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Torts—Recovery for Suicide—Wrongful Death

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and described this procedure in *Kermarec v. Compagnie General Transatlantique*,[33] where it pointed out that,

> the common law courts have found it necessary to formulate increasingly subtle verbal refinements, to create subclassifications among traditional common law categories, and to delieneate fine gradations in the standards of care which the landowner owes to each. Yet, even in a single jurisdiction, the classifications bred by the common law have produced confusion and conflict. As new distinctions have become spawned, older ones have become obscurred. Through this semantic morass the common law has moved, unevenly and with hesitation, towards imposing on owners and occupiers a single duty of reasonable care in all circumstances.

DICK STEINCIPHER

Recovery for Suicide—Wrongful Death. The Washington Supreme Court, by a 5-to-4 decision in *Orcutt v. Spokane County*,[1] made possible recovery by wrongful death action for negligent conduct resulting in suicide.

The plaintiff's decedent, while riding in a car driven by the defendant, received severe injuries which allegedly resulted in her suicide one year and nine months later. The administratrix of the deceased brought an action for pain and suffering, medical and hospital expenses, and wrongful death. Damages were allowed for pain and suffering and for medical and hospital expenses under RCW 4.20.060 (thus presenting an interesting example of survival of damages for pain and suffering, in Washington possible only in a wrongful death action).[2]

On the wrongful death issue, the court held that where there is medical testimony concluding that the suicide was the immediate result of an uncontrollable impulse ultimately caused by the defendant's negligence, the issue of proximate cause is for the jury's determination.

Since the Washington court is one of the few to grant recovery for suicidal death, a review of the legal developments in this area seems in order. Starting with the basic proposition that a defendant's conduct must have proximately caused an injury in order to make him liable,[3] the general rule in the majority of suicide-wrongful death cases has been to deny recovery.[4] Two theories support this result: (1) death by suicide cannot logically be regarded as the natural and probable conse-

[33] 358 U.S. 625, 631 (1961).

[1] 158 Wash. Dec. 842, 364 P.2d 1102 (1961).
[2] 36 WASH. L. REV. 331 (1961).
[3] GREEN, PROXIMATE CAUSE 132 (1927).
[4] 11 A.L.R.2d 751, 757 (1950).

quence of such conduct[5] (2) the suicide's acts are an independent force which breaks the chain of causation.[6] A single exception to the general rule has been developed, however, on the theory that if defendant's conduct caused decedent to become insane, then decedent's *involuntary* act of suicide while insane would be a normal incident of the risk and could not be considered an intervening force. The key problem in the cases recognizing the exception has thus been to establish standards by which to judge the degree or type of insanity which will make a decedent's suicide an involuntary act.

Liability Arising From Negligent Injury

Where defendant's conduct in causing the insanity has been negligent, three standards have been developed. Liability will be extended where the death of the injured person results from his own act: (1) committed in a delirium or frenzy without understanding the nature and consequences of his act,[7] (2) committed in a delirium or frenzy without conscious volition to produce death, but with knowledge of the physical nature and consequences of his act,[8] (3) committed with knowledge of the nature and consequences of the act, but under an *uncontrollable or insane impulse,* which is irresistible because insanity prevents his reason from controlling his actions.[9]

Although quite authoritatively stated in the *Orcutt* opinion, the uncontrollable impulse rule has been successfully applied in favor of a plaintiff in only two other cases during the sixty years of its existence.[10] Of the eleven[11] American negligence cases, only four have denied recovery without discussing uncontrollable impulse.[12] Five have stated the

[5] Scheffer v. Washington City, V.M. & G.S. R.R. Co., 105 U.S. 249 (1882).

[6] Koch v. Fox, 71 App. Div. 288, 75 N.Y. S. 913 (1902), later Koch v. Zimmerman, 85 App. Div. 370, 83 N.Y.S. 339 (1903); Daniels v. N.Y.N.H. & H. R.R., 183 Mass. 393, 67 N.E. 424 (1903); Brown v. Am. Steel & Wire Co., 43 Ind. App. 560, 88 N.E. 80 (1909); Long v. Omaha & C.B. St. Ry., 108 Neb. 342, 187 N.W. 930 (1922); Arsnow v. Red Top Cab Co., 159 Wash. 137, 292 Pac. 436 (1930).

[7] Koch v. Fox, 71 App. Div. 288, 75 N.Y.S. 913 (1902), later Koch v. Zimmerman, 85 App. Div. 370, 83 N.Y.S. 339 (1903); Arsnow v. Red Top Cab Co., 159 Wash. 137, 292 Pac. 436 (1930).

