

## ABOLISHING THE SUICIDE RULE

*Alex B. Long*

**ABSTRACT**—Suicide is increasingly recognized as a public health issue. There are over 40,000 suicides a year in the U.S., making suicide the tenth-leading cause of death in the country. But societal attitudes on the subject remain decidedly mixed. Suicide is often closely linked to mental illness, a condition that continues to involve stigma and often triggers irrational fears and misunderstanding. For many, suicide remains an immoral act that flies in the face of strongly held religious principles. In some ways, tort law’s treatment of suicide mirrors the conflicting societal views regarding suicide. Tort law has long been reluctant to permit recovery in a wrongful death action from a defendant who is alleged to have caused the suicide of the decedent. In many instances, courts apply a strict rule of causation in suicide cases that has actually been dubbed “the suicide rule” in one jurisdiction. While reluctance to assign liability to defendants whose actions are alleged to have resulted in suicide still remains the norm in negligence cases, there has been a slight trend among court decisions away from singling out suicide cases for special treatment and toward an analytical framework that more closely follows traditional tort law principles. This Article argues that this trend is to be encouraged and that it is time for courts to largely abandon the special rules that have developed in suicide cases that treat suicide as a superseding cause of a decedent’s death.

**AUTHOR**—Doug Blaze Distinguished Professor of Law, University of Tennessee College of Law. Thanks to Charles Clark and Katie Dwyer for their research assistance.

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INTRODUCTION

Suicide has been a controversial topic for centuries. But in recent years, the subject has garnered increased public attention. A 2018 study released by the Centers for Disease Control and Prevention (CDC) reported that suicide rates increased in nearly every state between 1999 and 2016.<sup>1</sup> Suicide rates increased by over 30% in half of the states during this timeframe.<sup>2</sup>

While the suicide rate has increased for almost every age group,<sup>3</sup> suicide is the second-leading cause of death among people between the ages of 10 and 24.<sup>4</sup> The suicide rate for girls in particular between the ages of 10 and 14 has doubled over the past decade.<sup>5</sup> Media reports of school and cyber

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<sup>1</sup> Deborah M. Stone et al., *Vital Signs: Trends in State Suicide Rates — United States, 1999–2016 and Circumstances Contributing to Suicide — 27 States, 2015*, 67 MORBIDITY & MORTALITY WKLY. REP. 617, 617 (2018), <https://www.cdc.gov/mmwr/volumes/67/wr/mm6722a1.htm> [<https://perma.cc/NR98-CE7T>].

<sup>2</sup> *Id.*

<sup>3</sup> *See id.* at 618 (noting that suicide rates increased for every age group under the age of 75).

<sup>4</sup> Laura Kann et al., *Youth Risk Behavior Surveillance — United States, 2015*, 65 MORBIDITY & MORTALITY WKLY. REP. 1, 2 (2016), <https://www.cdc.gov/mmwr/volumes/65/ss/ss6506a1.htm> [<https://perma.cc/CHT5-YSJB>].

<sup>5</sup> The group with the second highest increase in the suicide rate is men between the ages of 45 and 64 (43%). *See* SALLY C. CURTIN ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, NAT’L CTR. FOR HEALTH STAT. DATA BRIEF: INCREASE IN SUICIDE IN THE UNITED STATES, 1999–2014, at 3 (2016), <https://www.cdc.gov/nchs/products/databriefs/db241.htm> [<https://perma.cc/QD69-NLXH>].

bullying resulting in suicide have increasingly horrified Americans.<sup>6</sup> According to a 2015 report from the CDC involving high school students, “15.5% had been electronically bullied, 20.2% had been bullied on school property, and 8.6% had attempted suicide.”<sup>7</sup>

Suicide is increasingly recognized as a public health issue.<sup>8</sup> There are over 40,000 suicides a year in the United States, making suicide the tenth-leading cause of death in the country.<sup>9</sup> Roughly 18% of those who commit suicide are veterans,<sup>10</sup> and the Department of Veterans Affairs estimates that twenty veterans commit suicide every day.<sup>11</sup> The risk of suicide cuts across

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<sup>6</sup> See Samantha Schmidt, *After Months of Bullying, Her Parents Say, A 12-Year-Old New Jersey Girl Killed Herself. They Blame the School.*, WASH. POST (Aug. 4, 2017), <https://www.washingtonpost.com/news/morning-mix/wp/2017/08/02/after-months-of-bullying-a-12-year-old-new-jersey-girl-killed-herself-her-parents-blame-the-school> [<https://perma.cc/9A5K-4Q5C>]. The case of Michelle Carter, who was convicted of involuntary manslaughter for encouraging her friend to commit suicide through a series of texts, shocked the public in 2017. Katharine Q. Seelye & Jess Bidgood, *Guilty Verdict for Young Woman Who Urged Friend to Kill Himself*, N.Y. TIMES (June 16, 2017), <https://www.nytimes.com/2017/06/16/us/suicide-texting-trial-michelle-carter-conrad-roy.html> [<https://perma.cc/92ZA-GSWS>].

<sup>7</sup> Kann et al., *supra* note 4, at 1.

<sup>8</sup> Sabrina Tavernise, *U.S. Suicide Rate Surges to a 30-Year High*, N.Y. TIMES (Apr. 22, 2016), <https://www.nytimes.com/2016/04/22/health/us-suicide-rate-surges-to-a-30-year-high.html> [<https://perma.cc/37FN-AMAT>].

<sup>9</sup> Melonie Heron, *Deaths: Leading Causes for 2014*, 65 NAT'L VITAL STAT. REP. 1, 1 (2016), [https://www.cdc.gov/nchs/data/nvsr/nvsr65/nvsr65\\_05.pdf](https://www.cdc.gov/nchs/data/nvsr/nvsr65/nvsr65_05.pdf) [<https://perma.cc/8FWL-AAB5>]; Gregg Zoroya, *40,000 Suicides Annually, Yet America Simply Shrugs*, USA TODAY, (published Oct. 9, 2014, 3:39 PM; updated Oct. 10, 2014, 9:45 AM), <https://www.usatoday.com/story/news/nation/2014/10/09/suicide-mental-health-prevention-research/15276353> [<https://perma.cc/QYJ2-RVUF>].

<sup>10</sup> OFFICE OF RESEARCH & DEV., U.S. DEP'T OF VETERANS AFFAIRS, *VA Research on Suicide Prevention*, <https://www.research.va.gov/topics/suicide.cfm> [<https://perma.cc/E2YX-BA4Y>].

<sup>11</sup> U.S. DEP'T OF VETERANS AFFAIRS, *VA Suicide Prevention Program: Facts About Veteran Suicide* (July 2016), [https://www.va.gov/opa/publications/factsheets/Suicide\\_Prevention\\_FactSheet\\_New\\_VA\\_Stats\\_070616\\_1400.pdf](https://www.va.gov/opa/publications/factsheets/Suicide_Prevention_FactSheet_New_VA_Stats_070616_1400.pdf) [<https://perma.cc/H3EL-JTY5>].

any number of demographic lines, including race/ethnicity,<sup>12</sup> socioeconomic status,<sup>13</sup> and sexual orientation.<sup>14</sup>

Just as the risk of suicide cuts across demographic lines, societal attitudes toward suicide are remarkably heterogeneous. Several studies have shown disparities between men and women when it comes to their views as to the acceptability of suicide.<sup>15</sup> Geographic, socioeconomic, political, and religious differences have also been shown to influence attitudes toward suicide.<sup>16</sup>

One reason for this divergence of views is that suicide raises complicated and deeply personal issues. Suicide is often closely linked to mental illness,<sup>17</sup> a condition that continues to attract stigma and often triggers

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<sup>12</sup> American Indians and Alaska Natives have the highest suicide rate in the United States, followed by Caucasians. The rate among African Americans is significantly lower. AM. FOUND. FOR SUICIDE PREVENTION, *Suicide Statistics*, <https://afsp.org/about-suicide/suicide-statistics> [<https://perma.cc/7AMM-PESH>] (citing CDC numbers).

<sup>13</sup> According to a World Health Organization study, “75 percent of suicides occur in low- and middle-income countries.” See Tanya Basu, *The New Demographics of Suicide*, ATLANTIC (Sept. 11, 2014), <https://www.theatlantic.com/health/archive/2014/09/the-new-demographics-of-suicide/379961> [<https://perma.cc/33ZM-HMK9>] (citing WORLD HEALTH ORG., PREVENTING SUICIDE: A GLOBAL IMPERATIVE 11 (2014), [http://apps.who.int/iris/bitstream/handle/10665/131056/9789241564779\\_eng.pdf](http://apps.who.int/iris/bitstream/handle/10665/131056/9789241564779_eng.pdf) [<https://perma.cc/A3BD-NUB4>]). One study of suicides in Fulton County, Georgia, found that those who committed suicide “tended to live in lower income areas compared with the general population of Fulton County.” David C. Purselle et al., *Differential Association of Socioeconomic Status in Ethnic and Age-Defined Suicides*, 167 PSYCHIATRY RES. 258, 260 (2009).

<sup>14</sup> See Michael J. Higdon, *Queer Teens and Legislative Bullies: The Cruel and Invidious Discrimination Behind Heterosexist Statutory Rape Laws*, 42 U.C. DAVIS L. REV. 195, 223 (2008) (summarizing studies showing greater incidence and risk of suicide among LGBT youth); Stephen T. Russell & Kara Joyner, *Adolescent Sexual Orientation and Suicide Risk: Evidence From a National Study*, 91 AM. J. PUB. HEALTH 1276, 1278 (2001) (reporting results of survey finding “that youths with same-sex orientation are more than 2 times more likely than their same-sex peers to attempt suicide”); Jamiles Lartey, *Risk of Poverty and Suicide Far Higher Among Transgender People, Survey Finds*, GUARDIAN (Dec. 8, 2016, 3:22 PM), <https://www.theguardian.com/society/2016/dec/08/transgender-survey-suicide-poverty-unemployment-mental-health> [<https://perma.cc/HA66-276C>] (reporting results of survey finding that 40% of transgender individuals surveyed “said they had attempted suicide in their life, almost nine times the US overall attempted suicide rate”).

<sup>15</sup> Judith M. Stillion & Bethany D. Stillion, *Attitudes Toward Suicide: Past, Present and Future*, 38 OMEGA 77, 81–82 (1999).

<sup>16</sup> *Id.* at 82–83. Age may also play a role. See Benedict Carey, *How Suicide Quietly Morphed into a Public Health Crisis*, N.Y. TIMES (June 8, 2018), <https://www.nytimes.com/2018/06/08/health/suicide-spade-bordain-cdc.html> [<https://perma.cc/XDB5-ETNG>] (quoting physician as saying that “[w]e are seeing somewhat more tolerant attitudes toward suicide” among younger people).

<sup>17</sup> One frequently cited statistic is that 90% of suicide cases involve mental illness. Zoroya, *supra* note 9. This figure remains subject to dispute. See SUSAN STEFAN, RATIONAL SUICIDE, IRRATIONAL LAWS 101 (2016) (stating that this figure is “based on bad science, and the best researchers and most famous suicidologists acknowledge it”). But the research does suggest that those with mental health issues have higher rates of suicide than the general population. See OFFICE OF THE SURGEON GEN., U.S. DEP’T OF HEALTH & HUMAN SERVS., 2012 NATIONAL STRATEGY FOR SUICIDE PREVENTION: GOALS AND OBJECTIVES FOR ACTION 101 (2012), <https://www.surgeongeneral.gov/library/reports/national-strategy->

irrational fears and misunderstandings.<sup>18</sup> For many, suicide remains an immoral act that flies in the face of strongly held religious principles.<sup>19</sup> Others simply view those who die by suicide as being selfish or weak.<sup>20</sup> Still others view suicide as a tragic and preventable outcome,<sup>21</sup> or in some instances, a matter of rational, individual choice.<sup>22</sup>

In some ways, tort law's treatment of suicide mirrors the conflicting societal views regarding suicide. Tort law has long been reluctant to permit recovery in a wrongful death action from a defendant who is alleged to have caused the suicide of the decedent. In many instances, courts apply a strict rule of causation in suicide cases that has actually been dubbed "the suicide rule" in one jurisdiction.<sup>23</sup> Courts have rested their conclusions on a variety of grounds, but many of the decisions reveal a fundamental unease with the idea of assigning responsibility to defendants in such cases.<sup>24</sup> This is true even where the defendant is alleged to have engaged in intentional

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suicide-prevention/full-report.pdf [https://perma.cc/65X4-6GCT] (listing those with mental health conditions as being at greater risk of suicide); Jennifer M. Boggs et al., *General Medical, Mental Health, and Demographic Risk Factors Associated with Suicide by Firearm Compared with Other Means*, 69 PSYCHIATRIC SERVS. 677, 679 (2018) (reporting results of study finding that 61% of suicide deaths involved at least one mental disorder, "with the highest prevalence for alcohol use, anxiety, depression, and sleep disorders," and that over half of suicides studied involved individuals who had a psychiatric disorder diagnosed in the year prior to suicide death).

<sup>18</sup> See Susan D. Carle, *Analyzing Social Impairments Under Title I of the Americans with Disabilities Act*, 50 U.C. DAVIS L. REV. 1109, 1172 (2017) (noting that "persons with social impairments [including mental illness] face the problem of stigma"); John V. Jacobi, *Mental Illness: Access and Freedom*, 16 HOUS. J. HEALTH L. & POL'Y 37, 39 (2016) (noting the historical stigmatization of people with mental disorders and the accompanying consequences); Debbie N. Kaminer, *Mentally Ill Employees in the Workplace: Does the ADA Amendments Act Provide Adequate Protection?*, 26 HEALTH MATRIX 205, 217 (2016) (discussing the perception among some that mental illness is a character defect); Wayne Edward Ramage, *The Pariah Patient: The Lack of Funding for Mental Health Care*, 45 VAND. L. REV. 951, 951 (1992) ("Anglo-American society historically has viewed the mentally ill as outsiders."); Elizabeth A. McGuan, Note, *New Standards for the Involuntary Commitment of the Mentally Ill: "Danger" Redefined*, 11 MARQ. ELDER'S ADVISOR 181, 184 (2009) ("To be labeled 'mentally ill' means to be included in a group that has been viewed with aversion and fear throughout history.").

<sup>19</sup> See Stillion & Stillion, *supra* note 15, at 80 ("Some voices still speak of suicide as sin . . .").

<sup>20</sup> See Stephanie Chandler, *Please Don't Give Up*, WASH. POST (June 8, 2018), [https://www.washingtonpost.com/opinions/please-dont-give-up/2018/06/08/b3cb84aa-6b42-11e8-bf8c-f9ed2e672adf\\_story.html](https://www.washingtonpost.com/opinions/please-dont-give-up/2018/06/08/b3cb84aa-6b42-11e8-bf8c-f9ed2e672adf_story.html) [https://perma.cc/6YYL-5JG8] (noting the view among some that suicide is a selfish act).

<sup>21</sup> Karl Rove, *My Mom's Suicide Was Preventable*, WALL ST. J. (June 13, 2018, 6:30 PM), <https://www.wsj.com/articles/my-moms-suicide-was-preventable-1528929056> [https://perma.cc/V4UB-NNJX].

<sup>22</sup> See Stillion & Stillion, *supra* note 15, at 80 ("[O]thers view it as a rational, individual choice, perhaps even a right."); Paula Span, *A Debate Over 'Rational Suicide'*, N.Y. TIMES (Aug. 31, 2018), [www.nytimes.com/2018/08/31/health/suicide-elderly.html](http://www.nytimes.com/2018/08/31/health/suicide-elderly.html) [https://perma.cc/P8XN-V8U2] (discussing the notion of "rational suicide" in the context of suicide among older adults).

<sup>23</sup> See *infra* notes 121–22 and accompanying text.

<sup>24</sup> See generally STEFAN, *supra* note 17, at 12–13 ("The law has always assumed that people are legally responsible for their suicides and suicide attempts . . .").

wrongdoing as opposed to mere negligence and in some cases where the defendant intended to inflict severe emotional distress.<sup>25</sup> As this Article explains, this majority approach to wrongful death cases involving suicide reflects a straight line from nineteenth-century American judicial decisions, which themselves have as their origin English law from the Middle Ages.<sup>26</sup> These older decisions are based on the then-prevailing views regarding morality and mental illness. While reluctance to assign liability to defendants whose actions are alleged to have resulted in suicide still remains the norm in negligence cases, there has been a slight trend among court decisions away from singling out suicide cases for special treatment and toward an analytical framework that more closely follows traditional tort law principles.<sup>27</sup>

This Article argues that this trend is to be encouraged and that it is time for courts to largely abandon the special rules that have developed in suicide cases that mechanically treat suicide as a superseding cause of a decedent's death. Part I describes the historical views regarding suicide in Europe dating back to the Middle Ages that helped to shape American attitudes and law. Part II discusses tort law's treatment of suicide, most notably the special rules regarding proximate cause and insanity that have developed in negligence cases. Drawing upon studies into the causes and predictors of suicide, Part III analyzes the shortcomings of these special rules. Finally, Part IV argues for an approach based on traditional tort law principles that recognizes suicide as a public health problem while also taking into account the special nature of suicide.

## I. HISTORICAL SOCIETAL VIEWS REGARDING SUICIDE

Societal views regarding suicide are ever-changing. The ancient Greeks were divided as to the acceptability of the practice.<sup>28</sup> Roman attitudes were generally more favorable, but still divided.<sup>29</sup> As societal attitudes toward suicide have changed over time, so too has the law regarding the subject. The following Part examines the evolving societal and legal views on the subject of suicide to the present.

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<sup>25</sup> See *infra* notes 193–232 and accompanying text.

<sup>26</sup> See *infra* notes 78–104 & 115–23 and accompanying text.

<sup>27</sup> See *infra* notes 310–61 and accompanying text.

<sup>28</sup> See GEORGE MINOIS, HISTORY OF SUICIDE: VOLUNTARY DEATH IN WESTERN CULTURE 43–46 (Lydia G. Cochrane trans., Johns Hopkins Univ. Press 1999) (1995) (summarizing competing schools of thought).

<sup>29</sup> *Id.* at 46–47.

A. *Societal Views on Suicide and Mental Illness in England Through the Enlightenment*

1. *The Middle Ages*

During the Middle Ages, suicide was viewed “as the result of diabolic temptation induced by despair or as mad behavior.”<sup>30</sup> Accordingly, one who took his own life was subject to public scorn.<sup>31</sup> The corpse of the decedent was subjected to such punishments as being dragged through the streets, tortured, or hanged.<sup>32</sup> Popular plays and works of fiction of the era portrayed suicide as sinful and “the result of a despair inspired by the devil.”<sup>33</sup> Those who committed suicide were, in the words of St. Bruno, “Satan’s martyrs.”<sup>34</sup>

Religion heavily influenced societal views regarding suicide during this time. The biblical commandment “Thou shalt not kill” provided the basis for Christianity’s strong condemnation of suicide.<sup>35</sup> St. Augustine’s book *The City of God*, published in the fifth century, took an unequivocal stance against suicide.<sup>36</sup> According to Augustine, suicide was never justified, whether it be the result of a desire “to escape from temporal difficulties” or to avoid rape.<sup>37</sup> Augustine’s work influenced the Christian edicts that followed, including the denial of Christian burial rites for those who committed suicide and the excommunication of those who attempted suicide.<sup>38</sup> Writing in the thirteenth century, St. Thomas Aquinas explained that since life is a gift from God, “God alone has authority to decide about life and death.”<sup>39</sup> Suicide, then, amounted to an offense against God.<sup>40</sup>

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<sup>30</sup> *Id.* at 9.

<sup>31</sup> Interestingly, class played a role in how suicide was viewed, according to one account. A noble’s suicide, “whether he sacrificed himself for the cause he was defending or killed himself for love, in a fit of anger, or because he was afflicted by madness, was seen as altruistic. In all cases, it was excusable.” *Id.* at 16. In contrast, the peasant’s suicide was viewed as an act “born of egotism and cowardice” and an attempt to escape his responsibilities. *Id.*

<sup>32</sup> *Id.* at 7. In one case, the decedent’s body was ordered to be carried “to some cross way” and have a stake driven through her breast and buried so that the stake could be seen as a warning to others against suicide. HOWARD I. KUSHNER, SELF-DESTRUCTION IN THE PROMISED LAND: A PSYCHOCULTURAL BIOLOGY OF AMERICAN SUICIDE 18–19 (1989).

<sup>33</sup> MINOIS, *supra* note 28, at 13.

<sup>34</sup> *Id.* at 32.

<sup>35</sup> *See id.* at 27.

<sup>36</sup> *See id.*; GEORGE HOWE COLT, THE ENIGMA OF SUICIDE 157 (1991).

<sup>37</sup> MINOIS, *supra* note 28, at 27–28 (quoting ST. AUGUSTINE, THE CITY OF GOD, BOOKS I–IV, at 61 (Demetrius B. Zema & Gerald G. Walsh trans., Fathers of the Church 1950)).

<sup>38</sup> *See* COLT, *supra* note 36, at 158.

<sup>39</sup> *Id.* at 159 (quoting 38 ST. THOMAS AQUINAS, SUMMA THEOLOGIAE: INJUSTICE 33 (Marcus Lefébure ed. & trans., Blackfriars 1975)).

<sup>40</sup> *See id.*

At the time, the act of suicide was often attributed to insanity, with the decedent having succumbed to melancholia or “frenesy” (frenzy).<sup>41</sup> But mental illness itself was also closely linked to sin in medieval thinking. In the early Middle Ages, mental illness was often viewed as the result of sinfulness or demonic possession.<sup>42</sup> And even into the later Middle Ages, mental illness was sometimes attributed to possession.<sup>43</sup>

During the later Middle Ages, mental illness was usually attributed to physiological causes.<sup>44</sup> The prevailing theory was that there were four humours—blood, phlegm, yellow bile, and black bile—that influenced human behavior. An abnormality in any of them could produce mental disorder. For example, black bile was associated with melancholy, so an excess of black bile could produce what today would most likely be diagnosed as schizophrenia or depression.<sup>45</sup> “Frenzy” was caused by yellow bile, resulting in an overheating of the brain.<sup>46</sup> Treatment ranged from herbal remedies to exorcism.<sup>47</sup>

## 2. *The Enlightenment*

The idea that the devil was responsible for suicide was still somewhat common at the dawn of the eighteenth century.<sup>48</sup> But European attitudes toward suicide were also gradually evolving and loosening somewhat around

<sup>41</sup> MINOIS, *supra* note 28, at 38.

