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Negation of Factors Upon Which Defendant-Psychiatrist's Judgment Was Premised Is Necessary to Establish Prima Facie Case of Medical Malpractice

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c. Should the parties seeking incorporation be dissatisfied with the town supervisor's determination, an appeal may be brought before a three-judge panel of the appellate division, which panel will decide whether the town supervisor's findings as to the above five factors are meritorious.

It is hoped that the legislature will recognize the inadequacy of present legislation, and will move to bridge the gap between the public policy need for comprehensive planning and the existing statutory scheme, which grants municipal corporation status irrespective of area-wide problems and concerns.

Ricardo H. Piedra

Negation of factors upon which defendant-psychiatrist's judgment was premised is necessary to establish prima facie case of medical malpractice

The well-settled principle that a physician may not be held liable for a mere error in medical judgment is circumscribed by a patient's corresponding right to receive adequate medical treatment. Accordingly, should a physician depart from acceptable

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medical practice, thereby causing injury to his patient, the patient may seek relief pursuant to a malpractice cause of action. Significantly, in order to establish a prima facie case of medical malpractice, the plaintiff must produce expert medical testimony in support of his allegations. In this regard, when expert testimony having a “reasonable degree of medical certainty” conflicts at trial, it is within the province of the jury to assess the credibility of


The proper foundation for eliciting expert testimony in a medical malpractice action is that the expert opinion be stated with a “‘reasonable degree of medical certainty.’” Ulma v. Yonkers Gen. Hosp., 53 App. Div. 2d 626, 627, 384 N.Y.S.2d 201, 203 (2d Dep’t 1976). But see DEFENSE RESEARCH INSTITUTE, THE RULE OF MEDICAL CERTAINTY: ANALYSIS AND APPLICATION 48-49 (1967) (in some cases the New York courts have accepted expert testimony that was less than definite). Rule 4515 of the CPLR addresses the question of reasonable medical certainty:

Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state his opinion and reasons, without first specifying the data upon which it is based. Upon cross-examination, he may be required to specify the data and other criteria supporting the opinion.

CPLR 4515 (1963).
Recently, however, in *Topel v. Long Island Jewish Medical Center*, the Court of Appeals deviated from this approach in the context of malpractice by a psychiatrist, holding that a prima facie case had not been established when the plaintiff's expert testimony failed to "negate the factors" upon which the defendant-psychiatrist had based his medical judgment. In *Topel*, the decedent had been admitted into Long Island Jewish Medical Center after having exhibited suicidal tendencies. Upon examination, Dr. Levinson, the hospital's attending psychiatrist, instructed that the patient be observed at 15-minute intervals. Shortly thereafter, while left alone in his room, the patient committed suicide. During the trial of the ensuing malpractice action, a medical expert testified, on behalf of the plaintiff, that the physician's failure to keep the patient under constant observation was a deviation from accepted medical practice. Con-
trary expert medical testimony was offered and the case was submitted to the jury, which returned a verdict in favor of the plaintiff. Act upon the defendants' motions, the trial court set aside the verdict and dismissed the complaint upon the ground that the plaintiff had failed to establish a prima facie case. The Appellate Division, Second Department, unanimously affirmed.

On appeal, the Court of Appeals affirmed in a memorandum decision. Noting that the distinction between professional judgment and good medical practice was not easily discernible, the Court held that a plaintiff must, through the use of expert testimony, negate the factors upon which a physician's judgment was made in order to establish a prima facie case of malpractice. A contrary holding, the Court posited, would subject every medical judgment made by a physician to the second-guess of a jury.

In a vigorous dissent, Judge Fuchsberg criticized the Court's

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179 Dr. Levinson testified that in treating the patient he had exercised that degree of skill possessed by the average physician in his specialty and had used his best judgment in prescribing the 15-minute intervals of observation. N.Y.L.J., Jan. 8, 1979, at 17, col. 6 (Sup. Ct. Queens County). He also called an expert witness who substantiated that his treatment had conformed to good medical practice. Id.

180 55 N.Y.2d at 685, 431 N.E.2d at 295, 446 N.Y.S.2d at 934 (Fuchsberg, J., dissenting in part).

181 N.Y.L.J., Jan. 8, 1979, at 18, col. 1 (Sup. Ct. Queens County). The defendants moved to set aside the jury verdict as based upon insufficient evidence, and renewed their motions to dismiss asserting that the plaintiff had failed to make out a prima facie case. In addition, each defendant moved pursuant to CPLR 4404 to set aside the verdict and to grant a judgment in favor of the defendants as a matter of law. Id. at 17, col. 5. Granting the defendants' motions, the trial court found that the jury's verdict could not have been reached by any fair reading of the testimony offered by the plaintiff's medical expert. Id. at 18, col. 1.

