Loyola of Los Angeles Law Review

Volume 12
Number 4 *Ninth Circuit Symposium: The Federal Judiciary*

Article 7

9-1-1979

Civil Liability for Causing or Failing to Prevent Suicide

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CIVIL LIABILITY FOR CAUSING OR FAILING TO PREVENT SUICIDE

Suicide[1] is a traumatic event that produces conflicting feelings in the close relatives of the person who has committed suicide. These survivors often feel somehow responsible for the death and, at the same time, seek to blame someone else for it.[2] This blame is more frequently taking the form of a lawsuit,[3] as an increasing number of persons turns to the courts for the resolution of their problems.[4]

While there may be instances in which the imposition of liability will be proper, an examination of this litigation reveals that liability is often

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1. Suicide has been defined by Professor Edwin Shneidman as "the human act of self-inflicted, self-intentioned cessation." 21 ENCYCLOPAEDIA BRITANNICA *Suicide* 383 (14th ed. 1973) [hereinafter cited as *Suicide*]. An alternative definition suggested recently is "the taking of one's own life with the objective of effecting that result as a means or an end but not as a consequence." Comment, *Suicide and the Compulsion of Lifesaving Medical Procedures: An Analysis of the Refusal of Treatment Cases*, 44 BROOKLYN L. REV. 285, 312 (1978). The purpose of this definition is to exclude euthanasia deaths. It eliminates the possibility that persons who have terminated life support systems will be charged with aiding and abetting suicide. *See generally, In re* Quinlan, 355 A.2d 647 (N.J. Sup. Ct.), *cert. denied*, 429 U.S. 922 (1976); Brown & Truitt, *Euthanasia and the Right to Die*, 3 OHIO NW. L. REV. 615 (1976).

In 1977, 3,918 persons committed suicide in California. Telephone interview with an employee of the California Health and Welfare Agency, Department of Health Services, Sacramento, Calif. (March 5, 1979). In 1976, 3,791 persons committed suicide in California. DEP'T OF HEALTH SERVICES, CALIFORNIA HEALTH AND WELFARE AGENCY, *Vital Statistics of California* 83 (1976).

2. [S]ome deaths are more stigmatizing or traumatic than others: death by murder, by the negligence of oneself or some other person, or by suicide. Survivor-victims of such deaths are invaded by an unhealthy complex of disturbing emotions: shame, guilt, hatred, perplexity. They are obsessed with thoughts about the death, seeking reasons, casting blame, and often punishing themselves.

Shneidman, *Postvention and the Survivor-Victim*, in DEATH: CURRENT PERSPECTIVES 347, 348 (1976) [hereinafter cited as Shneidman].

3. Of the eight reported California wrongful death actions in which liability was sought for suicide, four were decided in the last three years. The eight cases are: Grant v. F.P. Lathrop Constr. Co., 81 Cal. App. 3d 790, 146 Cal. Rptr. 45 (1978); Bellah v. Greenson, 81 Cal. App. 3d 614, 146 Cal. Rptr. 535 (1978); Saxton v. McDonnell Douglas Aircraft Co., 428 F. Supp. 1047 (C.D. Cal. 1977); Lucas v. City of Long Beach, 60 Cal. App. 3d 341, 131 Cal. Rptr. 470 (1976); Duff v. Harrah South Shore Corp., 52 Cal. App. 3d 803, 125 Cal. Rptr. 259 (1975); Meier v. Ross Gen. Hosp., 69 Cal. 2d 420, 445 P.2d 519, 71 Cal. Rptr. 903 (1968); Vistica v. Presbyterian Hosp., 67 Cal. 2d 465, 432 P.2d 193, 62 Cal. Rptr. 577 (1967); Tate v. Canonica, 180 Cal. App. 2d 898, 5 Cal. Rptr. 28 (1960).

4. The number of civil cases on the Los Angeles Superior Court docket has increased from 38,922 in 1965 to 65,404 in 1975. While a certain percentage of this increase may be attributed to the growth in the population of Los Angeles from 6,954,350 to 7,020,700 during the same ten-year period, it also undoubtedly reflects an increased trend toward litigation. SUPERIOR COURT OF LOS ANGELES COUNTY, EXECUTIVE OFFICER'S REPORT 32 (1974-75).

being imposed even though the facts of the case and the applicable law indicate that it is inappropriate to do so. To point out these errors in analysis, this comment examines two fundamentally different circumstances that may create liability for suicide: first, when a person's active conduct is a substantial cause of the suicide and, second, when a person passively breaches a duty of care by failing to prevent the suicide. Special attention is given to California's refinements in certain areas of liability and to pertinent psychological factors that have not been considered sufficiently by the courts thus far.

I. RELEVANT STATUTES

Under the common law, death gave rise to no personal cause of action, and it terminated all causes of action that the decedent might have had for personal torts.[5] Therefore, the right to recover for another's wrongful death and the right to recover on a cause of action that survives the decedent are purely statutory.[6]

The wrongful death and survival actions are not mutually exclusive because each addresses a different category of injuries. Certainly both causes of action should be pleaded when possible if punitive damages are warranted, for such damages are recoverable only under the survival action.[7]

A. Wrongful Death Statutes

The cause of action for wrongful death in California is governed by section 377 of the California Code of Civil Procedure. This section provides that the heirs or personal representatives of a decedent may bring an action against the person whose negligent or wrongful conduct caused the death.[8] The right of the survivors to recover is not the same right as that of the decedent had he survived the injury. Rather, it is an action to compensate the survivors for the pecuniary loss they have sustained by reason of the decedent's death.[9] Damages for the emotional distress of the survivors, including grief and sorrow, however, are not recoverable.[10] Furthermore, punitive damages cannot be recovered.[11]

5. W. PROSSER, LAW OF TORTS § 126, at 898 (4th ed. 1971) [hereinafter cited as PROSSER].

6. *Id.*

7. *See* note 13 *infra* and accompanying text; Dunwoody v. Trapnell, 47 Cal. App. 3d 367, 370, 120 Cal. Rptr. 859, 860-61 (1975).

8. CAL. CIV. PROC. CODE § 377 (West 1979).

9. Reyna v. City of San Francisco, 69 Cal. App. 3d 876, 880, 138 Cal. Rptr. 504, 507 (1977).

10. Krouse v. Graham, 19 Cal. 3d 59, 72, 562 P.2d 1022, 1028, 137 Cal. Rptr. 863, 869 (1977).

11. Fease v. Beech Aircraft Corp., 38 Cal. App. 3d 450, 462, 113 Cal. Rptr. 416, 424 (1974).

B. Survival Actions

Section 573 of the California Probate Code provides that a cause of action survives a person's death and may be brought by the executor or administrator of that person's estate.[12] The damages recoverable are limited to those sustained by the decedent prior to death. They include any punitive or exemplary damages to which the decedent would have been entitled had he lived,[13] but damages for his pain, suffering or disfigurement are not recoverable.[14]

The statute of limitations[15] is of special significance to the survival action. If a length of time greater than the statutory period lapses between the accrual of the decedent's cause of action and his death, the action is barred. This, together with the limited damages that are recoverable, may explain why none of the reported California cases seeking to impose liability for suicide has been brought as a survival action.

II. CAUSING SUICIDE

A. Causation in Fact

The causal relationship between the tortious conduct of a defendant and the injured person's act of suicide has received little attention in wrongful death actions seeking damages for causing suicide.[16] The re-

12. CAL. PROB. CODE § 573 (West 1979).

13. *Id.* Originally, punitive damages were not recoverable in survival actions. *See* CAL. PROB. CODE § 573 (West 1956) (amended 1961).

14. In its recommendation to amend CAL. PROB. CODE § 573, the California Law Revision Commission indicated that these damages should be recoverable in the survival action. California Law Revision Commission, *Recommendation and Study Relating to Survival of Actions*, 3 CAL. L. REVISION COMM. F-1, F-7, F-11 (1960).

15. In most instances, the statute of limitations is one year "for injury to or for the death of one caused by the wrongful act or neglect of another." CAL. CIV. PROC. CODE § 340 (West 1979). If the cause of action is brought against a health care provider, the statute of limitations is that prescribed in CAL. CIV. PROC. CODE § 340.5 (West 1979).

16. The only reported decision in which a defendant has argued that his conduct was not a substantial cause in fact of the injured person's suicide is Fuller v. Preis, 322 N.E.2d 263 (N.Y. Ct. App. 1974). The decedent had been injured in an automobile collision negligently caused by the defendant. He had sustained head injuries that created a postconvulsive psychosis. Prior to the accident, the decedent had not been suicidal and had given no indications of emotional instability. Seven months after the accident, he committed suicide.

At that time, the decedent's wife was partially paralyzed, which was unrelated to the accident, and was suffering nervous exhaustion. Furthermore, the decedent's mother had recently been diagnosed as having cancer. The defendant argued that these facts, together with others, were the substantial cause of the suicide, not the injuries caused by the defendant. The appellate division dismissed the complaint after the jury rendered a verdict for the plaintiff. The New York Court of Appeals reversed the dismissal and remanded the case for

quirement of proof of causation in fact has been overshadowed by the issue of proximate cause. Due to its historical stringency, proximate cause has tended to be the critical factor in determining liability.[17] However, in states such as California, where the proximate cause hurdle is being lowered continually,[18] defendants should emphasize the element of factual causation.

As a general rule, a plaintiff must establish that the defendant's conduct was a substantial cause of the decedent's suicide, or no basis for recovery exists.[19] The mere fact that the decedent sustained tortiously caused injuries prior to his suicide is insufficient proof that the suicide was substantially caused by these injuries.[20] Therefore, to determine whether an injured person's suicidal act could have been caused substantially by the defendant's conduct, plaintiffs must rely upon the knowledge and theories of psychiatrists,[21] in the same way that medical testimony is utilized to determine the existence of a causal connection between a plaintiff's physical injuries and a tortfeasor's conduct.

Although there is no one theory that explains in all instances why people kill themselves, current professional literature indicates that suicide is the result of internal processes in most instances, while external

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a new trial, finding that sufficient credible evidence existed to support a verdict for the plaintiff. *Id.* at 269.

17. *See* note 65 *infra*.

18. *See, e.g.*, Grant v. F.P. Lathrop Constr. Co., 81 Cal. App. 3d 790, 146 Cal. Rptr. 45 (1978) & text accompanying notes 68-75 *infra*.

19. Addressing the issue of causation in all tort actions, Dean Prosser has stated:

> [T]he plaintiff, in general, has the burden of proof. He must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the possibilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.