<sup>42</sup> *See id.* at 30 (“In the Anglo-Saxon penitentials of the eighth and ninth centuries, only the insane or the possessed are excused from punishment for suicide, and then only if they had lived honorably before falling into the clutches of the devil.”). There was a distinction at the time between those who were born with some type of mental impairment (known as fools or idiots) and those who became mentally incompetent (or “insane”) later. *See* Wendy J. Turner, *Mental Incapacity and the Financing of War in Medieval England*, in *THE HUNDRED YEARS WAR (PART II): DIFFERENT VISTAS* 387, 388 (L.J. Andrew Villalon & Donald J. Kagay eds., 2008).

<sup>43</sup> *See* Simon Kemp, *Modern Myth and Medieval Madness: Views of Mental Illness in the European Middle Ages and Renaissance*, 14 *N.Z. J. PSYCHOL.* 1, 5 (1985) (noting that Thomas Aquinas, writing in the thirteenth century, viewed possession as one form of insanity). Witchcraft was also believed to be the cause of some mental illness. *See* Richard Neugebauer, *Mental Handicap in Medieval and Early Modern England: Criteria, Measurement and Care*, in *FROM IDIocy TO MENTAL DEFICIENCY: HISTORICAL PERSPECTIVES ON PEOPLE WITH LEARNING DISABILITIES* 22, 22 (David Wright & Anne Digby eds., 1996) (citations omitted). Some historians have argued that the extent to which madness was attributed to sin and the supernatural in general in medieval times has been overstated. *See* Jerome Kroll & Bernard Bachrach, *Sin and Mental Illness in the Middle Ages*, 14 *PSYCHOL. MED.* 507, 507 (1984).

<sup>44</sup> Kemp, *supra* note 43, at 5 (discussing medieval notions of mental illness and noting that the English legal records from the thirteenth century forward often identified the causes of insanity as physical).

<sup>45</sup> *See id.* (discussing the humours theory of mental imbalance).

<sup>46</sup> *See* Claire Trener & Peregrine Horden, *Madness in the Middle Ages*, in *THE ROUTLEDGE HISTORY OF MADNESS AND MENTAL HEALTH* 62, 67 (Greg Eghigian ed., 2017).

<sup>47</sup> *See* Kemp, *supra* note 43, at 6.

<sup>48</sup> *See* MINOIS, *supra* note 28, at 191 (“[B]elief in the intervention of the devil had not completely disappeared from either the popular mind or religious attitudes.”).

this time.<sup>49</sup> There still remained strong opposition to the practice, but the Enlightenment led to increased debate in philosophical and popular works concerning the morality of suicide.<sup>50</sup> Importantly, it was during this era that suicide became identified more as a physiological concern than a moral or religious one.<sup>51</sup> While some of the treatments for mental illness and suicidal tendencies seem odd by twenty-first-century standards, there was at least a general recognition that there were physiological causes for the conditions.<sup>52</sup> As suicide became less associated with sin and more with insanity, there were also increased calls to decriminalize suicide in the second half of the eighteenth century.<sup>53</sup>

This increased focus on physiological explanations for mental illness also apparently led to an increased focus on the concept of insanity and its supposed connection to suicide. As the number of people committed to asylums and “madhouses” increased during the eighteenth century,<sup>54</sup> the perception that insanity was closely connected to suicide grew. The fact that a dead person had a history of institutionalization or treatment for mental illness often led to a finding of suicide, “no matter how frail the other evidence was.”<sup>55</sup> The connection between suicide and insanity solidified during this time to the point that “[a] majority of intellectuals . . . thought that madness was a component in most suicides.”<sup>56</sup> By the end of the eighteenth century, the typical finding in suicide cases in England was that the decedent suffered from insanity at the time.<sup>57</sup>

### *B. Societal Views on Suicide and Mental Illness in the United States Through the Present*

The Puritans initially brought with them to the New World the view that those who committed suicide had given in to Satan’s temptations.<sup>58</sup> Thus, those who committed suicide were deemed sinners and denied a Christian

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<sup>49</sup> *Id.* It was also around this time that the word “suicide” began to be used. *Id.* at 181.

<sup>50</sup> *See id.* at 241 (explaining the trend “toward the idea that suicide was a result of madness or physiological malfunction,” which “helped to relieve suicide of guilt”).

<sup>51</sup> *Id.*

<sup>52</sup> For example, one theory attributed mental illness to the influence of the moon on the atmosphere, which could cause derangement of the brain. *Id.* Possible treatments for melancholia included showers, chimney soot, and wood lice. *Id.* at 244.

<sup>53</sup> *Id.* at 245; *see also id.* at 295–96 (discussing attitudes in France).

<sup>54</sup> *Id.* at 245. According to one source, “people of the eighteenth century had the decided impression that the insane had increased in number.” *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *See* KUSHNER, *supra* note 32, at 28.

<sup>58</sup> *Id.* at 15, 21.

burial.<sup>59</sup> But the American colonies were developing at a time when European attitudes were also evolving. So, while the Massachusetts Bay Colony originally refused to recognize insanity as a defense to a charge of suicide, the neighboring Providence Plantations declared that “a lunatic, mad or distracted man” could not be convicted.<sup>60</sup> By the end of the seventeenth century, the Rhode Island view was more in keeping with the view in England and other colonies that mental illness provided an excuse for the otherwise wrongful nature of the act of suicide.<sup>61</sup>

As the country grew during the eighteenth and nineteenth centuries, suicide became increasingly linked with insanity. An 1844 article appearing in *The American Journal of Insanity* advised that in most cases of suicide, “the individual was known to be melancholy, and partially insane.”<sup>62</sup> The best course of care for individuals who were “reserved and melancholy” and had lost affection for family and business was “a residence in a well-directed Lunatic Asylum—for usually such persons need medical treatment.”<sup>63</sup> According to one source, by the 1840s, “expert opinion concerning the etiology of suicide became the province of that small group of physicians charged with administering asylums for the insane.”<sup>64</sup>

Gradually, new theories as to the causes of suicide emerged.<sup>65</sup> The medical field continued to debate the causes of suicide and the extent to which insanity was associated with suicide throughout the rest of the nineteenth century. The field of neurology eventually developed toward the end of the century, further influencing study of the issue.<sup>66</sup>

As scientific views regarding the causes of suicide became more sophisticated, the American public’s views on the subject became more diverse. Suicide is still often linked with mental illness in the minds of many Americans,<sup>67</sup> and mental illness remains a stigmatic condition in our

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<sup>59</sup> *Id.* at 21.

<sup>60</sup> *Id.* at 22–23.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 35.

<sup>63</sup> *Id.* at 35–36.

<sup>64</sup> *Id.* at 37.

<sup>65</sup> *See id.* at 42–51 (discussing theories). Émile Durkheim’s 1897 work *Suicide* was widely viewed as an important step in the understanding of suicide for its argument that suicide may be caused by multiple social factors and not simply physiological ones. *See generally id.* at 2–3 (discussing the importance of Durkheim’s work).

<sup>66</sup> *See generally* KUSHNER, *supra* note 32, at 51–52 (discussing the medical field’s views regarding suicide during this time).

<sup>67</sup> *See* Alan H. Marks, *Historical Suicide*, in 1 HANDBOOK OF DEATH & DYING 309, 316 (Clifton D. Bryant et al. eds., 2003) (citing results of a survey).

society.<sup>68</sup> Some also continue to view suicide as immoral.<sup>69</sup> But researchers have found that societal attitudes can vary dramatically depending upon one's religious beliefs, geographic location, and other factors.<sup>70</sup> Overall, however, it seems clear that Americans have become more tolerant of suicide in terms of its morality.<sup>71</sup> For example, in 1950, only 36% of Americans believed that a doctor should be allowed to end a patient's life by painless means if the patient has a disease that cannot be cured and the patient requests it.<sup>72</sup> By 2016, that number had risen to almost 70%.<sup>73</sup> Americans also increasingly view individuals as having a moral right to take their own lives in some circumstances. A 2013 Pew Research Center poll found that 56% of respondents believed an individual has a moral right to take his or her own life where the individual has an incurable disease.<sup>74</sup> Sixty-two percent of respondents believed such a moral right exists if an individual is suffering great pain and has no hope for improvement.<sup>75</sup> These numbers reflect a 7% increase just from 1990.<sup>76</sup> At the same time, there is evidence that Americans are less tolerant of suicide where the reason is that the decedent suffers from depression or chronic pain as opposed to an incurable disease.<sup>77</sup>

### C. *The Law's View of Suicide and Mental Illness*

#### 1. *Early Legal Views in the United States*

Judicial decisions involving suicide reflect a similar evolution in thinking in the United States. Surveying legal history, the Supreme Court observed in *Washington v. Glucksberg* that “for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide.”<sup>78</sup> For example, a sixteenth-century British decision declared suicide to be a felony because it is an offense

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<sup>68</sup> See *supra* note 18 and accompanying text.

<sup>69</sup> See Marks, *supra* note 67, at 316.

<sup>70</sup> See *supra* note 16 and accompanying text; see also Marks, *supra* note 67, at 316.

<sup>71</sup> See Marks, *supra* note 67, at 316.

<sup>72</sup> Art Swift, *Euthanasia Still Acceptable to Solid Majority in U.S.*, GALLUP (June 24, 2016), <http://www.gallup.com/poll/193082/euthanasia-acceptable-solid-majority.aspx> [<https://perma.cc/5QVA-EQQS>] (reporting results of Gallup poll).

<sup>73</sup> *Id.*

<sup>74</sup> PEW RESEARCH CTR., *Views on End-of-Life Medical Treatments, Chapter 2: Views on the Morality of Suicide* (Nov. 21, 2013), <http://www.pewforum.org/2013/11/21/chapter-2-views-on-the-morality-of-suicide> [<https://perma.cc/64JP-CYEA>].

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Stillion & Stillion, *supra* note 15, at 83.

<sup>78</sup> 521 U.S. 702, 711 (1997).

“against nature, against God, and against the King.”<sup>79</sup> Blackstone famously described suicide as “[s]elf-[m]urder, the pretended heroism, but real cowardice, of the Stoic philosophers who destroyed themselves to avoid those ills which they had not the fortitude to endure.”<sup>80</sup> Blackstone explained the felonious nature of suicide, in part, as an offense against the king (“who hath an interest in the preservation of all his subjects”), and, in part, against God (in that suicide “invad[es] the prerogative of the Almighty, and rush[es] into his immediate presence uncalled for”).<sup>81</sup> English common law even carved out a special punishment for those who took their own lives. If sane, the decedent’s act was a crime (*felo de se*) and his personal property was confiscated; if the decedent was determined to be insane (*non compos mentis*), there was no forfeiture.<sup>82</sup>

This view of suicide as a felony originally carried over into Colonial American law. A majority of colonies retained the common law classification of suicide as a felony.<sup>83</sup> Some colonies also carried over the forfeiture provisions of English common law.<sup>84</sup> But, notably, colonies also increasingly recognized insanity as an excuse for suicide. Even in Puritan Massachusetts, coroners attempted to divine whether the decedent “knew the consequences of the act” and thus “*voluntarily and feloniously*, as a felon, of himself[] did kill and murder himself[].”<sup>85</sup> By the end of the eighteenth century, most of the colonies had decriminalized suicide and rejected forfeiture provisions based on the harsh impact on the families of those who

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<sup>79</sup> Hales v. Petit (1562) 75 Eng. Rep. 387, 400 (QB).

<sup>80</sup> Tate v. Canonica, 5 Cal. Rptr. 28, 31–32 (Ct. App. 1960) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES 189 (8th ed. 1778)).

<sup>81</sup> *Id.*

<sup>82</sup> See *Glucksberg*, 521 U.S. at 711–12 (summarizing the law); KUSHNER, *supra* note 32, at 18–19 (discussing the role of insanity). During the sixteenth century in England, the vast majority of cases involving suicide resulted in a finding that the decedent was responsible for his actions. MINOIS, *supra* note 28, at 62. The fact that forfeiture was a lucrative source of income for the Crown and that the coroners in suicide cases received compensation for every verdict of suicide perhaps explain this outcome. See *also id.* (discussing relevant laws at the time and postulating “that an entire branch of the royal administration, from the local coroner to the king’s almoner, had an interest in a strict application of the laws on suicide”).

<sup>83</sup> See Suzanne M. Alford, Note, *Is Self-Abortion a Fundamental Right?*, 52 DUKE L.J. 1011, 1027 (2003) (“The colonies of Virginia, North Carolina, South Carolina, Georgia, New Hampshire, New York, and Maryland all accepted the English common law’s treatment of suicide as a punishable crime.”).

<sup>84</sup> *Glucksberg*, 521 U.S. at 712–13.

<sup>85</sup> KUSHNER, *supra* note 32, at 25 (quoting Massachusetts law). Notably, “[s]uicide remained a crime in Massachusetts until the late nineteenth century.” *Id.* at 29. According to one source, juries often stretched to conclude that suicide was the result of insanity so as to avoid the harsh effects of forfeiture. See STEFAN, *supra* note 17, at 14.

committed suicide.<sup>86</sup> But the moral and (to a lesser extent) legal disapproval of suicide continued into the nineteenth century.<sup>87</sup>

As the nineteenth century progressed, suicide was less frequently deemed a crime.<sup>88</sup> But the special legal issues raised by suicide persisted. Issues related to suicide most commonly came up in the context of insurance cases in which a family sought to collect on an insurance policy covering a decedent who had committed suicide.<sup>89</sup> While the language in the contracts varied, they uniformly prohibited recovery where the insured committed suicide. The legal principle that typically emerged from these decisions (as well as British decisions around the same time<sup>90</sup>) was that the decedent's suicide voided the right to collect insurance proceeds unless the decedent's insanity prevented the decedent from understanding the consequences of his actions or the decedent was compelled by an insane impulse he could not resist.<sup>91</sup> Drawing upon the criminal law, some courts explained that the act of taking one's own life was not truly "suicide" if the decedent was insane.<sup>92</sup> If that were the case, recovery under an insurance policy could be permitted.

This, in turn, led to a question as to the definition of insanity. Under the famed *M'Naghten* rule in the criminal context, to establish the defense of insanity, the criminal defendant had to establish that the defendant did not understand the nature or quality of the criminal act, or if he did, that he did not know the act was wrong.<sup>93</sup> In the insurance policy cases, some courts took the position that if the decedent could not understand the moral implication of the act of taking his own life—if he could not distinguish between right and wrong—the decedent was insane and his act did not

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<sup>86</sup> See *MINOIS*, *supra* note 28, at 297; see also *Glucksberg*, 521 U.S. at 713 (“[T]he movement away from the common law’s harsh sanctions . . . reflected the growing consensus that it was unfair to punish the suicide’s family for his wrongdoing.”); *KUSHNER*, *supra* note 32, at 30 (“[B]y the later eighteenth century, jurisdictions from Massachusetts to Virginia” had started to “accept the notion that suicide was an act whose commission was itself sufficient punishment”). Suicide was not formally decriminalized in England until 1961. Suicide Act, 1961, 9 & 10 Eliz. 2 c. 60.

<sup>87</sup> See *Glucksberg*, 521 U.S. at 712–14 (discussing history); *KUSHNER*, *supra* note 32, at 26 (“Some Massachusetts Protestants continued to connect suicidal thoughts with diabolical temptation far into the eighteenth century . . .”).

<sup>88</sup> George P. Smith, II., *All’s Well That Ends Well: Toward a Policy of Assisted Rational Suicide or Merely Enlightened Self-Determination?*, 22 U.C. DAVIS L. REV. 275, 290 (1989).

<sup>89</sup> *Life Ins. Co. v. Terry*, 82 U.S. 580, 584–88 (1872); *Dean v. Am. Mut. Life Ins. Co.*, 86 Mass. (4 Allen) 96, 107–08 (1862); *Breasted v. Farmers’ Loan & Tr. Co.*, 8 N.Y. 299, 308–09 (1853).

<sup>90</sup> *Clift v. Schwabe* (1846) 136 Eng. Rep. 175, 175 (CP) (cited in *Daniels v. New York, N.H. & H.R. Co.*, 67 N.E. 424, 425 (Mass. 1903)); *Borradaile v. Hunter* (1843) 134 Eng. Rep. 715, 715 (CP) (cited in *Daniels*, 67 N.E. at 425).

<sup>91</sup> See *Terry*, 82 U.S. at 584–87 (summarizing decisions).

<sup>92</sup> *Phadenhauer v. Germania Life Ins. Co.*, 54 Tenn. 567, 577 (1872).

<sup>93</sup> *M’Naghten’s Case* (1843) 8 Eng. Rep. 718, 719 (HL).

amount to suicide in the legal sense.<sup>94</sup> Other courts took the position that the ability of the decedent to understand the wrongness of the act of his taking his own life was irrelevant; what mattered was whether the decedent understood the nature and consequences of his act.<sup>95</sup> If not, the decedent was insane, the act was not suicide, and recovery could be had under the insurance policy.

Regardless of the exact approach, American courts were essentially applying the English common law principles regarding forfeiture and insanity.<sup>96</sup> If “insane”—however that term was defined—the decedent was not blameworthy and his family’s right to recover under the insurance policy should not be forfeited. If the decedent was not insane, forfeiture was appropriate.<sup>97</sup>

Issues of morality frequently appeared in these decisions, with courts sometimes referring to suicide as “sinful and immoral,”<sup>98</sup> as well as noting that suicide was wrong from “a religious and moral point of view.”<sup>99</sup> In an 1898 decision, the Supreme Court explained that an insured’s act of taking his life should not be interpreted as being part of the parties’ contemplation at the time the agreement was entered into, because a contract “which is subversive of sound morality, ought never to receive the sanction of a court of justice.”<sup>100</sup> These decisions also tended to reflect then-current societal

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<sup>94</sup> *Phadenhauer*, 54 Tenn. at 577–78.

<sup>95</sup> *See id.* at 575 (summarizing the position of English courts on the issue).

<sup>96</sup> *See supra* note 83 and accompanying text.

<sup>97</sup> The issue of how one party’s alleged insanity should influence resolution of legal issues impacting that party has, of course, been an issue outside the narrow confines of tort and insurance law. *See, e.g.*, Joshua C. Tate, *Personal Reality: Delusion in Law and Science*, 49 CONN. L. REV. 891, 891 (2017) (discussing the concept of a delusion in making legal determinations regarding mental capacity in the context of wills).

<sup>98</sup> *Commonwealth v. Mink*, 123 Mass. 422, 424–25 (1877); *see also* *Aetna Life Ins. Co. v. Milward*, 118 Ky. 716, 722 (1904) (“The act of suicide is not only unnatural, but is highly immoral and criminal.”); *Benard v. Protected Home Circle*, 146 N.Y.S. 232, 235 (App. Div. 1914) (referring to suicide as illegal and immoral).

<sup>99</sup> *Phadenhauer*, 54 Tenn. at 570–71 (quoting jury instruction); *see* *Breasted v. Farmers’ Loan & Tr. Co.*, 8 N.Y. 299, 302 (1853) (“The facts establish that the assured well knew that by throwing himself into the river he would be drowned, and that he intended to drown himself and knew it was morally wrong to do so.”); *see also* *Dean v. Am. Mut. Ins. Co.*, 86 Mass. (4 Allen) 96, 101 (1862) (“He may have acted from an insane impulse, which prevented him from appreciating the moral consequences of suicide.”).

<sup>100</sup> *See Ritter v. Mut. Life Ins. Co. of N.Y.*, 169 U.S. 139, 154, 160 (1898) (holding that decedent’s death, “if directly and intentionally caused by himself, when in sound mind, was not a risk intended to be covered, or which could legally have been covered”).

attitudes regarding mental illness, using such terms as “lunatic,”<sup>101</sup> “madman,”<sup>102</sup> “madly insane,”<sup>103</sup> and “raving madness.”<sup>104</sup>

## 2. Modern Legal Views on Suicide

As societal views regarding suicide evolved, so too did the law’s approach to cases involving suicide. While some twentieth-century opinions continued to express moral disapproval of suicide,<sup>105</sup> explicit references to suicide being an immoral act began to appear less frequently in judicial decisions. The Supreme Court’s decisions in *Cruzan v. Missouri Department of Health*<sup>106</sup> and *Washington v. Glucksberg*,<sup>107</sup> both of which involved end-of-life issues, could hardly avoid the moral issues present. But the decisions lacked the sort of moral admonishment of earlier decisions and recognized that the decision to end one’s life could be rational.<sup>108</sup> Today, courts dealing with cases involving a decedent’s decision to take her own life are now more likely to acknowledge the difficult moral issues involved and to refrain from the sort of condemnation present in earlier decisions.<sup>109</sup>

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<sup>101</sup> *Breasted*, 8 N.Y. at 301.

<sup>102</sup> *Id.* at 305.

<sup>103</sup> *Id.* at 301.

<sup>104</sup> *Dean*, 86 Mass. at 100. An 1872 U.S. Supreme Court decision concerning the insurance policy issue referenced a book entitled *A Practical Treatise on the Law Concerning Lunatics, Idiots, and Persons of Unsound Mind* from 1833. See *Life Ins. Co. v. Terry*, 82 U.S. 580, 588 n.26 (1872) (citing JOHN ARMSTRONG, *THE ART OF PRESERVING HEALTH* 131 (1796), and LEONARD SHELFORD, *A PRACTICAL TREATISE ON THE LAW CONCERNING LUNATICS, IDIOTS, AND PERSONS OF UNSOUND MIND*, at xlvi (1833)).

<sup>105</sup> See, e.g., *Blackwood v. Jones*, 149 So. 600, 601 (Fla. 1933) (“No sophistry is tolerated in consideration of legal problems which seek to justify self-destruction as commendable or even a matter of personal right, and therefore such an argument is unsound which seeks to prove that an accusation unfounded in fact that a person sought to destroy his or her own life is not reprehensible but a normal thought reflecting in no wise upon the wickedness of the person accused of suicide.”).

<sup>106</sup> 497 U.S. 261 (1990).

<sup>107</sup> 521 U.S. 702 (1997).

<sup>108</sup> See *id.* at 747–48 (Stevens, J., concurring) (stating that an adequately informed patient might make a rational choice for assisted suicide).

<sup>109</sup> One of the more noteworthy decisions in this regard is *Baxter v. State*, 224 P.3d 1211 (Mont. 2009), a case involving the constitutionality of state homicide statutes in the case of physician-assisted suicide. There, the majority opinion spoke at length about the language surrounding the issue and the majority’s decisions with respect to the language it used. The majority noted its decision not to use the term “suicide” given the fact the term “suggests an act of self-destruction that historically has been condemned as sinful, immoral, or damning by many religions.” *Id.* at 1226.

