

NOTES

CIVIL LIABILITY OF PERSONS PARTICIPATING IN THE DETENTION OF THE ALLEGEDLY MENTALLY ILL

The theory behind the commitment and care of the mentally ill has undergone great change during the last century. Mental illness was once viewed as a shameful weakness or as a punishment for sin. The belief that mental illness is a disease which, with proper care, can be cured, simply did not exist. Early commitment statutes reflected this thought, concerning themselves with the mentally disturbed person only if he constituted a danger to others.¹ The law had little interest in the welfare of the lunatic himself.² As late as 1824, there were only two hospitals in the United States which were devoted exclusively to the care of the mentally ill.³ Thus, the mentally disturbed person was cared for by his family or friends,⁴ or not at all.

Mental disability is, of course, now recognized as an illness which can be treated and often cured. Consequently, commitment to a mental institution is not seen simply as a convenient means of protecting society from an incurably dangerous "madman"; commitment is considered an opportunity to provide the patient with rest and treatment which should at least relieve his immediate symptoms, and which hopefully will lead to his cure. One expert has described commitment as a means by which the patient may be returned to the "stream of normal community life."⁵

To implement this philosophy, a number of liberal commitment statutes, many based on the Draft Act Governing Hospitalization of the Mentally Ill,⁶

1. AMERICAN BAR FOUNDATION, *THE MENTALLY DISABLED AND THE LAW* 9-10 (1961).

2. This is evidenced by a Pennsylvania case in 1676 in which a father complained to the court that he was too poor to maintain his son, who was "quyt madd." The court ordered that three or four men be hired "to build a little blockhouse at Amesland for to put in the said madman." *Id.* at 9.

3. *Id.* at 10.

4. *Id.* at 9.

5. Stevenson, *Introductory Statement* to NATIONAL INSTITUTE OF MENTAL HEALTH, FEDERAL SECURITY AGENCY, *A DRAFT ACT GOVERNING HOSPITALIZATION OF THE MENTALLY ILL* (Public Health Service Pub. No. 51, rev. ed. 1952) [hereinafter cited as *DRAFT ACT*].

6. The Draft Act, a model act, has been used by many states in redrafting their mental health codes. The Draft Act's general objectives have been stated as follows:

were adopted to make it easier for the mentally ill to receive treatment. Taken by themselves, such statutes seem to go far toward insuring the ready availability of care and treatment for the mentally disabled. However, those who are expected to use these commitment procedures—police-men, public health officers, doctors, and members of the patient's family—may hesitate to do so if they fear damage suits based on a theory of wrongful commitment. If this hesitation does in fact result, liberal commitment procedures may be rendered ineffective.

In the first place, the law should put no hindrance in the way to the prompt use of those instrumentalities which are regarded as most effectual in promoting the comfort and restoration of the patient. Secondly, it should spare all unnecessary exposure of private troubles, and all unnecessary conflict with popular prejudices. Thirdly, it should protect individuals from wrongful imprisonment. *Foreword to DRAFT ACT.*

The Draft Act provides for several different types of commitment procedures.

Voluntary Hospitalization: The head of a private or public hospital is authorized to admit, subject to the availability of suitable accommodations, a person who is mentally ill or has symptoms of mental illness, and who, if sixteen or over, applies for admission. If the person is under sixteen, his parent or legal guardian may make application. The voluntary patient must be released when he has recovered, when his further hospitalization is no longer advisable, or when release would "contribute to the most effective use of the hospital in the care and treatment of the mentally ill." The voluntary patient must be released upon his own request or, if he is under sixteen, upon the request of his parent or guardian, unless the head of the hospital files within forty-eight hours a certification that release would be unsafe for the patient or others, thereby initiating judicial proceedings. DRAFT ACT §§ 2-3.

Involuntary Hospitalization: The Draft Act provides for an emergency procedure whereby any health or police officer may take an individual into custody and transport him to a hospital, pending examination and certification by a physician, if he has reason to believe that the individual, because of his mental illness, is likely to injure himself or others. DRAFT ACT § 8.

The Draft Act also contains two nonjudicial medical certification procedures. The first provides that an individual may be admitted to a hospital upon application by a friend, spouse, relative, or guardian, a health or public welfare officer, or the head of an institution in which the individual is held, and upon certification by two designated examiners that they have examined the individual and have found that he is mentally ill and dangerous, or that he is in need of care or treatment and lacks sufficient insight or capacity to seek treatment himself. DRAFT ACT § 6.

Section 7 of the Act provides for emergency medical certification. Admission is provided for upon the application of any person stating his belief that the person to be committed is likely to cause injury to himself or others if not immediately restrained. This must be accompanied by the certification of at least one licensed physician that he has examined the individual and has found him to be mentally ill and dangerous. DRAFT ACT § 7.

A judicial procedure is provided whereby, upon application by a proper person, accompanied by a physician's certificate stating that the individual requires hospitalization, the court must give notice to the proposed patient (unless there is reason to believe notice would be harmful) and appoint two examiners to make an examination and report to the court. If the report indicates a need for hospitalization, a hearing will be held and notice given to the allegedly insane person. DRAFT ACT § 9.

This note examines the possible civil liability of those persons participating in commitment proceedings. It also discusses the extent to which the law relating to the civil liability of such participants is an effective means of protecting an individual's right to be free from unwarranted interference with his personal freedom, and whether this law furthers or hinders the goal of providing procedures designed to insure that all individuals in need of mental treatment will receive it.

I. SUMMARY ARREST

A. *Private Persons*

At common law the courts recognized a privilege to detain an insane person without the delay of obtaining a warrant or initiating any other judicial proceeding. However, this privilege of summary arrest could be exercised by a private person only when an emergency existed—when it was necessary to prevent injury to the insane individual or others.⁷ It was necessary that dangerous insanity actually exist before the right of summary arrest could be exercised by a private person. The right to restrain a person who was dangerously insane existed only so long as the emergency lasted.⁸ Thus, once the fury subsided or the fit of depression ended, the person detained had to be released. An attempt to cause a summary arrest in the absence of dangerous insanity could lead to civil liability in an action of false imprisonment.

The possibility of liability is enhanced by the fact that in false imprisonment the burden of showing the legality of the arrest is on the defendant.⁹ Thus, the defendant has the burden of showing that the plaintiff was in fact insane and that he constituted a danger to himself or others. If he fails, he is held liable. The fact that the defendant can show that he acted in good faith, with a reasonable belief that the plaintiff was dangerously insane, or that he acted with the best interests of the plaintiff in mind, is immaterial if he cannot prove actual dangerous insanity.¹⁰

The requirement of dangerous insanity as a condition precedent to

7. *Porter v. Ritch*, 70 Conn. 235, 39 Atl. 169 (1898); *Crawford v. Brown*, 321 Ill. 305, 151 N.E. 911 (1926); *Paetz v. Dain*, 1 Wils. 148 (Ind. Super. Ct. 1872); *Maxwell v. Maxwell*, 109 Iowa 7, 177 N.W. 541 (1920); *Keleher v. Putnam*, 60 N.H. 30, 49 Am. Rep. 304 (1880); *Colby v. Jackson*, 12 N.H. 526 (1842); *Emmerich v. Thorley*, 35 App. Div. 452, 54 N.Y. Supp. 791 (1898); *Appeal of Sleeper*, 147 Me. 302, 87 A.2d 115 (1952) (dictum).

8. *Paetz v. Dain*, *supra* note 7; *Colby v. Jackson*, *supra* note 7. The *Colby* case held that the right to summarily detain an insane person exists for a relatively short period of time even though the danger has not abated.