182 Topel v. Long Island Jewish Medical Center, 76 App. Div. 2d 862, 862, 428 N.Y.S.2d 507, 508 (2d Dep't 1980). Notably, although the appellate division affirmed the trial court's determination, it disagreed with the trial judge's analysis of the expert medical testimony and commented that the weight to be given to such testimony is solely within the province of the jury. Id.


184 55 N.Y.2d at 684-85, 431 N.E.2d at 294-95, 446 N.Y.S.2d at 933-34.

185 Id.
holding as departing from well-established legal doctrine. The dissent contended that the majority improperly had founded its decision upon an "aberrational" case, Centeno v. City of New York, in which the appellate division had held that, when there was conflicting expert testimony as to whether a doctor had exercised proper medical judgment, the plaintiff had failed to present a prima facie case. The dissent observed, moreover, that the Centeno decision had ignored a line of cases which had recognized a physician's duty to protect suicidal patients from hurting themselves. Finally, Judge Fuchsberg maintained that a prima facie case had been established in Topel because the plaintiff had produced the requisite "quantum" of proof necessary to raise a factual issue for presentation to the jury.

It is submitted that the Topel and Centeno decisions were ill-conceived and were borne of a misplaced, albeit commendable, desire to shield psychiatrists from unfounded malpractice claims. Concededly, the burgeoning number of such actions almost a decade ago properly resulted in measures which engender protection of medical practitioners from onerous malpractice liability and, concomitantly, restrain rapid increases in malpractice insurance premiums. Indeed, the legislature responded to the situation by

186 Id. at 685, 431 N.E.2d at 295, 446 N.Y.S.2d at 934 (Fuchsberg, J., dissenting in part).
188 See 48 App. Div. 2d at 813, 369 N.Y.S.2d at 710-11.
189 55 N.Y.2d at 696, 431 N.E.2d at 301, 446 N.Y.S.2d at 940 (Fuchsberg, J., dissenting in part).
190 Id. at 690, 431 N.E.2d at 298, 446 N.Y.S.2d at 957 (Fuchsberg, J., dissenting in part).
191 Statistics indicate that, in New York State, the number of medical malpractice suits rose from 407 in 1968 to 773 in 1973, an increase of nearly 90 percent. STATE OF NEW YORK, REPORT OF THE SPECIAL ADVISORY PANEL ON MEDICAL MALPRACTICE 241 (1976) [hereinafter cited as MEDICAL MALPRACTICE REPORT]. The substantial increase in medical malpractice claims has been attributed to technological developments, the fragmentation of medical care, the disintegration of the physician-patient relationship, and the increasing ease of recovery. M. SUMNER, THE DOLLARS AND SENSE OF HOSPITAL MALPRACTICE INSURANCE 12 (1979); see MEDICAL MALPRACTICE REPORT, supra, at 9-10. A medical malpractice "crisis" surfaced in late 1974 when the Argonaut Insurance Company announced its intention to raise malpractice insurance premiums by almost 200 percent. T. LOMBARDI, JR., MEDICAL MALPRACTICE INSURANCE 87 (1978). The prompt legislative intervention that ensued culminated in the enactment of chapter 109 of the New York Session Laws of 1975, which was "aimed to make malpractice less risky, and consequently less expensive, by reducing some claimants' rights." MEDICAL MALPRACTICE REPORT, supra, at 31; see Act of May 21,
enacting legislation which, _inter alia_, limits "medical malpractice action[s] based on lack of informed consent";\(^{192}\) reduces the medical malpractice statute of limitations from 3 years to 2 years and 6 months;\(^{193}\) establishes preferences with respect to court calendars;\(^{194}\) and codifies several evidentiary provisions.\(^{195}\)

The above measures, as part of a common legislative scheme, were better conceived and executed than the _Topel_ rule, and the _Centeno_ decision upon which it was founded,\(^{196}\) for it seems apparent that these two cases effectively and impermissibly forestall jury consideration of malpractice claims. The _Centeno_ decision largely undercut the jury function of resolving disputed questions of fact,\(^{197}\) by not permitting it to resolve a "[d]isagreement between

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192 Act of May 21, 1975, ch. 109, § 1, [1975] N.Y. Laws 135 (current version at N.Y. PUB. HEALTH LAW § 2805-d (McKinney 1977)). Section 2805-d of the Public Health Law specifically limits recovery on the basis of informed consent to cases involving nonemergency medical treatment or a diagnostic procedure which invades the integrity of the body. _Id._