“Suicide” is a pejorative term in our society. Unfortunately, it is also a term used liberally by the State and its amici (as well as the Dissent) in this case. The term denigrates the complex individual circumstances that drive persons generally—and, in particular, those who are incurably ill and face prolonged illness and agonizing death—to take their own lives. The term is used to generate antipathy, and it does. The Patients and the class of people they represent do not seek to commit “suicide.” Rather, they acknowledge that death within a relatively short time is inescapable because of their illness or disease. And with that fact in mind, they seek the ability to self-administer, at a time and place of their choosing, a physician-prescribed medication that will assist them in preserving their own human dignity during the inevitable process of dying. Having come to grips

Despite the changes in societal and legal views regarding suicide, the fact that suicide is involved in a case still complicates the legal analysis. There are still occasional references to the traditional societal disapproval and moral issues surrounding suicide.<sup>110</sup> Mental illness, which is often an underlying cause of suicide, remains a problematic and sometimes stigmatic condition.<sup>111</sup> Finally, suicide raises difficult questions of causation and foreseeability for courts.

## II. TORT LAW'S TREATMENT OF SUICIDE CASES

Tort law's historical treatment of cases involving suicide represents a combination of society's traditionally negative views regarding suicide and tort law's traditional concerns with foreseeability and expanding liability in cases involving emotional injury. Courts developed special rules dealing with suicide that worked to limit the scope of liability for a defendant whose actions allegedly resulted in a decedent's suicide. These special rules, which were developed at an earlier time with an earlier understanding of the causes of suicide, continue to influence the law of negligence and intentional torts.

### A. Negligence Cases

Tort liability for negligence that contributes to a decedent's suicide is difficult to establish. In cases in which a defendant engaged in affirmative conduct that contributed to the decedent's suicide, plaintiffs often face significant problems establishing the proximate cause element of a negligence claim. While not as severe, plaintiffs face similar problems in cases in which a defendant is alleged to have negligently failed to prevent a suicide.

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with the inexorability of their death, they simply ask the government not to force them to suffer and die in an agonizing, degrading, humiliating, and undignified manner. They seek nothing more nor less; that is all this case is about.

*Id.*

<sup>110</sup> See *Haines v. Davies*, Nos. 1:07-cv-00851, 1:07-cv-00852, 2009 WL 331433, at \*2 (M.D. Pa. Feb. 9, 2009) (considering motion to exclude evidence relating to suicide because "suicide is viewed by some as a sinful, immoral, violent act, and therefore may be prejudicial"); *Seals, Inc. v. Tioga Cty. Grange Mut. Ins. Co.*, 519 A.2d 951, 956 (Pa. Super. Ct. 1986) ("To commit suicide is in the minds of many a reprehensible, even immoral and sinful act."); *infra* notes 133-36 and accompanying text (discussing still-existing special rules regarding suicide).

<sup>111</sup> See *supra* note 18 and accompanying text.

*I. Causation Issues in Cases Involving Affirmative Conduct Resulting in Suicide*

In order to establish liability, a negligence plaintiff must establish that the defendant's breach of duty was a proximate cause of her injuries.<sup>112</sup> While proximate cause is a concept that is largely incapable of precise definition, the main focus is upon foreseeability.<sup>113</sup> If the injuries that resulted from the defendant's negligence were within the scope of foreseeable risk caused by the defendant's behavior, proximate cause exists.<sup>114</sup> In situations in which a defendant's negligent actions have helped contribute to a decedent's suicide, courts have developed several special rules regarding proximate cause in cases involving suicide that operate to limit liability.

*a. The standard suicide rule*

One of the earliest statements of the law regarding suicide and proximate cause appears in the 1881 Supreme Court case of *Scheffer v. Railroad Co.*<sup>115</sup> Scheffer killed himself after suffering physical and mental injuries as a result of a train collision.<sup>116</sup> His executors brought a wrongful death action, alleging that the negligence of the train company caused Scheffer's suicide.<sup>117</sup> The Court sustained the defendant's demurrer, holding that the proximate cause of Scheffer's death "was his own act of self-destruction."<sup>118</sup> Suicide "was not the natural and probable consequence" of the defendant's negligence and, therefore, "could not have been foreseen," according to the Court.<sup>119</sup> Subsequent courts followed this same logic, concluding that suicide is "so highly extraordinary or unexpected" that it falls outside "the realm of reasonable foreseeability as a matter of law."<sup>120</sup>

This idea that suicide is an unforeseeable consequence of a defendant's negligence, and therefore the efficient or superseding cause of death, is now widely accepted among U.S. courts.<sup>121</sup> Indeed, the rule is actually known as

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<sup>112</sup> W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 263 (5th ed. 1984).

<sup>113</sup> *See id.* at 263 ("There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion."); *id.* at 280 (discussing the role of foreseeability).

<sup>114</sup> *See id.* at 281 (discussing the concept of scope of risk).

<sup>115</sup> 105 U.S. 249 (1881).

<sup>116</sup> *Id.* at 250.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 252.

<sup>119</sup> *Id.*

<sup>120</sup> *See, e.g.,* Gilmore v. Shell Oil Co., 613 So. 2d 1272, 1275 (Ala. 1993) (quoting 57A AM. JUR. 2D Negligence § 652 (1989)).

<sup>121</sup> *See* Jutzi-Johnson v. United States, 263 F.3d 753, 755 (7th Cir. 2001) (explaining that the general rule is that "suicide is said to be a supervening cause of the victim's loss of his life, breaking the chain of

“the suicide rule” in at least one jurisdiction.<sup>122</sup> Some formulation of this rule has been adopted in nearly every jurisdiction.<sup>123</sup> This rule has been applied

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responsibility that would otherwise link the loss to the negligent act”); *Tate v. Canonica*, 5 Cal. Rptr. 28, 39 (Ct. App. 1960) (stating that “the practically unanimous rule is that [suicide] is a new and independent agency which does not come within and complete a line of causation from the wrongful act to the death and therefore does not render defendant liable for the suicide”); *see also* *Brouhard ex rel. Estate of Brouhard v. Village of Oxford*, 990 F. Supp. 839, 842 (E.D. Mich. 1997) (“Generally, a decedent’s suicide is considered an unforeseeable intervening act between the defendants’ conduct and the decedent’s death.”); *Krieg v. Massey*, 781 P.2d 277, 279 (Mont. 1989) (“The general rule . . . is that [negligence actions for the suicide of another will generally not lie since the act or suicide is considered a deliberate intervening act exonerating the defendant from legal responsibility . . . .” (internal quotation marks omitted)).

<sup>122</sup> *Johnson v. Wal-Mart Stores, Inc.*, 588 F.3d 439, 440 (7th Cir. 2009) (referring to the “Illinois ‘suicide rule’”).

<sup>123</sup> *See Gilmore*, 613 So. 2d at 1275; *Tucson Rapid Transit Co. v. Tocci*, 414 P.2d 179, 183 (Ariz. Ct. App. 1966); *Tate*, 5 Cal. Rptr. at 40; *Moore v. W. Forge Corp.*, 192 P.3d 427, 436 (Colo. App. 2007); *Edwards v. Tardif*, 692 A.2d 1266, 1269 (Conn. 1997); *Porter v. Murphy*, 792 A.2d 1009, 1015 (Del. Super. Ct. 2001); *District of Columbia v. Peters*, 527 A.2d 1269, 1275 (D.C. 1987); *Appling v. Jones*, 154 S.E.2d 406, 408 (Ga. Ct. App. 1967); *Lee v. Corregedore*, 925 P.2d 324, 330 (Haw. 1996); *Little v. Chicago Hoist & Body Co.*, 203 N.E.2d 902, 904 (Ill. 1965); *Hooks SuperX, Inc. v. McLaughlin*, 642 N.E.2d 514, 520 (Ind. 1994); *Jain v. State*, 617 N.W.2d 293, 300 (Iowa 2000); *Epelbaum v. Elf Atochem, North America, Inc.*, 40 F. Supp. 2d 429, 431 (E.D. Ky. 1999) (applying Kentucky law); *Bertrand v. Air Logistics, Inc.*, 820 So. 2d 1228, 1231, 1232 (La. Ct. App. 2002); *Sindler v. Litman*, 887 A.2d 97, 109–10 (Md. Ct. Spec. App. 2005); *Daniels v. New York, N.H. & H.R. Co.*, 67 N.E. 424, 426 (Mass. 1903); *Costigan v. Plets*, No. 298286, 2011 WL 6376016, at \*4 (Mich. Ct. App. Dec. 20, 2011); *Truddle v. Baptist Mem’l Hosp.–DeSoto, Inc.*, 150 So. 3d 692, 697 (Miss. 2014); *Krieg*, 781 P.2d at 279; *Long v. Omaha & C.B. St. Ry. Co.*, 187 N.W. 930, 932, 933 (Neb. 1922); *McLaughlin v. Sullivan*, 461 A.2d 123, 124 (N.H. 1983); *Brenner v. Pub. Serv. Prod. Co.*, 164 A. 454, 455 (N.J. 1933); *Rimbert v. Eli Lilly & Co.*, 577 F. Supp. 2d 1174, 1199 (D.N.M. 2008) (applying New Mexico law); *Cauverien v. De Metz*, 188 N.Y.S.2d 627, 632 (Sup. Ct. 1959); *Fischer v. Morales*, 526 N.E.2d 1098, 1101 (Ohio Ct. App. 1987); *Runyon v. Reid*, 510 P.2d 943, 949 (Okla. 1973); *Ferris v. Cleaveland*, No. 3:10-1302, 2012 WL 2564782, at \*1 (M.D. Pa. July 2, 2012) (applying Pennsylvania law); *Scott v. Greenville Pharmacy, Inc.*, 48 S.E.2d 324, 328 (S.C. 1948); *Rains v. Bend of the River*, 124 S.W.3d 580, 593 (Tenn. Ct. App. 2003); *Exxon Corp. v. Breecheen*, 526 S.W.2d 519, 523–24 (Tex. 1975); *Lenoci v. Leonard*, 21 A.3d 694, 699–700 (Vt. 2011); *Arsnow v. Red Top Cab Co.*, 292 P. 436, 444 (Wash. 1930); *R.D. v. W.H.*, 875 P.2d 26, 28 (Wyo. 1994). Nevada, Oregon, and Utah appear to be the only states not to address the issue, although Nevada has at least considered the general issue in the context of a workers’ compensation claim. *See Doe v. Clark Cty. Sch. Dist.*, No. 2:15-cv-00793-APG-GWF, 2017 WL 1483428, at \*8 (D. Nev. Apr. 21, 2017) (“Nevada has not yet addressed whether suicide is an intervening act that breaks the chain of causation between a defendant’s conduct and the plaintiff’s injuries.”); *Vredenburg v. Sedgwick CMS*, 188 P.3d 1084, 1090 (Nev. 2008) (discussing causation in the context of workers’ compensation). Virginia’s treatment of such cases is discussed *infra* notes 133–36 and accompanying text. West Virginia has recognized claims based on the failure to prevent suicide, *see Moats v. Preston Cty. Comm’n*, 521 S.E.2d 180, 189 (W. Va. 1999), but has not expressly ruled on whether the traditional suicide rule bars recovery where a defendant is alleged to have caused the suicide, *see Setser v. Harvey*, No. 14-0680, 2015 WL 1741136, at \*3 (W. Va. Apr. 10, 2015). At least one state, Texas, has adopted a statute providing an affirmative defense in the case of suicide that roughly tracks the standard suicide rule:

(a) It is an affirmative defense to a civil action for damages for personal injury or death that the plaintiff, at the time the cause of action arose, was:

...

in a variety of factual settings, from disseminating allegedly dangerous fantasy games to children<sup>124</sup> to negligently misdiagnosing potentially fatal diseases.<sup>125</sup>

Issues of proximate cause are typically issues of fact for the jury to resolve.<sup>126</sup> But in wrongful death cases involving suicide, courts frequently apply the suicide rule and conclude as a matter of law that proximate causation is lacking.<sup>127</sup> Sometimes the rule is applied in rote fashion without further elaboration.<sup>128</sup> In other instances, courts explain that suicide is such an abnormal act that it breaks the chain of causation and amounts to a superseding cause.<sup>129</sup> Occasionally, plaintiffs are able to survive a motion to dismiss or summary judgment on these claims, but in the typical case, a decedent's suicide serves to break the chain of causation and bar recovery.<sup>130</sup>

Judge Richard Posner has explained the underlying justification for the general rule:

A person is not liable for such improbable consequences of negligent activity as could hardly figure in his deciding how careful he should be. Liability in such

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(2) committing or attempting to commit suicide, and the plaintiff's conduct in committing or attempting to commit suicide was the sole cause of the damages sustained; provided, however, if the suicide or attempted suicide was caused in whole or in part by a failure on the part of any defendant to comply with an applicable legal standard, then such suicide or attempted suicide shall not be a defense.

TEX. CIV. PRAC. & REM. CODE ANN. § 93.001 (West 2018).

<sup>124</sup> *Watters v. TSR, Inc.*, 904 F.2d 378, 384 (6th Cir. 1990).

<sup>125</sup> *Stafford v. Neurological Med., Inc.*, 811 F.2d 470, 473 (8th Cir. 1987).

<sup>126</sup> *Wood v. CRST Expedited, Inc.*, 419 P.3d 503, 506 (Wyo. 2018).

<sup>127</sup> *See, e.g., Long*, 187 N.W. at 932, 934.

<sup>128</sup> *Cf. Lenoci*, 21 A.3d at 699–700 (choosing to elaborate before applying the rule).

<sup>129</sup> The idea that suicide is an “abnormal thing” or usually the result of an abnormal mental condition appears frequently in the decisions. *See, e.g., Jamison v. Storer Broad. Co.*, 511 F. Supp. 1286, 1292 (E.D. Mich. 1981) (“With few exceptions, one who commits suicide is suffering some abnormal mental condition.”). Many of the references to suicide being an “abnormal thing” come from a passage in *Prosser & Keeton on Torts*, which courts often quote:

Some difficulty has arisen in cases where the injured person becomes insane and commits suicide. Although there are cases to the contrary, it seems the better view that when his insanity prevents him from realizing the nature of his act or controlling his conduct, his suicide is to be regarded either as a direct result and no intervening force at all, or as a normal incident of the risk, for which the defendant will be liable. The situation is the same as if he should hurt himself during unconsciousness or delirium brought on by the injury. But if the suicide is during a lucid interval, when he is in full command of his faculties but his life has become unendurable to him, it is agreed that his voluntary choice is an abnormal thing, which supersedes the defendant's liability.

*Lancaster v. Montesi*, 390 S.W.2d 217, 221–22 (Tenn. 1965) (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 49, at 273–74 (2d ed. 1955)); *see also Tucson Rapid Transit Co. v. Tocci*, 414 P.2d 179, 185 (Ariz. 1966) (same); *Estate of Girard v. Town of Putnam*, No. CV085002754–S, 2011 WL 783599, at \*3 (Conn. Super. Ct. Jan. 28, 2011) (same).

<sup>130</sup> *Compare MacDermid v. Discover Fin. Servs.*, 488 F.3d 721, 738 (6th Cir. 2007) (applying Tennessee law and affirming summary judgment in defendant's favor in case involving harassing debt collection), *with Burdett v. Harrah's Kansas Casino Corp.*, 294 F. Supp. 2d 1215, 1234, 1237 (D. Kan. 2003) (overruling motion to dismiss in case involving harassing debt collection results).

circumstances would serve no deterrent, no regulatory purpose; it would not alter behavior and increase safety. Nothing would be gained by imposing liability in such a case but compensation, and compensation can be obtained more cheaply by insurance.<sup>131</sup>

But other considerations have also clearly influenced courts. Longstanding concerns over the morality of suicide still linger to some extent in more modern decisions.<sup>132</sup> For example, suicide remains a common law crime in Virginia.<sup>133</sup> And in Virginia (as in several other states), “a party who consents to and participates in an immoral or illegal act cannot recover damages from other participants for the consequence of that act.”<sup>134</sup> Negligence defendants have had some success in asserting that suicide is an immoral or unlawful act and thus bars recovery.<sup>135</sup>

An element of blameworthiness or culpability also arguably underlies the general rule that suicide constitutes a superseding or efficient cause.<sup>136</sup> Typically, the concept of a superseding or efficient cause refers to the actions of a third party or some outside force, rather than the conduct of the plaintiff.<sup>137</sup> But some courts have explained that the plaintiff’s conduct may qualify as a superseding or efficient cause where it is highly extraordinary and where the conduct “is more than mere contributory negligence and is of a higher culpability level than the defendant’s negligence.”<sup>138</sup> At least one

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<sup>131</sup> *Jutzi-Johnson v. United States*, 263 F.3d 753, 756 (7th Cir. 2001).

<sup>132</sup> *See Logarta v. Gustafson*, 998 F. Supp. 998, 1001–02 (E.D. Wis. 1998) (attributing some of the special treatment of suicide cases to the association of suicide with criminality); *Delaney v. Reynolds*, 825 N.E.2d 554, 557 n.1 (Mass. App. Ct. 2005) (noting that cases from other jurisdictions cite to “the historic notion that suicide is an immoral or culpable act” as a policy underlying the general rule); *see also* *Cliff v. Narragansett Television, L.P.*, 688 A.2d 805, 808 (R.I. 1996) (noting that suicide remains a common law felony in Rhode Island).

<sup>133</sup> *Wackwitz v. Roy*, 418 S.E.2d 861, 864 (Va. 1992).

<sup>134</sup> *Id.* (quoting *Miller v. Bennett*, 56 S.E.2d 217, 218 (Va. 1949)); *see also* *Tug Valley Pharmacy, LLC v. All Plaintiffs Below in Mingo*, 773 S.E.2d 627, 638–39 (W. Va. 2015) (Loughry, J., dissenting) (noting that this rule has been adopted in thirteen jurisdictions).

<sup>135</sup> *See Brown v. Harris*, 240 F.3d 383, 388 (4th Cir. 2001) (applying this rule and affirming judgment as a matter of law in favor of defendant); *Hill v. Nicodemus*, 755 F. Supp. 692, 694 (W.D. Va. 1991) (applying this rule and granting summary judgment for defendant). *See generally* *Moats v. Preston Cty. Comm’n*, 521 S.E.2d 180, 188, 189 (W. Va. 1999) (declining to adopt this prohibition).

<sup>136</sup> *See* Allen C. Schlinsog, Jr., Comment, *The Suicidal Decedent: Culpable Wrongdoer, or Wrongfully Deceased?*, 24 J. MARSHALL L. REV. 463, 471 (1991) (attributing the special causation rules regarding suicide to the “public policy concern that the suicidal decedent was culpable”).

<sup>137</sup> RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 34 cmt. at 571 (AM. LAW INST. 2010) (discussing the superseding cause concept and noting “employing superseding cause to bar a plaintiff’s recovery based on the plaintiff’s conduct is difficult to reconcile with modern notions of comparative responsibility”).

<sup>138</sup> *Gilmore v. Shell Oil Co.*, 613 So. 2d 1272, 1275 (Ala. 1993) (quoting 57A AM. JUR. 2D *Negligence* § 652 (1989)); *see also* *Mesick v. State*, 504 N.Y.S.2d 279, 282 (App. Div. 1986) (stating rule).

court has pointed to this principle in concluding that suicide qualifies as such a cause.<sup>139</sup>

*b. The “delirium or insanity” (or “rage or frenzy”) exception*

The most common exception to the rule that a decedent’s suicide amounts to a superseding cause that breaks the chain of causation is where the defendant’s negligence brings about “delirium or insanity” that causes the victim to commit suicide.<sup>140</sup> The exception appeared in the first *Restatement of Torts* in 1934 and was carried over in Section 455 of the *Restatement (Second) of Torts*. The exception provides for liability where a defendant’s negligence results in the plaintiff’s “delirium or insanity,” which

(a) prevents him from realizing the nature of his act and the certainty or risk of harm involved therein, or

(b) makes it impossible for him to resist an impulse caused by his insanity which deprives him of his capacity to govern his conduct in accordance with reason.<sup>141</sup>

The comments explain that the first clause only applies when the plaintiff’s delirium or insanity (also frequently referred to in the decisional law as “rage” or “frenzy”<sup>142</sup>) “is so extreme as to prevent him from understanding what he is doing” or from understanding the consequences of his actions.<sup>143</sup> In support of the rule, the second *Restatement* authors cited several cases in which a defendant’s negligence caused physical harm to the decedent, which also severely impacted the decedent’s mental capacity.<sup>144</sup> The ultimate question in most of these cases was whether the defendant’s negligence caused the decedent to be unable to understand the physical nature and consequences of his act.<sup>145</sup> As originally envisioned by the authors, this first clause was an extremely limited exception to the general

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<sup>139</sup> *Gilmore*, 613 So. 2d at 1275.

<sup>140</sup> *See, e.g.*, *Clift v. Narragansett Television L.P.*, 688 A.2d 805, 810 (R.I. 1996) (applying this exception); *Rains v. Bend of the River*, 124 S.W.3d 580, 593 (Tenn. Ct. App. 2003) (recognizing this exception).

<sup>141</sup> RESTATEMENT (SECOND) OF TORTS § 455 (AM. LAW INST. 1965).

<sup>142</sup> *Prill v. Marrone*, 23 So. 3d 1, 8 (Ala. 2009); *City of Richmond Hill v. Maia*, 800 S.E.2d 573, 578 (Ga. 2017); *Best Homes, Inc. v. Rainwater*, 714 N.E.2d 702, 706–07 (Ind. Ct. App. 1999); *Nguyen v. Mass. Inst. of Tech.*, 96 N.E.3d 128, 139 n.12 (Mass. 2018); *Maloney v. Badman*, 938 A.2d 883, 887 (N.H. 2007); *Bogust v. Iverson*, 102 N.W.2d 228, 232 (Wis. 1960). The same phraseology is also used in the workers’ compensation setting in determining whether a suicide qualifies as a compensable injury. *See Vredenburg v. Sedgwick CMS*, 188 P.3d 1084, 1088 (Nev. 2008).

<sup>143</sup> RESTATEMENT (SECOND) OF TORTS § 455 cmt. b.

<sup>144</sup> *Id.* § 455 reporter’s notes; *Daniels v. New York, N.H. & H.R. Co.*, 67 N.E. 424 (Mass. 1903); *Millman v. U.S. Mortg. & Title Guar. Co.*, 1 A.2d 265 (N.J. 1938); *Koch v. Fox*, 75 N.Y.S. 913 (App. Div. 1902); *Hall v. Coble Dairies, Inc.*, 67 S.E.2d 63 (N.C. 1951); *Arsnow v. Red Top Cab Co.*, 292 P. 436 (Wash. 1930).