9. PROSSER, TORTS § 12, at 61 (3d ed. 1964).

10. *Keleher v. Putnam*, 60 N.H. 30 (1880). The defendant may, of course, always

summary arrest by a private person doubtless reflects the value placed on the right of each man to be free from unwarranted interference with his person. Concern for the abuses inherent in a system in which one individual could restrain the freedom of another without the protection of judicial proceedings, whenever the latter evidenced conduct which some might call peculiar, played a significant part in imposing this requirement.

This requirement when applied to most private persons seems quite sound. As one court has said, if there is no immediate danger of physical injury, those wishing to commit an individual should be required to use the judicial process, which, it is hoped, will provide a greater degree of protection for the allegedly insane person.¹¹ While it must be granted that this strict requirement could lead to a fear of personal liability and thus a reluctance to use the summary detention process, this reluctance may be a good thing. The right of one individual to summarily detain another is a dangerous one, subject to many abuses;¹² in the absence of actual danger, it should not exist at all.¹³

There is authority for mitigating the common law requirement of dangerous insanity when the person causing the restraint is morally responsible for the care of the one restrained, or is a member of his immediate family. In *Maxwell v. Maxwell*,¹⁴ a son had caused his elderly father to be sent to an old soldier's home. The court ruled that "the natural or proper custodian of an insane person" may place him in "some proper place for treatment . . . without warrant, and without judicial proceedings"¹⁵ if there are *reasonable grounds for believing* that the person is dangerous to himself or others. The *Maxwell* position seems commendable. To hold that a person morally charged with the care of another can act only when dangerous insanity does in fact exist may well render such individual unable to fulfill his duty of care to the allegedly insane person.

It is also submitted that this privilege should be extended to the other members of the immediate family or household. They are usually the ones in imminent danger from an outburst of the allegedly insane person. Their

show good faith to mitigate damages. *E.g.*, *Colby v. Jackson*, 12 N.H. 526 (1842).

11. *Keleher v. Putnam*, *supra* note 10.

12. Although one commentator has suggested that the danger of commitment based on such wrongful motives as a desire to obtain the allegedly insane person's property is practically nonexistent, Curran, *Hospitalization of the Mentally Ill*, 31 N.C.L. REV. 274, 293-94 (1953), the cases suggest that such a danger does exist, see, *e.g.*, *Dauphine v. Herbert*, 37 So. 2d 829 (La. Ct. App. 1948) (proceedings initiated to prevent plaintiff's participation in ejectment action).

13. Note, 107 U. PA. L. REV. 668, 682 (1959).

14. 189 Iowa 7, 177 N.W. 541 (1920).

15. *Id.* at 10, 177 N.W. at 543.

personal safety should dictate such a privilege.¹⁶ Furthermore, there is less likelihood that the detention or arrest will result from some motive other than concern for the safety of the one arrested when the individual making the arrest is responsible for the care of the detained or is a member of his immediate family.¹⁷

A further problem is the effect of present-day commitment statutes on the common law right of summary detention. The question is whether the common law privilege of summary arrest by a private person has been eliminated by statutes containing a provision for summary detention by a police or public health officer with no mention of private persons.¹⁸ It is not clear whether these commitment statutes encompass the entire area of summary arrest of the mentally ill and thus eliminate the common law privilege of summary arrest by a private person. Only two cases have considered the problem.¹⁹ In the first case, *Warner v. State*,²⁰ the New York Court of Appeals said, in dictum, that the statutes have neither abolished nor enlarged the common law privilege of summary arrest and detention of the dangerously insane. The other case, *Jillson v. Caprio*,²¹ involving summary arrest by a physician, held that a commitment statute eliminated any means of commitment which existed at common law. The *Jillson* case was careful to point out that its decision applied to private individuals as well as physicians.²² The elimination of the common law right of summary arrest in this indirect manner would be unwise, because,

16. Danger to personal safety has played an important part in liberalizing the law of summary arrest by a policeman. Note 27 *infra* and accompanying text. This reasoning would seem to apply at least as well to a member of the immediate family or household.

17. *But see* *Davenport v. Lynch*, 51 N.C. (6 Jones L.) 545 (1859); *Hinchman v. Richie*, Brightly 143 (Pa. Nisi Prius 1849). Further support for the position advanced in the text is found in the fact that the law has since an early date considered a lunatic to be the responsibility of his family. AMERICAN BAR FOUNDATION, *THE MENTALLY DISABLED AND THE LAW* 9-10 (1961).

18. *E.g.*, DRAFT ACT § 8; D.C. CODE ANN. § 21-327 (1961). The Draft Act also contains a medical certification emergency procedure which allows an individual to be admitted to a hospital on the written statement of any health or police officer or *any other person* that the individual is likely to cause harm to himself or others. This must be accompanied by the certification of at least one physician that in his opinion the person is mentally ill and dangerous. DRAFT ACT § 7. This method, it should be noted, is not quite the same as summary arrest.

19. *Jillson v. Caprio*, 181 F.2d 523 (D.C. Cir. 1950); *Warner v. State*, 297 N.Y. 395, 79 N.E.2d 459 (1948). For a discussion of the effect of these cases on the policeman's common law right of summary arrest see notes 27-30 *infra* and accompanying text.

20. 297 N.Y. 395, 79 N.E.2d 459 (1948).

21. 181 F.2d 523 (D.C. Cir. 1950).

22. *Id.* at 524.

as has been pointed out, there are some situations in which summary arrest is necessary to protect both the insane person and those near to him.²³

B. Police

Police officers are not usually required to act at their peril. The general view allows a peace officer to detain an allegedly insane person without a warrant if the officer has probable cause to believe that the person is dangerous to himself or others.²⁴ This rule has been made statutory in some states.²⁵ At least one court has developed a more liberal rule—actual insanity will justify arrest even when no emergency exists.²⁶ An important factor in liberalizing the rule is undoubtedly the concern for the safety of those who come in contact with the insane person:

An insane person is liable to become dangerous at any moment. Must a sheriff who sees an insane person, before taking him into custody, wait until that person shows dangerous tendencies by attacking another? . . . The law has a higher regard for the protection of . . . others.²⁷

The tendency of the courts to liberalize the law of summary arrest by police officers is understandable. It is inevitable that policemen, in the performance of their duties, will come into contact with mentally ill persons; when a disturbance is caused by an unbalanced person, it is logical to call the police. In such situations, the police officer will often have to use summary methods if he is to protect the allegedly insane person and others from injury.

Only one court has directly considered the question of whether the exis-

23. See note 16 *supra* and accompanying text.

24. *Orvis v. Brickman*, 196 F.2d 762 (D.C. Cir. 1952); *Christiansen v. Weston*, 36 Ariz. 200, 284 Pac. 149 (1930); *Paetz v. Dain*, 1 Wils. 148 (Ind. Super. Ct. 1872); *Forsythe v. Ivey*, 162 Miss. 471, 139 So. 615 (1932); see *Babb v. Carson*, 116 Kan. 690, 229 Pac. 76 (1924). *Contra*, *Look v. Dean*, 108 Mass. 116 (1871).

25. CAL. PEN. CODE § 847; OHIO REV. CODE ANN. § 5122.10 (Page Supp. 1965).

26. *Witte v. Haben*, 131 Minn. 71, 154 N.W. 662 (1915) (dictum). In *Cahill v. Michaelis*, 170 Fed. 66 (2d Cir. 1909), the court was concerned with a New York statute which allowed a policeman to arrest any apparently insane person conducting himself in a manner which, for a sane person, would amount to disorderly conduct. The case is unusual in that the statute was used to protect an employer who had the police arrest, without a warrant, an employee of eccentric habits who had refused to leave after discharge. One court, in construing its particular statute, may have gone even farther and held that the existence of probable cause to believe that a person is insane will validate his arrest. *Babb v. Carson*, 116 Kan. 690, 229 Pac. 76 (1924).