PROSSER § 41, *supra* note 5, at 241.

20. *See, e.g.*, Tate v. Canonica, 180 Cal. App. 2d 898, 909, 5 Cal. Rptr. 28, 36 (1960), in which the court stated:

> This does not mean that, in every case where the actor intentionally causes serious mental distress or physical suffering, and this is followed by suicide, the actor is necessarily liable for the suicide. The mental distress or physical suffering may not be, in the particular case, as a matter of fact, a substantial factor in bringing about the suicide.

While the court of appeal remanded *Tate* to the trial court, the action was not tried because the plaintiff concluded that there was insufficient evidence on which to base defendant's liability. Telephone interview with Marvin Giometti, attorney for plaintiff, San Francisco, Calif. (March 5, 1979).

21. *See, e.g.*, Platt v. City of Los Angeles, 72 Cal. App. 2d 753, 754, 165 P.2d 714, 715 (1946) ("The existence of such causal connection is necessarily a scientific question, upon which it is necessary to resort to the scientific knowledge of experts trained in such scientific subject. Expert testimony, therefore, becomes essential.").

events are only incidental or precipitating factors.[22] As a result, it seems inappropriate to impose civil liability on any particular person, because the conduct of other persons is of little significance to an individual's decision to commit suicide. This is emphasized by a cofounder of the Suicide Prevention Clinic in Los Angeles, Dr. Robert Litman. He has found that "[w]hen a patient's wish to continue living balances precariously for a time against a strong wish to commit suicide, then relatively minor, often accidental, adverse environmental influences may be decisively fatal."[23] The point is illustrated with a case study in which one man became despondent after his wife had asked for a divorce. Feeling suicidal, he tried to contact his brother, his father, and a psychiatrist without success. After calling his wife and finding the line busy, he took an overdose of sleeping pills. Although unconscious when found, the man survived. He stated later that, had he been able to contact any of the persons he had tried to reach, he would not have taken the pills.[24] Who "caused" his attempt? The people who were not available to prevent it? His wife in asking for a divorce? It may be that the unavailability of these people at a critical moment precipitated the attempted suicide, but no one of them could or should be held liable for it.

When psychiatrists testify as expert witnesses, they consider several factors to evaluate whether the defendant's conduct could have been a substantial cause of the suicide. These factors are: whether the dece-

22. *See* Litman, *Treatment of the Potentially Suicidal Patient*, in THE PSYCHOLOGY OF SUICIDE 405 (1970) [hereinafter cited as *Patient Treatment*]; Litman, *Suicide As Acting Out*, in THE PSYCHOLOGY OF SUICIDE 293 (1970) [hereinafter cited as *Acting Out*]. According to another author, "external misery has relatively little to do with suicide." A. ALVAREZ, THE SAVAGE GOD 95 (Bantam ed. 1973) [hereinafter cited as ALVAREZ]. He has found that

> a suicide's excuses are mostly casual. At best they assuage the guilt of the survivors, soothe the tidy-minded and encourage the sociologists in their endless search for convincing categories and theories. They are like a trivial border incident which triggers off a major war. The real motives which impel a man to take his own life are elsewhere; they belong to the internal world, devious, contradictory, labyrinthine, and mostly out of sight.

Id. at 97.

23. *Patient Treatment*, *supra* note 22, at 405. *See also Acting Out*, *supra* note 22, at 298.

24. *Patient Treatment*, *supra* note 22, at 405-06. Alvarez has found that

> [o]nce a man decides to take his own life he enters a shut-off, impregnable but wholly convincing world where every detail fits and each incident reinforces his decision. An argument with a stranger in a bar, an unexpected letter which doesn't arrive, the wrong voice on the telephone, the wrong knock at the door, even a change in the weather—all seem charged with special meaning; they all contribute.

ALVAREZ, *supra* note 22, at 116. He relates the statement of one suicidal person: "It's a pattern of my entire life. I would like to think that it was only brought on by certain stresses and strains. But in fact, if I'm honest and look back, I realize it's been a pattern ever since I can remember." *Id.* at 119.

dent was previously suicidal or mentally unbalanced;[25] the nature and severity of the injuries inflicted; the length of time between the injuries and the suicide; and the existence and nature of events occurring between the time of the injuries and the suicide.[26] The facts of *Faber v. Board of Pension Commissioners*[27] and *Platt v. City of Los Angeles*[28] are illustrative. In both cases widows sought to compel payment of pensions after the deaths of their husbands, who had been members of the Los Angeles Police Department. Each man had committed suicide after sustaining injuries in the course of his employment. In order to recover, each plaintiff had to prove that the work-related injuries were the cause of death. While recovery was permitted in *Faber*, it was denied in *Platt*.

The decedent in *Platt* had sustained crippling leg injuries that were aggravated by other incidents during his career with the police department. There was testimony that Platt had been of sound mind prior to these injuries.[29] The suicide occurred approximately twelve years after the initial injuries, and there was no evidence of emotional instability until several years after the injury. Subsequent to Platt's initial injuries he became an alcoholic and, on the day that he committed suicide, he was injured in an automobile accident.

The decedent in *Faber* sustained injuries after being hit over the

25. If the decedent would have committed suicide without having been injured by the defendant, then the defendant cannot be held liable for the death. "[A]n act or an omission is not regarded as a cause of an event if the particular event would have occurred without it." PROSSER § 41, *supra* note 5, at 238. *See also* Arthur v. Santa Monica Dairy Co., 183 Cal. App. 2d 483, 487, 6 Cal. Rptr. 808, 811 (1960) (" '[I]f the accident would have happened anyway, whether defendant was negligent or not, then his negligence was not a cause in fact and, of course, cannot be the legal or responsible cause.' ") (quoting 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW § 284, at 1484 (7th ed. 1960)).

A relevant psychological concept is that of the "subintentioned death,"—"the person plays some partial, covert, subliminal or unconscious role in hastening his own demise." E. SHNEIDMAN, DEATHS OF MAN 87 (2d ed. 1974). Several behavior patterns are indicative—"poor judgment, imprudence, excessive risk-taking . . .—all ways in which an individual can advance the date of his death." *Id.* Shneidman has suggested that subintentioned deaths are "more common than most of us would care to recognize and characteristic of a large percentage, perhaps a majority, of all deaths." *Id.* While not readily susceptible of proof, many of the "accidents" that allegedly "cause" a suicide may in fact be the result of the "victim's" subintentioned death wish. In such a situation, it is not the defendant's negligence that caused the suicide, but the decedent's subintentional suicidal wish that caused the accident.

26. *See* Platt v. City of Los Angeles, 72 Cal. App. 2d 753, 766-69, 165 P.2d 714, 722-23 (1946); Faber v. Board of Pension Comm'rs, 56 Cal. App. 2d 825, 828, 133 P.2d 404, 405-06 (1943).

27. 56 Cal. App. 2d 825, 133 P.2d 404 (1943).

28. 72 Cal. App. 2d 753, 165 P.2d 714 (1946).

29. *Id.* at 766, 165 P.2d at 722.

head with a bottle. There was evidence that Faber had been of sound mind prior to this injury.[30] There were indications of instability, however, immediately after the injury and these continued throughout the nine years between his injury and his suicide. No evidence was presented at trial of any significant events occurring between the time of the injury and the time of the suicide.

The court in *Faber* found that the injuries the decedent sustained during the performance of duty were a substantial cause of his suicide,[31] while the court in *Platt* held that the decedent's injuries sustained during the course of employment were not a substantial cause of his unbalanced state of mind or of his suicide.[32] The plaintiff in *Platt* argued that *Faber* was indistinguishable and required a finding in her favor.[33] The court responded that Faber's head injuries, the immediate deterioration of his mental condition, and the lack of alternative explanation for his suicide made *Faber* inapposite to plaintiff's case.[34]

It appears that the evidence of significant events between the time of injury and the time of suicide was the crucial distinction between the two cases. Certainly the difference between committing suicide nine years and twelve years after sustaining injuries was not. Likewise, the nature of the injuries sustained was not so different as to mandate the difference in outcome of the actions; neither was the length of time between the injuries and indications of mental instability. In *Platt*, however, the defendant's expert witness testified that, in his opinion, the substantial causes of the suicide were the decedent's manic-depressive mental illness, his drinking on the day of his suicide, and the accident on that day.[35] Similarly, a psychiatrist appointed by the court testified that, in his opinion, the actual cause of the suicide was the decedent's long-term drinking problem, which was not caused by his work-related injury.[36] There was no comparable testimony in the *Faber* case.

Therefore, when it appears that a tortfeasor's conduct was the cause of a suicide, the parties to a wrongful death action should closely scrutinize the facts of the case to determine whether the totality of factors reasonably indicate that the defendant's conduct was a substantial cause in fact of the suicide. Particular attention should be given to

30. 56 Cal. App. 2d at 826, 133 P.2d at 405.
31. *Id.* at 834, 133 P.2d at 409.
32. 72 Cal. App. 2d at 770, 165 P.2d at 724.
33. *Id.* at 771, 165 P.2d at 724.
34. *Id.*
35. *Id.* at 766-67, 165 P.2d at 722.
36. *Id.* at 768-69, 165 P.2d at 723.

whether there are alternative explanations for the suicide.[37] Since psychiatrists indicate that people usually do not kill themselves in response to the conduct of another person, it seems that it should be infrequent that a plaintiff will sustain his burden of proof on the issue of causation in fact.

B. Proximate Cause

Conduct that eventually leads another to commit suicide may be characterized in three ways: (1) a negligent act that inflicts injury and is followed later by suicide, (2) an act that is intended to cause injury but not suicide, and (3) an intentional act that is substantially certain to cause injury and suicide. The extent to which a tortfeasor's liability will be limited by tests of proximate cause[38] should be analyzed separately for each situation.

1. Negligently Caused Suicide

Proximate cause is an issue in any tort action, but it is particularly important when the defendant's conduct was not the immediate cause of injuries. Since the immediate cause of death of one who commits suicide is his own action, suicide is an act that intervenes between the defendant's negligence and the injured person's death. Intervening acts[39] are classified as either dependent or independent under general tort principles. A dependent intervening act does not disrupt the chain of causation and the defendant's conduct remains the proximate cause of the harm sustained by the plaintiff.[40] An independent intervening act supersedes the defendant's conduct as the cause in fact of the plain-

37. *See* discussion in note 16 *supra* of Fuller v. Preis, 322 N.E.2d 263 (N.Y. Ct. App. 1974), in which the defendant did argue that there were alternative explanations for the suicide.