<sup>145</sup> *See, e.g.*, *Long v. Omaha & Council Bluffs St. Ry. Co.*, 187 N.W. 930, 934 (Neb. 1922).

rule that suicide breaks the chain of causation for purposes of a wrongful death claim. Liability could be imposed only where the defendant's negligence caused physical harm so extensive that it actually impacted the decedent's mental functioning to the point that the decedent could not understand that his actions were likely to lead to his own death.<sup>146</sup> The decisions also make clear that in crafting this rule, courts were borrowing from the older insurance policy cases.<sup>147</sup> There appear to be few modern cases applying this part of the exception.

The second clause in Section 455 applies when the defendant's negligent conduct results in a plaintiff's delirium or insanity, which produces an irresistible impulse to do an act.<sup>148</sup> The plaintiff may recover even if the plaintiff understands the nature or likely consequences of the act, provided "his act is done under an insane impulse which is irresistible because his insanity has prevented his reason from controlling his actions."<sup>149</sup> None of the cases cited by the authors of the second *Restatement* shed much light as to the concept of irresistible suicidal impulses, perhaps because none of the cases cited actually resulted in a finding of such an impulse.<sup>150</sup> Nonetheless, the idea that an insane impulse excused the fact of suicide had been floating around in American legal decisions for quite some time before the adoption of the first *Restatement*.<sup>151</sup>

The limited nature of the exception to the standard rule regarding suicide and proximate cause is emphasized in a comment to Section 455. The fact that a defendant's negligence causes harm to an individual that results in depression (or "extreme melancholia") does not make the defendant liable

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<sup>146</sup> See *Eckerd's, Inc. v. McGhee*, 86 S.W.2d 570, 575 (Tenn. Ct. App. 1935) (stating there could be no recovery "unless [the decedent's] reason and memory were, at the time, so far obscured that she did not know and understand what she was doing"). The limited nature of the exception is best illustrated by the two non-suicide cases cited by the authors. In one, the defendant's negligence caused the decedent to suffer a concussion, which resulted in her becoming dizzy and falling out of a window. *Millman*, 1 A.2d at 269. In the other, the decedent's car struck the defendant's car. *Hall*, 67 S.E.2d at 64–65. The decedent, "in a dazed and addled condition," got out of the car, walked out onto the highway, and was struck by another oncoming car. *Id.* Thus, both cases involved decedents in a state of delirium that ultimately resulted in another injury. Both decisions focused almost exclusively on the issue of proximate cause, specifically whether the defendant's negligence resulted in a continuous sequence of events unbroken by any unforeseeable cause. *Millman*, 1 A.2d at 269–70; *Hall*, 67 S.E.2d at 67. Both courts did include brief mentions of the delirium or insanity rule as described in the first *Restatement of Torts*, but the references were included largely to bolster the court's conclusion regarding proximate cause. *Millman*, 1 A.2d at 270; *Hall*, 67 S.E.2d at 67.

<sup>147</sup> See *supra* notes 89–94 and accompanying text; *Koch*, 75 N.Y.S. at 921.

<sup>148</sup> RESTATEMENT (SECOND) OF TORTS § 455 cmt. c.

<sup>149</sup> *Id.*

<sup>150</sup> *In re Sponatski*, 108 N.E. 466 (Mass. 1915); *Delinousha v. Nat'l Biscuit Co.*, 161 N.E. 431 (N.Y. 1928); *Garrigan v. Kennedy*, 101 N.W. 1081 (N.D. 1904).

<sup>151</sup> See *supra* note 91 and accompanying text.

for the decedent's suicide.<sup>152</sup> This is true even where the decedent takes his own life "because of his dread of the increasingly frequent recurrence of these attacks."<sup>153</sup> Unless the defendant's negligence causes injury that results in insanity or delirium in a form that prevents an individual from understanding the nature of his act or that creates an irresistible suicidal impulse, suicide breaks the chain of causation.<sup>154</sup>

Despite the fact that this exception has been part of tort law for over a century, courts are not at all consistent in their application of the exception.<sup>155</sup> Courts generally treat as synonymous the concepts of "mental illness," "mental derangement," and "delirium or insanity."<sup>156</sup> Some courts require documentation of a mental *illness*, as opposed to a mere mental *condition* (whatever difference there may be between those terms), before the exception is triggered,<sup>157</sup> whereas others do not delineate between the two concepts<sup>158</sup> or otherwise speak primarily in terms of the existence of a

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<sup>152</sup> RESTATEMENT (SECOND) OF TORTS § 455 cmt. d.

<sup>153</sup> *Id.*

<sup>154</sup> The case that most clearly seems to have most directly influenced the authors of the *Restatement* was *Daniels v. New York, N.H. & H.R. Co.*, 67 N.E. 424 (Mass. 1903). There, the decedent was injured at a railroad crossing and killed himself nearly two months later. *Id.* at 425. According to medical experts, the decedent "was probably insane when he took his life." *Id.* The court expressly framed the issue regarding the right to recover in terms of proximate cause. Recognizing that the decedent was probably insane at the time and that his insanity might very well have been caused by the collision, the court held that the suicide was "an independent, direct, and proximate cause of the death." *Id.* at 426. Drawing upon other decisions, the court concluded that "the liability of a defendant for a death by suicide exists only when the death is the result of an uncontrollable impulse, or is accomplished . . . without conscious volition to produce death, having knowledge of the physical nature and consequences of the act." *Id.* This is essentially the same test that appears in Section 455.

<sup>155</sup> See *Kivland v. Columbia Orthopaedic Grp., LLP*, 331 S.W.3d 299, 309 (Mo. 2011) (en banc) (noting problems with the rule as "demonstrated by the various ways" in which courts have applied it).

<sup>156</sup> See *Freyermuth v. Lutfy*, 382 N.E.2d 1059, 1065 (Mass. 1978) (permitting recovery where plaintiff's "mental illness" or "mental derangement" resulted in an uncontrollable impulse to kill herself).

<sup>157</sup> See *Estate of Ko ex rel. Hill v. Sears Roebuck & Co.*, 982 F. Supp. 471, 476 (E.D. Mich. 1997), *aff'd* 173 F.3d 855 (6th Cir. 1999) (granting summary judgment where decedent's expert witness failed to testify that decedent suffered from a mental illness); *Jamison v. Storer Broad. Co.*, 511 F. Supp. 1286, 1292 (E.D. Mich. 1981) (distinguishing between mental conditions and mental illnesses and saying "it is essential that a full explanation of the claimed mental illness be offered to assist the trier of fact in resolution of the question of causation"); *Moore v. W. Forge Corp.*, 192 P.3d 427, 438 (Colo. App. 2007) (drawing a distinction between the terms and concluding that "mental illness" is the more useful term); *Worsham v. Nix*, 83 P.3d 879, 887 (Okla. Civ. App. 2003) (affirming summary judgment for defendant in the absence of any documentation of mental illness or delirium).

<sup>158</sup> See *Grant v. F.P. Lathrop Constr. Co.*, 146 Cal. Rptr. 45, 50 (Ct. App. 1978) ("No fair distinction may be made between a mental condition, and mental illness or insanity, proximately caused by another's tortious conduct which results in an uncontrollable impulse to commit suicide."); *District of Columbia v. Peters*, 527 A.2d 1269, 1276 (D.C. 1987) ("'[M]ental illness,' 'mental condition,' and 'insanity' are generally considered synonymous terms, and should be so construed.").

“mental condition.”<sup>159</sup> Still others gloss over the initial requirement that the decedent have been insane or under a delirium and proceed directly to the question of whether the decedent acted pursuant to an uncontrollable impulse or otherwise treat an uncontrollable impulse as a form of insanity itself.<sup>160</sup>

In practice, the delirium or insanity exception is of limited value for plaintiffs.<sup>161</sup> The most obvious limitation of the rule for plaintiffs is that there must actually be some evidence that the decedent was experiencing “delirium or insanity” that impacted the decedent’s decision-making process.<sup>162</sup> As a practical matter, this will normally require expert testimony.<sup>163</sup> In addition, the fact that an individual was “insane” is not enough, by itself, to satisfy this exception. The plaintiff must show that the mental illness actually resulted in an irresistible impulse to commit suicide as opposed to a mere suicidal tendency.<sup>164</sup> For example, in one case, the decedent’s psychiatrist testified that the decedent suffered from depression that was a “powerful contributor” to his suicide and that “it had been his experience that people who kill themselves feel an overwhelming sense of hopelessness and helplessness so that they cannot think about various options but can see only one sort of release or relief.”<sup>165</sup> According to the court, this

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<sup>159</sup> See *McLaughlin v. Sullivan*, 461 A.2d 123, 124 (N.H. 1983); *Orcutt v. Spokane*, 364 P.2d 1102, 1105 (Wash. 1961) (en banc); see also James A. Howell, Comment, *Civil Liability for Suicide: An Analysis of the Causation Issue*, 1978 ARIZ. ST. L.J. 573, 575 (noting that some courts permit recovery where a “mental condition” as opposed to insanity exists).

<sup>160</sup> See *Stafford v. Neurological Med., Inc.*, 811 F.2d 470, 473 (8th Cir. 1987) (explaining that an irresistible impulse is a form of mental insanity); *Wickersham v. Ford Motor Co.*, 194 F. Supp. 3d 434, 445 (D.S.C. 2016) (rejecting any requirement that the impulse be caused by insanity and instead focusing on the existence of the impulse itself).

<sup>161</sup> See Note, *Tortious Inducement of Suicide: A Study of the Judicial Ostrich*, 1970 WASH. U. L.Q. 166, 166–67 (stating that court decisions applying the exception “render recovery virtually impossible in circumstances short of complete loss of bodily control”); see also Victor E. Schwartz, *Civil Liability for Causing Suicide: A Synthesis of Law and Psychiatry*, 24 VAND. L. REV. 217, 227–28 (1971) (noting that the “stringent requirements” of the test limit its reach).

<sup>162</sup> An example of where the resort to the exception proved successful is *Young v. Swiney*, 23 F. Supp. 3d 596, 615 (D. Md. 2014). There, the plaintiff’s expert was willing to testify that the decedent’s suicide “was directly and proximately caused by the psychosis he sustained as a result” of the defendant’s negligence. *Id.* at 617. The expert helpfully explained that “[t]he layman’s term for psychosis would be ‘insanity’” and that the decedent’s suicide was “due to an irresistible impulse when he was not in his right mind.” *Id.* at 618.

<sup>163</sup> See *Sindler v. Litman*, 887 A.2d 97, 113 (Md. Ct. Spec. App. 2005) (explaining that the issue requires expert testimony); *Orcutt v. Spokane*, 364 P.2d 1102, 1105 (Wash. 1961) (en banc) (concluding a jury question exists “where there is medical testimony that the injury sustained by the decedent caused a mental condition which resulted in an uncontrollable impulse to commit suicide”).

<sup>164</sup> See *Moore v. W. Forge Corp.*, 192 P.3d 427, 437 (Colo. App. 2007); see also *Baxter v. Safeway Stores, Inc.*, 534 P.2d 585, 589 (Wash. Ct. App. 1975) (holding that expert’s testimony that depression caused the plaintiff’s suicide was insufficient to create a jury question as to whether plaintiff was unable to resist the impulse to take her life).

<sup>165</sup> *District of Columbia v. Peters*, 527 A.2d 1269, 1277 (D.C. 1987).

was insufficient to create a question for the jury on the proximate cause issue because it did not establish that the defendant's action caused a condition that "resulted in the decedent's having an irresistible or uncontrollable impulse to commit suicide."<sup>166</sup>

Some plaintiffs are unable to establish that the decedent had an irresistible impulse to commit suicide due to the fact that the act appears to have been premeditated. Typically, the more evidence there is that the decision to commit suicide was thought out in advance, the less likely it is the exception will apply.<sup>167</sup> For example, *Lenoci v. Leonard*<sup>168</sup> involved a teenage girl who committed suicide after a traumatic incident. She had threatened suicide several times before the traumatic incident, going so far on one occasion as describing her plan to do so.<sup>169</sup> On the night after the incident, she texted several of her friends about the incident, texted her boyfriend goodbye, composed a suicide note, and then carried out the suicide plan she had previously described.<sup>170</sup> While it seems clear that the traumatic incident the girl experienced was the triggering event for her suicide, according to the Vermont Supreme Court, the events leading to her death were "not evidence of an 'uncontrollable impulse,' but rather of a voluntary, deliberate, and tragic choice by a girl who knew the purpose and the physical effect of her actions."<sup>171</sup> Accordingly, the court affirmed summary judgment in favor of the defendant.<sup>172</sup>

The final factor limiting the value of the delirium or insanity exception for plaintiffs is that courts often decide the issue as a matter of law.<sup>173</sup> As is the case with the issue of proximate cause more generally in suicide cases, questions as to whether a decedent was experiencing delirium or insanity, could comprehend the consequences of her actions, or was acting under an irresistible impulse would generally seem to be questions of fact for the jury.<sup>174</sup> But given the specific evidentiary requirements necessary to invoke

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<sup>166</sup> *Id.* at 1276.

<sup>167</sup> See *Kivland v. Columbia Orthopaedic Grp., LLP*, 331 S.W.3d 299, 309 (Mo. 2011) (en banc) (citing counterexamples, but stating "the majority of courts have found that if the evidence shows the decedent planned the suicide and knew what he was doing, no irresistible impulse existed even where it is clear that the decedent committed suicide as a result of injuries"). *But see Fuller v. Preis*, 322 N.E.2d 263, 268 (N.Y. 1974) ("An irresistible impulse does not necessarily mean a 'sudden' impulse." (citation omitted)).

<sup>168</sup> 21 A.3d 694 (Vt. 2011).

<sup>169</sup> *Id.* at 697.

<sup>170</sup> *Id.* at 700.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 701.

<sup>173</sup> See, e.g., *supra* note 166 and accompanying text.

<sup>174</sup> See *Estate of Van Dyke ex rel. Van Dyke v. Glaxo Smithkline*, No. 05-CV-153-J, 2009 WL 10669421, at \*5 (D. Wyo. Apr. 14, 2009) (stating that the issue of whether an individual was acting

the exception,<sup>175</sup> courts frequently decide these issues as a matter of law against plaintiffs.<sup>176</sup>

## 2. *Causation Issues in Cases Involving the Failure to Prevent Suicide*

The other common fact pattern involving civil liability stemming from suicide is where the defendant fails to exercise reasonable care in preventing the decedent from committing suicide. Unlike the situation where the defendant's negligence allegedly causes the decedent to commit suicide, these are cases in which the defendant did not act to prevent the suicide from occurring. A clear example would be the situation where prison officials fail to take reasonable steps to prevent a prisoner from committing suicide while in custody.<sup>177</sup>

The standard suicide rule does not have the same limiting effect in this context as it does in other cases. Indeed, some courts refer to this situation as an exception to the traditional suicide rule that treats suicide as a superseding cause; where the defendant owes an affirmative duty to take reasonable steps to prevent suicide, suicide is not a superseding cause.<sup>178</sup> However, the fact that suicide is involved still tends to limit liability.

Typically, courts do not recognize a duty to exercise reasonable care to protect another from harm; however, there are several types of special relationships that can give rise to such a duty, as listed in Section 314A of the *Restatement (Second) of Torts*.<sup>179</sup> One noteworthy feature of the suicide cases is that the number of relationships that courts are willing to recognize as "special" enough to impose a duty to exercise reasonable care to prevent another's suicide is markedly lower than in other factual scenarios.<sup>180</sup> So, for

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pursuant to an uncontrollable impulse should ordinarily be a jury question), *rev'd on other grounds*, 388 F. App'x 786 (10th Cir. 2010).

<sup>175</sup> See *supra* notes 162–66 and accompanying text (discussing evidentiary hurdles faced by plaintiffs).

<sup>176</sup> See, e.g., *Moore v. W. Forge Corp.*, 192 P.3d 427, 432, 436–37 (Colo. App. 2007); *Lenoci*, 21 A.3d at 700; *Baxter v. Safeway Stores, Inc.*, 534 P.2d 585, 589 (Wash. Ct. App. 1975).

<sup>177</sup> See *infra* notes 183–91 and accompanying text.

<sup>178</sup> See, e.g., *Rains v. Bend of the River*, 124 S.W.3d 580, 593–94 (Tenn. Ct. App. 2003) (recognizing an exception to the intervening cause rule for custodians who know or have reason to know that an inmate might engage in self-destructive acts).

<sup>179</sup> RESTATEMENT (SECOND) OF TORTS § 314A (AM. LAW INST. 1965).

<sup>180</sup> Courts often speak about a "duty to prevent suicide." See, e.g., *Estate of Cummings v. Davie*, 40 A.3d 971, 974 n.3 (Me. 2012) ("Courts in other jurisdictions have also held that, barring a special duty such as that recognized in a jailor-inmate or psychiatrist-patient relationship, there is no duty to prevent suicide by an adult."); *Nelson v. Driscoll*, 983 P.2d 972, 980 (Mont. 1999) (discussing the "duty to prevent suicide" in the case of custodial relationships); *McLaughlin v. Sullivan*, 461 A.2d 123, 125 (N.H. 1983) (speaking in terms of "a specific duty of care to prevent suicide"). The more accurate terminology would be a duty to exercise reasonable care to prevent suicide.

example, while an employer might have a duty to exercise reasonable care to assist an employee whom the employer knows is at risk of harm,<sup>181</sup> an employer does not have a duty to take reasonable care to prevent an employee from committing suicide.<sup>182</sup> Instead, the general rule has emerged that only defendants who have custody over others (e.g., prison officials), or those with special mental health training (e.g., psychiatrists), and who have the ability to take steps to prevent the suicide owe such a duty.<sup>183</sup> In recent years, there have also been a number of claims brought against school officials and school districts who allegedly failed to take steps to prevent a student's suicide stemming from bullying.<sup>184</sup> Courts have shown a willingness to recognize the existence of such a duty in these cases.<sup>185</sup> But besides these exceptions, there is generally no duty to exercise reasonable care to prevent another from committing suicide.

The standard suicide rule does not serve as an absolute bar to recovery in these exceptional, special relationship cases because suicide is no longer deemed to be an unforeseeable action.<sup>186</sup> But the standard suicide rule regarding causation may still limit a defendant's liability even in these kinds of cases. In the prison-suicide cases, for example, courts sometimes cite the

<sup>181</sup> RESTATEMENT (SECOND) OF TORTS § 314B.

<sup>182</sup> See *Rollins v. Wackenhut Servs, Inc.*, 703 F.3d 122, 128 (D.C. Cir. 2012) (questioning whether employer conducted an adequate background check on employee who died by suicide, but refusing to recognize that a special relationship existed); *Olson v. Barrett*, No. 6:13-cv-1886-Orl-40KRS, 2015 WL 1277933, at \*6 (M.D. Fla. Mar. 20, 2015) (concluding that employer owed no duty to prevent an employee "from later committing suicide" where employer knew of "hateful remarks from co-workers" that allegedly contributed to employee's vulnerable state of mind).

<sup>183</sup> As explained by one court,

this duty has been imposed on: (1) institutions such as jails, hospitals and reform schools, having actual physical custody of and control over persons; . . . and (2) persons or institutions such as mental hospitals, psychiatrists and other mental-health trained professionals, deemed to have a special training and expertise enabling them to detect mental illness and/or the potential for suicide, and which have the power or control necessary to prevent that suicide.

*McLaughlin*, 461 A.2d at 125 (internal citations omitted).

<sup>184</sup> See, e.g., *Lewis v. Blue Springs Sch. Dist.*, No. 4:17-cv-00538-NKL, 2017 WL 5011893, at \*1 (W.D. Mo. Nov. 2, 2017); *Walsh v. Tehachapi Unified Sch. Dist.*, 997 F. Supp. 2d 1071, 1088 (E.D. Cal. 2014); *Butler v. Mountain View Sch. Dist.*, No. 3:12-CV-02038, 2013 WL 4520839, at \*3 (M.D. Pa. Aug. 26, 2013); *Ferraro v. Glendale Unified Sch. Dist.*, No. B262428, 2016 WL 2944268, at \*7 (Cal. Ct. App. May 17, 2016); *Patton v. Bickford*, 529 S.W.3d 717, 729 (Ky. 2016); *Elissa v. City of New York*, 990 N.Y.S.2d 780, 782 (Sup. Ct. 2014); *Estate of Smith v. W. Brown Local Sch. Dist.*, 26 N.E.3d 890, 896 (Ohio Ct. App. 2015).

<sup>185</sup> See, e.g., *Walsh*, 997 F. Supp. 2d at 1086 (recognizing that a "strong argument" can be made that such a duty should exist); *Patton*, 529 S.W.3d at 729-30 (recognizing the existence of a duty "to supervise students so as to prevent bullying, to stop bullying as it occurred, and to report bullying to the Administrators if it occurred").

<sup>186</sup> See *White v. Watson*, No. 16-cv-560-JPG-DGW, 2016 WL 6277601, at \*7 (S.D. Ill. Oct. 27, 2016) ("Where the duty of care breached is the duty to protect against what would otherwise be an unforeseeable consequence, that consequence becomes foreseeable to the defendant, and the breach of the duty to protect against it can result in negligence liability.").

general suicide rule in explaining that a jailer is not liable for failing to prevent a prisoner's suicide absent special circumstances.<sup>187</sup> As one court has explained, “[s]pecial circumstances’ form the basis of virtually every decision involving a jailer’s liability for a prisoner’s acts of self-destruction.”<sup>188</sup> The key is in how a court chooses to define the concept. Most courts take the view that a jailer may be liable where the jailer knows or should have known of a prisoner’s suicidal tendencies.<sup>189</sup> However, a few essentially adopt a more stringent recklessness or deliberate indifference standard and limit liability to where the defendant had *actual knowledge* that the decedent was *likely* to commit suicide.<sup>190</sup> Therefore, even though courts often speak of the existence of a special relationship as creating an exception to the general suicide rule,<sup>191</sup> the shadow of the standard suicide rule still looms in such cases.

### B. *Intentional Tort Cases*

Plaintiffs who allege that a defendant’s intentional misconduct resulted in suicide face their own set of challenges.<sup>192</sup> The most common intentional tort theory in suicide cases has been intentional infliction of emotional distress (IIED).<sup>193</sup> The tort is premised on the existence of extreme and outrageous conduct intended to cause distress “so severe that no reasonable man could be expected to endure it.”<sup>194</sup> Therefore, as one court has noted, IIED, “by its very nature, . . . [has a] closer connection to suicide than other intentional torts.”<sup>195</sup> That said, plaintiffs alleging IIED as the underlying basis for a wrongful death claim have often faced difficulty satisfying the demanding standard that the defendant’s conduct was “extreme and outrageous.”<sup>196</sup>

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<sup>187</sup> See, e.g., *Pretty On Top v. City of Hardin*, 597 P.2d 58, 61 (Mont. 1979); *Falkenstein v. City of Bismarck*, 268 N.W.2d 787, 792 (N.D. 1978).