[8] Daniels v. N.Y.N.H. & H. R.R., 183 Mass. 393, 67 N.E. 424 (1903).

[9] Scheffer v. Washington City, V.M. & G.S. R.R. Co., 105 U.S. 249 (1882); Lum v. Fullaway, 42 Hawaii 500, 3 D.C.H. 58 (1958); Tate v. Canonica, 180 Cal. App. 2d 898, 5 Cal. Rptr. 28 (1960).

[10] Lum v. Fullaway, 42 Hawaii 500, 3 D.C.H. 58 (1958); Tate v. Canonica, 180 Cal. App. 2d 898, 5 Cal. Rptr. 28 (1960).

[11] A twelfth case, Millman v. United States Mortgage & T.G. Co., 121 N.J.L. 28, 1 A.2d 265 (1938), involved an attempted suicide.

[12] Scheffer v. Washington City, V.M. & G.S. R.R. Co., 105 U.S. 249 (1882), see discussion preceding note 4; Ludlow v. Yazoo & M.V.R.R. Co., 144 La. 307, 80 So. 547 (1919) (without discussion other than to say that decedent had the purpose of suicide in mind); Brenner v. Public Serv. Prod. Co., 110 N.J.L. 344, 164 Atl. 454 (1933) (no

rule as dicta but then refused to apply it in favor of the particular plaintiffs, mainly because in each case the plaintiff had failed to produce or allege enough facts to show uncontrollable impulse, but also because the physical acts of the decedents preparatory to suicide had indicated an intelligent purpose to commit suicide.[13] Without mention of uncontrollable impulse, one case made recovery possible on the basic theory behind the rule itself, that since the decedent was insane, his act was not voluntary and did not break the causal connection between tort and death.[14] Finally, in *Lum v. Fullaway,* the Supreme Court of Hawaii denied a motion to dismiss a complaint which alleged that decedent was "bereft of reason and while in this condition took her own life, being motivated by an uncontrollable impulse."[15] Ruling that the issue thus presented must be decided as a matter of proof, the court followed the opinion in *Elliot v. Stone Baking Co.,*[16] and dicta in five other cases.[17] Aside from *Orcutt,* the most recent American case is *Tate v. Canonica,*[18] in which both intentional and negligent acts were alleged. The court adopted the uncontrollable impulse rule with regard to the allegation of negligence, and rested its decision on: (1) the position adopted by the American Law Institute in the Restatement of Torts,[19] (2) Prosser,[20] (3) the reasoning in *Elliot*[21] and (4) *Cauverien v. De Metz.*[22] In *Tate* the court emphasized that even if decedent knew what he was doing and knew the nature and consequences of his acts, the suicide would not be an independent cause where decedent was unable to resist the impulse to kill himself. By taking this position the court has weakened the effect of evidence concerning the decedent's preparations for suicide.

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proof that death couldn't have happened from a cause unconnected with the defendant); McMahon v. City of New York, 16 Misc. 2d 143, 141 N.Y.S.2d 190, *aff'd,* 3 App. Div. 713, 159 N.Y.S.2d 266 (1955), where evidence showed that decedent was a sane, depressed man, a claim of death springing from a depression psychosis was not sufficient.

[13] Scheffer v. Washington City, V.M. & G.S.R.R. Co., 105 U.S. 249 (1882).

[14] Elliot v. Stone Baking Co., 49 Ga. 515, 176 S.E. 112 (1934). A demurrer was overruled on the basis of cases holding (1) that a causal connection was not broken if the intervening act was such that its probable or natural consequence could reasonably have been anticipated, apprehended or foreseen, (2) that if a bullet wound inflicted by defendant on *X* contributed concurrently with a knife wound (later inflicted by *X* on himself) in causing *X*'s death, then defendant is guilty of homicide, and (3) that if parole of a mental patient from a hospital was negligent, then a causal relation existed between the parole and a fire set while insane.

[15] 42 Hawaii 500, 512, 3 D.C.H. 58 (1958).

[16] 49 Ga. 515, 176 S.E. 112 (1934).

[17] Scheffer v. Washington City, V.M. & G.S. R.R. Co., 105 U.S. 249 (1882).

[18] 180 Cal. App. 2d 898, 5 Cal. Rptr. 28 (1960).

[19] RESTATEMENT, TORTS, § 455 (1934).

[20] PROSSER, TORTS, § 49 at 273 (2d ed. 1955).

[21] *Supra* note 16.

[22] 20 Misc. 2d 144, 188 N.Y.S.2d 627 (1959).