38. *See, e.g.*, Valdez v. J.D. Diffenbaugh Co., 51 Cal. App. 3d 494, 509, 124 Cal. Rptr. 467, 477 (1975) ("Proximate cause is not a question of causation; it is simply a policy determination of whether or not the defendant should be held responsible for his acts."). Prosser has described the issue of proximate cause as follows:

> "Proximate cause"—in itself an unfortunate term—is merely the limitation which the courts have placed upon the actor's responsibility for the consequences of his conduct. . . . As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability. Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy.

PROSSER § 41, *supra* note 5, at 236-37.

39. "An intervening cause is one which comes into active operation in producing the result *after* the negligence of the defendant." PROSSER § 44, *supra* note 5, at 271 (emphasis in original).

40. *See* Landeros v. Flood, 17 Cal. 3d 399, 411, 551 P.2d 389, 395, 131 Cal. Rptr. 69, 75 (1976). *See also* RESTATEMENT (SECOND) OF TORTS § 441, Comment c (1965).

tiff's injuries and relieves the defendant of liability.[41] The tests used to determine whether an intervening act is dependent or independent are: (a) whether the intervening act was foreseeable to a reasonable person or to the particular defendant;[42] and (b) whether the intervening act was a normal incident of the harm caused by the defendant's conduct.[43] Unless suicide was a foreseeable consequence or a normal incident of the injuries inflicted by the tortfeasor, the decedent's suicidal act remains an independent intervening act that supersedes the defendant's conduct and relieves him of liability for the death.

(a) Foreseeable suicides

In *Tate v. Canonica*,[44] California's first reported wrongful death action involving liability for causing suicide, an appellate court acknowledged in dicta that a voluntary suicide in fact caused by a defendant's negligence might not be a superseding cause of death if the suicide was reasonably foreseeable to the particular defendant.[45] The facts of *Lancaster v. Montesi*,[46] a Tennessee case, provide a rare example of this situation. The complaint alleged that the defendant had been Lancaster's paramour, that he dominated and controlled her, and that he subjected her to sadistic punishment. The day before she committed suicide, Lancaster had been with the defendant and tried to leave him,

41. *See* Schrimsher v. Bryson, 58 Cal. App. 3d 660, 664, 130 Cal. Rptr. 125, 127 (1976). *See also* RESTATEMENT (SECOND) OF TORTS § 441, Comment c (1965).

42. "The general test of whether an independent intervening act, which operates to produce an injury, breaks the chain of causation is the foreseeability of that act." Schrimsher v. Bryson, 58 Cal. App. 3d 660, 664, 130 Cal. Rptr. 125, 127 (1976). *See also* PROSSER § 44, *supra* note 5, at 272-75.

43. There are other intervening causes which could scarcely have been contemplated by any reasonable man in the place of the defendant at the time of his conduct, but which are nevertheless to be regarded as normal incidents of the risks he has created. . . . . . They are closely and reasonably associated with the immediate consequences of the defendant's act, and form a normal part of its aftermath; and to that extent they are not foreign to the scope of the risk created by the original negligence.

PROSSER § 44, *supra* note 5, at 276.

44. 180 Cal. App. 2d 898, 5 Cal. Rptr. 28 (1960).

45. *Id.* at 918, 5 Cal. Rptr. at 42. The court stated:

We need not and do not now decide whether, in those cases where it would be proper to treat the act of suicide as an independent intervening act because it was truly voluntary, this would still not be a defense if, under the particular circumstances of the case, a truly voluntary suicide was a reasonably foreseeable result of the defendants' wrongdoing. The usual rule is "that the intervening act of a third person does not relieve the original wrongdoer of liability if the intervening act was a reasonably foreseeable result of the original actor's wrongdoing. . . ." It is arguable that the same rule might apply to the act of decedent.

Id. (quoting Davis v. Erickson, 53 Cal. 2d 860, 863, 350 P.2d 535, 537, 3 Cal. Rptr. 567, 569 (1960) (en banc)).

46. 390 S.W.2d 217, 219 (Tenn. Sup. Ct. 1965) (per curiam).

but he prevented her from doing so. Later that day she tried unsuccessfully to kill herself by jumping out of the car in which they were travelling. When they returned to their apartment, Lancaster telephoned a mutual friend and told him that she was "going to end it all." The friend talked to the defendant and asked him to take care of her—to do anything—but not leave her alone. The defendant responded, "Hell, I'm gone," and left. Lancaster committed suicide shortly thereafter by jumping from a bridge.

The allegations of the complaint seem to indicate intentional infliction of emotional distress,[47] but the court treated it as a cause of action for negligence.[48] The Tennessee Supreme Court determined that the suicide would be an independent intervening cause of death if it were voluntary.[49] The court stated that the suicide was voluntary and, as a matter of law, unforeseeable.[50] Accepting the allegations as true, it seems that the suicide was entirely foreseeable to the defendant in view of the decedent's earlier suicide attempt and the phone conversation, both of which occurred in his presence. It is difficult to imagine a situation in which a defendant's conduct could create a more foreseeable risk of suicide. If general tort principles and the dicta in *Tate v. Canonica* were applied,[51] the defendant's conduct could have been held to have been the proximate cause of the decedent's death.

(b) Suicides within the risk of harm

In *Scheffer v. Railroad Co.*,[52] the first reported wrongful death action in which a plaintiff alleged that negligently caused injuries were the proximate cause of the injured person's suicide, the Supreme Court held that the decedent's act was a superseding cause of death.[53] The decedent had been injured in a train collision and subsequently committed suicide during a state of insanity. The Court held that, as a matter of law, the suicide and insanity were not the "natural and probable" results of the injuries sustained, *i.e.*, they were neither foreseeable

47. Even if the defendant had not wished to cause Lancaster emotional distress, he must have known that such distress was substantially certain to follow from his conduct. *See* PROSSER § 12, *supra* note 5, at 60 ("In the great majority of the cases allowing recovery the mental distress has been inflicted intentionally, either in the sense that the defendant desired to cause it, or that he knew that it was substantially certain to follow from his conduct.").

48. 390 S.W.2d at 220.

49. *Id.* at 222.

50. *Id.*

51. 180 Cal. App. 2d at 918, 5 Cal. Rptr. at 42. *See* note 45 *supra* and accompanying text.

52. 105 U.S. 249 (1881).

53. "The proximate cause of the death of Scheffer was his own act of self-destruction. . . ." *Id.* at 252.

nor a normal incident of the injuries caused by the defendant.[54] As a result, the railroad could not be held liable for the decedent's death because the decedent had intervened with his own willful act.

Prosser indicates that some intervening acts, although not foreseeable in a literal sense, nevertheless should be considered dependent intervening acts if those acts are within the risk of harm created by the defendant's conduct. These intervening acts "are closely and reasonably associated with the immediate consequences of the defendant's act, and form a normal part of its aftermath; and to that extent they are not foreign to the scope of the risk created by the original negligence."[55] Applying this rule to a wrongful death action for negligently caused suicide, if a person kills himself involuntarily after being injured by the defendant, the defendant's conduct may be considered the proximate cause of death if the involuntary suicide follows as a normal consequence of the defendant's act. It is as if the injured person "hurt[s] himself during unconsciousness or delirium brought on by the injury."[56] For example, if someone causes an automobile collision, there is a risk that the injured person will sustain head injuries that may produce brain damage and an organic psychosis, during which the injured person may commit suicide involuntarily.[57] Although the suicide may not be foreseeable at the time the head injuries are inflicted, the possibility of brain damage and consequential involuntary acts by the injured person, that may include suicide, is not highly unlikely. The suicide may therefore fall within the risk of harm created by the negligent person's conduct, and liability could attach.

Prosser also indicates, however, that

> if the man is sane, or 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 by reason of his injury, it is agreed in negligence cases that his voluntary

54. The suicide of Scheffer was not a result naturally and reasonably to be expected from the injury received on the train. It was not the natural and probable consequence, and could not have been foreseen in the light of the circumstances attending the negligence of the officers in charge of the train.

His insanity, as a cause of his final destruction, was as little the natural or probable result of the negligence of the railway officials, as his suicide, and each of these are casual or unexpected causes, intervening between the act which injured him, and his death.

Id.

55. PROSSER § 44, *supra* note 5, at 276 (citing Hill v. Peres, 136 Cal. App. 132, 28 P.2d 946 (1934)). *See* Evans v. Thomason, 72 Cal. App. 3d 978, 983, 140 Cal. Rptr. 525, 528 (1977).

56. PROSSER § 44, *supra* note 5, at 280.

57. These are substantially the facts of Fuller v. Preis, 322 N.E.2d 263 (N.Y. Ct. App. 1974). *See* note 16 *supra*.

choice is an abnormal thing, which supersedes the defendant's liability.[58] Thus, when a person is injured in an automobile collision but his injuries do not cause him to become incompetent or insane, and he returns to work for six months before committing suicide, the person negligently causing the injuries is not liable for the death. Presented with these facts, the New York Supreme Court stated:

> This is a situation where a sane man, depressed it is true, but sane nevertheless, superimposes upon the defendants' negligence, acts of his own will to destroy himself. The defendants' acts are not the proximate cause of the suicide and they may not be charged with the death of the decedent.[59]

Thus, an unforeseeable suicide that is the result of the injured person's free will should supersede the defendant's conduct as the cause of death, but a suicide that is involuntary and within the risk of harm created by the defendant's negligence should not disrupt the chain of causation and the defendant should be liable.

The difficult task is to determine whether the suicide was voluntary or involuntary, for this will delimit the liability of the tortfeasor. It is proposed here that the most effective means of determining this is to call upon psychiatrists as expert witnesses to state whether, in their opinion, the decedent's suicide was voluntary or involuntary. To find the defendant liable, the jury should determine that the suicide was

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58. PROSSER § 44, *supra* note 5, at 280-81.

59. *Id.* McMahon v. City of New York, 141 N.Y.S.2d 190, 192 (Sup. Ct. 1955). The court then stated, "In the circumstances of the case one may not aggravate the defendants' damage by wilful and deliberate self-destruction." *Id.* This statement brings to mind the concept of "mitigation of damages." Professor Witkin has stated:

> Where damage to person . . . is threatened or inflicted by . . . tort, the injured party has the active duty to use reasonable care and diligence to protect himself and minimize the loss. . . .
>
> Personal injury cases furnish a familiar illustration. If the plaintiff fails or refuses to submit to necessary treatment by a doctor, he cannot recover for any additional harm resulting therefrom.