<sup>188</sup> *Pretty On Top*, 597 P.2d at 61.

<sup>189</sup> See, e.g., *Cockrum v. State*, 843 S.W.2d 433, 436 (Tenn. Ct. App. 1992).

<sup>190</sup> See, e.g., *Walsh*, 997 F. Supp. 2d at 1086 (stating this rule in the context of school bullying case); *Murdock v. City of Keene*, 623 A.2d 755, 757 (N.H. 1993) (stating the rule in the context of prisoner case).

<sup>191</sup> *Murdock*, 623 A.2d at 756.

<sup>192</sup> Not included in this discussion are cases in which a physician or other individual assists the decedent in the act of suicide. These cases present their own special issues.

<sup>193</sup> *Moore v. W. Forge Corp.*, 192 P.3d 427, 433 (Colo. App. 2007) (“Most cases applying intentional tort analysis in suicide cases involve intentional infliction of emotional distress . . .”).

<sup>194</sup> RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (AM. LAW INST. 1965). Recklessness may also suffice in place of intent. *Id.* § 46(1).

<sup>195</sup> *Turcios v. DeBruler Co.*, 32 N.E.3d 1117, 1128 (Ill. 2015).

<sup>196</sup> See *Corales v. Bennett*, 567 F.3d 554, 560–61, 571–72 (9th Cir. 2009) (holding that middle school vice principal who issued an “unduly harsh” warning to a student and told the student he was going to

Plaintiffs seeking recovery in suicide cases may face other challenges. As is the case with negligence claims, establishing that the defendant's conduct was a legal cause of the decedent's suicide sometimes proves difficult. In the typical intentional tort case, causation typically does not pose much of an obstacle for a plaintiff. In the case of intentional torts, courts sometimes permit discovery in the case of "even very remote causation."<sup>197</sup> As Professors Prosser and Keeton explain, in the case of most intentional torts, a defendant's liability extends "to consequences which the defendant did not intend, and could not reasonably have foreseen."<sup>198</sup> And as every first-year Torts student knows, a defendant takes his plaintiff as he finds him.<sup>199</sup> Thus, under the famed eggshell-plaintiff rule,

[w]hen an actor's tortious conduct causes harm to a person that, because of a preexisting physical or mental condition or other characteristics of the person, is of a greater magnitude or different type than might reasonably be expected, the actor is nevertheless subject to liability for all such harm to the person.<sup>200</sup>

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end up in juvenile hall, after which the student committed suicide, did not engage in extreme and outrageous conduct); *Harrison v. Wexford Health Sources, Inc.*, No. 1:17-cv-01383-JBM, 2018 WL 659862, at \*8 (C.D. Ill. Feb. 1, 2018) (bullying and alleged sexual abuse by prison guards of prisoner with psychiatric issues not extreme and outrageous); *Burdett v. Harrah's Kan. Casino Corp.*, 294 F. Supp. 2d 1215, 1236 (D. Kan. 2003) (concluding on motion to dismiss that defendant's harassing debt collection methods did not amount to extreme and outrageous conduct); *Epelbaum v. Elf Atochem, N. Am., Inc.*, 40 F. Supp. 2d 429, 433-34 (E.D. Ky. 1999) (holding that employer who permitted an allegedly hostile work environment to exist, under which the plaintiff suffered "mere insults or indignities" and which ultimately resulted in decedent's suicide, did not engage in extreme and outrageous conduct); *Mikell v. Sch. Admin. Unit No. 33*, 972 A.2d 1050, 1055 (N.H. 2009) (granting motion to dismiss where the actions of a special education teacher who made a false accusation against student in alleged attempt to affect student's disciplinary record did not rise to level of extreme and outrageous conduct); *Meroni v. Holy Spirit Ass'n for the Unification of World Christianity*, 506 N.Y.S.2d 174, 177 (App. Div. 1986) (holding that brainwashing practices of church that allegedly led to decedent's suicide were not extreme and outrageous); *Gygi v. Storch*, 503 P.2d 449, 450 (Utah 1972) (granting summary judgment where defendant refused to marry decedent and ended relationship with him); *see also Giard v. Town of Putnam*, No. CV085002754S, 2008 WL 5481273, at \*10-11 (Conn. Super. Ct. Dec. 3, 2008) (granting motion to dismiss on the grounds that there had not been "affirmative misbehavior" where defendant guidance counselor failed to stop student's suicide, despite allegation that defendant had "received unspecified information that [the student] was suicidal"). Some plaintiffs have been unable to meet the requirement in an IIED action that the defendant intended to cause severe emotional distress. *See Corales v. Bennett*, 488 F. Supp. 2d 975, 989 (C.D. Cal. 2007).

<sup>197</sup> *Derosier v. New Eng. Tel. & Tel. Co.*, 130 A. 145, 152 (N.H. 1925); *see also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 33 (AM. LAW INST. 2010) ("An actor who intentionally or recklessly causes harm is subject to liability for a broader range of harms than the harms for which that actor would be liable if only acting negligently.")

<sup>198</sup> KEETON ET AL., *supra* note 112, § 9, at 40.

<sup>199</sup> *See Coates v. Whittington*, 758 S.W.2d 749, 752 (Tex. 1988) ("It is well settled that a tortfeasor takes a plaintiff as he finds him.")

<sup>200</sup> RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 31.

This willingness to expand liability for intentional torts resulting in unforeseeable harms is traditionally justified on the grounds that one who intentionally causes harm has greater culpability than one who negligently does so.<sup>201</sup> But in the case of recovery for suicide resulting from a defendant's intentional tort, courts have developed specific causation rules that alter the standard approach and may significantly limit a defendant's liability.

*1. Intentional Tort Theories as an Alternative to Negligence Claims*

Early wrongful death decisions tended not to draw any distinction between suicide brought about by negligent as opposed to intentional acts.<sup>202</sup> Instead, they sometimes spoke of the "general rule that tort actions may not be maintained which seek damages for the suicide of another."<sup>203</sup> Thus, for example, the Court of Appeals for the Second Circuit held in 1921 that the defendants, who had allegedly confined and tortured the decedent, could not be held liable for the decedent's act of hurling himself from a window to his death because his suicide was an intervening cause that cut off liability for the defendants.<sup>204</sup> Importing principles from the negligence cases, the court concluded that suicide "was not the natural and probable consequence of the wrongful acts of the defendants."<sup>205</sup> A 1913 Georgia case likewise sustained the defendant's demurrer on the grounds that the decedent's suicide was not the natural result of the defendant's conduct, and therefore was not the legal cause of the suicide, despite the allegation in the complaint that the defendant acted with the specific intent that the decedent would kill himself.<sup>206</sup>

Perhaps the first decision to draw a clear distinction between an intentional tort claim and negligence in the context of a suicide case was *Tate v. Canonica*, a 1960 case from California.<sup>207</sup> There, a California appellate court considered a wrongful death claim in which the defendants were alleged to have "intentionally made threats, statements and accusations

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<sup>201</sup> See, e.g., *State ex rel. Richardson v. Edgeworth*, 214 So.2d 579, 587 (Miss. 1968) ("A higher degree of responsibility is imposed upon a wrongdoer whose conduct was intended to cause harm than upon one whose conduct was negligent."); *Mayer v. Town of Hampton*, 497 A.2d 1206, 1209 (N.H. 1985) ("The law of torts recognizes that a defendant who intentionally causes harm has greater culpability than one who negligently does so.").

<sup>202</sup> See *Salsedo v. Palmer*, 278 F. 92, 94 (2d Cir. 1921) ("[I]t is now well established that no action lies at common law to recover damages for causing the death of a human being by the wrongful or negligent act of another.").

<sup>203</sup> *Mayer*, 497 A.2d at 1209.

<sup>204</sup> *Salsedo*, 278 F. at 99.

<sup>205</sup> *Id.* at 96.

<sup>206</sup> *Stevens v. Steadman*, 79 S.E. 564, 566–67 (Ga. 1913); see also *Waas v. Ashland Day & Night Bank*, 257 S.W. 29, 31 (Ky. 1923) (sustaining defendant's demurrer on the grounds that it was not foreseeable that plaintiff would commit suicide after being falsely accused of a crime and threatened with imprisonment).

<sup>207</sup> 5 Cal. Rptr. 28 (Ct. App. 1960).

against [the] deceased for the purpose of harassing, embarrassing, and humiliating him in the presence of friends, relatives and business associates.”<sup>208</sup> The resulting emotional distress eventually led to the decedent’s suicide.<sup>209</sup>

The court began by noting that the law had long drawn a distinction between intentional torts and negligence and did not place as many restrictions on the concept of causation in the case of intentional wrongdoing.<sup>210</sup> Consequently, the court refused to import the foreseeability and superseding cause concepts from negligence law.<sup>211</sup> Once this distinction was recognized, it became a relatively simple matter for the court to conclude that liability could exist for intentional misconduct resulting in suicide. Under the court’s rule, “where the defendant intended, by his conduct, to cause serious mental distress or serious physical suffering, and does so, and such mental distress is shown by the evidence to be ‘a substantial factor in bringing about’ the suicide, a cause of action for wrongful death results.”<sup>212</sup> Importantly, the court also decided not to import the delirium or insanity rule used in negligence cases. Citing tort law’s longstanding reluctance to recognize fewer defenses in the case of intentional torts as opposed to negligence torts, the court concluded that the fact that the decedent was insane or could not resist the impulse to commit suicide was irrelevant for purposes of liability.<sup>213</sup>

Following *Tate*, several other courts declined to import the special causation rules from negligence cases into intentional tort claims involving suicide.<sup>214</sup> In at least two instances, however, courts have modified the other elements of the *Tate* approach. In *Mayer v. Town of Hampton*, the New Hampshire Supreme Court analogized a wrongful death claim involving suicide to a claim of intentional infliction of emotional distress.<sup>215</sup> Consequently, the court added the requirement that the defendant’s conduct must be extreme and outrageous before liability can attach,<sup>216</sup> thereby narrowing the scope of liability articulated in *Tate*. In contrast, the Wyoming

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<sup>208</sup> *Id.* at 30–31.

<sup>209</sup> *Id.* at 31.

<sup>210</sup> *Id.* at 33.

<sup>211</sup> *Id.* at 35–36.

<sup>212</sup> *Id.* at 36 (quoting RESTATEMENT OF TORTS: INTENTIONAL HARMS TO PERSONS, LAND, AND CHATTELS §§ 279–80 (AM. LAW INST. 1934)).

<sup>213</sup> *Id.* at 33, 36.

<sup>214</sup> Other decisions recognizing the potential for liability soon followed. *See* *Rowe v. Marder*, 750 F. Supp. 718, 724 (W.D. Pa. 1990); *Kimberlin v. DeLong*, 637 N.E.2d 121, 128 (Ind. 1994); *Clift v. Narragansett Television L.P.*, 688 A.2d 805, 811 (R.I. 1996); *R.D. v. W.H.*, 875 P.2d 26, 31 (Wyo. 1994).

<sup>215</sup> 497 A.2d 1206, 1210–11 (N.H. 1985).

<sup>216</sup> *Id.* at 1211.

Supreme Court has held that one whose intentional tort causes an emotional or psychiatric illness that is a substantial factor in bringing about the suicide of the victim may be liable “even though he does not intend to cause the emotional or psychiatric illness.”<sup>217</sup>

## 2. *Special Intentional Tort Rules in Suicide Cases: The Substantial Factor Rule*

Following *Tate*, most of the courts to consider the issue have similarly decided against importing foreseeability principles from negligence law. But like *Tate*, they have adopted a different causation standard than that which typically applies in intentional tort cases. Under this approach, a plaintiff may recover where a defendant acts with the intent to cause physical or emotional harm and the conduct was a *substantial factor* in causing the suicide.<sup>218</sup> Courts adopting the substantial factor test frequently refer to the test as being more stringent than the ordinary causation standard in intentional tort cases.<sup>219</sup> According to a federal court in Pennsylvania, the substantial factor standard is justified because in the case of suicide, “the final cause of death always appears as an independent act of a separate will, always raising the very real possibility that the suicide was truly unrelated to the defendant’s actions.”<sup>220</sup> According to the New Hampshire Supreme Court, “[p]roof of the substantial causation will usually be based on expert testimony.”<sup>221</sup>

In practice, the substantial factor standard has not proven to be a particularly onerous requirement for plaintiffs.<sup>222</sup> Indeed, “the fact that a decedent has a history of mental instability is no automatic bar to finding the defendant’s conduct to be a substantial factor in causing the suicide.”<sup>223</sup> As explained by the New Hampshire Supreme Court, “[s]o long as the defendant’s wrongful act was a substantial cause of the suicide, there is no

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<sup>217</sup> *R.D.*, 875 P.2d at 31.

<sup>218</sup> See *Rowe*, 750 F. Supp. at 724 (discussing the approach of most courts); see also *N. Shore Pharmacy Servs., Inc. v. Breslin Assocs. Consulting LLC*, No. 02-11760-NG, 2004 WL 6001505, at \*5 (D. Mass. June 22, 2004) (applying the rule); *Collins v. Village of Woodridge*, 96 F. Supp. 2d 744, 756 (N.D. Ill. 2000) (same); *Tucson Rapid Transit Co. v. Tocci*, 414 P.2d 179, 184-85 (Ariz. Ct. App. 1966) (adopting the substantial factor test); *Kimberlin*, 637 N.E.2d at 127-28 (citing prior decisions and applying the rule); *Clift*, 688 A.2d at 812 (citing *Tate* and adopting its test).

<sup>219</sup> See *Rowe*, 750 F. Supp. at 724 (explaining that the substantial factor test imposes “a greater standard of causation than might otherwise be required”); *Clift*, 688 A.2d at 812 (explaining that the substantial factor test is “certainly a more stringent test than that employed in typical intentional infliction of emotional distress cases”).

<sup>220</sup> *Rowe*, 750 F. Supp. at 724.

<sup>221</sup> *Mayer*, 497 A.2d at 1211.

<sup>222</sup> *But see Dargie v. County of Hillsborough*, No. 93-391-SD, 1995 WL 73339, at \*8 (D.N.H. Feb. 23, 1995) (holding that plaintiff failed to meet the substantial causation standard).

<sup>223</sup> *Mayer*, 497 A.2d at 1211.

reason in such a case to undermine to [sic] the policy behind intentional torts which extends a defendant's liability almost without limit to any actual harm resulting."<sup>224</sup>

### 3. *Special Intentional Tort Rules in Suicide Cases: The Foreseeability Rule*

Other courts have adopted an alternative approach that applies foreseeability principles from negligence law to intentional tort cases to limit defendants' liability. A 2015 decision from a South Carolina federal district court directly imported the standard suicide rule from negligence cases in holding that suicide constitutes an intervening force that breaks the chain of causation.<sup>225</sup> To prevail, the plaintiff must fit within either the irresistible impulse or special relationship exceptions.<sup>226</sup>

The Illinois Supreme Court has adopted a similar foreseeability standard in suicide wrongful death cases involving intentional wrongdoing on the part of a defendant. Rejecting the traditional causation standard that applies in intentional tort cases, the Illinois Supreme Court held that a "plaintiff must plead facts which, if proven, would overcome application of the general rule that suicide is deemed unforeseeable as a matter of law."<sup>227</sup> The plaintiff must ultimately establish that the suicide was foreseeable, which, under the court's approach, means that suicide "was a likely result of the defendant's conduct."<sup>228</sup>

### 4. *Special Intentional Tort Rules in Suicide Cases: The Irresistible Impulse Rule*

A handful of courts have held that there can be no recovery for wrongful death suicide unless the decedent acted from an uncontrollable impulse and the defendant's intentional tort was a substantial cause of the decedent's impulse.<sup>229</sup> Mississippi first adopted this rule in 1968 in a case involving abuse of process on the part of various defendants to collect debts from the decedent that ultimately led to the decedent's suicide.<sup>230</sup> In reaching its decision, the Mississippi Supreme Court referred to several negligence cases as well as *Tate* and several pre-*Tate* intentional tort cases involving

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<sup>224</sup> *Id.*

<sup>225</sup> *Watson v. Adams*, No. 4:12-cv-03436-BHH, 2015 WL 1486869, at \*6 (D.S.C. Mar. 31, 2015).

<sup>226</sup> *Id.* at \*8.

<sup>227</sup> *Turcios v. DeBruler Co.*, 32 N.E.3d 1117, 1128 (Ill. 2015).

<sup>228</sup> *Id.*

<sup>229</sup> *State ex rel. Richardson v. Edgeworth*, 214 So. 2d 579, 587 (Miss. 1968); *see also Hare v. City of Corinth*, 814 F. Supp. 1312, 1326 (N.D. Miss. 1993) (applying this rule); *Cauverien v. De Metz*, 188 N.Y.S.2d 627, 632 (Sup. Ct. 1959) (same).

<sup>230</sup> *Richardson*, 214 So. 2d at 584.

suicide.<sup>231</sup> Ultimately, the court cobbled together a rule that combined aspects of both lines of cases, borrowing the uncontrollable impulse concept from negligence cases and the substantial factor language from *Tate*.<sup>232</sup>

### III. PROBLEMS WITH THE CURRENT APPROACH TO SUICIDE IN TORT LAW

As one reviews the cases involving potential liability for suicide, several fact patterns reappear frequently. There is the harassing, abusive, or bullying behavior that results in suicide.<sup>233</sup> There is the negligent entrustment or sale of a firearm or drugs to the individual who later kills himself.<sup>234</sup> There is the friend, counselor, or other confidant who fails to take action to prevent the decedent from committing suicide.<sup>235</sup> There is the landlord,<sup>236</sup> employer,<sup>237</sup> or other individual who arguably has a special relationship with

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<sup>231</sup> *Id.* at 586–87.

<sup>232</sup> See *supra* note 140 and accompanying text. Mississippi case law on the subject of liability for negligence in suicide cases seemed, until recently, to be quite restrictive. See *Truddle v. Baptist Mem'l Hosp.–De Soto, Inc.*, 150 So. 3d 692, 697 (Miss. 2014) (“Nothing in Mississippi caselaw, save the irresistible-impulse doctrine . . . abrogates the general rule that suicide constitutes ‘an independent, intervening and superseding event that severs the causal nexus between any wrongful action on the part of the defendant.’” (quoting *Shamburger v. Grand Casino of Miss., Inc./Biloxi*, 84 F. Supp. 2d 794, 798 (S.D. Miss. 1998))); *Collins ex rel. Irby v. Madakasira*, No. 2015–CA–01759–COA, 2017 WL 9480890, at \*7 (Miss. Ct. App. Mar. 28, 2017) (“*Truddle* clearly states that an intentional act must be pled to support a cause of action for suicide.”). In 2018, the Mississippi Supreme Court recognized that liability could attach in a case in which the decedent was under the custody and control of a medical facility and the facility’s negligence helped lead to the decedent’s suicide. *Singing River Health Sys. v. Vermilyea*, 242 So. 3d 74, 83 (Miss. 2018).

<sup>233</sup> See, e.g., *MacDermid v. Discover Fin. Servs.*, 488 F.3d 721, 736 (6th Cir. 2007) (harassing debt collection); *Burdett v. Harrah’s Kan. Casino Corp.*, 294 F. Supp. 2d 1215, 1235 (D. Kan. 2003) (harassing debt collection); *Halko v. N.J. Transit Rail Operations, Inc.*, 677 F. Supp. 135, 141–43 (S.D.N.Y. 1987) (harassing supervisors); *Doe v. Doe*, 67 N.E.3d 520, 524 (Ill. App. Ct. 2016) (bullying of minor); *Laytart v. Laytart*, No. 5-94-11, 1994 WL 463777, at \*1 (Ohio Ct. App. Aug. 26, 1994) (sexual abuse of a minor); *Lancaster v. Montesi*, 390 S.W.2d 217, 222 (Tenn. 1965) (domestic abuse).

<sup>234</sup> See, e.g., *Johnson v. Wal-Mart Stores, Inc.*, 588 F.3d 439, 443 (7th Cir. 2009) (sale of firearm ammunition); *Kelly v. Echols*, No. CIV-F-05-118 AWI DLB, 2008 WL 4163221, at \*12 (E.D. Cal. Sept. 4, 2008) (sale of prescription drugs); *Prill v. Marone*, 23 So. 3d 1, 7 (Ala. 2009) (negligent entrustment); see also *Gilmore v. Shell Oil Co.*, 613 So. 2d 1272, 1277 (Ala. 1993) (negligent entrustment); *Tonn v. Moore*, No. 1 CA–CV 12–0372, 2013 WL 1858773, at \*4 (Ariz. Ct. App. Apr. 23, 2013) (negligent entrustment); *Scoggins v. Wal-Mart Stores, Inc.*, 560 N.W.2d 564, 567–68 (Iowa 1997) (sale of ammunition to minor); *Delaney v. Reynolds*, 825 N.E.2d 554, 559 (Mass. App. Ct. 2005) (negligent entrustment); *Splawnik v. DiCaprio*, 540 N.Y.S.2d 615, 617 (App. Div. 1989) (negligent entrustment); *Rains v. Bend of the River*, 124 S.W.3d 580, 587 (Tenn. Ct. App. 2003) (sale of ammunition to minor).

<sup>235</sup> See, e.g., *Logarta v. Gustafson*, 998 F. Supp. 998, 1005 (E.D. Wis. 1998) (companion); *Nally v. Grace Cmty. Church*, 763 P.2d 948, 957 (Cal. 1988) (religious counselor); *Lee v. Corregedore*, 925 P.2d 324, 341–42 (Haw. 1996) (veterans’ counselor); *Lenoci v. Leonard*, 21 A.3d 694, 698 (Vt. 2011) (friend).

<sup>236</sup> See *Krieg v. Massey*, 781 P.2d 277, 279 (Mont. 1989) (holding that landlord did not have duty to prevent suicide).

<sup>237</sup> See *Rollins v. Wackenhut Servs., Inc.*, 703 F.3d 122, 128 (D.C. Cir. 2012) (holding employer not liable for security guard’s suicide using company-issued firearm); *Olson v. Barrett*, No. 6:13–cv–1886–

the decedent<sup>238</sup> who fails to take action to prevent the decedent's suicide. And there is the more generic case in which the defendant's negligence causes physical or emotional harm to the decedent that ultimately leads to the decedent's death.<sup>239</sup>

Each of these cases involves its own tragic set of facts. Each is painful to read. But most share one common thread: the plaintiff loses on the issue of duty or proximate cause.<sup>240</sup> There are certainly exceptions, such as the cases in which a defendant retains custody of an individual and has reason to know of the individual's suicidal tendencies.<sup>241</sup> But the fact that the decedent has committed suicide usually makes it quite difficult for the plaintiff to recover, at least where the defendant's affirmative conduct is alleged to have resulted in suicide.