27. *Id.* at 693, 229 Pac. at 77-78. California has liberalized the rule in a different manner by shifting the burden of proof from the defendant policeman, on whom it traditionally lies in an action of false imprisonment, to the plaintiff. *Whaley v. Kirby*, 208 Cal. App. 2d 232, 25 Cal. Rptr. 50 (1962), *cert. denied*, 374 U.S. 856 (1963).

tence of emergency detention statutes has pre-empted the policeman's common law privilege of summary arrest.²⁸ In *Orvis v. Brickman*,²⁹ a police officer who had sent a probably suicidal person to the hospital suggested in his report that she be given a mental examination. The District of Columbia Circuit Court of Appeals held that the statute, which provided for arrest by an officer only when the allegedly insane person is found in a "public place," was not "intended to supersede the common law power of emergency arrest."³⁰ The court held the officer's action was justified even though the plaintiff had been "found" in her apartment.

Despite the fact that the law of summary arrest by police is much more liberal than that applied to private persons, the police are apparently hesitant to arrest someone on a basis as ill-defined as mental illness. When possible, they prefer to place the arrest on such firmer grounds as a misdemeanor committed in the officer's presence—for example, disturbing the peace.³¹ By placing the arrest on that basis, the policeman can avoid the necessity of deciding in questionable cases whether a seemingly deranged person constitutes a danger to himself or others, and thus, reduce the danger of civil liability. The police argue that this device accomplishes substantially the same result as summary arrest based on mental illness. Following the arrest, the police can either take the person to the hospital or notify the hospital that he is in police custody.³²

However, at least one article has criticized this procedure on the ground that the allegedly insane person will often languish in jail awaiting trial on

28. *Orvis v. Brickman*, 196 F.2d 762 (D.C. Cir. 1952); see *Warner v. State*, 297 N.Y. 395, 79 N.E.2d 459 (1948) (discussed in text accompanying note 20 *supra*).

29. 196 F.2d 762 (D.C. Cir. 1952).

30. *Id.* at 767.

31. This reluctance is indicated by one police training bulletin which, after stating the rule that a person who appears mentally ill can be arrested on that basis only when the officer has reasonable grounds to believe that the person is dangerous, goes on to state:

If, however, in addition to displaying symptoms of mental illness, the person attempted or did commit some offense in the officer's presence, the officer would be justified in concluding that the person might injure himself or others. The offense committed might be, for example, a disturbance of the peace, an act of malicious mischief, or assault. If the person did commit a misdemeanor in the officer's presence, the officer would have authority to arrest the person.

Often a person will display symptoms of mental illness, but will commit no offense in the officer's presence. Complainants, friends, or relatives of such person may, however, state that he committed some public offense prior to the officer's arrival. In these situations, or in any case when the officer's authority to act is not clear, advice should be secured by calling the Hospital Division. LOS ANGELES POLICE DEP'T, DAILY TRAINING BULLETIN 56 (1958).

32. *Id.* at 56, 62.

the misdemeanor charge at a time when he should be receiving medical treatment.³³

Although the hesitancy of the police to follow a course of action which includes a greater possibility of civil liability is understandable, the better practice seems to be to use the traditional summary arrest procedure based on insanity if the person does appear to be dangerous. The general rule which gives a police officer the right of summary arrest if he has probable cause to believe that the person is insane and dangerous seems to offer sufficient protection to the officer exercising reasonably careful judgment. Since anyone who is in such a mental state that he constitutes a danger to himself or others probably needs immediate medical attention, it is preferable for the police to use this direct procedure.

C. Physicians

Only one case has involved a summary arrest by a doctor. In *Jillson v. Caprio*,³⁴ a doctor instigated the arrest of plaintiff on his certification alone, although the certification of two doctors was required by statute.³⁵ The court found the doctor liable for false imprisonment even though there was strong evidence that the plaintiff was dangerous at the time of arrest. The District of Columbia Circuit Court of Appeals was unwilling to look past the statutory means for detention to any common law method. Thus, this court would not give the physician the right of summary arrest on the ground of dangerous insanity, even though most jurisdictions give this right to a layman.³⁶ Moreover, this court clearly would not give the common law right to a layman. In holding that "the most reasonable belief that they [the allegedly insane persons] will do harm in the future does not justify the *doctor or layman* in arresting them without statutory authorization and without warrant,"³⁷ the court did not distinguish between doctors and laymen.

Even if one could justify the theory that a layman should have no right of summary arrest, it is highly questionable whether a doctor, acting in his professional capacity, should be denied this right. The effect of this holding

33. Slovenko & Super, *The Mentally Disabled, the Law and the Report of the American Bar Foundation*, 47 VA. L. REV. 1366, 1372 (1961). However, while stating that the detention of the mentally ill in jail cells is deplorable, the authors pointed out that it is no more so than the use of the "closed wards" provided for extremely disturbed patients in some hospitals. *Ibid.*

34. 181 F.2d 523 (D.C. Cir. 1950). For a discussion of this decision's bearing on commitment by medical certification see note 49 *infra* and accompanying text.

35. D.C. CODE ANN. § 21-327 (1961).

36. Authorities cited note 7 *supra*.

37. *Jillson v. Caprio*, 181 F.2d 523, 525 (D.C. Cir. 1950). (Emphasis added.)

is that a doctor who found on the basis of his training and experience that a patient was dangerously insane could take no direct action. Therefore, in this jurisdiction, a doctor must either wait for certification by another doctor or go through the even longer process of judicial proceedings. This holding completely ignores the fact that a doctor is better qualified than anyone to determine whether or not a person is insane and dangerous. To place a physician in a position where he may be forced to stand idly by while an insane individual injures himself or others is unreasonable.³⁸ The Draft Act has solved the problem raised by the *Jillson* case by prescribing an emergency procedure whereby a doctor may commit a dangerous person on his certification alone.³⁹

II. MEDICAL CERTIFICATION

Many statutes provide for commitment without judicial proceedings upon the application of the family or "next friend" of the patient when accompanied by a certificate of either one or two licensed physicians confirming insanity.⁴⁰ While some statutes, which ostensibly are medical certification statutes, require "endorsement" or "approval" by a judge or court officer, only cases involving no such judicial process will be included in this section.⁴¹ The grounds for a medical commitment depend, of course, on the wording of the particular statute and the judicial construction of that statute. Some statutes provide that a person may be committed by medical certification only when the certificate alleges that he is mentally ill and dangerous to himself or others.⁴² Thus, in these jurisdictions, the conditions

38. It is interesting to note that this court in a later decision held that the policeman's common law right of summary arrest was not affected by statute. *Orvis v. Brickman*, 196 F.2d 762 (D.C. Cir. 1952). Apparently the court felt that the policy reasons favoring the policeman's common law right were sufficient to overcome its position in *Jillson*.

39. DRAFT ACT § 7.

40. *E.g.*, DRAFT ACT §§ 6-7; ILL. ANN. STAT. ch. 91½, §§ 6-1, 7-1 (Smith-Hurd Supp. 1965); N.Y. MENTAL HYGIENE LAW §§ 72, 75; OHIO REV. CODE ANN. §§ 5122.06, .08 (Page Supp. 1965); VA. CODE ANN. § 37-103 (Supp. 1964).

41. See, *e.g.*, ARIZ. REV. STAT. ANN. § 36-504 (Supp. 1965). Although this division does not follow the nomenclature of the statutes, such statutes present separate problems which will be discussed *infra* in the section entitled "Judicial Proceedings."

42. *E.g.*, DRAFT ACT § 7; OHIO REV. CODE ANN. § 5122.08 (Page Supp. 1965) (emergency hospitalization with medical certification by one physician); *cf.* *Belger v. Arnot*, 344 Mass. 679, 183 N.E.2d 866 (1962); *Karjavainen v. Buswell*, 289 Mass. 419, 194 N.E. 295 (1935). Ohio also has a "nonjudicial hospitalization" procedure whereby it is necessary that the certificate, which must be signed by two physicians, allege only that the patient is a "mentally ill individual subject to hospitalization by court order." OHIO REV. CODE ANN. § 5122.06 (Page Supp. 1965).

precedent for commitment by means of medical certification are the same as those for summary arrest—the patient must be dangerously insane.