4 B. WITKIN, SUMMARY OF CALIFORNIA LAW § 870, at 3158-59 (8th ed. 1974). *See* Green v. Smith, 261 Cal. App. 2d 392, 396, 67 Cal. Rptr. 796, 799 (1968).

One might argue that a person who becomes suicidal as the result of injuries caused by the tortfeasor's conduct should "minimize the loss" by seeking psychiatric care. In Casimere v. Herman, 137 N.W.2d 73, 77-78 (Wis. Sup. Ct. 1965), medical testimony indicated that the plaintiff's mental condition, brought about by the defendant's conduct, would persist throughout her life unless she underwent proper psychological treatment. The court stated that the defendant could not be expected to pay for lifetime disability or pain if proper psychotherapy could reasonably correct the ailment. However, in Browning v. United States, 361 F. Supp. 17, 24 n.5 (D.C. Pa. 1973), the court held that the plaintiff's failure to take advantage of psychiatric treatment was not a failure to mitigate damages when the "rejection of treatment . . . was a manifestation of plaintiff's mental illness." *See generally* Annot., 62 A.L.R.3d 70 (1975) (duty to submit to nonsurgical medical treatment to minimize tort damages).

involuntary *and* that it was one of the risks of harm created by the defendant's conduct. Rather than doing this, courts have developed their own tests to measure voluntariness, and psychiatrists testify whether or not "the test" has been met.[60] The jury is then instructed that, if they find that the test has been met, the defendant is liable.[61]

The first such test, adopted by the courts of a few states, required two findings: that the injuries inflicted produced a state of insanity in the injured person and that, while insane, the injured person committed suicide without understanding the nature of his act. In each instance, the courts found that as a matter of law the decedent had understood the nature of his act and therefore denied recovery.[62] This test seems relatively reliable because if the negligently inflicted injuries produce a state of mind in which the injured person does not know what he is doing when he kills himself, the suicide is not the result of his free will, but is instead an involuntary act caused by the defendant's conduct. It closely resembles the situation in which an injured person hurts himself "during unconsciousness or delirium brought on by the injury."[63] Furthermore, the test is relatively easy to apply because the circumstances of the suicide provide evidence of the decedent's awareness. In one instance a court determined that the decedent must have understood the nature of his act, because he locked the door to his room to exclude others before strangling himself.[64] The initial prong of the test, the decedent's insanity, however, seems unnecessary. As long as the injuries caused by the defendant produce a mental condition during which the injured person involuntarily commits suicide, as indicated by his failure to understand the nature of his act, it should not matter whether he is sane or not.

When several jurisdictions altered this test, however, the requirement of insanity was retained, while the requirement that the injured person not understand the nature of his act was dropped. In its place, the courts stated that, if the injured person commits suicide in response to an uncontrollable impulse during a state of insanity brought on by the injuries, the defendant may be liable for the death.[65] Theoretically, if

60. *See, e.g.*, Fuller v. Preis, 322 N.E.2d 263, 267 (N.Y. Ct. App. 1974).

61. *See, e.g., id.* at 266; Lucas v. City of Long Beach, 60 Cal. App. 3d 341, 347, 131 Cal. Rptr. 470, 473 (1976).

62. Brown v. American Steel & Wire Co., 88 N.E. 80, 85 (Ind. Ct. App. 1909); Daniels v. New York, N.H. & H.R.R., 67 N.E. 424, 426 (Mass. Sup. Ct. 1903); Long v. Omaha & C.B. St. Ry., 187 N.W. 930, 932 (Neb. Sup. Ct. 1922).

63. *See* text accompanying note 56 *supra*.

64. Daniels v. New York, N.H. & H.R.R., 67 N.E. 424, 426 (Mass. Sup. Ct. 1903).

65. *See, e.g.*, Tucson Rapid Transit Co. v. Tocci, 414 P.2d 179, 184-86 (Ariz. Ct. App.

the person commits suicide in response to an uncontrollable impulse, the suicide is no longer voluntary. However, if circumstantial evidence indicates that the person understood the nature of his act, what evidence is available to indicate that the impulse to commit suicide was uncontrollable? Or, if a psychiatrist testifies as an expert witness for the plaintiff that the person's impulse to commit suicide was uncontrollable, what evidence can the defendant introduce to rebut this testimony? It is suggested here that the "insanity plus uncontrollable impulse" test is neither a practical nor a just method of determining liability.

Even though a suicide committed during insanity is not necessarily involuntary,[66] evidence of insanity is easier to negate than is evidence of an uncontrollable impulse.[67] Thus, it was a sad day for defendants when California announced in *Grant v. F.P. Lathrop Construction Co.*[68] a test of proximate cause that eliminated the insanity requirement.[69]

1966); Appling v. Jones, 154 S.E.2d 406, 409 (Ga. Ct. App. 1967); Elliot v. Stone Baking Co., 176 S.E. 112, 112 (Ga. Ct. App. 1934); Fuller v. Preis, 322 N.E.2d 263, 265-66 (N.Y. Ct. App. 1974); Exxon Corp. v. Brecheen, 526 S.W.2d 519, 524 (Tex. Sup. Ct. 1975); Baxter v. Safeway Stores, Inc., 534 P.2d 585, 589 (Wash. Ct. App. 1975). This author found only one decision reported prior to 1974 in which an appellate court remanded for a factual determination of the proximate cause issue. Orcutt v. Spokane County, 364 P.2d 1102, 1108 (Wash. Sup. Ct. 1961). All other pre-1974 decisions had held as a matter of law that the defendant's conduct was not the proximate cause of the decedent's suicide. *See, e.g.*, cases cited *supra*.

The Restatement of Torts has adopted this test as well as the test of "insanity plus not understanding the nature of the suicidal act."

> If the actor's negligent conduct so brings about the delirium or insanity of another as to make the actor liable for it, the actor is also liable for harm done by the other to himself while delirious or insane, if his delirium or insanity (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.

RESTATEMENT (SECOND) OF TORTS § 455 (1965).

66. *See, e.g.*, Daniels v. New York, N.H. & H.R.R., 67 N.E. 424, 426 (Mass. Sup. Ct. 1903) (injured person's suicide was committed during a state of insanity, but held to be voluntary).

67. It would be extremely unusual to find witnesses to a suicide. Furthermore,

> the acute suicidal crisis (or period of high and dangerous lethality) is an interval of relatively short duration—to be counted, typically, in hours or days, not usually in months or years. An individual is at a peak of self-destructiveness for a brief time and is either helped, cools off, or is dead.

Suicide, *supra* note 1, at 384A.

In contrast, if a person were insane when he committed suicide, he probably would have been under the care and watchful eyes of many persons who could attest to his mental state. His insanity probably would have been in existence for months or years before the suicide. *See, e.g.*, Scheffer v. Railroad Co., 107 U.S. 249 (1881).

68. 81 Cal. App. 3d 790, 146 Cal. Rptr. 45 (1978).

69. *Id.* at 799, 146 Cal. Rptr. at 50. Prior to this, California had adopted the "insanity plus uncontrollable impulse" test in Tate v. Canonica, 180 Cal. App. 2d 898, 915, 5 Cal. Rptr. 28, 40 (1965), in which the court stated:

> [W]here the negligent wrong only causes a mental condition in which the injured per-

The court of appeal upheld an award made to the plaintiff, ruling that a defendant is liable for a resulting suicide if his negligence was a substantial cause of a mental condition in the injured person that proximately resulted in an uncontrollable impulse to commit suicide. The court reasoned that there was no substantial difference between a state of insanity that produces an uncontrollable impulse to commit suicide and a mental condition producing the same result.[70] While this is theoretically accurate, the revised test lightens the plaintiff's burden of proof significantly. While previously the plaintiff had to produce substantial evidence that the defendant's negligence caused a state of insanity *and* an uncontrollable impulse to commit suicide, now the plaintiff need prove only that the negligence was a substantial cause of an uncontrollable impulse.[71]

In *Grant*, the defendant's negligence had caused the decedent, Le Flore, to fall from a roof on which he had been working. The injuries sustained in the fall were so severe that he was rendered a paraplegic. This condition caused LeFlore to become depressed, which in turn left him unable to sleep. He then began using Seconal and, about a year and one-half after the accident, he committed suicide by ingesting a lethal amount of the Seconal. There was no indication or proof presented at trial that LeFlore had been insane when he committed suicide. On the contrary, a psychiatrist testifying for the plaintiff stated that in his opinion LeFlore had made a conscious choice to commit suicide.[72] This seems entirely inconsistent with proof that the suicide was involuntary; but apparently some evidence was presented that the suicidal impulse had been uncontrollable.[73]

It does not appear to this author that the suicide in *Grant* was within

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son is able to realize the nature of the act of suicide and has the power to control it if he so desires, the act then becomes an independent intervening force and the wrongdoer cannot be held liable for the death. On the other hand, if the negligent wrong causes *mental illness which results in an uncontrollable impulse* to commit suicide, then the wrongdoer may be held liable for the death.

Id. (emphasis added).

70. 81 Cal. App. 3d at 799, 146 Cal. Rptr. at 50.

71. *Id.* at 798-99, 146 Cal. Rptr. at 50. Furthermore, if most people who commit suicide are not insane, this holding expands potential liability to instances in which a basis for recovery could not be established under the other tests. Professor Shneidman labels it a "fable" that all suicidal individuals are mentally ill or that suicide is always the act of a psychotic person. "[S]tudies of hundreds of genuine suicide notes indicate that although the suicidal person is extremely unhappy, he is not necessarily mentally ill." *Suicide*, *supra* note 1, at 384D.

72. 81 Cal. App. 3d at 802-03, 146 Cal. Rptr. at 52.

73. The court related the testimony of the plaintiff's expert witness.

[O]ne of the most common symptoms of depression is the inability to sleep. This inability to sleep was present in this man by virtue of these various drugs . . . over a signifi-

the risk of harm created by the defendant. The chain of events—falling from a roof as a result of the defendant's negligence, becoming a paraplegic, being depressed, being unable to sleep, using Seconal, and committing suicide a year and one-half after the fall—bears little resemblance to the situation in which the injured person hurts himself "during unconsciousness or delirium brought on by the injury."[74] Furthermore, in view of the testimony of the plaintiff's expert witness that the decedent's choice to commit suicide was a conscious one, it would have been more appropriate to view this willful act as the superseding and proximate cause of the death.[75]

It is this author's opinion that the new "uncontrollable impulse" test produces nothing but battles between expert witnesses and permits actions for causing suicide to be determined solely by the juries' sympathies and not by the facts of the cases. The facts in *Grant* seem to support this opinion.[76] This author proposes that the most accurate means of establishing whether a suicide was involuntary and within the risk of harm created by the defendant's conduct is not to ask psychia-

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cant period of time, and which I assume led him to use Seconal, which in turn, I think, led to his death.

