THE LAW AND CERTIFYING PRACTITIONERS.

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Recent decisions in the Law Courts leave the law relating to improper or negligent certification in a very unsatisfactory position; and that not only from the point of view of the medical practitioner. The effect of the decision in *Harnett* v. *Fisher* ([1927] *Appeal Cases* 573) is that a person of sound mind who has been improperly certified as insane through the negligence of the certifying physician, and has as a result of that negligence been deprived of his liberty for a period exceeding six years during which it has been impossible for him to take legal proceedings, is by his failure to do so—in other words, by the very gravity of the wrong that he has suffered—deprived of any remedy for that wrong against the person to whose negligence it is traceable.

It seems clear that the framers of the Lunacy Act, 1890, contemplated (see s. 331, since repealed by the Public Authorities Protection Act, 1893) that in such a case time should run, not from the date of the original wrongful act, but from the release from detention of the injured party. And in the opinion of Lord Blanesburgh, differing from the majority of the House of Lords, that principle was kept alive by the later Act, with the substitution of six months for twelve as the period of limitation ([1927] A.C. at pp. 601, 602). And although, or rather because, Lord Blanesburgh's was a minority opinion, no fair-minded person can dispute that for the prevention of the hardship amounting to injustice which, upon the findings of the jury (and these for this purpose must be taken as correct), was inflicted in that case, some amendment in the law should be made when next the Lunacy Act, 1890, comes under review by the Legislature.

It must, further, be observed that a mere re-enactment of s. 331 would not be sufficient, since, in the opinion of the majority of the House (see the speech of Lord Sumner at p. 583), that section and the General Limitation Act (21 Jac. 1, c. 16, s. 3) were not mutually exclusive; so that an action would have had to be brought both within six years of the original wrong, and within twelve months of release. Moreover, it was expressly decided that the

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circumstances of that case were not within the purview of the Public Authorities Protection Act. (Whether they would have been within s. 331 was left undecided, though Lord Sumner's reasoning seems to apply equally to that section.) And a distinction was drawn (see *per* Lord Atkinson at p. 590) between a release mentioned in that Section and discharge consequent on escape. It follows that any re-enactment of s. 331 should clearly extend to actions not only for " anything done under " the Lunacy Act, but for any act, neglect or default in furtherance or for the purpose of anything intended to be done under it.

This matter has so far been considered from the point of view of the victim of wrongful detention, and with reference to circumstances of a very unusual character. From the point of view of the medical profession the law is yet more unsatisfactory, with results disastrous (quite apart from the need of provision for early treatment without certification) both to the public and to patients who may be a danger to themselves and to others, and in urgent need of protection.

Stated shortly, a medical practitioner called in to examine and, if satisfied that it is necessary, to certify an alleged lunatic, owes a duty to the latter to use due care, for breach of which he may be liable in damages. If, without using due care, he signs a certificate upon which the magistrate acts, and the patient is afterwards found to have been unjustifiably detained, his act is held to have been the cause of the detention and of the resulting damages. It seems to follow that he might also be held liable for damages for negligently refusing to certify, if consequently on such refusal the patient sustained some injury or injured someone else (*De Fréville* v. *Dill*, 96 Law Journal K.B. 1056, at pp. 1060, 1061, *per* McCardie, J.; *Everitt* v. *Griffiths* [1920], 3 *King's Bench*, at p. 196, *per* Scrutton, L. J.) In such a case he would at least incur the risk of public censure (see *Report of the Royal Commission*, p. 40).

Both the above fundamental propositions have been disputed and doubted by high authority. It has been said that the certifying physician owes no duty of due care to an alleged lunatic who has not called him in; and further, that even if he did, the detention which follows on a certificate is caused, not by the certificate or the doctor who gave it, but by the order of the magistrate acting in a judicial capacity. The authorities were collected in the above-cited case of *De Fréville* v. *Dill* by Mr. Justice McCardie, who, while evidently sympathizing with the views last stated, felt constrained by authority to refuse to give effect to them. It is, as he indicated, eminently desirable that the House of Lords should give an authoritative decision on both points.

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To the writer it seems difficult to believe that a medical practitioner owes no duty to an involuntary patient to use due care, when called in with a view to certification, since (in the words of McCardie, J., 96 L.J. K.B. at p. 1060) "it is plain that a surgeon who operates negligently on the body of a patient is liable in damages, though there is no contract between the patient and himself." It may be that the contrary view will ultimately be held to be the law; but it would offend the public conscience, and legislation to that effect would have small prospect of success. This was in effect the opinion of the Royal Commission on Lunacy (see p. 41 of their report).

On the other hand, the argument that not the certificate, but the Reception Order is the cause of detention, and therefore that damages caused by the detention are not the legal result of giving the certificate, has much force; and this conclusion seems almost to follow from the reasoning in the case of *Harnett* v. *Bond* ([1924] 2 K.B. 517; [1925] A.C. 669, 682). Indeed, it has been suggested that in view of s. 317 (2) of the Lunacy Act, 1890, the only available remedy for misstatement in a medical certificate may be by criminal proceedings (Lord Sumner [1927] A. C. at p. 584).

The Royal Commission, while expressing the view that the absolute privilege of a witness, involving complete immunity from civil proceedings for a medical practitioner who gave a certificate negligently or in bad faith, could not be defended, yet recognizes that "unless some relief is found for the situation without delay a break-down in the system is inevitable." And they suggest a shifting of the onus of proof by amendment of s. 330 (1) of the Lunacy Act, 1890, so that for the last words of that clause, "a person . . . shall not be liable . . . *if* such person has acted in good faith and with reasonable care," would be substituted "*unless* such person has acted in bad faith or without reasonable care," with a corresponding amendment to clause (2) as to a summary stay of proceedings.

It is to be feared that such an enactment would afford but little more security to the certifying physician than exists already. Where s. 330 (1) is pleaded, the plaintiff goes into court prepared with such evidence as he can gather to negative the plea, and in effect undertakes the onus that the proposed amendment would lay upon him; and few actions are brought in which a sufficient *primâ facie* case cannot be made out on affidavit evidence to prevent summary dismissal.

It has occurred to the writer that a useful analogy may be found in actions for "malicious prosecution." Here the plaintiff must *inter alia* prove three things: (1) That the prosecution failed—

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corresponding to proof that the patient was in fact sane; (2) malice—in other words bad faith; and (3) absence of reasonable and probable cause (*Laws of England*, Halsbury, xix, pp. 677–682). The last element, raising a mixed issue of law and fact, is for the judge to determine upon the facts as found by the jury—a circumstance which should lift it out of the atmosphere of sentiment and prejudice. It is suggested therefore that the proposed amendment should read somewhat as follows: "Unless such person has acted in bad faith or negligently, and without reasonable and probable cause," with, perhaps, a *proviso* that in the case of a trial with a jury, the issue of reasonable and probable cause should be determined by the judge upon the facts found by the jury. But it is believed that it would be unnecessary to provide expressly for this.

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