Legal writers[23] and most of the courts which recognize the uncontrollable impulse rule ultimately rely on dicta in *Koch v. Fox*[24] and/or *Daniels v. N.Y.N.H. & H. R.R.*[25] These two cases appropriated the rule from a series of insurance cases where beneficiaries were allowed to recover under life insurance policies which contained clauses exempting coverage if death occurred by suicide.[26] Although recognizing that insurance cases involved interpretation of insurance contract terms, while wrongful death cases involved proximate cause and interpretation of wrongful death statutes, the courts in *Koch* and *Daniels* decided that the conclusions reached in the insurance cases were also applicable to the suicide-wrongful death field.

Two basic theories were advanced by plaintiff in the English decision of *Borradaile v. Hunter:*[27] first, because of insanity the suicide was not the act of the insured at all, and second, since only criminal acts of self-destruction were contemplated in the contract, a party who was insane by criminal standards had not committed suicide according to the understanding of the parties. An American court in the early case of *Mutual Life Ins. Co. v. Terry*[28] seemed to base its decision more on considerations of policy. Noting that the question of sanity may avoid the validity of an agreement, the capacity to make a will, or responsibility for a crime, the court stated that "a similar principle must control the present case, although the standard may be different."[29]

Liability Based On Intentional Injury

Where defendant's conduct in causing the insanity has been intentional, there has been little uniformity in developing standards from which to determine liability. Of the six American intent cases, the first four followed the general rule denying recovery.[30] Then, in *Cauverien*

[23] Restatement, Torts, § 455 (1934); Prosser, Torts, § 49 at 273 (2d ed. 1955).

[24] 71 App. Div. 288, 75 N.Y.S. 913 (1902), later Koch v. Zimmerman, 85 App. Div. 370, 83 N.Y.S. 339 (1903).

[25] 183 Mass. 393, 67 N.E. 424 (1903).

[26] *Koch* cited: Van Zandt v. Mutual Benefit Ins. Co., 55 N.Y. 169, 14 Am. Rep. 215 (1873); Newton v. Mutual Benefit Ins. Co., 76 N.Y. 426, 32 Am. Rep. 335 (1879); Meacham v. Association, 120 N.Y. 237, 24 N.E. 283 (1890). *Daniels* cited: Dean v. Am. Ins. Co., 84 Mass. (4 Allen) 96 (1862); Cooper v. Mass. Mut. Life Ins. Co., 102 Mass. 227, 3 Am. Rep. 451 (1869); Boradaile v. Hunter, 5 M. & G. 637, 44 Eng. Rep. 335 (C.P. 1843); Clift v. Schwabe, 3 M., G. & S. 437, 54 Eng. Rep. 437 (Ex. 1846).

[27] 5 M. & G. 639, 44 Eng. Rep. 335 (C.P. 1843).

[28] 82 U.S. (15 Wall) 236 (1873).

[29] *Id.* at 242.

[30] Stevens v. Steadman, 140 Ga. 680, 79 S.E. 564 (1913), it was held impossible to say that any particular state of mind would naturally result from a letter asking for a resignation; Salsedo v. Palmer, 278 Fed. 92 (2d Cir. 1921), based on *Scheffer, Stevens* and *Daniels;* Waas v. Ashland Day & Night Bank, 201 Ky. 469, 257 S.W. 29 (1923), based on *Scheffer, Stevens* and *Salsedo* (attempted suicide); Jones v. Stewart, 183 Tenn. 176, 191 S.W.2d 439 (1946), based on *Stevens, Salsedo* and *Daniels.*

v. De Metz,[31] the New York court adopted the uncontrollable impulse rule and other views expressed by the dissent in the earlier case of *Salsedo v. Palmer*[32] because "the trend merging from the cases in tort liability since that time as well as the advances in medical science and knowledge of mental illness compel . . . [that] conclusion."[33] In addition, the court felt that the rule was a more realistic approach to the problem, and accepted the reasoning of both the Restatement of Torts[34] and Prosser.[35] Going further, the court considered the element of intent as a factor in determinations of liability. The court said that when a wrong is alleged to be intentional, the wrongdoer is responsible for injuries directly caused (even though beyond the limits of foreseeability) and the question of proximate cause is for the jury.

In the most recent intent case, *Tate v. Canonica*,[36] the California court stated that: defendants would only be liable if (a) they intentionally caused severe physical or mental distress to decedent, and (b) that physical or mental distress was severe enough to be, in the judgment of the trier of fact, a substantial factor in bring about the suicide.[37] This standard was based on the Restatement of Torts[38] and also on the theory that intervening cause has no application to the law of intentional torts so long as there is a factual chain of causation. The court went much further than in the *Cauverien* decision in holding that even a "voluntary" suicide would not make it an independent intervening cause.