The court then stated, "This testimony and other evidence of LeFlore's mental condition throughout the months following his injury, presumably believed by the jury, constituted evidence that Lathrop's negligence proximately resulted in an uncontrollable impulse to commit suicide." *Id.* at 803, 146 Cal. Rptr. at 52. It seems evident to this author that the expert witness' testimony, as related by the court, was not proof of an uncontrollable suicidal impulse. One wonders what evidence *was* presented on this issue.

74. *See* text accompanying note 56 *supra*.

75. *See* text accompanying notes 58 & 59 *supra*. One is reminded of Prosser's statement that, if a person commits suicide because "his life has become unendurable to him by reason of his injury, it is agreed in negligence cases that his voluntary choice is an abnormal thing, which supersedes the defendant's liability." PROSSER § 44, *supra* note 5, at 280-81.

76. The wrongful death action had been consolidated with the personal injury action brought by LeFlore during his lifetime. 81 Cal. App. 3d at 794, 146 Cal. Rptr. at 47. The jury, therefore, must have been aware that the only damages that could be recovered from the defendant would be those that the jury awarded in that action. Had LeFlore remained alive, the damages he and his family could have expected to recover for his becoming a paraplegic were quite substantial; the sum would have been about 20 times greater than that recoverable under the personal injury action because it would have been based upon a life expectancy of about 30 years rather than the 17-month period that lapsed between the injuries and suicide. (While the court did not indicate how old LeFlore was when he became a paraplegic, even if he was 42 at the time, he would have had a life expectancy of 30.8 years. CALIFORNIA JURY INSTRUCTIONS CIVIL 711 app. (1977)). The sum would also have been several times that recoverable in a wrongful death action, because one cannot recover damages for the decedent's pain and suffering in the wrongful death or survival action. *See* notes 9 & 14 *supra* and accompanying text. Therefore, by awarding the plaintiff damages in the wrongful death action, the jury still could not award as much money as could have been awarded if LeFlore had not committed suicide but had remained a paraplegic for his entire life expectancy.

trists whether the suicidal impulse was uncontrollable, or whether it was uncontrollable and the decedent was insane, or even whether the decedent understood the nature of his act and was insane when committing suicide, but, rather, to ask psychiatrists whether the suicide was involuntary or voluntary. Juries should be instructed to weigh this evidence while considering evidence of the risk of harm created by the defendant's conduct.

2. Intentionally Caused Harm Resulting in Suicide

Generally, greater liability is imposed on those who intentionally cause injury than on those who are merely negligent, by reducing proximate cause limitations.[77] Under this principle, a defendant is liable for the particular harm he intended to cause when it occurs, whether or not it was foreseeable that his conduct would bring about such harm.[78] Proximate cause limitations are not lessened when only the defendant's conduct was intentional; rather, the consequences must have been either intended by the defendant[79] or substantially certain to occur.[80] When a person intends to cause physical injuries or emotional distress to another, but does not intend or is not substantially certain that the other will die as a result of the injuries, one could argue that the risk of death by suicide was only negligently created and the proximate cause limitations should be retained, such that the suicide must have been foreseeable or involuntary before the defendant may be liable.

Initially courts did not differentiate those situations in which a defendant intentionally caused injuries from those in which the defendant's injury-causing conduct was negligent. Liability was denied in each action in which it was alleged that a suicide was caused by an intentional tort on the basis that the suicide as a matter of law was not the "natural result" of the tortious conduct.[81] This was the same foreseeability test used in early negligence actions to limit a defendant's liability to those consequences that were "proximately" caused by his

77. PROSSER § 43, *supra* note 5, at 263. *See also* note 86 *infra*.

78. PROSSER § 43, *supra* note 5, at 263. *See also* RESTATEMENT OF TORTS § 279 (1934) ("If the actor's conduct is intended by him to bring about bodily harm to another which the actor is not privileged to inflict, it is the legal cause of any bodily harm of the type intended by him which it is a substantial factor in bringing about.").

79. RESTATEMENT OF TORTS § 279 (1934).

80. *See* PROSSER § 8, *supra* note 5, at 31-32. (An actor intends to cause "not only . . . those consequences which are desired, but also . . . those which the actor believes are substantially certain to follow from what he does.").

81. Salsedo v. Palmer, 278 F. 92, 99 (2d Cir. 1921); Stevens v. Steadman, 79 S.E. 564, 567-68 (Ga. Sup. Ct. 1913); Waas v. Ashland Day & Night Bank, 257 S.W. 29, 32 (Ky. Sup. Ct. 1923); Jones v. Stewart, 191 S.W.2d 439, 440-41 (Tenn. Sup. Ct. 1946).

conduct.[82]

California is presently the only jurisdiction that permits recovery for a voluntary and unforeseeable suicide resulting from conduct intended to cause serious harm, but not death.[83] This rule was announced in *Tate v. Canonica*,[84] a 1960 court of appeal decision. The complaint in *Tate* alleged that the defendants had intentionally made threats, statements, and accusations, which had embarrassed and humiliated the decedent in the presence of his friends, relatives and business associates. It further alleged that, as a result of this emotional distress, the decedent became physically and mentally disturbed and, as a direct result, committed suicide.[85] The court first acknowledged the general principle that there should be fewer limitations on the liability of a defendant whose tortious conduct was intentional.[86] It then stated that, if the defendant intended to cause serious physical harm or emotional distress to the decedent and causation in fact were established, the defendant could be held liable whether or not the suicide was committed during a state of insanity or in response to an uncontrollable impulse.[87]

In adopting this rule, the court relied in part[88] upon section 279 of

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82. *See* text accompanying notes 52-54 *supra*.

83. A New York decision, Cauverien v. De Metz, 188 N.Y.S.2d 627, 632-33 (Sup. Ct. 1959), indicated that the limitations of proximate cause are not entirely applicable to actions based on intentional torts and held that, if an intentional tort was a cause in fact of a suicide, the defendant may not avoid liability because the suicide was unforeseeable. However, the court retained the uncontrollable impulse requirement, and, thus, the action was not treated any differently than those for negligence. It is not necessary that a suicide be foreseeable for liability to attach; if the suicide was involuntary, which the uncontrollable impulse supposedly indicates, the suicide does not supersede the defendant's conduct as the cause of death in actions based on negligence. *See* notes 55-57 *supra* and accompanying text.

84. 180 Cal. App. 2d 898, 5 Cal. Rptr. 28 (1960).

85. *Id.* at 900, 5 Cal. Rptr. at 30-31.

86. "The law has for a long time recognized a distinction between intentional and negligent torts, and has generally recognized fewer defenses, and been more inclined to find that defendant's conduct was the legal cause of the harm complained of, where the tort is intentional." *Id.* at 904, 5 Cal. Rptr. at 33.

87. The court stated:

> Consequently, we believe that, in a case 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, whether the suicide was committed in a state of insanity, or in response to an irresistable impulse, or not.

Id. at 909, 5 Cal. Rptr. at 36 (citation omitted).

88. The court also "found support" for its conclusion in decisions involving "special relationships" that create a duty to prevent a voluntary suicide. *Id.* at 912-13, 5 Cal. Rptr. at 38-39. As discussed in text accompanying notes 118-40 *infra*, liability is imposed in those cases for the failure to prevent a foreseeable suicide. This differs substantially from causing an unforeseeable suicide. The *Tate* court stated, "We think that suicide resulting from intentionally inflicted injuries of the type here involved should be similarly treated [to cases in

the Restatement of Torts and the comments thereto. Section 279 provides, "If the actor's conduct is intended by him to bring about bodily harm to another which the actor is not privileged to inflict, it is the legal cause of any bodily harm *of the type intended by him* which it is a substantial factor in bringing about."[89] Comment c, which explains how this liability differs from that for negligent torts, makes it quite clear that it is to apply only when the defendant's conduct is a substantial factor in bringing about an injury *of the type which he intended to inflict*.[90] The *Tate* court stated, "We think that either serious bodily harm such that it would cause serious mental distress . . . or serious mental distress alone, if intentionally caused, are such that the harm of suicide, in fact caused thereby, is 'of the type intended' within the rule of the Restatement."[91]

The court's analysis is not entirely persuasive. There is a substantial difference between intentionally causing emotional distress or physical injuries and intending that one's conduct result in another's death, whether by suicide or some other means. It seems that the appropriate Restatement section to examine is section 435B, which provides: "[w]here a person has intentionally invaded the legally protected interests of another, his intention to commit an invasion, the degree of his moral wrong in acting, and the seriousness of the harm which he intended are important factors in determining whether he is liable for resulting unintended harm."[92] Under this section, liability is not immediately imposed upon proof of factual causation; the defendant's intent and culpability must be considered. When the defendant did not intend the injuries his conduct caused to be so serious as to create a risk of death this author proposes that the defendant's conduct should be

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which a special duty toward the suicidal person exists.]" *Id.* at 912, 5 Cal. Rptr. at 38. There is no basis for similarly treating these two different situations.

89. RESTATEMENT OF TORTS § 279 (1934) (emphasis added).

90. Comment c provides, in part:

> First, in determining whether the actor's conduct is a substantial factor in bringing about *harm of the type which he intended* to inflict upon the other, no consideration is given to the fact that after the event it appears highly extraordinary that it should have brought about such harm or that the actor's conduct has created a situation harmless unless acted upon by other forces for which the actor is not responsible. . . .
>
> Second, all that is necessary to make the actor liable under the rule stated in the Section is that his conduct is a substantial factor in bringing about an *injury of the type which he intended to inflict*. . . . [T]he fact that the actor's conduct becomes effective in harm only through the intervention of new and independent forces for which the actor is not responsible is of no importance.

Id. (emphasis added).

91. 180 Cal. App. 2d at 913, 5 Cal. Rptr. at 39.

92. RESTATEMENT (SECOND) OF TORTS § 435B (1965). This section was not proposed until after the *Tate* decision.

treated as negligently creating a risk of death and that the proximate cause limitations should be retained in a wrongful death action. Thus, liability could not be imposed unless the suicide were foreseeable or involuntary.

Comment a to Restatement section 435B states that "responsibility for harmful consequences should be carried further in the case of one who does an intentionally wrongful act than in the case of one who is merely negligent or is not at fault."[93] Liability, however, is not and should not be infinite.[94] Even if the decedent would not have chosen to commit suicide but for the defendant's intentionally tortious conduct, unless the death were foreseeable,[95] this author proposes that the responsibility for a voluntary suicide should remain with the one who decided to commit suicide and not be shifted to the tortfeasor who only intended to cause serious harm.

