A.2d 218 (1956).
[5] *Maben v. Rankin*, 55 Cal.2d 139, 10 Cal. R. 353, 358 P.2d 681 (1961).
[6] *Stowers v. Ardmore Acres Hospital*, 19 Mich App. 115, 172 N.W.2d 497 (1969).
[7] *Ayers v. Russell*, 3 N.Y.S. 338 (1888).
[8] Laws N.Y. 1874, Ch. 446, Section 1.
[9] *Niven v. Boland*, 177 Mass. 11, 58 N.E. 282 (1900).
[10] *Bailey v. McGill*, 247 N.C. 286, 100 S.E.2d 860 (1957).
[11] *Ayers v. Russell*, at 34-341.
[12] Slawson, P. F., "Psychiatric Malpractice: The California Experience," *American Journal of Psychiatry*, Vol. 136, No. 5, 1979, pp. 650-654.
[13] *Kleber v. Stevens*, 241 N.Y.S.2d 497 (1963).
[14] N.Y. Mental Hygiene Law, § 75.
[15] *Kleber v. Stevens*, at 499.
[16] *Twitchell v. McKay*, 434 N.Y.S.2d 516 (1980).
[17] *Twitchell v. McKay*, at 519.
[18] *Ferguson v. Wolkin*, 499 N.Y.S.2d 356 (1986).
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[21] *Davis v. Tirrell*, 443 N.Y.S.2d 136 (1981).
[22] *Davis v. Tirrell*, at 141.

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