OTHER SUICIDE CASES

Public policy considerations have controlled determinations of liability in other suicide situations:

(1) Following a policy of liberal statutory construction, workmen's compensation cases since 1915 have uniformly granted recovery for suicidal death due to uncontrollable impulse resulting from insanity caused by injury in the course of employment.[39]

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[31] 20 Misc. 2d 144, 188 N.Y.S.2d 627 (1959).
[32] 278 Fed. 92 (2d Cir. 1921).
[33] Cauverien v. De Metz, 20 Misc. 2d 144, 188 N.Y.S.2d 627, 632 (1959). See case cited note 8 *supra*.
[34] RESTATEMENT, TORTS, § 455 (1934).
[35] PROSSER, TORTS, *op. cit. supra* note 20.
[36] 180 Cal. App. 2d 898, 5 Cal. Rptr. 28 (1960).
[37] *Id.* at 38.
[38] RESTATEMENT, TORTS, § 279, Comment *c*, § 280 (1934).
[39] *In re* Sponatski, 220 Mass. 526, 108 N.E. 466 (1915); Lupfer v. Baldwin Locomotive Works, 269 Pa. 275, 112 Atl. 458 (1921); Wilder v. Russell Library Co., 107 Conn. 56, 139 Atl. 644 (1927); Delinousha v. National Biscuit Co., 248 N.Y. 93, 161

(2) Recovery has also been allowed where defendant was found to have breached a specific duty of care toward decedent. Most cases in this area have arisen where a hospital or sanitarium is found to owe the specific duty of exercising such reasonable care and attention for the safety of its patients as their mental and physical condition, if known, may require.[40]

(3) Civil damage acts or "dramshop acts" have been passed in some states allowing recovery where defendant caused decedent to become intoxicated, and which intoxication caused suicide.[41]

(4) As a general rule druggists are not civilly liable for negligence in selling a dangerous product which is eventually used to commit suicide.[42]

(5) A conviction of murder was affirmed where a girl committed suicide after an attempted rape.[43] Defendant's heinous conduct obviously needed redress.

THE ORCUTT DECISION

Having reviewed the development of the uncontrollable impulse rule and the general area of liability following a suicide, the *Orcutt* case may be more readily appreciated as a liberal extension of liability for negligently caused harm.

In the *Orcutt* decision the Washington court relied upon the uncontrollable impulse rule as stated in the 1930 Washington case of *Arsnow v. Red Top Cab Co.*,[44] remarking that "it is in conformity with the rule as expressed by many text writers, and it reflects the weight of case law in other jurisdictions."[45] The *Arsnow* case was based on the *Daniels* rationale,[46] and similarly denied recovery because the plaintiff failed to produce evidence to support a theory of uncontrollable impulse. The only basis for distinguishing *Orcutt* from *Arsnow* is the presence of

N.E. 431 (1928); Jackson Hill Coal & Coke Co. v. Slover, 102 Ind. App. 145, 199 N.E. 417 (1936); Karlen v. Department of Labor & Indus., 41 Wash.2d 301, 249 P.2d 364 (1952); Gatterdam v. Department of Labor & Indus., 185 Wash. 628, 56 P.2d 693 (1936); McFarland v. Department of Labor & Indus., 188 Wash. 357, 62 P.2d 714 (1936).

[40] 11 A.L.R.2d 751, 778 (1950); Kent v. Whitaker, 364 P.2d 556 (1961). See also Bogust v. Iverson, 10 Wis.2d. 129, 102 N.W.2d 228 (1960), where college counsellor was held to have no duty to prevent suicide in absence of facts showing that he should have known of student's suicidal tendencies and of facts showing loss of volition.

[41] 11 A.L.R.2d 751, 766 (1950).

[42] *Id.* at 763.

[43] Stephenson v. State, 205 Ind. 141, 179 N.E. 633 (1932).

[44] Scheffer v. Washington City, V.M. & G.S. R.R. Co., 105 U.S. 249 (1882).

[45] 158 Wash. Dec. 842, 364 P.2d 1102 (1961).

[46] 183 Mass. 393, 67 N.E. 424, (1903), see text discussion accompanying note 24.

medical testimony establishing that the injury caused a mental condition which resulted in an uncontrollable impulse to commit suicide. All the cases which have considered the uncontrollable impulse rule and which then have denied recovery have done so because the facts failed to support the requirements of the rule.[47] *Long v. Omaha & C.B. St. Ry.* was the only one of these cases to decide the question on demurrer, however, and in that case the plaintiff alleged that he had experts ready to show that the suicide resulted from the injury. *Orcutt* seems, therefore, directly inconsistent with *Long,* but the *Long* case was not even discussed.