194 Act of May 21, 1975, ch. 109, § 11, [1975] N.Y. Laws 138 (current version at CPLR 3403(a)(5) (McKinney Supp. 1981-1982)). This section of chapter 109 was enacted to give trial preference to medical malpractice suits. _Id._

195 E.g., Act of May 21, 1975, ch. 109, § 9, [1975] N.Y. Laws 137 (current version at CPLR 4401-a (McKinney Supp. 1981-1982)); Act of May 21, 1975, ch. 109, § 10, [1975] N.Y. Laws 137 (current version at CPLR 4010 (McKinney Supp. 1981-1982)). CPLR 4401-a provides for a judgment in favor of the defendant-physician, as a matter of law, when the action is founded upon a lack of informed consent and the plaintiff has failed to produce expert medical testimony in support of his position. CPLR 4010 permits the presentation of evidence to a jury to establish the plaintiff's recovery from collateral sources such as insurance, social security, worker's compensation, and other employee benefit programs.

196 The enactment of the 1975 medical malpractice legislation involved close to 6 months of investigation, negotiation, and debate. _See_ T. LOMBARDI, _supra_ note 191, at 88-97. Subsequent to its passage, Governor Carey formed the Special Advisory Panel on Medical Malpractice to examine the entire medical malpractice issue in New York and to monitor the effectiveness of the recent legislation. _Id._ at 99-100; MEDICAL MALPRACTICE REPORT, _supra_ note 191, at 1. It is partly for the lack of such monitoring devices and "penchants for factual investigation and experimentation" in the judiciary that Judge Fuchsberg, in his dissent, criticized the majority's approach in _Topel_. 55 N.Y.2d at 695-96, 431 N.E.2d at 301, 446 N.Y.S.2d at 940 (Fuchsberg, J., dissenting in part).

197 The United States Constitution provides that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII. Although there are instances when the distinction is not clear, it is well-established that the court's function is to decide questions of law, leaving factual determinations to be made by the jury. Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1934); Walker v. New Mexico & S. Pac. R.R., 165 U.S. 593, 596 (1897). Clearly, "[i]t is the exclusive province of the jury . . . to
professional experts." Ostensibly, the Centeno Court equates expert testimony with mere speculative evidence. Surely, such an approach is improper given that, traditionally, the two concepts have not been deemed equivalent. While the submission of expert testimony has been held sufficient, indeed necessary, to create a triable issue of malpractice liability, mere speculative evidence has been held insufficient to make out a prima facie case.


"To ensure that the standard of medical practice to which the expert testifies is accurate, it is necessary that the opinion evidence be based upon material facts contained in the record or upon information personally known by the witness. Cassano v. Hagstrom, 5 N.Y.2d 643, 646, 159 N.E.2d 348, 349, 187 N.Y.S.2d 1, 3 (1959); Cross v. Board of Educ., 49 App. Div. 2d 67, 70, 371 N.Y.S.2d 179, 182 (3d Dep't 1975); Cooke v. Bernstein, 45 App. Div. 2d 497, 500, 359 N.Y.S.2d 793, 796 (1st Dep't 1974); Fｌlanowicz v. Guarino, 27 App. Div. 2d 666, 666-67, 276 N.Y.S.2d 656, 657-58 (2d Dep't 1967). In this regard, the court may determine that a witness is not qualified to testify as an expert. Meiselman v. Crown Heights Hosp., Inc., 285 N.Y. 289, 398-99, 34 N.E.2d 367, 372 (1941); Morwin v. Albany Hosp., 7 App. Div. 2d 582, 586, 185 N.Y.S.2d 85, 89 (3d Dep't 1959); DeFalco v. Long Island College Hosp., 90 Misc. 2d 164, 166, 393 N.Y.S.2d 859, 861 (Sup. Ct. Kings County 1977). In addition, a court may rule that a witness' testimony is incredible as a matter of law. W. Richardson, supra note 197, § 123, at 98. Clearly, then, when a verdict of liability is based upon speculation it cannot stand and a judgment as a matter of law is appropriate. Taylor v. City of Yonkers, 105 N.Y. 202, 209-10, 11 N.E. 642, 644 (1887); Baudenbach v. Schwertfeger, 224 App. Div. 314, 318, 230 N.Y.S. 640, 646 (3d Dep't 1928). Absent the presence of mere speculative expert testimony, however, it is the jury's function to evaluate the experts' credibility. See notes 171 & 197 and accompanying text supra. In cases involving the conflict of medical testimony at trial, the conclusion of the jury can be disturbed only if it could not have been "reached by any fair interpretation of the evidence." Hale v. State, 53 App. Div. 2d 1025, 1025, 386 N.Y.S.2d 151, 152 (4th Dep't 1976); see Collins v. Wilson, 40 App. Div. 2d 750, 751, 337 N.Y.S.2d 541, 542 (4th Dep't 1972); cf. Blum v. Fresh Grown Preserve Corp., 292 N.Y. 241, 245, 54 N.E.2d 809, 811 (1944) (in an action to recover on a debt, a court can set aside a verdict if the evidence is wholly insufficient to sustain it); Bucek v. Meritt, 37 App. Div. 2d 905, 905, 325 N.Y.S.2d 584, 585 (4th Dep't 1971) (in tort action for injuries
A similar infringement upon the province of the jury results from the *Topel* holding. By definition, the Court’s “negation” standard amounts to retention, in the bench, of the power to decide the very essence of a malpractice controversy, namely, whether the defendant-physician’s actions deviated from an acceptable standard of care.\(^2\)\(^0\)\(^1\) It seems unclear, therefore, precisely what is left for the jury to decide. Consequently, it is urged that the Court abandon the *Centeno* and *Topel* rules in favor of the well-settled principle that a plaintiff who has produced expert medical testimony in support of his allegations establishes a prima facie case of malpractice.\(^2\)\(^0\)\(^2\)