However, the existence of a medical certification statute protects a doctor who acts in good faith from actions of false imprisonment or negligence.⁴³ Proof of compliance with the statute has the effect of raising a presumption that the imprisonment was lawful. It then becomes the burden of the plaintiff in a false imprisonment action to prove bad faith on the part of the physician.⁴⁴

The courts have disagreed as to the effect of a physician's noncompliance with a certification statute on his possible liability in a false imprisonment action. Some courts have held that a failure to conform to the statutory requirements is merely evidence of bad faith which may be outweighed by contrary evidence.⁴⁵

Other courts, however, have held that failure to follow the statutory procedure results in liability regardless of other factors indicating good faith. Thus, in *Maben v. Rankin*,⁴⁶ the court said that if it can be shown that the defendant physician did not examine the plaintiff, as the statute required, within three days before her admission to the sanitarium, he is liable. The rationale behind this point of view was stated in *Frey v. Barr*:⁴⁷

It [the Act] was passed to protect the liberty of our citizens by preventing the commitment of sane persons to such institutions. The power

43. *Maben v. Rankin*, 55 Cal. 2d 139, 358 P.2d 681 (1961); *Belger v. Arnot*, 344 Mass. 679, 183 N.E.2d 866 (1962); *Karjavainen v. Buswell*, 289 Mass. 419, 194 N.E. 295 (1935); *Schall v. Irwin*, 120 Misc. 573, 199 N.Y. Supp. 141 (Sup. Ct. 1923) (dictum), *aff'd*, 212 App. Div. 834, 207 N.Y. Supp. 914 (1925); *cf. Miller v. West*, 165 Md. 245, 167 Atl. 696 (1933); *Van Deusen v. Newcomer*, 40 Mich. 90 (1879) (superintendent of asylum not liable if he acts in good faith); *Williams v. Lebar*, 141 Pa. 149, 21 Atl. 525 (1891) (no presumption of negligence from defendant doctors' error about plaintiff's sanity). This rule has been followed even when the medical certification statute explicitly provided protection only for institutions and their personnel, but did not mention committing physicians. *Maben v. Rankin*, *supra*; *Belger v. Arnot*, *supra*.

44. *E.g.*, *Maben v. Rankin*, *supra* note 43. The difficulty of the plaintiff's case was compounded by the *Maben* court, which held that the plaintiff must show the bad faith by "positive and direct" proof, thus rejecting the plaintiff's argument that the malice of her husband, who had instigated the examination, should transfer to the physician.

45. *O'Rourke v. O'Rourke*, 227 La. 262, 79 So. 2d 87 (1955); *Miller v. West*, 165 Md. 245, 167 Atl. 696 (1933) (failure to examine); *Karjavainen v. Buswell*, 289 Mass. 419, 194 N.E. 295 (1935); *Bacon v. Bacon*, 76 Miss. 458, 24 So. 968 (1899) (failure to examine).

46. 55 Cal. 2d 139, 358 P.2d 681 (1961). According to this court, "the involuntary hospitalization of a person in a mental institution in violation of the statute constitutes false imprisonment." *Id.* at 144, 358 P.2d at 683.

47. 28 Pa. Dist. 570, 36 Lanc. L. Rev. 101 (C.P. 1919).

given . . . by the Act is a dangerous one, and is only to be exercised where all the requirements of the Act have been complied with.⁴⁸

Although the latter position may seem harsh, especially when other facts indicating probable cause exist, one may argue that since the procedures are designed to effectuate the easy commitment of the mentally ill, it is not asking too much of the certifying physician to stay within the safeguards provided. It should be noted that *Jillson v. Caprio*⁴⁹ illustrated a situation in which the physician's noncompliance with the statute seems entirely reasonable. However, *Jillson* is an exceptional noncompliance case; most of these cases involve nothing more than carelessness on the part of the certifying physician. Moreover, as pointed out above, all the problems of the *Jillson* case are solved by a statute such as section 7 of the Draft Act, which allows emergency commitment upon the certification of one doctor. When a medical certification statute allows certification by one doctor upon his examination of the patient, full compliance with the statute should be required to protect the physician from liability, since all he has to do to comply with the statute is examine the patient. If the physician fails to fulfill that basic requirement, if in fact he has no personal knowledge of the patient's mental condition, he should not sign the certificate.

A further question arises as to the effect of medical certification on the liability of individuals other than the certifying physician. When the suit is against the party who instigated the commitment or obtained the certificate from the doctor, liability may be imposed, despite the existence of a valid certificate, if the plaintiff can show bad faith.⁵⁰ This result is more likely if the certificate was made solely in reliance on information supplied by the defendant.⁵¹ Otherwise, the existence of a valid certificate is at least strong evidence of probable cause for the commitment and of the absence of bad faith.

If, however, the certificate is invalid—for example, only one doctor's signature was obtained when two were needed—the legal justification for the detention is removed and the burden of going forward with the evidence is shifted from the plaintiff to the defendant, as in a normal summary arrest case.⁵²

48. *Id.* at 571, 36 *Lanc. L. Rev.* at 102.

49. 181 F.2d 523 (1950). For a discussion of the *Jillson* case see text accompanying notes 34-37 *supra*.

50. *O'Rourke v. O'Rourke*, 227 La. 262, 79 So. 2d 87 (1955) (brother-in-law liable); *Karjavainen v. Buswell*, 289 Mass. 419, 194 N.E. 295 (1935) (plaintiff's employer liable); *Bacon v. Bacon*, 76 Miss. 458, 24 So. 968 (1899); see *Frey v. Barr*, 28 Pa. Dist. 570, 36 *Lanc. L. Rev.* 101 (C.P. 1919).

51. *E.g.*, *Bacon v. Bacon*, *supra* note 50.

52. See notes 9-10 *supra* and accompanying text.

It is clear that one, such as the superintendent of a mental hospital, who subsequently relies on a certificate which is valid on its face is protected from liability.⁵³

III. JUDICIAL PROCEEDINGS

This section deals with those cases in which either judicial authority for commitment was obtained or commitment by judicial procedure was attempted. The type of judicial participation involved in these cases ranges from a full hearing before a court and perhaps a jury⁵⁴ to the issuance of a commitment order upon the presentation of certificates of insanity by one or more qualified physicians,⁵⁵ or the endorsement of certificates of insanity as required by some medical certification statutes.⁵⁶ In all of these situations, the most important question with regard to commitment by means of judicial proceedings is the extent to which their use protects the participants in the commitment action.

A. Commitment Unsuccessful

If commitment was attempted unsuccessfully, the allegedly insane person may have an action of malicious prosecution. However, the plaintiff in such an action must meet some fairly stringent requirements. He is required to prove that the defendant initiated the original proceedings with malicious intent and without probable cause, that the original proceedings terminated in his favor, and that he suffered injury as a result.⁵⁷ The failure to prove any one of these elements defeats the plaintiff's action.⁵⁸

A problem peculiar to a malicious prosecution action is the requirement that the plaintiff must show a termination of the original proceedings in his favor.⁵⁹ Some courts have been very strict in applying this requirement to an action based on a commitment attempt. The rule has been applied even when the original proceeding consisted only of the issuance of an order of commitment by the court based solely on certifications of insanity by two physicians.⁶⁰

53. *E.g.*, *Felix v. Hall-Brooke Sanitarium*, 140 Conn. 496, 101 A.2d 500 (1953). The court said that "since the emergency certificate met all the conditions prescribed by the statute, its delivery to the defendant carried immunity from an action for false imprisonment." *Id.* at 500, 101 A.2d at 502.