3. Intentionally Caused Suicide

When the defendant intends his conduct to cause another to commit suicide, or when the suicide is substantially certain to follow from the defendant's conduct,[96] the defendant has intentionally created a risk of suicide and should be held liable, even if the suicide was voluntary. In this situation, the principles of Restatement of Torts section 279[97] are fully applicable, because suicide was the type of harm intended. This conclusion is supported by the strong social policy against encouraging suicide, evidenced by California Penal Code section 401 which provides, "Every person who deliberately aids, or advises, or encourages another to commit suicide, is guilty of a felony."[98]

The mass suicide tragedy of the Peoples Temple in Guyana[99] suggests a situation in which liability may be appropriate. It seems clear that Jim Jones intended the members of the Peoples Temple to commit suicide, and that the members in fact did so in direct response to his conduct. Since the risk of suicide was intentionally created, liability should be imposed even if the suicides were voluntary.[100]

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93. *Id.*, Comment a.

94. *See* PROSSER § 43, *supra* note 5, at 263.

95. The strong social policy against encouraging suicide justifies imposing liability when the suicide is a reasonably foreseeable consequence of the defendant's conduct. *See* note 98 *infra* and accompanying text.

96. *See* PROSSER § 8, *supra* note 5, at 31-32.

97. *See* notes 89-91 *supra* and accompanying text.

98. CAL. PENAL CODE § 401 (West 1979).

99. *See generally* M. KILDUFF & R. JAVERS, THE SUICIDE CULT 103-88 (1978).

100. The suicides, however, were not necessarily voluntary. *See How They Bend Minds*, NEWSWEEK, Dec. 4, 1978, at 72.

If the laws of California as announced in the *Tate* decision[101] were applied, however, there is no need to apply the rules proposed herein; a cause of action clearly could be stated upon allegation that the defendant intended to cause serious emotional or physical harm to the decedents and that the conduct of the defendant was a substantial cause in fact of the suicides.[102]

The justification for liability is enhanced and the burden of proof is more easily sustained in situations like the Guyana tragedy in which the defendant actually provided the instrumentalities of the suicide: such conduct directly encourages the suicide[103] and provides physical evidence of the defendants' intent to encourage the suicide.

III. FAILURE TO PREVENT SUICIDE

Certain special relationships, such as that which exists between a hospital and patient, create a legal duty of care to prevent a foreseeable suicide. This duty does not depend upon the specific request of a suicidal person; it exists as a matter of law.[104] In contrast to the action brought when a defendant allegedly caused a suicide, in a wrongful death action for negligent failure to prevent a suicide, the actual causes of the decedent's suicidal tendencies and the degree to which the suicide was voluntary are irrelevant. The defendant's duty of care to prevent a suicide is imposed because of his special knowledge of the decedent's tendencies.[105] As a result, the voluntary suicidal act, although intervening in the causal chain of events, remains a dependent act that does not supersede the defendant's negligent conduct as the proximate cause of death.

Some psychiatrists have suggested that there should be a protected right to commit suicide,[106] such that if a person of sound mind wants to

101. Tate v. Canonica, 180 Cal. App. 2d 898, 5 Cal. Rptr. 28. *See* notes 84-87 *supra* and accompanying text.

102. *Id.* at 909, 5 Cal. Rptr. at 36.

103. And, thus, it would be a violation of CAL. PENAL CODE § 401 (West 1979). *See* text accompanying note 98 *supra*.

104. *See* cases cited in notes 126 & 132 *infra*.

105. In Bogust v. Iverson, 102 N.W.2d 228, 230 (Wis. Sup. Ct. 1960), an action against a school guidance counselor, the court stated that "[t]he duty of advising [the decedent's] parents could arise only from facts establishing knowledge on the part of defendant of a mental or emotional state which required medical care; and no such facts are alleged." Furthermore, "as a teacher, [the defendant] cannot be charged with the same degree of care based on such knowledge as a person trained in medicine or psychiatry could exercise."

106. *See, e.g.*, Motto, *The Right to Suicide: A Psychiatrist's View*, in MORAL PROBLEMS IN MEDICINE 392 (1976) [hereinafter cited as Motto]; Szasz, *The Ethics of Suicide*, in BETWEEN SURVIVAL AND SUICIDE 163, 165 (1976) [hereinafter cited as Szasz]; Williams, *Euthanasia*, 41 MEDICO-LEGAL J. 14, 26-27 (1973) [hereinafter cited as Williams].

kill himself and does not request intervention from others to prevent his act, no one should be held liable for permitting him to do so. Advocates of a right to commit suicide would argue that the state's interest in the suicidal person's life[107] should be secondary in view of the person's primary right of self-autonomy.[108] These advocates might ask, "Why should we be our brother's keeper, if he clearly does not want a keeper?" This author would answer that it is not always clear that the suicidal person does not want a keeper.

The foremost advocate of the right to commit suicide is Thomas Szasz, who particularly objects to the involuntary commitment of a suicidal person[109] and also to lesser forms of unsolicited interventions in the suicidal person's life.[110] Szasz proposes that the modern response to Patrick Henry's exclamation, "Give me liberty or give me death!" would be, "Give him commitment, give him electroshock, give him lobotomy, give him life-long slavery, but do not let him choose death!"[111] Szasz rejects the idea that suicide is always the result of an illness[112] and argues that the decision to kill oneself can be an exercise of free will.[113]

Other psychiatrists argue that the suicidal person is sick and cannot

107. The Supreme Court has found that "a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life." Roe v. Wade, 410 U.S. 113, 153-54 (1973). *See also* Comment, State *ex rel.* Swann v. Pack: *Self-endangerment and the First Amendment*, 65 KY. L.J. 195 (1976).

108. One author assumes a personal right to suicide, advocating its formal protection only when one's liberty may be restrained.

> [P]eople who are living normally do not need a protected right to commit suicide. It is a decision that they can execute for themselves, if they feel strongly enough, whether society chooses to acknowledge their right or not. But the point is important for those who have lost their liberty, in prisons or hospitals or geriatric homes, or who are simply too ill to take any action.

Williams, *supra* note 106, at 26. *Cf.* C. LEONARD, UNDERSTANDING AND PREVENTING SUICIDE 223 (1967) ("Even if one insists that an individual has a right to take his own life in spite of the [emotional and economic] suffering survivors must endure, one must also look to the right of the individual to protection from himself during a suicidal crisis."); Schulman, *Suicide and Suicide Prevention: A Legal Analysis*, 54 A.B.A.J. 855, 862 (1968) ("No one in contemporary Western society would suggest that people be allowed to commit suicide as they please without some attempt to intervene or prevent such suicides. Even if a person does not value his own life, Western society does value everyone's life.").

109. Szasz, *supra* note 106, at 168.

110. Szasz is not opposed to all interventions, only those to which the suicidal person has not acquiesced voluntarily. He considers "counseling, persuasion, psychotherapy, or any other *voluntary measure*, especially for persons troubled by their own suicidal inclinations and seeking such help, unobjectionable, and indeed generally desireable, interventions." *Id.* (emphasis in original).

111. *Id.* at 177 (emphasis deleted).

112. *Id.* at 167.

113. *Id.* at 175. *See also* Motto, *supra* note 106; Williams, *supra* note 106, at 27.

rationally decide to take his own life. One proponent of the illness model states that professionals agree that suicide "is a public health matter and that the state should combat the disease of suicide."[114] Another psychiatrist proposes that the suicidal person is often suffering from a recognized psychiatric illness with an excellent prognosis. He argues that "[t]o say that this person is exercising a right is to mock him in his frustration at failing to find the understanding and the technical skill he sought."[115] Under this theory, the duty to prevent suicide would be appropriate in most circumstances; the person who is sick and in need of treatment is unable to exercise his free will.

A third significant group of psychiatrists advocate suicide prevention even though they believe that a suicidal person is not necessarily mentally ill.[116] These professionals believe that the suicidal person is ambivalent about his wish to kill himself, that "[m]ost people have a stronger wish to live than to die."[117] According to this theory, it would not make sense to say that a person has a protected right to do that which he only half wants to do at the moment and which he would not do after the crisis passes.

This author believes that the thesis of the ambivalency model is more tenable, given the level of the state of the art. Advocates of the right to commit suicide have not sufficiently established that a suicidal impulse is not a transient one about which the person is ambivalent. In the face of disagreement about the nature of the suicidal impulse, if one is to err, it should be on the side of prevention rather than permission. This author concludes that a right to commit suicide should not be recognized and that the duty to prevent a foreseeable suicide is an appropriate foundation on which to impose liability.

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114. Yolles, *The Tragedy of Suicide in the United States*, in SYMPOSIUM ON SUICIDE 15, (L. Yochelson ed. 1967).

115. Murphy, *Suicide and the Right to Die*, 130 AM. J. PSYCH. 472, 472 (1973).

116. *Suicide*, *supra* note 1, at 348D. *See also* THE PSYCHOLOGY OF SUICIDE (1970); UNDERSTANDING AND PREVENTING SUICIDE (1967).

117. The Los Angeles Suicide Prevention Center's training manual states:

> One of the most prominent features characterizing the suicidal person is ambivalence, expressed through feelings of wanting to die and wanting to live, both occurring at the same time. . . . The relationship and strength of the two opposing impulses to live and to die will vary for different persons, and also within the same person under different conditions. Most people have a stronger wish to live than to die. It is this fact of ambivalence that makes suicidal prevention possible.

Farberow, Heilig & Litman, *Evaluation and Management of Suicidal Persons*, in THE PSYCHOLOGY OF SUICIDE 273, 274 (1970).

A. Duty of Care

1. Special Relationships

The duty to prevent a foreseeable suicide may arise out of a special relationship that exists between the suicidal person and another.[118] The general characteristics of such a relationship may be stated as follows: one of the parties places himself in a superior position as caretaker of the other, who depends upon that caretaker either entirely or with respect to a particular matter.[119] The caretaker's duty to prevent suicide is premised upon his special training or experience[120] and his consequent ability to recognize suicidal tendencies in the person under his care.[121]

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118. Complaints alleging that a suicidal death was wrongfully caused by a breach of contract consistently have been held not to state a cause of action. *See, e.g.*, Bloss v. Dr. C.R. Woodson Sanitarium Co., 5 S.W.2d 367 (Mo. Sup. Ct. 1928) (contract for custody and protection for husband while hospitalized); Duncan v. Nebraska Sanitarium & Benev. Ass'n, 137 N.W. 1120 (Neb. Sup. Ct. 1912) (contract for constant supervision by nurse); Duncan v. St. Luke's Hosp., 98 N.Y.S. 867, *aff'd*, 85 N.E. 1109 (1906) (contract for special supervision); Ellsworth v. Brattleboro Retreat, 68 F. Supp. 706 (D. Vt. 1946) (applying Vermont law) (oral contract to keep patient under strict observation).