As the following Part argues, while the actual results in many suicide cases are not particularly problematic, the manner in which courts arrive at those results and the message that the suicide rule sends about suicide and mental health are often troublesome. In addition, the failure of courts to engage in any meaningful analysis regarding proximate cause in these cases and the special causation rules some courts have developed in intentional tort cases sometimes lead to problematic results.

#### *A. Nonproblematic Results*

The standard suicide rule in tort law is a rule regarding proximate cause.<sup>242</sup> As explained by Professor Dan Dobbs, "[t]he most general and pervasive approach to . . . proximate cause holds that a negligent defendant is liable for all the general kinds of harms he foreseeably risked by his negligent conduct and to the class of persons he put at risk by that conduct."<sup>243</sup> The general rule treating suicide as an unforeseeable kind of harm is generally consistent with the medical research regarding suicide.

In 2003, the American Psychiatric Association developed assessment guidelines to help mental health professionals assess the risk of suicide in

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Orl-40KRS, 2015 WL 1277933, at \*6 (M.D. Fla. Mar. 20, 2015) (noting that suicide did not occur "in the scope or course of employment").

<sup>238</sup> See *McPeake v. Cannon*, 553 A.2d 439, 442 (Pa. Super. Ct. 1989) (attorney); *McLaughlin v. Sullivan*, 461 A.2d 123, 127 (N.H. 1983) (attorney).

<sup>239</sup> See *Scheffer v. R.R. Co.*, 105 U.S. 249, 252 (1881) (holding railway company not liable for suicide of passenger injured in train collision).

<sup>240</sup> See, e.g., *Laytart v. Laytart*, No. 5-94-11, 1994 WL 463777, at \*1 (Ohio Ct. App. Aug. 26, 1994) (affirming dismissal on the pleadings in case of sexual abuse of a minor resulting in suicide on the grounds that suicide is intervening act that breaks the chain of causation).

<sup>241</sup> See, e.g., *P.W. v. Children's Hosp.*, 364 P.3d 891, 896 (Colo. 2016).

<sup>242</sup> See *supra* notes 115–30 and accompanying text.

<sup>243</sup> DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 198 (2d ed. 2011).

patients.<sup>244</sup> The guidelines were developed after a review of over thirty years of research and literature in the field.<sup>245</sup> However, considerable doubt within the psychiatric field as to how effective existing risk assessment methods are at predicting the risk of suicide in specific cases has existed for some time.<sup>246</sup> A 2016 meta-analysis examined thirty-seven longitudinal studies involving psychiatric patients or people who had made suicide attempts and who had been classified as being at high or low risks of suicide.<sup>247</sup> The study found that the proportion of suicides among the high-risk patients was 5.5%, in contrast with 0.9% among lower risk patients, suggesting “a statistically strong association between high-risk strata and completed suicide.”<sup>248</sup> However, the meta-analysis also revealed “that about half of all suicides are likely to occur in lower-risk groups” and that “95% of high-risk patients will not suicide.”<sup>249</sup> Thus, despite over forty years of study, the authors concluded that “[a] statistically strong and reliable method to usefully distinguish patients with a high-risk of suicide remains elusive.”<sup>250</sup>

Other studies have reached similar conclusions. A separate 2016 meta-analysis published in the *British Journal of Psychiatry* found that

there is no robust evidence to support the use of one risk scale over another, and because all the scales reviewed had a low [positive predictive value] with significant numbers of false positives these scales should not be used in clinical practice alone to assess the future risk of suicide.<sup>251</sup>

Researchers who attempted to identify patients at risk for suicide among 4800 veterans admitted for in-patient psychiatric care were unsuccessful in their efforts, leading to the conclusion that “[i]dentification of particular

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<sup>244</sup> AM. PSYCHIATRIC ASS’N, PRACTICE GUIDELINE FOR THE ASSESSMENT AND TREATMENT OF PATIENTS WITH SUICIDAL BEHAVIORS (2003), [https://psychiatryonline.org/pb/assets/raw/sitewide/practice\\_guidelines/guidelines/suicide.pdf](https://psychiatryonline.org/pb/assets/raw/sitewide/practice_guidelines/guidelines/suicide.pdf) [<https://perma.cc/MCM8-28JW>].

<sup>245</sup> *Id.* at 7.

<sup>246</sup> See Albert M. Drukteinis, *Psychiatric Perspectives on Civil Liability for Suicide*, 13 BULL. AM. ACAD. PSYCHIATRY L. 71, 80 (1985) (“In general, psychiatric prediction of a patient’s potential for suicide is being questioned more and more.”).

<sup>247</sup> Matthew Large et al., *Meta-Analysis of Longitudinal Cohort Studies of Suicide Risk Assessment Among Psychiatric Patients: Heterogeneity in Results and Lack of Improvement over Time*, PLOS ONE (June 1, 2016), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0156322> [<https://perma.cc/9932-F8HH>].

<sup>248</sup> *Id.* at 1–2, 12.

<sup>249</sup> *Id.* at 12.

<sup>250</sup> *Id.* at 2.

<sup>251</sup> Melissa K.Y. Chan et al., *Predicting Suicide Following Self-harm: Systematic Review of Risk Factors and Risk Scales*, 209 BRIT. J. PSYCHIATRY 277, 281 (2016), <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/C9D595168EDF06401A823E2E968915E1/S000712500024511Xa.pdf> [<https://perma.cc/PJ45-5TGS>].

persons who will commit suicide is not currently feasible.”<sup>252</sup> There are certainly identifiable factors that increase the risk of suicide. For example, a 2009 study found that of patients who had been hospitalized after a suicide attempt, nearly one-third of those who had psychotic symptoms attempted suicide at least one more time, thus leading to the conclusion that “[p]sychotic symptoms during major depressive episode increase the risk of completed suicide after serious suicide attempt.”<sup>253</sup> But predicting those who are most at risk of suicide remains frustratingly difficult.<sup>254</sup>

The fact that suicide remains an unpredictable occurrence to trained experts speaks to the foreseeability of suicide for purposes of tort law. Predictability is not the same thing as foreseeability.<sup>255</sup> But foreseeability does involve some measure of probability of an event’s occurrence. And if an event occurs infrequently enough under a given set of facts to be unpredictable, this impacts the foreseeability of the event.<sup>256</sup> Moreover, foreseeability is typically assessed from the perspective of the hypothetical reasonable person. If experts with superior knowledge regarding suicide have been unable to develop a reliable method for determining those at a high risk of suicide, the hypothetical reasonable person will ordinarily not be able to do better.<sup>257</sup>

Even where emotional distress is within the foreseeable scope of risk resulting from a defendant’s conduct, it is the unusual case in which suicide is the kind of harm foreseeably risked. One can easily foresee that an intentional wrong or the failure to exercise reasonable care could result in emotional distress. But the foreseeable scope-of-risk analysis involved in proximate cause determinations involves consideration of degrees. Burning resulting from an explosion caused by an unpredictable chemical reaction is a different kind of harm than injury resulting from being accidentally

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<sup>252</sup> Alex D. Pokorny, *Prediction of Suicide in Psychiatric Patients. Report of a Prospective Study*, 40 ARCHIVES GEN. PSYCHIATRY 249, 249 (1983), <https://jamanetwork.com/journals/jamapsychiatry/fullarticle/492987> [<https://perma.cc/2H8F-WHKN>].

<sup>253</sup> Kirsi Suominen et al., *Outcome of Patients with Major Depressive Disorder After Serious Suicide Attempt*, 70 J. CLINICAL PSYCHIATRY 1372, 1372 (2009), <http://www.psychiatrist.com/JCP/article/Pages/2009/v70n10/v70n1005.aspx> [<https://perma.cc/8MLF-SNSM>].

<sup>254</sup> See Phyllis Coleman & Ronald A. Shellow, *Suicide: Unpredictable and Unavoidable—Proposed Guidelines Provide Rational Test for Physician’s Liability*, 71 NEB. L. REV. 643, 644 (1992) (“In fact, predictions of the likelihood a specific individual will commit suicide are wrong far more often than they are right.”).

<sup>255</sup> See Drukteinis, *supra* note 246, at 80 (stating that “the legal use of the term foreseeability and the concept of predictability are not synonymous”).

<sup>256</sup> See *id.*

<sup>257</sup> See *id.* (stating that “if professionals trained in mental health cannot prevent suicide or even predict it accurately, then the average citizen certainly has no way of predicting it”).

splashed by hot liquid.<sup>258</sup> It is not simply the fact that one injury is more substantial than the other that may take one of the harms outside the scope of risk. It is the fact that the essence or fundamental nature of the injuries are different in kind. Suicide involves emotional distress *plus* the intentional act of the decedent. In this respect, suicide is ultimately a harm that is different in kind than the emotional distress that tort law recognizes as a compensable injury. It is the unusual case where suicide is the kind of harm that a defendant foreseeably risked by his negligent conduct. Thus, as a general proposition, the special causation rules in suicide cases usually produce the correct result.

*B. Problematic Reasoning (and Sometimes Problematic Results)*

*1. Problematic Reasoning: Proximate Cause*

Rote application of the suicide rule produces the correct result in the run of cases. But not always. In some instances, a court's application of the rule effectively short-circuits any real analysis into whether the decedent's suicide was within the scope of foreseeable risk created by the defendant's negligence.

For example, in *R.D. v. W.H.*, a Wyoming case, the decedent's family was able to state a claim by successfully invoking the delirium or insanity exception to the traditional suicide rule in a negligence case after the court had explained that suicide is ordinarily treated as an intervening cause that breaks the chain of causation.<sup>259</sup> But it is difficult to understand why there was a need to resort to the exception in the first place when application of traditional foreseeable scope-of-risk analysis would almost certainly have resulted in a jury question. According to the complaint, the defendant (the decedent's stepfather) had allegedly sexually abused the decedent throughout her entire life to the point that she developed psychiatric difficulties and attempted suicide on several previous occasions.<sup>260</sup> The defendant loaned a gun to the decedent, which she used to try to kill herself; five days later, the defendant helped the decedent obtain a prescription for medicine—the same medicine that the defendant knew or should have known the decedent had used in a previous attempt to kill herself.<sup>261</sup> On this occasion, she was successful.<sup>262</sup> There is nothing wrong with articulating a general rule that suicide is not the sort of resulting harm that is foreseeable from one's negligence. But in this instance, common sense would suggest

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<sup>258</sup> See *Doughty v. Turner Mfg. Co. Ltd.* [1964] 1 Q.B. 518 (Eng.).

<sup>259</sup> 875 P.2d 26, 28–29 (Wyo. 1994).

<sup>260</sup> *Id.* at 28.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

that suicide was the *exact* harm a reasonable person could foresee by assisting the decedent in obtaining the prescription. As such, the decedent's acts cannot be viewed as a superseding cause if that term is to have any meaning.<sup>263</sup>

The fact that the defendant in *R.D. v. W.H.* had, according to the complaint, contributed to the decedent's psychiatric problems through repeated sexual abuse only strengthens the case for foreseeability. Suicide is admittedly difficult to predict.<sup>264</sup> But there is also a correlation between sexual and other forms of abuse with long-term psychological problems and risk of suicide.<sup>265</sup> As an example, according to one study, "heterosexual women who had experienced physical violence by a partner were more than seven times more likely to report current suicidal ideation than their counterparts who had not experienced" such violence.<sup>266</sup>

Courts' tendency to apply the traditional suicide rule in cases of alleged negligence involving abusers and to apply similar foreseeability concepts to claims founded on intentional misconduct precludes jurors from hearing expert testimony that might shed light on the causal connection (if any) between the defendant's conduct and the ensuing suicide. For example, in a Tennessee case, the decedent's boyfriend "had broken her leg, burned her with a cigarette, blacked her eyes, kicked her, [] caused her to be bruised and discolored over large areas," and forcibly retrieved her from another state after she had attempted to leave him.<sup>267</sup> Eventually, the decedent jumped to her death after writing a suicide note ascribing her actions to the abuse she

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<sup>263</sup> See *Dew v. Crown Derrick Erectors, Inc.*, 208 S.W.3d 448, 453 (Tex. 2006) ("Where the intervening act's risk is the very same risk that renders the original actor negligent, the intervening act cannot serve as a superseding cause.").

<sup>264</sup> See *supra* notes 244–54 and accompanying text.

<sup>265</sup> See Peter J. Fagan et al., *Pedophilia*, 288 JAMA 2458, 2460 (2002) (noting that child victims of sexual abuse are at higher risk for mood disorders and suicide).

<sup>266</sup> See Courtenay E. Cavanaugh et al., *Prevalence and Correlates of Suicidal Behavior Among Adult Female Victims of Intimate Partner Violence*, 41 SUICIDE & LIFE-THREATENING BEHAV. 372, 372–73 (2011); see also John Briere & Lisa Y. Zaidi, *Sexual Abuse Histories and Sequelae in Female Psychiatric Emergency Room Patients*, 146 AM. J. PSYCHIATRY 1602, 1602 (1989) (noting that studies "tend to document high rates of anxiety, depression, dissociation, self-destructiveness, substance abuse, and interpersonal dysfunction in [male and female] adults who were molested as children" as well as more frequent diagnoses of borderline personality disorder); Elizabeth Oddone Paolucci et al., *A Meta-Analysis of the Published Research on the Effects of Child Sexual Abuse*, 135 J. PSYCHOL. 17, 17 (2001) (reporting "clear evidence confirming the link between" childhood sexual abuse and posttraumatic stress disorder, depression, suicide, sexual promiscuity, victim–perpetrator cycle, and poor academic performance); Melissa K. Holt et al., *Bullying and Suicidal Ideation and Behaviors: A Meta-Analysis*, 135 PEDIATRICS e496, e496 (2015) (conducting meta-analysis and concluding "that involvement in bullying in any capacity is associated with suicidal ideation and behavior").

<sup>267</sup> *Lancaster v. Montesi*, 390 S.W.2d 217, 219 (Tenn. 1965).

had suffered.<sup>268</sup> Nonetheless, the Tennessee Supreme Court, applying the suicide rule without further inquiry, affirmed the trial court's decision to sustain the defendant's demurrer on the grounds that the decedent's suicide was unforeseeable and "an abnormal thing."<sup>269</sup>

In an Ohio case, the complaint alleged that a teenager died by suicide as a result of having been sexually abused by an adult.<sup>270</sup> In a brief opinion affirming the trial court's dismissal of the complaint for failure to state a claim upon which relief can be granted, the Ohio appellate court perfunctorily cited the standard rule that suicide is generally an intervening cause that breaks the chain of causation.<sup>271</sup> The court then noted that there was no allegation in the complaint that the alleged abuser knew or should have known the teen was suicidal when he was abusing the teen, nor was there any allegation that suicide "is a normal incident of the risk involved in" sexual abuse of a teen.<sup>272</sup> As such, dismissal was proper.<sup>273</sup>

These kinds of cases present special circumstances that take them outside of the confines of the standard rule regarding suicide and causation. Where the risk of the decedent's act is the same risk that renders the defendant's conduct negligent to begin with, the intervening act cannot serve as a superseding cause.<sup>274</sup> If a defendant's own extreme conduct foreseeably risks severe emotional injury, the foreseeability arguments and arguments about the extreme nature of the decedent's own acts carry considerably less weight. When current science and everyday experience suggest that a defendant's conduct substantially increased the risk of suicide, it is the worst sort of legal fiction to argue that the decedent's actions were a superseding cause and that a jury could reach no other conclusion.

## 2. Comparative Fault Problems

A problem related to this short-circuited proximate cause analysis involves the defense of comparative fault. Courts sometimes explain that the decedent's suicide was "the sole proximate cause" of death.<sup>275</sup> The idea that

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<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 222.

<sup>270</sup> *Laytart v. Laytart*, No. 5-94-11, 1994 WL 463777, at \*1 (Ohio Ct. App. Aug. 26, 1994).

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> See *Dew v. Crown Derrick Erectors, Inc.*, 208 S.W.3d 448, 453 (Tex. 2006) ("Where the intervening act's risk is the very same risk that renders the original actor negligent, the intervening act cannot serve as a superseding cause."); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29 (AM. LAW INST. 2010) ("An actor's liability is limited to those physical harms that result from the risks that made the actor's conduct tortious.").

<sup>275</sup> See, e.g., *La Quinta Inns, Inc. v. Leech*, 658 S.E.2d 637, 641 (Ga. Ct. App. 2008) ("[T]he evidence demands a finding that Mr. Leech's act of suicide was the sole proximate cause of his death . . ."); *Jones*

the decedent's suicide is the sole proximate cause of death was devised at a time when the all-or-nothing defense of contributory negligence was the norm.<sup>276</sup> Given the choice of assigning responsibility for a suicide to one of the two parties, the choice to assign it to the decedent made sense. The use of the term "sole proximate cause" was certainly unfortunate in that it implies that there can be only one proximate cause of an injury.<sup>277</sup> But the idea was nonetheless defensible.

With tort law's switch to comparative fault, however, the idea that the decedent's suicide was always the sole proximate cause ceased to be persuasive. Cases outside of the suicide context in which the acts of both the plaintiff and defendant were found to be proximate causes of the plaintiff's injuries and the plaintiff's recovery was proportionally reduced became commonplace following the switch to comparative fault.<sup>278</sup> Underlying the switch from a contributory negligence to comparative negligence regime were concerns over fairness; while the plaintiff's own fault should justifiably limit recovery, the defendant could sometimes rightfully be expected to bear some portion of the responsibility.<sup>279</sup> Yet, the idea that the decedent's decision to take her life was the sole proximate cause of death remained rooted in tort law with little acknowledgment that both parties could share legal responsibility for an outcome. In this respect, blind application of the idea that suicide is the sole proximate cause of the decedent's death serves as the functional, if not intentional, equivalent of the old contributory negligence bar. As Professor Joe King notes, "[t]he serious misconduct bar reinvests the effect of the plaintiff's fault with a complete bar potential despite a comparative fault scheme, and thus legitimizes an avenue for the court to end-run the jury."<sup>280</sup> As a result, application of the principle may sometimes undermine the fairness and proportionality concerns underlying comparative fault rules.<sup>281</sup>

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v. Stewart, 191 S.W.2d 439, 441 (Tenn. 1946) ("This intervening act of the deceased, and not the tort of the defendant, must be regarded as the sole proximate cause of that death.").

<sup>276</sup> The switch from contributory negligence to comparative negligence began in the 1960s and 1970s. See Christopher J. Robinette & Paul G. Sherland, *Contributory or Comparative: Which Is the Optimal Negligence Rule?*, 24 N. ILL. U. L. REV. 41, 43 (2003).

<sup>277</sup> See generally *Brisboy v. Fibreboard Corp.*, 418 N.W.2d 650, 653 (Mich. 1988) ("The facts of this case illustrate the principle that there may be more than one proximate cause of an injury.").

<sup>278</sup> See, e.g., *Breaux v. Grand Casinos of Miss., Inc.-Gulfport*, 854 So. 2d 1093, 1097 (Miss. Ct. App. 2003) (explaining that when there is more than one proximate cause, comparative negligence principles apply).

<sup>279</sup> See generally Joseph H. King, Jr., *Outlaws and Outlier Doctrines: The Serious Misconduct Bar in Tort Law*, 43 WM. & MARY L. REV. 1011, 1062-63 (2002).

<sup>280</sup> *Id.* at 1067-68.

<sup>281</sup> See *id.* at 1063.

C. *Problematic Messages*1. *Value Judgments*

The special causation rules that apply in the case of suicide represent a departure from traditional tort principles. It is certainly not uncommon for special tort rules to develop based on policy or moral judgments. But the concern in suicide cases is that courts may be applying moral judgments that were developed centuries ago at a time when societal views on suicide were evolving.

There are other examples in which tort law departs from its traditional principles for particular groups of plaintiffs. For example, standard tort principles would permit a plaintiff to hold a defendant liable where the plaintiff was injured after engaging in unwise or dangerous conduct and this conduct was foreseeable to the defendant at the time of the defendant's negligence.<sup>282</sup> It is the unusual case in which the plaintiff's own negligence is treated as the sole proximate cause of the plaintiff's injuries. But where, for example, a bartender serves an obviously intoxicated patron and that patron drives under the influence and injures himself, the majority rule is that the patron may not recover from the individual who provided the alcohol.<sup>283</sup> Some courts explicitly ground their conclusions on the notion that a patron's actions in such cases are the sole proximate cause of the injuries.<sup>284</sup>

This rule in dram shop cases is obviously driven more by policy than by logic. One of the foreseeable risks one contributes to by serving alcohol to a visibly intoxicated individual is obviously that the individual will injure himself in addition to others. Yet, the majority rule is grounded on the notion

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<sup>282</sup> The plaintiff's recovery might be limited by comparative negligence principles in such instances.

<sup>283</sup> See *Bertelmann v. TAAS Assocs.*, 735 P.2d 930, 934 n.3 (Haw. 1987) (stating that the majority rule is that "neither minors nor adults who hurt themselves after becoming intoxicated possess a cause of action against whoever provided them with liquor"). Statutes play an important part in the law in this area. See *Cuevas v. Royal D'Iberville Hotel*, 498 So. 2d 346, 348 (Miss. 1986) ("[W]e do not think the legislature intended to impose liability upon a dispenser of intoxicants to an adult individual, such as appellant here, who voluntarily consumes intoxicants and then, by reason of his inebriated condition, injures himself."); Richard Smith, Note, *A Comparative Analysis of Dramshop Liability and a Proposal for Uniform Legislation*, 25 J. CORP. L. 553, 563 (2000) ("Relatively few states allow an intoxicated adult patron to recover from the dramshop for injuries caused by his own intoxication.").