54. *E.g.*, DRAFT ACT § 9; MICH. STAT. ANN. § 14.811 (Supp. 1965).

55. *E.g.*, ILL. ANN. STAT. ch. 91½, § 1-2 (Smith-Hurd Supp. 1965); MICH. STAT. ANN. § 14.809 (1956).

56. *E.g.*, DRAFT ACT § 7; N.Y. MENTAL HYGIENE LAW § 73.

57. PROSSER, TORTS § 114, at 873-75 (3d ed. 1964).

58. *Ibid.*

59. *E.g.*, *Fetterley v. Gibson*, 210 Cal. 282, 283, 291 Pac. 411, 412 (1930).

60. *Rouse v. Twin Pines Sanitarium*, 162 Cal. App. 2d 639, 328 P.2d 536 (1958).

This rigorous burden placed on the plaintiff has been lessened by some courts. Thus, the North Carolina Supreme Court recently held that a plaintiff, found sane in a habeas corpus hearing after an original finding of insanity, had shown sufficient evidence of termination in her favor to submit the question to the jury.⁶¹ This decision was based in part on the court's interpretation of the relevant commitment statute, which warned that "neither the institution of the proceeding . . . as provided in this section nor the order of commitment by the clerk shall have the effect of creating any presumption that such person is legally incompetent for any purpose."⁶² Similarly, an early Colorado case stated in dictum that a plaintiff, found insane in the original proceeding but later found "not insane" in the same court, could allege a termination in his favor.⁶³ The reasoning was based on a statute declaring that all lunacy proceedings, orders, and judgments are of a continuing character and are open to change or modification on the application of any party in interest.⁶⁴

In both of these cases, the courts used statutes primarily aimed at insuring the right of a person committed to an institution to prove his sanity at any time, and thereby procure his speedy release, to liberalize the rules of pleading in malicious prosecution. As a result, a plaintiff may be able to use any subsequent adjudication of his sanity to fulfill the termination requirement of a malicious prosecution action. The practical effect of these holdings is to eliminate the requirement imposed by most courts that the *original* proceedings must terminate in the plaintiff's favor.⁶⁵

An early California case, *Kellogg v. Cochran*, 87 Cal. 192, 25 Pac. 677 (1890), held that the order of commitment was neither conclusive evidence nor probable cause for believing that the person committed was insane. This reasoning has been rejected by the later California cases, *Fetterley* and *Rouse*. Undoubtedly the *Kellogg* case is no longer law in California.

61. *Fowle v. Fowle*, 263 N.C. 724, 728, 140 S.E.2d 398, 401 (1965).

62. *Ibid.*

63. *Coulter v. Coulter*, 73 Colo. 144, 214 Pac. 400 (1923).

64. *Id.* at 152, 214 Pac. at 403. A later Colorado Supreme Court case reached a similar result when the plaintiff had been committed by a judge upon the request of a physician. The court decided that an action of malicious prosecution would lie in spite of a statute which provided that "such an order of the court shall be complete protection for the confinement, examination, diagnosis, observation and treatment of such patient as against all persons." The court construed the statute to protect only those persons who, after the entry of a "hold and treat order," have the responsibility pursuant to the order for the "confinement, examination, diagnosis, observation and treatment" of the patient, not the instigators of the proceedings. The court said that to hold otherwise would make the statute void as a violation of a Colorado constitutional guarantee that a speedy remedy be provided for every injury to person, property or character. *Lowen v. Hilton*, 142 Colo. 200, 204, 351 P.2d 881, 883-84 (1960).

65. The Nebraska court has lessened the burden of the requirement by holding that the finding of insanity by "commissioners of insanity" was not conclusive, but only

One of the most unusual features of the action of malicious prosecution is that the existence of probable cause is generally a question for the judge rather than the jury. Thus, if the facts are not in dispute, or if the same conclusion could be reached no matter which set of facts is believed, the judge decides the question. If the existence or nonexistence of probable cause depends on which set of facts is believed, the judge leaves the determination of fact to the jury and either instructs them as to what conclusions they must reach if certain facts are found or decides probable cause himself on the basis of the findings of the jury.⁶⁶

This assumption of a typical jury function by the court is an attempt to protect those who institute a commitment in good faith from the uncertainties of a jury verdict.⁶⁷ For a number of reasons, this practice seems appropriate when the suit is based on an unsuccessful commitment action. First, if, at the time the malicious prosecution action is tried, the plaintiff is sane, the impact on the jury may cause it to refuse to believe the evidence introduced to show probable cause at the time of the commitment. Furthermore, the facts introduced to show probable cause may be of such a technical nature that a jury will not be able to comprehend them. As one authority has put it, having the jury decide such questions is tantamount to having a jury decide whether or not the plaintiff displayed symptoms indicating meningitis.⁶⁸ The jury simply does not have the training to make such a decision. The same point might be made with respect to the court, but given the lack of technical training on the part of both judge and jury, the judge will (1) be more likely to understand the technical testimony introduced to show that probable cause did or did not exist and (2) be better able to look past the emotional issues which are inevitably involved in a malicious prosecution action based on an attempted commitment.

"*prima facie* evidence of probable cause." *Figg v. Hanger*, 4 Neb. Unof. 792, 96 N.W. 658 (1903).

66. *E.g.*, *Johnson v. Huhner*, 76 N.D. 13, 33 N.W.2d 268 (1948). *Contra*, *Perez v. Rodriguez*, 155 Fla. 501, 20 So. 2d 654 (1945); *see* *Sutherland v. Palme*, 93 Cal. App. 2d 307, 208 P.2d 1035 (1949).

67. *See* *Treloar v. Harris*, 66 Ind. App. 59, 117 N.E. 975 (1917). A look at two recent California appellate court decisions reveals the difference in outcome which can occur when the question of probable cause is decided by the judge rather than the jury. In *Jensen v. Leonard*, 82 Cal. App. 2d 340, 186 P.2d 206 (1947), the trial judge had directed a verdict for the defendant because the plaintiff's testimony did not "amount to that *substantial* evidence required to create a conflict on the issue of probable cause." *Id.* at 354, 186 P.2d at 215. In *Sutherland v. Palme*, *supra* note 66, the court held that even though there was no evidence of malice and the preponderance of evidence indicated the existence of probable cause, the existence of some contrary evidence was sufficient to support the jury's verdict for the plaintiff.

68. Curran, *Hospitalization of the Mentally Ill*, 31 N.C.L. REV. 274 (1953).

B. *Commitment Successful*

Since a court order of commitment which is valid on its face establishes legal authority for the patient's detention,⁶⁹ it might seem to follow that the initiator of the action would be absolutely protected from subsequent liability. This, however, is not necessarily true; even when a valid commitment order has been obtained, the instigator may still be liable.

Courts have imposed such liability on a theory of malicious abuse of process if there was perversion or improper use of the legal process by the individual initiating the legal proceedings.⁷⁰

According to Prosser, this action differs from malicious prosecution in that the gist of the tort is not commencing an action or causing process to issue without justification, but misusing or misapplying process, justified in itself, for an end other than that which it was designed to accomplish. The essential elements of the tort as it has developed are (1) an ulterior purpose and (2) a willful act in the use of the process not proper in the regular conduct of the proceedings.⁷¹ Thus it has been held that the action would not lie when the lunacy proceeding was brought to prevent the plaintiff from executing a will⁷² or to bring the plaintiff into public disgrace.⁷³ These courts require that the plaintiff show not only the existence of an ulterior motive, but also an act in the use of the legal process not proper in the regular proceedings, such as threatening the continuation of the proceedings to extort money.⁷⁴

One court, however, has ignored the latter requirement and held that the allegation that the defendant doctor initiated lunacy proceedings solely for the purpose of getting rid of a troublesome patient stated a cause of action for malicious abuse of process.⁷⁵

As a general rule, the action of false imprisonment will not lie if there is

69. *E.g.*, *Smith v. Fish*, 182 Ark. 115, 30 S.W.2d 223 (1930).