In Duff v. Harrah South Shore Corp., 52 Cal. App. 3d 803, 125 Cal. Rptr. 259 (1975), an innovative but unsuccessful plaintiff attempted to state a cause of action against several casinos for the wrongful death of her husband who had committed suicide after losing all the money in gambling from checks the defendant casinos cashed for him. The decedent had entered into contracts with the casinos to limit the amount of money for which they would cash checks for him. The express purpose of the contracts had been to prevent the decedent from being tempted to spend more money gambling than the specified limits which he had set. Plaintiff alleged that the defendants' cashing of checks in excess of the specified limits was not only a breach of the contracts, but a breach of duty proximately causing the suicide. The court held that any contractual relationship had ended prior to or concurrently with the alleged breach, since the decedent's request to cash checks in excess of the specified sum was an offer to rescind the contract which was accepted; the contract and any accompanying duties were no longer in existence when the decedent lost the money gambling. *Id.* at 806-07, 125 Cal. Rptr. at 261.

In Bellah v. Greenson, 81 Cal. App. 3d 614, 146 Cal. Rptr. 535 (1978), discussed in text accompanying notes 143-46 *infra*, plaintiffs also attempted to state a cause of action based on the psychiatrist's negligent performance of his contract with plaintiffs to care for their daughter, which contract allegedly contained the implied term that he would use reasonable care to prevent his patient from harming herself. The court summarily dismissed the attempt, holding that an action against a doctor that arises out of his negligent treatment of a patient is a tort action and not one based on contract. *Id.* at 625, 146 Cal. Rptr. at 542.

119. *See* Dezort v. Hinsdale, 342 N.E.2d 468, 472-73 (Ill. App. Ct. 1976); La Vigne v. Allen, 321 N.Y.S.2d 179, 181 (Sup. Ct. 1971).

120. *Cf., e.g.*, Bogust v. Iverson, 102 N.W.2d 228, 230 (Wis. Sup. Ct. 1960) (defendant, the director of a counseling and testing center, had no medical training or diagnostic experience and therefore had no duty to obtain psychiatric care to prevent student's suicide).

121. That these tendencies are evident has been acknowledged by psychiatrists. *Acting Out*, *supra* note 22, at 297 (the suicide plan is "rehearsed in fantasy and preliminary action"); Shneidman & Mandelkorn, *How To Prevent Suicide*, in THE PSYCHOLOGY OF SUI-

Thus, the duty to prevent a patient's suicide is part of the affirmative duty of a hospital or in-patient facility[122] when it accepts the responsibility to care for and attend to the safety of its patients.[123] A psychiatrist's professional duty to assess the suicidal risk of a hospitalized patient is acknowledged by the psychiatric profession in the following situations: at the time of the patient's admission and discharge, when the patient's family or the hospital staff expresses concern about the possibility of suicide, when the patient requests increasing amounts of dangerous drugs, and when the patient has attempted a suicide.[124] A prison or jailing authority owes each prisoner a duty of care to keep him safe from unnecessary harm,[125] and this has been held to encompass a duty to prevent the prisoner's suicide.[126] Reported decisions have also indicated that a duty of care to prevent a foreseeable suicide may be owed by the psychiatrist, psychologist, or physician of an outpatient,[127] a guidance counselor,[128] a pharmacist,[129] and a hotel.[130]

2. Foreseeability

A person or entity in a special relationship with a suicidal person has a duty to prevent the suicide only when it is reasonably foreseeable.[131]

CIDE 125, 133 (1970) ("Almost everyone who seriously intends suicide leaves clues to his imminent action. . . . It is not impossible, then, to spot a potential suicide if one only knows what to look for.").

122. There have been more wrongful death actions filed against hospitals for an alleged failure to prevent suicide than against any other group of persons or entities. *See* Annot., 11 A.L.R.2d 751, 775-800 (1950).

123. *See generally* Mills, *Medical Legal Exposures of Psychiatrists*, 13 So. CAL. PSYCH. SOC. NEWS 6 (March 1966), *quoted in* Litman, *Medical-Legal Aspects of Suicide*, 6 WASHBURN L.J. 395, 398-99 (1967); Perr, *Suicide Responsibility of Hospital and Psychiatrist*, 9 CLEV.-MAR. L. REV. 427, 428 (1960) [hereinafter cited as Perr]; Schwartz, *Civil Liability for Causing Suicide: A Synthesis of Law and Psychiatry*, 24 VAN. L. REV. 217, 220 (1971) [hereinafter cited as Schwartz].

124. Litman, *Medical-Legal Aspects of Suicide*, 6 WASHBURN L.J. 395, 400-01 (1967).

125. *See* RESTATEMENT (SECOND) OF TORTS § 314A.4 (1965). *See generally* Wicks, *Suicide Prevention: A Brief for Corrections Officers*, FEDERAL PROBATION, Sept. 1972, at 29.

126. *See, e.g.*, Dezort v. Hinsdale, 342 N.E.2d 468 (Ill. App. Ct. 1976); LaVigne v. Allen, 321 N.Y.S.2d 179 (Sup. Ct. 1971). *See also* Annot., 79 A.L.R.3d 1210 (1977). *But see* Lucas v. City of Long Beach, 60 Cal. App. 3d 341, 131 Cal. Rptr. 470 (1976).

127. *See, e.g.*, Bellah v. Greenson, 81 Cal. App. 3d 614, 146 Cal. Rptr. 535 (1978); Fernandez v. Baruch, 244 A.2d 109 (N.J. Sup. Ct. 1968).

128. Bogust v. Iverson, 102 N.W.2d 228 (Wis. Sup. Ct. 1960).

129. *See, e.g.*, Trumbaturi v. Katz & Besthoff, Ltd., 158 So. 16 (La. Sup. Ct. 1934).

130. Sneider v. Hyatt Corp., 390 F. Supp. 976 (N.D. Ga. 1975).

131. *Compare* Bogust v. Iverson, 102 N.W.2d 228, 230 (Wis. Sup. Ct. 1960) (Wisconsin Supreme Court affirmed the sustaining of a demurrer to plaintiffs' wrongful death complaint because plaintiffs had not alleged that the suicide was foreseeable to the defendant) *with* Sneider v. Hyatt Corp., 390 F. Supp. 976 (N.D. Ga. 1975) (district court denied the defendant's summary judgment motion because the plaintiff alleged that the suicide of the defend-

A suicide is considered foreseeable to a hospital or other in-patient facility in several situations: when a patient has had a history of suicidal tendencies, when the patient is admitted to the hospital because of a suicide attempt, and when the patient exhibits suicidal tendencies while in the hospital.[132] Professor Edwin Shneidman takes the position that "[i]n almost every case of suicide, there are hints of the act to come, and physicians and nurses are in a special position to pick up the hints and to prevent the act."[133] These "hints" usually take the form of a communication by the patient.[134] When testifying as an expert witness in *Frederic v. United States*,[135] however, Shneidman concluded that the decedent's suicide was unforeseeable to the defendant hospital. In reaching this conclusion, Shneidman emphasized the lack of conscious or unconscious communications by the patient of his suicidal tendencies, as indicated by the failure of relatives, doctors or hospital staff to sense the patient's contemplation of suicide.[136]

As the particular relationship fails to resemble the caretaking relationship of hospital toward patient, it becomes less likely that the person in a superior position will be able to recognize another's suicidal tendencies. Thus, in a wrongful death action against a guidance counselor for the suicide of a student, the court affirmed the sustaining of a demurrer because the plaintiffs had failed to establish that the defendant knew of the student's suicidal tendencies.[137]

The relationship that seems least analogous to that of hospital toward patient is that of a hotel toward a guest. In *Sneider v. Hyatt*

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ant-hotel's guest was foreseeable due to prior suicides from the hotel and the decedent's appearance at the time of her registration).

132. Meier v. Ross Gen. Hosp., 69 Cal. 2d 420, 445 P.2d 519, 71 Cal. Rptr. 903 (1968) (en banc) (patient admitted to defendant-hospital because of suicide attempt); Vistica v. Presbyterian Hosp., 67 Cal.2d 465, 432 P.2d 193, 62 Cal. Rptr. 577 (1967) (en banc) (same). *See also* Annot., 11 A.L.R.2d 751, 775-86 (1950).

133. Shneidman, *Preventing Suicide*, in THE PSYCHOLOGY OF SUICIDE 429, 430 (1970).

134. Shneidman states that all direct and indirect verbal communications, and certainly any suicide attempts, should be taken seriously. *Id.* at 431-32.

> On occasion the situation itself cries out for attention, especially when there is a variety of stresses. For example, when a patient is extremely anxious about surgery, or when he has been notified that he has a malignancy, when he is scheduled for mutilative surgery, when he is frightened by hospitalization itself, or when outside factors (like family discord, for example, or finances) are a problem—all these are situational. If the doctor or nurse is sensitive to the fact that the situation constitutes a "psychological emergency" for that patient, then he is in a key position to perform lifesaving work.

Id. at 433.

135. 246 F. Supp. 368 (E.D. La. 1965).

136. *Id.* at 372-73.

137. Bogust v. Iverson, 102 N.W.2d 228, 231 (Wis. Sup. Ct. 1960).

Corp.,[138] a wrongful death action was filed against a hotel for the suicide of a guest who jumped from a top floor window. The plaintiffs alleged that the suicide was foreseeable because the hotel was aware of prior suicides having been committed by guests jumping from the building. Plaintiffs further alleged that the decedent's suicidal tendencies were foreseeable to the defendant because of her appearance and the circumstances surrounding her registration and stay.[139] Despite the minimal caretaking relationship between a hotel and its guest, the court denied the defendant's summary judgment motion, refusing to adopt a rule that a hotel can never be liable for the suicide of one of its guests.[140]

B. Breach of Duty

A person or entity will not be held liable for another's suicide unless his conduct falls below the standard of care imposed by law.[141] The importance of the issue of breach of duty of care is illustrated in actions against psychiatrists and psychotherapists. Commentators have suggested that imposing liability on a psychiatrist is only appropriate if his patient is hospitalized at the time of the suicide, because a psychiatrist does not have sufficient control over the non-hospitalized patient to prevent his suicide.[142]

California appears to be the only jurisdiction to acknowledge that a psychiatrist could be held liable for a patient's suicide when that patient is being treated on an out-patient basis. In *Bellah v. Greenson*,[143] a wrongful death action was brought against a psychiatrist by the parents of an out-patient who had committed suicide. While the action was held barred by the statute of limitations,[144] the court of appeal indi-

138. 390 F. Supp. 976 (N.D. Ga. 1975).