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\(^{201}\) See 55 N.Y.2d at 684-85, 431 N.E.2d at 295, 446 N.Y.S.2d at 934.

\(^{202}\) See note 169 and accompanying text supra. It is further submitted that, at a minimum, the Court should be careful to restrict the *Centeno* and *Topel* holdings to instances of medical malpractice involving psychiatrists. In this regard, it is arguable that the “imprecise” nature of psychiatry, *Tarasoff* v. Regents of Univ. of Cal., 17 Cal. 3d 425, 451, 551 P.2d 334, 353-54, 131 Cal. Rptr. 14, 33-34 (1976) (Mosk, J., concurring and dissenting); People v. Burnick, 14 Cal. 3d 306, 325-27, 535 P.2d 352, 365-66, 121 Cal. Rptr. 488, 501-02 (1975); Comment, *Tort Liability of the Psychotherapist*, 8 U.S.F.L. Rev. 406, 409 (1973), justifies judicial reluctance to send conflicting expert testimony to a jury for resolution of the issue of psychiatric malpractice, at least with respect to suicidal patients. Of course, in the past, the New York courts have been willing to find a prima facie case of psychiatric malpractice when the evidence suggested that the patient’s self-inflicted suicidal act was foreseeable and there was a failure to guard against it. *See, e.g.*, Gries v. Long Island Home, Ltd., 274 App. Div. 938, 938, 83 N.Y.S.2d 728, 728 (2d Dep’t 1948); Robertson v. Charles B. Towns Hosp., 178 App. Div. 285, 288, 165 N.Y.S. 17, 18-19 (2d Dep’t 1917); Robinson v. State, 17 Misc. 2d 775, 777, 187 N.Y.S.2d 257, 259 (Ct. Cl. 1959); Callahan v. State, 179 Misc. 781, 784-85, 40 N.Y.S.2d 109, 112-13 (Ct. Cl.), aff’d, 266 App. Div. 1054, 46 N.Y.S.2d 104 (1943). Recognizing, however, that “[a]n ingenious patient harboring a steady purpose to take his own life cannot always be thwarted,” the courts have been reluctant to require 24-hour supervision. *Hirsch* v. State, 8 N.Y.2d 125, 127, 168 N.E.2d 372, 373, 202 N.Y.S.2d 296, 298 (1960); *Comiskey* v. State, 71 App. Div. 2d 699, 699, 418 N.Y.S.2d 233, 234 (3d Dep’t 1979); *Fernandez* v. State, 45 App. Div. 2d 125, 126, 355 N.Y.S.2d 708, 709-10 (3d Dep’t 1974). Moreover, the courts have hesitated to hold a physician liable upon the claim that a patient’s suicide was due to his premature release from a hospital or institution, and have reasoned that the imposition of liability under these circumstances would result in few patients being discharged from mental institutions. *See Fiederlein* v. City of New York Health & Hosps. Corp., 80 App. Div. 2d 821, 822, 437 N.Y.S.2d 321, 323 (1st Dep’t 1981); *Centeno* v. City of New York, 48 App. Div. 2d 812, 813, 369 N.Y.S.2d 710, 711 (1st Dep’t 1975), aff’d, 49 N.Y.2d 932, 358 N.E.2d 520, 389 N.Y.S.2d 837 (1976); *Taig* v. State, 19 App. Div. 2d 182, 183, 241 N.Y.S.2d 495, 496-97 (3d Dep’t 1963).