70. *E.g.*, *Coulter v. Coulter*, 73 Colo. 144, 214 Pac. 400 (1923); *Bailey v. McGill*, 247 N.C. 286, 100 S.E.2d 860 (1957).

71. PROSSER, *TORTS* § 114, at 876 (3d ed. 1964).

72. *Hauser v. Bartow*, 273 N.Y. 370, 7 N.E.2d 268, *rehearing denied*, 274 N.Y. 489, 8 N.E.2d 617 (1937).

73. *Hocker v. Welti*, 239 Ill. App. 392 (1926).

74. *Hocker v. Welti*, *supra* note 73; *Hauser v. Bartow*, 273 N.Y. 370, 7 N.E.2d 268, *rehearing denied*, 274 N.Y. 489, 8 N.E.2d 617 (1937); *Barnette v. Woody*, 242 N.C. 424, 88 S.E.2d 223 (1955).

75. *Bailey v. McGill*, 247 N.C. 286, 100 S.E.2d 860 (1957); *accord*, *Coulter v. Coulter*, 73 Colo. 144, 214 Pac. 400 (1923). The *Bailey* case is extremely interesting since it arose in the same jurisdiction as *Barnette v. Woody*, *supra* note 74, in which the court had adhered to the general rule that the plaintiff must show the existence of an ulterior motive *and* an act in the use of the process not proper in the regular proceedings. The court in *Bailey* simply ignored the *Barnette* decision.

legal authority for the incarceration derived from a court of competent jurisdiction.⁷⁶ The theory is that by complying with the formal requirements of the law, the instigator makes the imprisonment the act of the court or the state rather than his own, and thus cannot be responsible for the imprisonment.⁷⁷ Most opinions hold that if the court was the proper one in which to bring lunacy proceedings, its authority is sufficient to protect the participants from liability in a false imprisonment action. Any errors in obtaining jurisdiction of the case, such as failure to serve notice, can only be corrected by the erring court or by appellate review.⁷⁸

Some courts, however, have allowed an action for false imprisonment against an *instigator* bringing the commitment proceeding in bad faith despite judicial approval of the original commitment.⁷⁹ Proving liability for this tort is, however, no easy task. As one court held,⁸⁰ "The order of commitment . . . was *prima facie* evidence of the plaintiff's insanity"; this imposes the burden of proving bad faith on the plaintiff. In the cases where liability was imposed, the evidence of bad faith or malice was quite strong,⁸¹ indicating that bad faith must be proven directly and cannot be inferred

76. *E.g.*, *Guzy v. Guzy*, 16 Misc. 2d 975, 185 N.Y.S.2d 161 (Sup. Ct. 1959); *Pate v. Stevens*, 257 S.W.2d 763, 767 (Tex. Civ. App. 1953); PROSSER, TORTS § 12, at 62 (3d ed. 1964).

77. *Ibid.*

78. *Pate v. Stevens*, 257 S.W.2d 763, 767 (Tex. Civ. App. 1953); *Dedrick v. Dunham*, 136 Wash. 265, 239 Pac. 385 (1925); see *Ussery v. Haynes*, 344 Mo. 530, 127 S.W.2d 410 (1939); *cf.* *Getsinger v. Corbell*, 188 N.C. 533, 125 S.E. 180 (1924) (failure to comply with notice requirements evidence of bad faith). *But see* *Troutman v. State*, 273 App. Div. 619, 79 N.Y.S.2d 709 (1948); *Washer v. Slater*, 67 App. Div. 385, 73 N.Y. Supp. 425 (1901); *Mierop v. State*, 22 Misc. 2d 216, 201 N.Y.S.2d 2 (Ct. Cl. 1960).

Any person subsequently relying on or enforcing a judicial order which is valid on its face and issued by a court of competent jurisdiction will always be protected from liability in false imprisonment. *E.g.*, *Smith v. Fish*, 182 Ark. 115, 30 S.W.2d 223 (1930). In *Zinkhan v. District of Columbia*, 50 App. D.C. 312, 271 Fed. 542 (Ct. App. 1921), the superintendent of the asylum and jail was liable for incarcerating the plaintiff in reliance on the penciled authorization of a precinct desk sergeant which was not accompanied by other necessary papers.

79. *Boesch v. Kick*, 98 N.J.L. 183, 119 Atl. 1 (1922); *Sheean v. Holman*, 6 N.J. Misc. 346, 141 Atl. 170 (Sup. Ct. 1928) (personal animosity); *Dougherty v. Snyder*, 97 Mo. App. 495, 71 S.W. 463 (1903) (dictum); see *Comfort v. Young*, 100 Iowa 627, 69 N.W. 1032 (1897); *Morris v. University of Texas*, 348 S.W.2d 644 (Tex. Civ. App. 1961). In *Comfort*, a libel action against the instigator of lunacy proceedings, the court said, "Persons have the undisputed right to file such informations as the one referred to, when made in good faith and in the honest belief that the statements therein made are true." *Comfort v. Young*, *supra* at 629, 69 N.W. at 1033.

80. *Schall v. Irwin*, 120 Misc. 573, 575, 199 N.Y. Supp. 141, 143 (Sup. Ct. 1923).

81. *Boesch v. Kick*, 98 N.J.L. 183, 119 Atl. 1 (1922); *Sheean v. Holman*, 6 N.J. Misc. 346, 141 Atl. 170 (Sup. Ct. 1928); see *Comfort v. Young*, 100 Iowa 627, 69 N.W. 1032 (1897).

from a lack of probable cause, as may be done in an action for malicious prosecution.⁸²

A few courts have found *certifying physicians* who acted as witnesses in the commitment proceedings (rather than as instigators) liable for false imprisonment for negligently certifying that the plaintiff was insane.⁸³ An old New York case, *Ayers v. Russell*,⁸⁴ held that certifying doctors have the duty of making the examination with ordinary care.

Other courts, considering a false imprisonment action against a physician who testified against the allegedly insane person, have dealt with the question of civil liability in terms of the privilege afforded a witness in a judicial proceeding.⁸⁵ The privilege granted to such a physician may be qualified⁸⁶ or absolute.⁸⁷ Thus the Massachusetts court in *Niven v. Boland*⁸⁸ held that the certifying physician was protected by a qualified privilege—so long as he acted in good faith and without malice.⁸⁹ However, in a later decision, *Mezullo v. Maletz*,⁹⁰ the same court held that the privilege granted the certifying physician was absolute. The court relied on the following reasoning from *Niven v. Boland*:

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

82. *Sutherland v. Palme*, 93 Cal. App. 2d 307, 208 P.2d 1035 (1949); *Dugan v. Midwest Cap Co.*, 213 Iowa 751, 239 N.W. 697 (1931); *Manz v. Kippel*, 158 Wis. 557, 149 N.W. 375 (1941); *Johnson v. Huhner*, 76 N.D. 13, 33 N.W.2d 268 (1948) (dictum).

83. *Hough v. Ogden*, 4 N.J. Misc. 455, 133 Atl. 73 (Sup. Ct. 1926); *Walder v. Manahan*, 21 N.J. Misc. 1, 29 A.2d 395 (Cir. Ct. 1942).

84. 50 Hun 282, 3 N.Y. Supp. 338 (1888).

85. Of privilege in general, Prosser has said:

In its broader sense, it is applied to any immunity which prevents the existence of a tort; but in its more common usage, it signifies that the defendant has acted to further an interest of such social importance that it is entitled to protection, even at the expense of damage to the plaintiff. PROSSER, TORTS § 16, at 99 (3d ed. 1964).