<sup>284</sup> See *Bennett v. Godfather's Pizza, Inc.*, 570 So. 2d 1351, 1353 (Fla. Dist. Ct. App. 1990) ("The rationale for not holding the establishment liable is that the voluntary drinking of the alcohol, not the furnishing of [the alcohol], [is] the proximate cause of the injury." (internal quotations omitted)); *Bertelmann*, 735 P.2d at 933 ("Drunken persons who harm themselves are solely responsible for their voluntary intoxication and cannot prevail under a common law or statutory basis."); *Smith v. Tenth Inning*, 551 N.E.2d 1296, 1298-99 (Ohio 1990) (treating the plaintiff's consumption of alcohol as the proximate cause of the plaintiff's injuries in such cases); *McClelland v. Harvie Kothe-Ed Riemann*, Post No. 1201, *Veterans of the Foreign Wars of the U.S., Inc.*, 770 P.2d 569, 572 (Okla. 1989) ("Claims do not lie against liquor vendors because—at common law—it is the drink's *voluntary consumption* rather than its sale that constitutes the *proximate cause* of the injuries sought to be redressed.").

that a person should not be permitted to benefit “by his or her own wrongful act.”<sup>285</sup>

Professor King has explored the idea that courts sometimes recognize a special doctrine barring tort claims arising out of serious misconduct.<sup>286</sup> King cites as one of his many examples a case in which a teenager was killed by an unsecured vending machine that fell when he was attempting to steal drinks.<sup>287</sup> The Alabama Supreme Court held that the plaintiff’s subsequent products liability claim was barred on the grounds that “[a] person cannot maintain a cause of action if, in order to establish it, he must rely in whole or part on an illegal or immoral act.”<sup>288</sup> As in the dram shop cases, the primary justification for what King calls this “serious misconduct bar” is the notion that a wrongdoer engaged in serious misconduct should not be permitted to benefit from his wrongdoing by recovering damages.<sup>289</sup> King’s survey of the decisional law reveals that sometimes the “serious misconduct bar” he identifies operates less explicitly.<sup>290</sup> In some cases, courts formally treat the plaintiff’s misconduct as the sole proximate cause of the plaintiff’s own injuries, despite the negligence of the defendant.<sup>291</sup> But as King observes, what courts are actually doing is applying the serious misconduct bar under the guise of proximate cause.<sup>292</sup>

The judicial treatment of suicide cases follows a similar format. A few courts have expressly applied the serious misconduct bar in suicide cases.<sup>293</sup> More commonly, courts treat a decedent’s suicide as so extreme or abnormal

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<sup>285</sup> *Buntin v. Hutton*, 206 Ill. App. 194, 199 (App. Ct. 1917); *see also Smith*, 551 N.E.2d at 1298 (“Clearly, permitting the intoxicated patron a cause of action in this context would simply send the wrong message to all our citizens, because such a message would essentially state that a patron who has purchased alcoholic beverages from a permit holder may drink such alcohol with unbridled, unfettered impunity and with full knowledge that the permit holder will be ultimately responsible for any harm caused by the patron’s intoxication.”).

<sup>286</sup> King, *supra* note 279, at 1015.

<sup>287</sup> *Id.* at 1023 (discussing *Oden v. Pepsi Cola Bottling Co. of Decatur, Inc.*, 621 So. 2d 953, 954 (Ala. 1993)).

<sup>288</sup> *Oden*, 621 So. 2d at 954–55 (quoting *Hinkle v. Ry. Express Agency*, 6 So. 2d 417, 421 (Ala. 1942)).

<sup>289</sup> King, *supra* note 279, at 1017. The dram shop cases are, in some instances, examples of the serious misconduct bar in action. *See* Alison K. Goodwin, Comment, *One Drunk Driver, Shame on You, Two Drunk Drivers, Shame on Who: Reconciling the Unlawful Acts Doctrine with Comparative Fault*, 48 N.M. L. REV. 173, 188 (2018) (discussing New Mexico’s “complicity doctrine” in the context of dram shop cases).

<sup>290</sup> King, *supra* note 279, at 1016.

<sup>291</sup> *See id.* at 1063–64 (discussing cases).

<sup>292</sup> *Id.* at 1064.

<sup>293</sup> *See supra* notes 132–35 and accompanying text. As Professor King notes, there are relatively few cases in which courts explicitly invoke the serious misconduct rule in barring a plaintiff’s claim in a suicide case. King, *supra* note 279, at 1028–29.

as to be the sole proximate cause of the plaintiff's injuries.<sup>294</sup> The history of the suicide rule leaves little doubt that the rule developed, at least in part, from the historical view that suicide was a criminal or immoral act.<sup>295</sup> Regardless of whether a court expressly applies the serious misconduct bar or does so under the guise of proximate cause, those who commit suicide are grouped with drunk drivers, thieves, and others whose acts take them outside the protection of the law.<sup>296</sup>

The fact that courts sometimes make policy judgments as part of the proximate cause element is hardly surprising. The proximate cause element exists in large measure to ensure that liability is not limitless, and the limits that courts impose are often based on policy concerns and notions of fairness.<sup>297</sup> But in the case of the special causation rules for suicide cases, courts are applying legal rules that have their origin at a time when suicide was widely viewed as sinful and a crime.<sup>298</sup> While U.S. society continues to view suicide as a tragedy, societal attitudes have evolved since the days when courts could describe the act as sinful or immoral without fear of contradiction.<sup>299</sup>

Citing Justice Oliver Wendell Holmes, Jr., Judge David L. Bazelon once observed that “the continued vitality of the common law, including the law of torts, depends upon its ability to reflect contemporary community

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<sup>294</sup> See *supra* note 275 and accompanying text.

<sup>295</sup> See *supra* note 132 and accompanying text.

<sup>296</sup> The delirium or insanity exception to the general suicide rule likewise reflects a morality-based judgment upon those who commit suicide. The insanity or delirium exception is less a rule about causation than it is a value judgment as to the relative blameworthiness of the parties. The question of whether a defendant's conduct resulted in the decedent being insane or unable to resist an impulse to commit suicide has virtually no relation to the question of whether the defendant's conduct resulted in a foreseeable risk of suicide. Instead, like the *M'Naghten* rule in criminal law, the insanity or delirium exception reflects a value choice as to the blameworthiness or culpability of the decedent. See generally Bruce J. Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 B.C. L. REV. 785, 832 (2009) (explaining that the *M'Naghten* test “focus[es] on cognitive impairment produced by mental illness that reduces culpability to the extent that the offender is not blameworthy for his conduct”). The fact that the decedent was supposedly insane at the time of suicide absolves the decedent of all legal and moral blame for the suicide. See *Baker v. Bd. of Fire Pension Fund Comm'rs*, 123 P. 344, 345 (Cal. Dist. Ct. App. 1912) (explaining that the decedent “cannot be said to have been the cause, either morally or legally, of his own death” when his actions were the result of his insanity).

<sup>297</sup> See, e.g., *Ashley Cty. v. Pfizer, Inc.*, 552 F.3d 659, 671 (8th Cir. 2009) (“Proximate cause is bottomed on public policy as a limitation on how far society is willing to extend liability for a defendant's actions.”); *Caputzal v. Lindsay Co.*, 222 A.2d 513, 518 (N.J. 1966) (“Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy.” (quoting WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 240–41 (3d ed. 1964))).

<sup>298</sup> See *supra* notes 79–82 and accompanying text.

<sup>299</sup> See *supra* notes 71–77 and accompanying text.

values and ethics.”<sup>300</sup> Tort law in particular “operates as a vehicle through which communities perpetually reexamine and communicate their values.”<sup>301</sup> Yet, courts have developed a morality-based rule and encased it in amber in the face of evolving societal attitudes and better psychological understanding of suicide. In the process, they may sometimes send a message about the nature of suicide that is no longer shared by the broader community.

## 2. *The “Rage or Frenzy” (or “Delirium or Insanity”) Exception*

The “rage or frenzy”/“delirium or insanity” exception presents a similar problem in terms of messaging. As an initial matter, “insanity” is a legal concept, not a medical one.<sup>302</sup> The terms “rage” and “frenzy” have even less medical significance. But not only are the terms unhelpful in helping juries understand the relevant concepts,<sup>303</sup> they are actually harmful in terms of promoting misunderstandings and negative stereotypes.

The use of the term “frenzy”—with its medieval origins<sup>304</sup>—conjures images of snake pit mental hospitals with frightening and dangerous patients. In order to avoid the strictures of the general suicide rule, family members bringing a wrongful death action are forced to argue that a loved one was acting in a rage or frenzy or was insane at the time of the suicide. The reality is that the most common description of the mental state of those who have attempted suicide is that they did not want to die; they just wanted the pain they were experiencing to stop,<sup>305</sup> a seemingly rational decision to a person who otherwise sees no realistic end to the pain he or she is suffering. Moreover, continued use of the term “irresistible impulse” rightly or wrongly often suggests to courts the idea that the decedent simply “snapped” or was unable to control his actions.<sup>306</sup> In fact, modern psychiatric understanding of

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<sup>300</sup> *Whetzel v. Jess Fisher Mgmt. Co.*, 282 F.2d 943, 946 (D.C. Cir. 1960) (citing OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (1881)).

<sup>301</sup> Cristina Carmody Tilley, *Tort Law Inside Out*, 126 *YALE L.J.* 1320, 1324 (2017); see also Eric T. Freyfogle, *Water Justice*, 1986 *U. ILL. L. REV.* 481, 503 (“Tort law has long had close ties to community values and standards and to shifting concepts of public morality.”).

<sup>302</sup> See *Tucson Rapid Transit Co. v. Tocci*, 414 P.2d 179, 185–86 (Ariz. Ct. App. 1966) (“The word ‘insanity’ has no definite legal meaning.”); Pamela A. Wilkins, *Competency for Execution: The Implications of a Communicative Model of Retribution*, 76 *TENN. L. REV.* 713, 722 (2009) (noting that “insanity is a legal rather than a medical concept”).

<sup>303</sup> See generally *Wickersham v. Ford Motor Co.*, 194 F. Supp. 3d 434, 445 (D.S.C. 2016) (questioning whether the term “insanity” is “meaningful or appropriate” in the context of a suicide case).

<sup>304</sup> See *supra* note 41 and accompanying text.

<sup>305</sup> See Chandler, *supra* note 20 and accompanying text.

<sup>306</sup> See *supra* note 167 and accompanying text (discussing the tendency of courts to view premeditation as evidence that the act of suicide was not the result of an irresistible impulse).

suicide suggests that the decision to take one's life often occurs over an extended period of time.<sup>307</sup>

In short, the continued use of the "rage or frenzy" terminology furthers stigmatization and misunderstandings associated with suicide, mental illness, and depression.<sup>308</sup> This is especially troubling at a time when there is increasing acceptance of the idea that suicide is a public health problem that needs to be addressed through increased research and prevention.<sup>309</sup>

#### IV. TOWARD A COHERENT APPROACH TO SUICIDE CASES

Most of the special causation rules regarding suicide in tort law are outdated and problematic in their application. It is time for courts to reevaluate these rules in light of changing conditions. Drawing upon several fairly recent decisions in the area, the following Part of the Article proposes alternative rules in the negligence and intentional tort contexts. These alternative approaches seek to give effect to standard foreseeability and scope-of-risk analyses and reflect modern understandings of suicide, including its public dimensions, while also recognizing the special and sometimes unpredictable nature of suicide.

##### A. Negligence

In the negligence context, courts need to abolish the blanket rule that suicide is a superseding cause. Courts also need to eliminate the unhelpful and harmful rage or frenzy/delirium or insanity exception altogether. But courts can continue to recognize the exceptional and usually unforeseeable nature of suicide in other ways.

##### 1. *Establishing a Default Position and Recognizing Special Circumstances*

While most courts continue to apply the general rule that suicide acts as an unforeseeable superseding cause, some courts are beginning to move beyond rote application of the suicide rule and its exceptions and toward a more traditional scope-of-risk analysis.<sup>310</sup> Implicit in these decisions is the

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<sup>307</sup> See Schwartz, *supra* note 161, at 234 (explaining that the tendency of courts to confine "the definition of uncontrollable impulse to a sudden frenzied act . . . does not comport with modern medical knowledge of mental illness" (footnote omitted)).

<sup>308</sup> Similar concerns over stigma and stereotypes exist regarding the *M'Naghten* rule in criminal law. See Scott E. Sundby, *The Virtues of a Procedural View of Innocence—A Response to Professor Schwartz*, 41 HASTINGS L.J. 161, 168 (1989) (noting the stigma attached to a finding of insanity under *M'Naghten*).

<sup>309</sup> See Carey, *supra* note 16 (discussing suicide in terms of a public health issue).

<sup>310</sup> See *Halko v. N.J. Transit Rail Operations, Inc.*, 677 F. Supp. 135, 142 (S.D.N.Y. 1987) ("[T]he most recent trend is to place less emphasis on the mental state and more on the causal connection."); see also *Wyke v. Polk Cty. Sch. Bd.*, 129 F.3d 560, 575 (11th Cir. 1997) (affirming trial court's denial of

recognition that traditional foreseeable scope-of-risk analysis is sufficient to address the vast majority of these cases without relying upon the fiction that suicide is a superseding cause as a matter of law. For example, where a driver negligently rear-ends another driver, resulting in physical injuries that eventually allegedly lead to suicide, suicide is simply not the kind of harm the defendant foreseeably risked through her negligence.<sup>311</sup> We do not need a special “suicide rule,” with all of its attendant shortcomings, to tell us this.

But also implicit in the decisions that are willing to actually take the proximate cause element seriously in suicide cases is the reality that sometimes suicide *is* a foreseeable consequence of a defendant’s negligence. A 2016 opinion by a federal court in South Carolina provides a useful way of viewing the issue. After reviewing the decisional law in South Carolina on the subject of causation in negligence cases involving suicide, the court observed that the cases are “most sensibly read to provide that, *under normal circumstances*, a decedent’s suicide will constitute an intervening event which defeats any showing of causation.”<sup>312</sup> The general rule “may establish a default position,” but it “cannot be applied in every case.”<sup>313</sup> In short, mechanical application of the suicide rule should not short-circuit proximate cause analysis; “[e]ach case must be decided largely on the special facts belonging to it.”<sup>314</sup>

Courts must be willing to look past the boilerplate of the traditional suicide rule and be willing to recognize the special facts that may be present that make suicide the kind of harm that the defendant foreseeably risked through his negligence. Here, the law concerning the theory of negligent infliction of emotional distress provides a useful parallel.

Courts have long been leery of claims of negligently inflicted emotional distress.<sup>315</sup> While part of the concern involves the potential for fakery, courts

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motion for judgment as a matter of law where decedent had recently attempted suicide on two previous occasions); *Edwards v. Tardif*, 692 A.2d 1266, 1269–70, 1272–73 (Conn. 1997) (affirming jury verdict for plaintiff and rejecting application of suicide rule); *Wozniak v. Lipoff*, 750 P.2d 971, 983 (Kan. 1988) (affirming jury verdict for plaintiff based on conclusion that being treated for depression made suicide foreseeable); *Champagne v. United States*, 513 N.W.2d 75, 76–77 (N.D. 1994) (“If the patient’s act of suicide is a foreseeable result of the medical provider’s breach of duty to treat the patient, the patient’s act of suicide cannot be deemed a superseding cause of the patient’s death that breaks the chain of causation between the medical provider and the patient, which absolves the medical provider of liability.”).

<sup>311</sup> See *Tucson Rapid Transit Co. v. Tocci*, 414 P.2d 179, 186 (Ariz. Ct. App. 1966).

<sup>312</sup> *Wickersham v. Ford Motor Co.*, 194 F. Supp. 3d 434, 442 (D.S.C. 2016) (emphasis added).

<sup>313</sup> *Id.*

<sup>314</sup> *Scott v. Greenville Pharmacy, Inc.*, 48 S.E.2d 324, 328 (S.C. 1948) (quoted in *Wickersham*, 194 F. Supp. 3d at 441).

<sup>315</sup> See John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 MARQ. L. REV. 789, 807–08 (2007) (noting courts’ concerns with recognizing such claims).

have also expressed a concern that has helped drive the recognition of the suicide rule: the fear of expansive liability.<sup>316</sup> Originally, courts refused to permit recovery for emotional distress unless the defendant's negligence resulted in physical impact, there was some type of physical manifestation of the distress, or the plaintiff was in the "zone of danger" of physical injury.<sup>317</sup> Several courts eventually observed that "modern advances made in medical and psychiatric science" helped alleviate the concerns underlying these special rules.<sup>318</sup> Over time, courts began to move away from these unrealistic and mechanical rules that foreclosed any real analysis into foreseeability<sup>319</sup> and began to recognize exceptions permitting recovery where the facts presented a greater guaranty that the alleged distress was likely to be real and that the distress was actually within the foreseeable scope of risk created by the defendant's negligence.<sup>320</sup> These included

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<sup>316</sup> See KEETON ET AL., *supra* note 112, § 54, at 360–61 (5th ed. 1984) (identifying "the danger that claims of mental harm will be falsified or imagined; and . . . the perceived unfairness of imposing heavy and disproportionate financial burdens upon a defendant, whose conduct was only negligent, for consequences which appear remote from the 'wrongful' act" as among the concerns driving courts).

<sup>317</sup> See Kircher, *supra* note 315, at 810–16 (discussing various tests).

<sup>318</sup> Paugh v. Hanks, 451 N.E.2d 759, 762 (Ohio 1983); see also Norboe v. Wells Fargo Bank, N.A., 66 Conn. L. Rptr. 112, 126 n.19 (Super. Ct. 2018) ("As medical knowledge advances, the clean distinction between a person's mental and physical condition becomes increasingly blurred."); James v. Lieb, 375 N.W.2d 109, 116 (Neb. 1985) ("While physical manifestation of the psychological injury may be highly persuasive, such proof is not necessary given the current state of medical science and advances in psychology."); Bowen v. Lumbermens Mut. Cas. Co., 517 N.W.2d 432, 443 (Wis. 1994) ("[G]iven the present state of medical science, emotional distress can be established by means other than proof of physical manifestation.");

<sup>319</sup> See, e.g., Knaub v. Gotwalt, 220 A.2d 646, 649 (Pa. 1966) (Musmanno, J., dissenting) ("The rule that there must be the mechanical requirement of impact, before recovery will be permitted, charges with lowered head against the stone wall of the most elementary phenomena observable practically every day.");

<sup>320</sup> See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 47 reporters' notes cmt. b (AM. LAW INST. 2012). Even among jurisdictions that retain impact as a requirement, exceptions are sometimes recognized when the circumstances involved provide a reasonable basis for concluding the plaintiff suffered serious emotional harm. State Dep't of Corr. v. Abril, 969 So. 2d 201, 202–03 (Fla. 2007) (recognizing exception to impact requirement given the foreseeability that emotional distress would result from the failure to ensure the confidentiality of HIV test results); Moresi v. Dep't of Wildlife & Fisheries, 567 So. 2d 1081, 1096 (La. 1990) (recognizing an exception to the physical manifestation requirement where there is "the especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious"); Ricottilli v. Summersville Mem'l Hosp., 425 S.E.2d 629, 635 (W. Va. 1992) ("[A]n individual may recover for the negligent infliction of emotional distress [absent accompanying physical injury] upon a showing of facts sufficient to guarantee that the emotional damage claim is not spurious."). Some courts went beyond this and decided to apply general negligence principles to such claims, while adopting the requirement that the resulting emotional distress be severe. See Rodrigues v. State, 472 P.2d 509, 520–21 (Haw. 1970); Camper v. Minor, 915 S.W.2d 437, 446 (Tenn. 1996).

situations in which the claimed distress resulted from negligent handling of a corpse<sup>321</sup> or negligent notification of the death of a loved one.<sup>322</sup>

Over time, courts identified other factual scenarios where a defendant might foreseeably risk serious emotional distress.<sup>323</sup> Eventually, the *Restatement (Third) of Torts* adopted a rule recognizing liability where the serious emotional harm resulted from conduct that “occurs in the course of specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional harm.”<sup>324</sup> Examples of such categories include

[where] a physician negligently diagnoses a patient with a dreaded or serious disease; a physician negligently causes the loss of a fetus; a hospital loses a newborn infant; a person injures a fetus; a hospital (or another) exposes a patient to HIV infection; an employer mistreats an employee; or a spouse mentally abuses the other spouse.<sup>325</sup>

The examples included in the *Restatement* are situations in which the circumstances are special enough to allow a jury to conclude that serious emotional harm was not only genuine but within the foreseeable scope of risk created by the defendant’s negligence.<sup>326</sup>

A similar principle should guide the analysis in cases involving negligence leading to suicide. Ordinarily, suicide will be outside the foreseeable scope of the defendant’s negligence. But where a plaintiff is able to introduce evidence that the facts of their situation are such that negligent conduct is especially likely to result in suicide, the default rule regarding suicide and proximate cause should give way.

For example, in *Kivland v. Columbia Orthopaedic Group, LLP*, a 2011 case from Missouri, a doctor was accused of negligence resulting in the suicide of the decedent.<sup>327</sup> The complaint alleged that the doctor’s negligence while performing spinal surgery resulted in paralysis from the waist down.<sup>328</sup> The resulting pain experienced by the decedent was so severe that the touch of a sheet across his legs caused him pain.<sup>329</sup> The decedent had a morphine

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<sup>321</sup> See *Ricottilli*, 425 S.E.2d at 635 (discussing this exception).

<sup>322</sup> See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 47 cmt. b (listing this example).

<sup>323</sup> *Id.* § 47 cmt. f.

<sup>324</sup> *Id.* § 47(b).

<sup>325</sup> *Id.* § 47 cmt. f.

<sup>326</sup> A comment emphasizes, however, that the test is not solely one of foreseeability. As an example, the comment notes that it might be foreseeable that a doctor who negligently misdiagnoses a celebrity as having a fatal disease would cause emotional distress to fans of the celebrity. *Id.* § 47 cmt. i.

<sup>327</sup> 331 S.W.3d 299 (Mo. 2011) (en banc).

<sup>328</sup> *Id.* at 303.

<sup>329</sup> *Id.*

pump installed to ease his pain, but this proved unsuccessful.<sup>330</sup> Eventually, the decedent ended his own life.<sup>331</sup>

After the defendant prevailed on his motion for summary judgment in the lower court, the Missouri Supreme Court focused on the special causation rule applied in suicide cases in other jurisdictions and noted that “[m]odern psychiatry supports the idea that suicide sometimes is a foreseeable result of traumatic injuries.”<sup>332</sup> In the case of those with spinal cord injuries in particular, research indicated that individuals with spinal cord injuries are at a higher risk of suicide and that those with the form of paralysis that the decedent had were at a greater risk of suicide than other categories of individuals with paralysis.<sup>333</sup> Other studies have similarly found those with spinal cord injuries to be at an increased risk of depression and suicide,<sup>334</sup> and much of the popular literature surrounding spinal cord injuries also references these concepts.<sup>335</sup> In short, suicide does not have the same lightning-strike quality among those with spinal cord injuries as it does among the general population. As such, a spinal surgeon foreseeably risks not only emotional distress as a result of a negligent procedure but arguably suicide resulting from that distress.<sup>336</sup>

Other courts have taken a similar approach without explicitly labeling it as such. For example, in *White v. Lawrence*, a doctor had treated a patient

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> *Id.* at 308.