Expert testimony in *Daniels* (that decedent was probably insane when he took his life) and in *Koch* (that the injuries would tend to cause him to have impulses of an abnormal nature, to be irritable, melancholy, and irrational . . . and that the injuries were considered ample to cause his death) were similarly not discussed or distinguished in the *Orcutt* opinion.

Evidently the Washington court was more willing to rely on general statements of the rule in the Restatement of Torts[48] and Prosser[49] and on the trend toward recovery evidenced by *Tate,* than on the three earlier decisions. An additional make-weight was found in a rather weak analogy to workmen's compensation cases adopting uncontrollable impulse.[50] Whatever the rationale, however, it now appears that medical testimony is a quick and easy route to the jury.

Although some psychiatrists deny that suicide is ever committed with a sound mind, the courts, in adopting "degree of volition" of decedent's act as the criterion for liability, have assumed that it is possible to commit suicide voluntarily.[51] In order to determine liability, therefore, it has become necessary for the courts to judge what has been going on in the mind of a suicide. Obviously this is an impossible task, and the courts have recognized that fact by making their determinations on the basis of other factors. Decisions have turned on: (1) physical preparations for suicide tending to show an understanding of the physical nature and effect of the act and an intelligent purpose to accomplish it,[52] (2) facts of the method of suicide as showing knowledge of the

[47] See cases cited *supra* note 6.
[48] RESTATEMENT, TORTS, § 455 (1934).
[49] PROSSER, TORTS, § 49 at 273 (2d ed. 1955).
[50] Karlen v. Department of Labor & Indus., 41 Wash.2d 301, 249 P.2d 362 (1952); Gatterdam v. Department of Labor & Indus., 185 Wash. 628, 56 P.2d 693 (1936); McFarland v. Department of Labor & Indus., 188 Wash. 357, 62 P.2d 714 (1936).
[51] See generally 15 RUTGERS L. REV. 134 (1960).
[52] *Daniels, Brown, Long, Arsnow.*

means and purpose of destroying life,[53] (3) the harmless nature of defendant's conduct which produced no physical impact,[54] (4) whether defendant's conduct was intended to harm,[55] and (5) the presence of expert testimony.[56]

Whether the determination is made in terms of proximate cause or foreseeable risk, and no matter which of the five factors above are considered by the courts, public policy and common sense would indicate that each case should be decided only after a complete hearing of the evidence. The *Orcutt* decision seems clearly in line with the trend of the times in delaying policy considerations until after a jury has found negligence.

HARTLEY PAUL

Tavernkeeper's Liability for Act of Guest. *In Miller v. Staton,*[1] the members of the Washington Supreme Court disagree on how properly to apply the general rule that a tavernkeeper "owes the duty to his guests to exercise reasonable care to protect them from injury at the hands of a fellow guest."[2]

At about ten o'clock New Year's Eve, 1957, the plaintiff and her husband went to the defendants' tavern in Omak, Washington. At 2:20 in the morning the plaintiff, while drinking beer at a table next to the dance area, was knocked to the floor and injured during a fight between two intoxicated patrons. Earlier in the evening two fights had been prevented by the defendants' employees.

The plaintiff alleged that the defendants were negligent in failing to provide sufficient policing to prevent the fight, and was awarded a $25,743.37 verdict by the jury. The cause was reversed and remanded for prejudicial error in admitting testimony concerning policing practices of another establishment and certain irrelevant medical bills.[3] However, a majority of the court held there was sufficient evidence in support of the plaintiff's allegations to attach liability for negligence. It is the latter point that results in a sharp disagreement between the majority and dissent. That the tavernkeepers' liability is to be based

[53] *Brown, Long, Arsnow.*
[54] *Stevens, Jones.*
[55] *Cauverien, Tate.*
[56] *Orcutt.*

[1] 158 Wash. Dec. 874, 365 P.2d 333 (1961).
[2] Peck v. Gerber, 154 Ore. 126, 54 P.2d 675 (1936); Thomas v. Bruza, 151 Cal. App.2d 150, 311 P.2d 128 (1957); Fisher v. Robbins, 78 Wyo. 50, 319 P.2d 116 (1957); 106 A.L.R. 1003; RESTATEMENT, TORTS § 348 (1934).
[3] Miller v. Staton, 158 Wash. Dec. 874, 879, 365 P.2d 333, 336 (1961).