For an illustration of this reasoning and its effect see *Mezullo v. Maletz*, 331 Mass. 233, 118 N.E.2d 356 (1954).

86. *Christopher v. Henry*, 284 Ky. 127, 143 S.W.2d 1069 (1940); *Niven v. Boland*, 177 Mass. 11, 58 N.E. 282 (1900); *Ussery v. Haynes*, 344 Mo. 530, 127 S.W.2d 410 (1939); *Springer v. Steiner*, 91 Ore. 100, 178 Pac. 592 (1919).

87. *Fisher v. Payne*, 93 Fla. 1085, 113 So. 378 (1927); *Hurley v. Towne*, 155 Me. 433, 156 A.2d 377 (1959); *Dabkowski v. Davis*, 364 Mich. 429, 111 N.W.2d 68 (1961); *Dyer v. Dyer*, 178 Tenn. 234, 156 S.W.2d 445 (1941); see *Beckham v. Cline*, 151 Fla. 481, 10 So. 2d 419 (1942); *Brady v. Collom*, 68 R.I. 299, 27 A.2d 311 (1942).

88. 177 Mass. 11, 58 N.E. 282 (1900).

89. *Id.* at 14, 58 N.E. at 283.

90. 331 Mass. 233, 118 N.E.2d 356 (1954).

by them to be insane . . . should have a right of action in case it turns out that the certificate ought not to have been given.⁹¹

Obviously this court felt that the need to develop laws to protect those who might be involved in judicial commitment procedures outweighed the possibility that a person wrongfully committed might have no redress for any injury suffered.

A Rhode Island case, *Brady v. Collom*,⁹² held the privilege to be absolute also. However, this was done on the ground that the doctors were only "witnesses in a hearing before a judicial tribunal, in which the *plaintiff* . . . had an opportunity to be heard and to introduce evidence."⁹³ The *Mezullo* case made no such statement and presumably the absolute privilege granted there would apply to any judicial proceeding regardless of its character. The Michigan Supreme Court has actually reached this result by holding that an absolute privilege exists even though the judicial proceeding involved no more than the signing of an emergency order of commitment by a judge.⁹⁴

It is important to note that all the cases in which liability was imposed involved summary type proceedings at which the plaintiff was neither present nor represented, a proceeding which required only the judge's approval of the physician's application for commitment and gave the plaintiff no opportunity to defend himself.⁹⁵ The importance of this factor (inability to defend oneself) is demonstrated by a Florida false imprisonment decision. The Florida Supreme Court held that the fact that the defendant physicians had failed to give the plaintiff the required examination, thereby depriving the plaintiff of notice of the commitment hearing

91. *Id.* at 237, 118 N.E.2d at 359.

92. 68 R.I. 299, 27 A.2d 311 (1942).

93. *Id.* at 302, 27 A.2d at 312. (Emphasis added.) *Ayers v. Russell*, 50 Hun 282, 3 N.Y. Supp. 338 (Sup. Ct. 1888), held that certifying doctors were privileged only if they discharged their duty (examination of the plaintiff) with ordinary care. The court in *Brady* distinguished *Ayers* on the ground that the proceedings in *Ayers* were summary in character.

94. *Dabkowski v. Davis*, 364 Mich. 429, 111 N.W.2d 68 (1961). The proceedings in this case involved an application to the probate court for plaintiff's commitment. While the application was pending, the defendant doctors submitted certificates stating that the plaintiff was dangerous and should be committed pending the hearing. In fact the physicians had not examined the plaintiff.

95. *Coulter v. Coulter*, 73 Colo. 144, 214 Pac. 400 (1923); *Beckham v. Cline*, 151 Fla. 481, 10 So. 2d 419 (1942); *Boesch v. Kick*, 98 N.J.L. 183, 119 Atl. 1 (1922); *Sheean v. Holman*, 6 N.J. Misc. 346, 141 Atl. 170 (Sup. Ct. 1928); *Hough v. Ogden*, 4 N.J. Misc. 455, 133 Atl. 73 (Sup. Ct. 1926); *Walder v. Manahan*, 21 N.J. Misc. 1, 29 A.2d 395 (Cir. Ct. 1942); *Ayers v. Russell*, 50 Hun 282, 3 N.Y. Supp. 338 (Sup. Ct. 1888); *Bailey v. McGill*, 247 N.C. 286, 100 S.E.2d 860 (1957).

and consequently of the opportunity to defend herself,⁹⁶ was significant to the imposition of liability.

*C. An Appraisal: Recovery Against Participants in
Judicial Proceedings*

It should be evident from the foregoing discussion that within a particular jurisdiction the chance of recovery for wrongful commitment by means of judicial proceedings may well depend upon the peculiar characteristics of the different forms of action and upon which of these actions the plaintiff chooses to bring. That is, a plaintiff's recovery may depend on whether he brings an action for malicious prosecution, malicious abuse of process, or false imprisonment.

To illustrate—suppose a defendant doctor has a patient committed solely because the patient is a hypochondriac who constantly annoys the physician with his every ache and pain. If the original commitment was successful, in the majority of jurisdictions an action of malicious prosecution would fail because the plaintiff, even if later proved sane, could not allege termination of the original proceedings in his favor. Similarly, an action of malicious abuse of process would fail unless the plaintiff could show “an act in the use of the process not proper in regular conduct of the proceedings.” If the plaintiff brings an action of false imprisonment, in most jurisdictions he would not recover because there would be legal authority for the imprisonment. The confusion is multiplied when one recalls that in certain jurisdictions the traditional requirements of malicious prosecution, malicious abuse of process, and false imprisonment have been relaxed. Thus, in the hypothetical case, the plaintiff may be able to recover in an action of malicious prosecution if the court should decide to re-interpret the termination requirement. Also, recovery may be had for malicious abuse of process if the court should adopt the minority position and allow recovery on the basis of improper motive alone. False imprisonment will lie if the court chooses to allow recovery on a showing of bad faith despite the legal authority for the incarceration.

One obvious objection to all this is that recovery will depend on the tech-

96. *Beckham v. Cline*, *supra* note 95. This is so in Florida because of a statute which provides that following the examination, a report is sent to the person examined, affording him an opportunity to appear before the court and contest the findings of the committee. FLA. STAT. ANN. § 394.22(4) (1960); FLA. STAT. ANN. § 394.22(6) (Supp. 1965). *Brady v. Collom*, 68 R.I. 299, 27 A.2d 311 (1942), where the patient's opportunity to defend himself at the judicial proceeding was an important factor in the court's finding of no liability, is in accord on this point. For a further discussion of the *Brady* case see note 93 *supra* and accompanying text.

nalities of common law forms of action. A plaintiff may be denied redress for wrongful commitment if he has brought a cause of action in which he cannot meet one of the technical pleading requirements.

Some may argue that these problems are not particularly serious since, if a plaintiff discovers that he has chosen the wrong action, he may simply begin his case anew under a different theory. However, such a procedure is at least time consuming, especially if the first action should reach the appellate level, and may be so expensive that the plaintiff will be unwilling or unable to try again. A further possibility is that, because of the time consumed by the first action, the applicable statute of limitations may run, preventing a subsequent action.⁹⁷

An even more serious objection to the importance placed on the technical requirements of these various forms of action is that this emphasis obscures more important considerations. One finds little discussion of whether the protection from civil liability afforded the participants in judicial commitment proceedings should vary with the type of judicial proceeding involved. Should an individual involved in a commitment proceeding which amounts to no more than the court's endorsing a medical certificate signed by a physician receive the same protection as a participant in a full hearing before a judge and jury? Should the cloak of judicial participation shield the participants in a proceeding in which judicial approval serves as no more than a rubber stamp of a doctor's certification?