<sup>333</sup> See Susan W. Charlifue & Kenneth A. Gerhart, *Behavioral and Demographic Predictors of Suicide After Traumatic Spinal Cord Injury*, 72 ARCHIVES PHYSICAL MED. & REHABILITATION 488, 488 (1991) (finding that “death from suicide is two to six times more prevalent than in the general population” and finding that of 489 deaths of those studied with spinal cord injuries, 9% were due to suicide) (cited in *Kivland*, 331 S.W.3d at 308 n.12); Andreas Hartkopp et al., *Suicide in a Spinal Cord Injured Population: Its Relation to Functional Status*, 79 ARCHIVES PHYSICAL MED. & REHABILITATION 1356, 1356 (1998) (finding that the suicide rate among those with spinal cord injuries “was nearly five times higher than expected in the general population” and “that the suicide rate in the group of marginally disabled persons was nearly twice as high as the group of functionally complete tetraplegic individuals”) (cited in *Kivland*, 331 S.W.3d at 308 n.12).

<sup>334</sup> See M. J. DeVivo et al., *Suicide Following Spinal Cord Injury*, 29 PARAPLEGIA 620, 624–25 (1991) (citing studies showing higher than expected suicide rates among those with spinal cord injuries); Zahra Khazaeipour et al., *Depression Following Spinal Cord Injury: Its Relationship to Demographic and Socioeconomic Indicators*, 21 TOPICS SPINAL CORD INJ. REHABILITATION 149, 149 (2015) (classifying depression as being highly prevalent among those with spinal cord injuries).

<sup>335</sup> Tiffany Carlson, *Suicide and SCI: Moving Past the Darkness*, SPINALCORD.COM (Aug. 22, 2017), <https://www.spinalcord.com/blog/suicide-and-sci-moving-past-the-darkness> [https://perma.cc/YG4M-KGK4] (“While a few people with paralysis claim to have never considered it, most people who’ve had a spinal cord injury, if they’re being honest with themselves, have.”); *Depression and Spinal Cord Injury (SCI)*, ST. LUKE’S, <https://www.saintlukeskc.org/health-library/depression-and-spinal-cord-injury-sci> [https://perma.cc/HZP8-M5UB] (“People with SCI have a higher rate of depression.”).

<sup>336</sup> See *Kivland*, 331 S.W.3d at 313–14 (concluding that summary judgment in favor of surgeon in a wrongful death action was inappropriate where spinal surgery patient died of suicide following surgery).

with a host of physical ailments.<sup>337</sup> The doctor was aware that the patient was also an alcoholic who suffered from severe depression to the point that the doctor viewed the patient as a “‘likely candidate’ for suicide.”<sup>338</sup> The doctor, unbeknownst to the patient, prescribed medication in an attempt to curb the patient’s drinking and encouraged the patient’s wife to administer the medication covertly.<sup>339</sup> The medication made the patient physically sick to the point that he went to the emergency room for treatment.<sup>340</sup> After being released, the patient took his own life.<sup>341</sup>

Under the majority approach, the defendant’s suicide would, of course, have been treated as a superseding cause that cut off the doctor’s liability. However, the Tennessee Supreme Court concluded that a jury question existed on the issue of proximate cause:

The record shows that leading risk factors for suicide include physical illness and depression. The decedent suffered from both. The plaintiff presented medical proof that the decedent’s suicide was reasonably foreseeable from a medical standpoint . . . Both Dr. Pate and Dr. Smith testified that the defendant should have reasonably foreseen that secretly prescribing Antabuse to an alcoholic and depressed patient would cause severe physical problems and could cause the decedent to choose to end his life. The jury could thus find that the suicide was the foreseeable result of the defendant’s negligence.<sup>342</sup>

The *White* court’s approach is quite similar to the one advanced in this Article. The court cited a string of decisions that all held that the decedent’s suicide broke the chain of causation.<sup>343</sup> One of the cases went so far as to hold:

[W]here a defendant injures another either willfully or negligently and as a result of the injury, the injured person commits suicide the act of suicide is, *as a matter of law*, an intervening independent cause if the decedent knew and understood the nature of his or her act or the act resulted from a moderately intelligent power of choice.<sup>344</sup>

But the *White* court was willing to treat this precedent as establishing more of a default rule and conclude, based upon the constellation of special circumstances present and the expert testimony presented, that a jury question existed as to proximate cause.

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<sup>337</sup> 975 S.W.2d 525, 527 (Tenn. 1998).

<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> *Id.* at 527–28.

<sup>342</sup> *Id.* at 530.

<sup>343</sup> *Id.*

<sup>344</sup> *Weathers v. Pilkinton*, 754 S.W.2d 75, 78 (Tenn. Ct. App. 1988) (emphasis added).

What should qualify as the type of evidence necessary to create a jury question in this context is incapable of precise definition. In the context of negligent infliction of emotional distress, some courts have dispensed with most of the special requirements associated with such claims and instead have adopted a standard negligence approach.<sup>345</sup> However, these courts also sometimes require that the plaintiff prove the existence of severe emotional distress through expert scientific or medical testimony.<sup>346</sup>

This same type of evidence may often be necessary in wrongful death cases involving suicide to establish not only that the defendant's negligence was a cause in fact of the plaintiff's suicide but that the pain caused by the defendant's negligence made suicide a foreseeable result.<sup>347</sup> Science has not progressed to the point where it can predict with certainty whether one person versus another will commit suicide. But the scientific research and understanding of suicide has progressed to where experts can sometimes testify authoritatively that the circumstances were such that a particular plaintiff was at a statistically greater risk of suicide than the average person to the point that suicide was foreseeable.<sup>348</sup> Expert testimony may also be particularly relevant in some instances, such as in the case of teen suicide where neuroscience has provided valuable insight into how the adolescent brain develops.<sup>349</sup>

In at least some instances, however, the application of common sense may be sufficient. So, for example, the fact that an individual suffers from depression should not, absent other circumstances, be enough to raise an

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<sup>345</sup> *Rodrigues v. State*, 472 P.2d 509, 520 (Haw. 1970); *Camper v. Minor*, 915 S.W.2d 437, 446 (Tenn. 1996).

<sup>346</sup> *See Leong v. Takasaki*, 520 P.2d 758, 766–67 (Haw. 1974); *Camper*, 915 S.W.2d at 446 (concluding that “claimed injury or impairment must be supported by expert medical or scientific proof”).

<sup>347</sup> *See generally Leong*, 520 P.2d at 767 (“While a psychiatrist may not be able to establish a negligent act as the sole cause of plaintiff’s neurosis, he can give a fairly accurate estimate of the probable effects the act will have upon the plaintiff and whether the trauma induced was a precipitating cause of neurosis, and whether the resulting neurosis is beyond a level of pain with which a reasonable man may be expected to cope.”).

<sup>348</sup> *See supra* notes 333–35 and accompanying text (discussing studies finding increased risk of suicide in some cases).

<sup>349</sup> *See Andrea MacIver, Suicide Causation Experts in Teen Wrongful Death Claims: Will They Assist the Trier of Fact?*, 45 J. MARSHALL L. REV. 51, 68–75 (2011) (discussing advancements in neuroscience with respect to the adolescent brain and the value of expert testimony on this issue).

issue regarding proximate cause.<sup>350</sup> But the fact that a defendant is aware that the decedent had recently attempted suicide may be.<sup>351</sup>

The approach described here may also be employed in cases where the alleged negligence involves the failure to prevent suicide. *Patton v. Bickford* is a 2016 case from Kentucky in which an eighth grader committed suicide, allegedly as a result of bullying.<sup>352</sup> The decedent's estate filed negligence actions against various teachers and administrators who allegedly knew or should have known that the child was being bullied but failed to take reasonable steps to stop it.<sup>353</sup> The lower court granted summary judgment to the teachers on the predictable grounds that the child's suicide was a superseding cause that relieved the defendants of liability.<sup>354</sup> On appeal, the Kentucky Supreme Court applied standard scope-of-risk analysis while also taking into account the public dimensions of suicide. The court noted "that bullying as a source of torment has been recognized as a foreseeable cause of suicide and medical/psychological professionals now widely acknowledge this societal concern."<sup>355</sup> Interestingly, in support of its conclusion, the court referenced the fact that the Kentucky Board of Education's website contained a letter to teachers noting that "student suicides resulting from the bullying and harassment activities of other youths have escalated" in recent years.<sup>356</sup> Thus, the Board of Education itself viewed suicide as a foreseeable result of the failure to prevent bullying.

*Patton* is also noteworthy for its recognition of the role tort law can play in addressing the public health problem that is suicide. In its decision, the court also referenced recent "bullying bills" enacted in Kentucky that "mandate[d] that school teachers be trained in suicide prevention policies."<sup>357</sup> This fact served not only as evidence as to the foreseeability of suicide in the case of bullying but also as evidence of a "public policy decision to stop bullying in schools."<sup>358</sup> The court was thus able to tie the legislation to the policy-driven nature of the proximate cause requirement and the traditional

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<sup>350</sup> See *Rafferman v. Carnival Cruise Lines, Inc.*, 659 So. 2d 1271, 1273 (Fla. Dist. Ct. App. 1995) (concluding that defendant could not have reasonably foreseen decedent's suicide despite the awareness that decedent had "become 'visibly and obviously depressed'").

<sup>351</sup> Cf. *Wyke v. Polk Cty. Sch. Bd.*, 129 F.3d 560, 575 (11th Cir. 1997) ("We can think of no other facts that would have given school officials more reason to anticipate Shawn's suicide than Shawn's two recent, overt suicide attempts.").

<sup>352</sup> 529 S.W.3d 717 (Ky. 2016).

<sup>353</sup> *Id.* at 721.

<sup>354</sup> *Id.* at 722.

<sup>355</sup> *Id.* at 733.

<sup>356</sup> *Id.*

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

role tort law has played in deterring “harmful socially unacceptable behavior by imposing liability upon the wrongdoer for the wrong done.”<sup>359</sup>

The *Patton* decision is also noteworthy for what it does not do. One possible objection to the approach this Article proposes is that it will lead to increased liability. Perhaps. But in addition to raising a jury question as to proximate cause, a plaintiff must also ultimately prove that the defendant’s actions were a cause in fact of the plaintiff’s suicide. In *Patton*, the plaintiff was unable to meet this burden.<sup>360</sup> Without an obvious causal link or expert testimony regarding whether the bullying actually caused the suicide, the plaintiff was unable to survive summary judgment on the issue of causation.<sup>361</sup> Thus, *Patton* serves as a reminder of the difficult road that those seeking to recover under a negligence theory face, even without application of the suicide rule.

## 2. *Abolishing the Rage or Frenzy/Delirium or Insanity Exception*

Courts should also abolish the rage or frenzy/delirium or insanity exception to the standard suicide rule. The exception is a relic from a time when suicide was not well understood, when societal attitudes on the subject were quite different, and when suicide remained a crime. The exception has always primarily reflected a view of fault or lack thereof on the part of a decedent. Now that nearly every state has adopted a system of comparative fault, decisions as to the fault of the decedent are better dealt with as part of this analysis. Indeed, it is noteworthy that while the *Restatement (Third) of Torts* references some of the decisions involving suicide and proximate cause, the rage or frenzy/delirium or insanity exception does not appear in the third *Restatement*.<sup>362</sup>

There are other reasons to abolish the exception. The law can play a role as a part of a multidisciplinary approach to the public health problem of suicide.<sup>363</sup> At a minimum, it should not further misunderstandings that

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<sup>359</sup> *Id.* at 733–34.

<sup>360</sup> *Id.* at 736.

<sup>361</sup> *Id.*

<sup>362</sup> RESTATEMENT (THIRD) OF TORTS § 29 cmt. h (AM. LAW INST. 2010) (referencing suicide cases and proximate cause but omitting any reference to this exception).

<sup>363</sup> See generally CTRS. FOR DISEASE CONTROL & PREVENTION, *Suicide Prevention: A Public Health Issue*, [https://www.cdc.gov/violenceprevention/pdf/asap\\_suicide\\_issue2-a.pdf](https://www.cdc.gov/violenceprevention/pdf/asap_suicide_issue2-a.pdf) [<https://perma.cc/D9D6-Q4UF>] (discussing the role of multidisciplinary perspectives in public health); SUICIDE PREVENTION RES. CTR., *Suicide Prevention and Policy Legislation*, <https://www.sprc.org/sites/default/files/resource-program/FromthefieldLegislation.pdf> [<https://perma.cc/L55P-CUFM>] (discussing state laws aimed at suicide prevention). Tort law has sometimes been used as a means of addressing public health issues. See Peter D. Jacobson & Soheil Soliman, *Litigation as Public Health Policy: Theory or Reality?*, 30 J. L. MED. ETHICS 224, 225 (2002) (“In recent years, the most ardent proponents of litigation as public policy have been public health advocates.”); W. E. Parmet & R. A. Daynard, *The New Public Health Litigation*, 21 ANN. REV. PUB. HEALTH 437, 437 (2000) (“Increasingly, individuals and organizations concerned

prevent progress. The sense of shame and stigma that often accompanies depression and related conditions tends to discourage those who are considering suicide from seeking help.<sup>364</sup> Aside from crafting legal rules that are consistent with the goal of reducing the number of suicides, courts can shape the law in ways that do not perpetuate the sorts of stereotypes that discourage those with depression or thoughts of suicide from seeking treatment. By eliminating the unhelpful and antiquated rage or frenzy/delirium or insanity exception, courts can shape the law regarding suicide and tort law in a manner that better reflects more modern understandings of suicide and its prevention.

### 3. Comparative Fault

Given the fact that most suicides will still remain outside of the scope of risk created by a defendant's negligence under the proposed approach, the concerns over expanded liability should be limited. Any remaining concerns are largely addressed through application of standard comparative fault principles.<sup>365</sup> By permitting juries to take the decedent's own actions into account when comparing the relative responsibilities of the parties, courts can better respect a jurisdiction's determinations as to the operation of

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about public health have sought to use litigation to further their goals. In other words, courts are now being used affirmatively in an effort to make public health policy.”); Stephen P. Teret & Michael Jacobs, *Prevention and Torts: The Role of Litigation in Injury Control*, 17 L. MED. & HEALTH CARE 17, 19–20 (1989) (discussing the role that litigation plays in preventing injuries from dangerous products).

<sup>364</sup> See Mark E. Hastings et al., *Shame, Guilt, and Suicide*, in *SUICIDE SCIENCE* 76–77 (Thomas Joiner & M. David Rudd eds., 2002) (“Theory and emerging empirical research indicates that feelings of shame are more prominent than guilt in the dynamics leading up to suicidal thoughts and behaviors.”); Kimberly Arditte Hall, *Interpersonal Risk for Suicide in Social Anxiety: The Roles of Shame and Depression*, 239 PSYCHIATRY RES. 139, 139 (2016) (analyzing how shame and depression may help to explain the relationship between social anxiety and interpersonal suicide risk factors); Maanvi Singh, *Study: Vast Majority of People Who Are Depressed Do Not Seek Help*, NPR (Dec. 2, 2016, 2:08 PM), <https://www.npr.org/sections/goatsandsoda/2016/12/02/504131307/study-vast-majority-of-people-who-are-depressed-do-not-seek-help> [<https://perma.cc/ZZYA-5XQE>] (noting that the stigma associated with depression discourages people from seeking help); Alice G. Walton, *Why Are So Many People with Depression Not Getting Treatment?*, FORBES (Feb. 9, 2018, 10:18 AM), <https://www.forbes.com/sites/alicegwalton/2018/02/09/why-are-so-many-people-with-depression-not-getting-treated/#23b810a1b2fb> [<https://perma.cc/BKF2-2A22>] (suggesting that one reason why people diagnosed with depression do not seek treatment is because of the stigma associated with depression).

<sup>365</sup> Currently, there are few cases fitting this fact pattern in which the decedent's fault is considered for purposes of comparative fault analysis. See *Allison C. v. Advanced Educ. Servs.*, 28 Cal. Rptr. 3d 605, 611 (Ct. App. 2005) (involving jury verdict apportioning 2% of fault to teen with psychiatric issues who killed himself); *Rubin v. Aaron*, 594 N.Y.S.2d 797, 798 (App. Div. 1993) (involving jury verdict apportioning 80% of responsibility to negligent defendant). This is undoubtedly because the suicide rule effectively dispenses with the majority of claims involving this set of facts.

comparative fault principles while also better reflecting modern views regarding suicide.<sup>366</sup>

Where a defendant's negligence is alleged to have affirmatively contributed to the decedent's suicide, a jury should be permitted to consider the decedent's own actions when comparing the respective responsibilities of the parties. The fact that the decedent's own actions were the most direct cause of death might increase the decedent's share of responsibility.<sup>367</sup> In apportioning responsibility, many courts take the position that the plaintiff's contributory negligence must be evaluated by using a subjective standard that takes into account the plaintiff's own mental state, including any mental impairments.<sup>368</sup> The fact that the decedent had an existing psychiatric disability at the time of the suicide may reduce, but not completely eliminate, the decedent's portion of responsibility. Thus, a plaintiff is not forced to advocate for the all-or-nothing form of responsibility mandated by the rage or frenzy/delirium or insanity exception to the suicide rule, nor is a court forced to apply it. Where, however, the decedent's psychiatric disability truly prevented the decedent from understanding the physical nature and consequences of his actions,<sup>369</sup> the decedent would no longer be at fault at all, and comparative negligence principles would not reduce recovery.<sup>370</sup>

In cases where the defendant owes a duty to take reasonable measures to prevent suicide, the suicide rule has not served as the same sort of limitation on a plaintiff's ability to recover as it has in other cases. Therefore, the issue of comparative fault has come up more frequently. The general rule that has emerged is that where the decedent was in the custody of the defendant—for example, where the decedent was a prisoner or where the decedent was a patient confined to a hospital under a suicide watch—the

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<sup>366</sup> See generally *Dugger v. Arredondo*, 408 S.W.3d 825, 832–36 (Tex. 2013) (citing Texas's proportionate responsibility in support of refusal to apply the “unlawful acts” doctrine to bar recovery where decedent died after ingesting heroin).

<sup>367</sup> See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 8 (AM. LAW INST. 2000) (listing “the strength of the causal connection between the person's risk-creating conduct and the harm” as a relevant consideration in apportioning responsibility).

<sup>368</sup> See *Dodson v. State Dep't. of Human Servs.*, 703 N.W.2d 353, 357–59 (S.D. 2005) (discussing majority rule of applying the subjective standard); *Gray v. Roten*, No. W2010-00614-COA-R3-CV, 2011 WL 236115, at \*10 n.10 (Tenn. Ct. App. Jan. 18, 2011) (citing cases that use the subjective standard).

<sup>369</sup> See *supra* notes 140–47 and accompanying text (discussing this prong of the exception).

<sup>370</sup> See *Mulhern v. Catholic Health Initiatives*, 799 N.W.2d 104, 111 (Iowa 2011) (“Whether a person suffering from a mental disease lacks the capacity to be found negligent is generally a question of fact.”); *Dodson*, 703 N.W.2d at 357 (“One whose mental faculties are diminished, not amounting to total insanity, is capable of contributory negligence, but is not held to the objective reasonable-person standard.” (quoting 57B AM. JUR. 2D *Negligence* § 864 (2005))).

decendent's own actions do not reduce recovery.<sup>371</sup> In the noncustodial setting, however, normal comparative fault principles typically apply and the decendent's own actions may reduce recovery.<sup>372</sup>

### *B. Intentional Torts*

In the case of an intentional tort resulting in suicide, the current majority approach, which requires that the defendant's conduct be a substantial factor in causing the suicide in order for the defendant to be held liable,<sup>373</sup> already strikes the appropriate balance. Introducing the issue of foreseeability into intentional tort analysis is inconsistent with the principles underlying tort law and is only likely to lead to confusion. And introducing the suicide rule and its exceptions into this area is inadvisable for the reasons discussed previously.

Regardless of the precise formulation of the test,<sup>374</sup> the majority approach gives effect to the basic tort principle that a defendant who engages in intentional wrongdoing is more culpable than one who is merely negligent, and should thus not be able to claim the unforeseeability of a negative consequence as an excuse for avoiding liability.<sup>375</sup> At the same time, by requiring that the defendant's conduct be more than a trivial cause of the resulting suicide<sup>376</sup> and by requiring that causation usually be established through expert testimony,<sup>377</sup> courts can effectively check the possibility of strict liability. Moreover, the nature of most claims will serve as an inherent limitation on the scope of liability. The vast majority of the decisions in the area involve the alleged intentional infliction of emotional distress resulting in suicide.<sup>378</sup> The requirement of this claim that the defendant's conduct be extreme and outrageous already serves to limit the number of instances in

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<sup>371</sup> See *Sauders v. County of Steuben*, 693 N.E.2d 16, 18–19 (Ind. 1998); see also *Cole v. Multnomah Cty.*, 592 P.2d 221, 223 (Or. Ct. App. 1979); *c.f.* *P.W. v. Children's Hosp.*, 364 P.3d 891, 894–95, 898 (Colo. 2016) (holding that hospital was liable for a patient's damages resultant from his failed suicide attempt because "the hospital [knew he was] actively suicidal, and . . . the admission [was] for the purpose of preventing [his] self-destructive behavior"); *Cowan v. Doering*, 545 A.2d 159, 161, 167 (N.J. 1988) (holding that a hospital's staff members were liable for damages resulting from a patient's failed suicide attempt because they "were aware of her condition, [and] their duty was to prevent [her] self-damaging actions").

<sup>372</sup> See *Mulhern*, 799 N.W.2d at 115–16; *Maunz v. Perales*, 76 P.3d 1027, 1033–34 (Kan. 2003).

<sup>373</sup> See *supra* note 218 and accompanying text.

<sup>374</sup> See *supra* notes 215–17 and accompanying text (discussing variations).

<sup>375</sup> See *supra* note 201 and accompanying text.

<sup>376</sup> See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 36 (AM. LAW INST. 2010) ("When an actor's negligent conduct constitutes only a trivial contribution to a causal set that is a factual cause of harm [in the case of multiple sufficient causes], the harm is not within the scope of the actor's liability.").

<sup>377</sup> See *supra* note 221 and accompanying text.

<sup>378</sup> See *supra* note 193 and accompanying text.

which defendants may be held liable.<sup>379</sup> Assuming courts do not lower the bar on this element of an IIED claim, the number of potential claims should be fairly limited without having to resort to other, more awkward causation standards.

CONCLUSION

The standard suicide rule that applies in negligence and some intentional tort cases is based on outdated science and a debatable appraisal of society's views concerning the morality of suicide. The same is true of its rage or frenzy/delirium or insanity exception. The former rule tends to short-circuit commonsense inquiry into causation while the latter tends to further harmful stereotypes. At a time when suicide is increasingly recognized as a serious public health issue, courts do a disservice to those impacted by suicide by continuing to apply these rules. While the special and often unpredictable nature of suicide needs to be taken into account in wrongful death actions, tort law already has the tools in place to effectively deal with such cases. Courts need only begin using them.

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<sup>379</sup> See *supra* notes 194–96 and accompanying text.