It is submitted that where the procedure involved is a full hearing in which the allegedly insane person has the opportunity to defend himself, the participants should be completely immune from any later civil liability, if insanity is found. The allegedly insane person has ample opportunity to prove his sanity; thus, the possibility of wrongful commitment is greatly

97. Another statute of limitations problem revolves around the effect that a plaintiff's imprisonment for mental incompetency will have on his ability to bring a wrongful commitment action. Two cases illustrate this problem.

In *Mierop v. State*, 22 Misc. 2d 216, 201 N.Y.S.2d 2 (Ct. Cl. 1960), the plaintiff had been committed on August 9, and released on habeas corpus on August 17. There was a ninety-day limit on filing notice of intent to sue. The court held that the notice filed by the plaintiff on November 14 was timely, because, as provided by statute, a person confined in the state hospital is under a legal disability whether he is, in fact, sane or insane. However in *Woodruff v. Shores*, 354 Mo. 742, 190 S.W.2d 994 (1945), the Missouri court held that a statute which required that a malpractice suit be brought within two years, unless at the time the cause of action accrued the party was disabled because of insanity, barred a plaintiff who had not brought her action within that period. The court construed "disability" as requiring actual insanity rather than any disability caused by a judgment of insanity. These cases indicate how a court's attitude toward the civil liability of those participating in the commitment of the mentally ill can be reflected in a decision which is seemingly based on procedural problems alone.

reduced. Even the fact that the instigator of the proceedings acted from such improper motives as greed or personal antipathy should not alter this result. If the defendant in the commitment action is in fact insane, he will not be damaged by commitment; on the contrary, he will benefit from it.⁹⁸ A more difficult problem arises if the commitment proceeding results in a finding of sanity. Viewed in terms of any loss of personal freedom, the commitment action defendant has suffered no injury and cannot, consistently with the analysis used in this note, be given a cause of action. However, many courts might justifiably find it difficult to overlook another factor. It may be that a certain stigma attaches to a person who has been the subject of even an unsuccessful commitment proceeding which could be very damaging to a public official, an attorney, a banker, or any other person who must maintain an image of responsibility. If this consideration compels the granting of a cause of action against participants in an unsuccessful judicial commitment attempt, the limits of possible liability should be narrowly circumscribed. Recovery should be permitted only upon a showing of actual malice on the part of the commitment participant. In addition, only significant, demonstrable damages should be awarded.

Where, however, the original proceeding is nothing more than a form of medical certification, no such protection should be afforded; in this type of proceeding the allegedly insane person has no opportunity to defend himself by proving in court that he in fact does not need medical attention. The requirements for protection given the participants in such proceedings should be no different than those in a medical certification procedure which does not require judicial approval—good faith compliance with the relevant statute. If limiting the protection results in some hesitancy to use this type of commitment procedure, this may be a necessary consequence of the high value which our society places on individual freedom.

That some courts have not been entirely oblivious to this problem is suggested by the fact that most of the cases in which the courts have seen fit to lessen the traditional requirements of the various forms of action, or to grant the participants in the commitment procedure only a limited protection, have involved summary type proceedings in which the allegedly insane person had no opportunity to prove his sanity.⁹⁹ However, this factor, which should be a crucial issue in a wrongful commitment action, has often gone unmentioned.

Another problem which results from a preoccupation with the technicalities of different forms of action is that this tends to obscure the basic issue

98. If the instigator has attempted to subvert the proceedings for an illegal purpose such as the extortion of money, the state's criminal remedies seem quite sufficient.

99. Authorities cited note 95 *supra*.

in any wrongful commitment action—the balancing of the desire of each individual to be free from unwarranted interference with his personal freedom with the need to develop commitment procedures which will enable those in need of mental treatment to have ready access to it. This latter factor obviously depends on the readiness with which third parties use these procedures, since the mentally ill for the most part cannot be expected to seek treatment themselves.¹⁰⁰ There has been too little concern with the issue of whether or not a particular holding will cause those who would normally be expected to use commitment procedures—police, physicians, public health officers—to hesitate because of the fear of personal liability. If one has any doubt that an adverse holding in a wrongful commitment action has an effect upon the tendency of certain professional groups to use commitment procedures, he is simply failing to take into consideration the lines of communication operating within such groups.¹⁰¹

These issues have been considered in some cases.¹⁰² In *Mezzullo*,¹⁰³ the court went to great pains to point out that it considered the need to provide commitment procedures which would be used without fear of civil liability to be of paramount importance. However, as a general proposition, this question has also been almost totally ignored.

CONCLUSION

Modern commitment statutes represent an attempt to provide procedures designed to insure that all individuals in need of mental treatment will receive it. The very real possibility that fear of civil liability will result in a relative lack of use of these procedures presents a serious problem. Clearly, anything short of complete protection for those involved in the commitment of others leaves some chance of this reaction. However, the obvious opportunities for abuse in a system of absolute protection in all situations make it totally incompatible with our traditional reverence for individual freedom.

With these issues in mind it is suggested that the dangerous insanity requirement in an action growing out of a summary arrest be retained when a private person is defending his actions. The danger to personal freedom inherent in this situation is such that only actual immediate danger should be acceptable as a justification. When, however, the defendant is a police-

100. Slovenko & Super, *The Mentally Disabled, the Law and the Report of the American Bar Foundation*, 47 VA. L. REV. 1366 (1961).

101. See, e.g., *Mental Health Court Digest*, Aug. 1966, p. 1; *Mental Health Court Digest*, June 1966, p. 6.

102. *Mezullo v. Maletz*, 331 Mass. 233, 118 N.E.2d 356 (1954); *Niven v. Boland*, 177 Mass. 11, 58 N.E. 282 (1900).

103. *Mezullo v. Maletz*, *supra* note 102. For a full discussion of this case see notes 87-88 *supra* and accompanying text.

man, a public health officer, or a member of the plaintiff's immediate family or household, a reasonable belief of dangerous insanity should suffice. The fact that the first two groups inevitably come into contact with mentally ill persons in performing their duties underlies the relaxation of the traditional rule as to them. The family members' protection is based on their close contact with the allegedly insane person, which makes them particularly vulnerable to harm from any outburst.

Traditionally, a certifying physician is required to act in good faith and in compliance with the relevant statute. If a physician fails to comply with a certification statute which calls for an examination only, it seems that liability should attach. A doctor should not commit a patient on any basis other than first-hand knowledge. But if the statute involves a more complicated and lengthy process such as the certification of two physicians, non-compliance should be considered as no more than evidence of a lack of good faith; the examining physician may not be able to prevent injury to the patient or others if he takes the time to call in another doctor.

If the original commitment action was a judicial proceeding, this note has argued that the crucial factor in determining the protection afforded those involved in the commitment should be the character of the proceeding. If the original proceeding was a full hearing in which the allegedly insane person had the opportunity to defend himself, an individual actually found insane should have resort to no action. Even one whose sanity was vindicated by the commitment hearing should have only a severely limited opportunity, if any, to bring an action. If, however, there was no opportunity for self-defense, if the court simply acted as a rubber stamp, the participants should receive no greater protection than is provided in nonjudicial proceedings.

Any proposed solution will inevitably be colored by one's predispositions in the area. For example, the man on the street undoubtedly would cringe from any law which would allow for the possibility that he might have no recourse against one who wrongfully commits him to a mental institution; a police officer or physician would be equally repulsed by the thought that they are subjecting themselves to civil liability whenever they try to have an individual committed for his own benefit.

When such important interests as mental health and personal liberty must be balanced, when such contradictory but legitimate views are widely held, it is obvious that there can be no absolute solution to the problems. However, it is not too much to ask of the courts that they, in considering any particular set of facts, recognize the central issues in these wrongful commitment actions and base their decisions on these factors alone.