139. *Id.* at 978.

140. *Id.* at 977, 981.

141. *See, e.g.*, Fernandez v. Baruch, 244 A.2d 109 (N.J. Sup. Ct. 1968) (plaintiffs failed to establish that defendant psychiatrist acted contrary to accepted medical standards in the treatment of his patient who committed suicide).

142. Schwartz, *supra* note 123, at 246-47 (citing Morse, *The Tort Liability of the Psychiatrist*, 18 SYRACUSE L. REV. 691, 707-09 (1967)); Perr, *supra* note 123, at 432.

143. 81 Cal. App. 3d 614, 146 Cal. Rptr. 535 (1978).

144. Plaintiffs' complaint was filed more than two years after their daughter committed suicide; the court held that it was barred by CAL. CIV. PROC. CODE § 340.5, stating:

> In the instant case, plaintiffs' daughter committed suicide while under the care of a psychiatrist who had been treating her at the time of a prior suicide gesture and who had continued to treat her thereafter. The events surrounding Tammy's death were sufficient to cause plaintiffs to inquire into the circumstances about which they now complain. They were free to bring suit immediately, pursue discovery and avail themselves of the opportunity to examine defendant's records. It follows that the one-year period specified in section 340.5 was not tolled by defendant's failure to disclose his

cated that a cause of action could be stated for the breach of a psychiatrist's duty of care toward his patient. The court suggested that the following allegations might be sufficient: (1) the existence of a psychiatrist-patient relationship, (2) knowledge on the part of the psychiatrist that the patient was likely to attempt suicide, and (3) a failure by the psychiatrist to take appropriate preventative measures.[145] The court noted that the nature of the precautionary steps that could or should have been taken by the defendant presents a factual question for resolution at trial, at which time both sides would be afforded an opportunity to produce expert medical testimony on the subject.[146]

Obviously, the most difficult element of proof in an action against a psychotherapist is establishing that the defendant failed to take the proper precautionary steps. Psychotherapists are permitted by an exception to the doctor-patient privilege to notify relatives of a patient's suicidal tendencies.[147] The court in *Bellah* noted, however, that there is no duty to do so,[148] because the imposition of such a duty could inhibit treatment. It seems the only other course of treatment remaining, other than continuing office therapy, is psychiatric hospitalization.[149] However, a psychologist is not authorized to hospitalize a patient,[150] and a psychiatrist could quite reasonably believe that hospitalization is not the appropriate treatment for the particular patient,[151] or for any suicidal patient.[152] It should be recognized that psychiatrists and psycho-

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professional opinion that Tammy was suicidally disposed and that plaintiffs' action was barred by their failure to bring suit within one year after Tammy's death.

Id. at 624, 146 Cal. Rptr. at 541.

145. *Id.* at 620, 146 Cal. Rptr. at 538.

146. *Id.*

147. CAL. EVID. CODE § 1024 (West 1968) provides:

There is no privilege under this article if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger.

148. 81 Cal. App. 3d at 621, 146 Cal. Rptr. 539-40 (citing Tarasoff v. Regents of Univ. of Calif., 17 Cal. 3d 425, 440-42, 551 P.2d 334, 346-47, 131 Cal. Rptr. 14, 26-27 (1976)).

149. *See* Lanterman-Petris-Short Act of 1967, CAL. WELF. & INST. CODE § 5150 (West Supp. 1979).

150. *Id.*

151. *See Patient Treatment*, *supra* note 22, at 408-09 ("One is tempted to [use office therapy] . . . when the patient is the only breadwinner for many dependents or when the patient is prominent in some social or political or business activity and feels that his career might be hurt by a record of psychiatric hospitalization.").

152. Commentators have taken disparate stances on this issue. Litman advocates office therapy rather than hospitalization.

The disadvantage of drugs, electric treatments, and hospitalization in general is that they provide essentially passive remedies for problems that often require active resolution. If patients are discharged abruptly from the hospital to return to their original conflicts the cycle of hopelessness and suicide may be repeated. The advantage of office

therapists are neither insurers of good results nor can their judgment always be correct; it must only be reasonable and in accordance with accepted practice.[153] Therefore, a patient's suicide does not necessarily indicate negligent treatment by the psychiatrist and, in the absence of unusual circumstances,[154] liability appears inappropriate.

IV. DIFFERENTIATING ACTIONS FOR CAUSING FROM ACTIONS FOR FAILING TO PREVENT SUICIDE

Although resolved correctly, the California opinion of *Lucas v. City of Long Beach*[155] illustrates some of the errors of analysis that can be made when the wrongful death action for failing to prevent suicide is treated as an action for causing suicide. The decedent had committed suicide while incarcerated in the Long Beach City jail, and his mother brought a wrongful death action against the city. She prevailed at trial, but the court of appeal reversed, holding that as a matter of law the defendants were not liable for the suicide.[156]

The decedent, a seventeen-year-old youth named Steven Lucas, had been arrested for disorderly conduct. At the time of the arrest and booking, police officers were of the opinion that Steven was under the influence of a drug. A sobriety test indicated that he was not intoxicated, and a medical examination was not ordered. Although a cell was available that would have placed Steven within sight of the defendant officer, he was placed in a cell outside of view. While state

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psychotherapy is that it encourages the patient toward solving his problems himself, which promotes self-confidence and self-respect. Psychotherapy aims at changes in character, which are then reflected by changes in the patient's environment, leading to more satisfactions in life.

Patient Treatment, *supra* note 22, at 412. And Szasz vehemently objects to involuntary commitments.

It is not clear why the patient's placing confidence in his therapist to the extent of confiding his suicidal thoughts to him should *ipso facto* deprive the patient from being the arbiter of his own best interests. . . . And, again, the thrust of the argument is to legitimize depriving the patient of basic human freedoms—the freedom to choose his therapist and to grant or withhold consent for treatment.

Szasz, *supra* note 106, at 164. *But see* Greenberg, *Involuntary Psychiatric Commitments To Prevent Suicide*, 49 N.Y.U.L. REV. 227, 245-46 (1974) ("[F]ew would disagree that psychiatric hospitalization is the treatment of choice for an individual who is actively suicidal.").

153. Perr, *supra* note 123, at 432. *See, e.g.*, Fernandez v. Baruch, 244 A.2d 109 (N.J. Sup. Ct. 1968) (plaintiff failed to prove that defendant-psychiatrist acted contrary to accepted medical standards).

154. One can imagine, however, some outrageous circumstances. Were a patient to call his therapist to obtain an appointment specifically because of his suicidal feelings and find that the therapist would only schedule one for the following week, such conduct would seem a clear breach of duty.

155. 60 Cal. App. 3d 341, 131 Cal. Rptr. 470 (1976).

156. *Id.* at 351, 131 Cal. Rptr. at 476.

regulations governing the administration of juvenile detention facilities require that inmates be observed by a custodian at least once each hour,[157] the decedent was not observed at all during the three hours preceding his death. He was discovered hanging by his neck from a noose constructed of a strip of cloth torn from the mattress cover. The autopsy indicated the cause of death as asphyxia due to hanging. A blood test showed the presence of Secobarbital, a barbituate.

The jury indicated in special interrogatories that: (1) the defendant officer was negligent in failing to inspect the decedent's cell at least once an hour; (2) such inspection would probably have prevented the decedent from taking his life; (3) the failure to provide medical care was negligent and was a legal cause of the suicide; (4) the suicide was not an intentional act done with knowledge of the probable consequences thereof; and (5) the decedent failed to realize the nature of his act or the certainty of risk or harm involved therein.[158] The jury also found that Steven would not have committed suicide had he been placed in a cell within view of the defendant officer but the defendant was not negligent in having placed him in a different cell.[159] Most significantly, however, the jury found that the suicide was *not* foreseeable to the defendants.[160]

Analyzed properly, the facts indicate a cause of action for failing to prevent suicide, not one for causing suicide. The defendants did not *do* anything that *caused* Steven to kill himself; rather, they were in a position to *prevent* his suicide. As indicated above, a prison or jail authority owes its prisoner a duty of reasonable care to keep him safe from unnecessary harm.[161] In other states this has been held to include a duty to prevent the prisoner's suicide.[162] The defendants clearly breached their duty of care by not inspecting Steven's cell at least once each hour and by failing to provide Steven with medical care. The jury found that these omissions were the proximate cause of the suicide. However, the jury found that the suicide was unforeseeable. Since foreseeability is an essential element to the action for failing to prevent suicide,[163] the jury should not have found the defendants liable. Therefore, the court of appeal's reversal of the judgment was correct.

The court of appeal held that the jury's finding, that the suicide was

157. *Id.* at 345, 131 Cal. Rptr. at 472.
158. *Id.* at 347, 131 Cal. Rptr. at 473-74.
159. *Id.* at 346-47, 131 Cal. Rptr. at 473.
160. *Id.* at 345-46, 131 Cal. Rptr. at 472.
161. *See* text accompanying note 125 *supra.*
162. *See* cases cited in note 126 *supra.*
163. *See* text accompanying notes 119-37 *supra.*

not an intentional act sufficient to relieve the defendants of liability, was unsupported by the evidence. It stated, "The evidence that Steven tore a piece of cloth from a mattress cover, then carefully replaced the edges of the cover and fashioned a noose sufficient to bear his weight points to a deliberate intentional act."[164] In the first place, the court's analysis is the same as that used to determine whether the decedent "understood the nature of his act,"[165] which is not the test that California uses. California has held that a decedent may realize the nature of his act and yet commit suicide in response to an uncontrollable impulse;[166] the latter being the present test used in this state. Furthermore, while some commentators have proposed that voluntariness should be considered when the decedent did not specifically request that the defendant prevent his suicide,[167] it is presently irrelevant to the action for failing to prevent suicide.[168]

The court of appeal found that the cause of Steven's death was his own act of hanging himself and that no act or omission of the defendants produced the mental condition resulting in suicide. While the cause of the mental condition resulting in suicide is critical in the action for causing suicide, it is irrelevant to the action for failing to prevent suicide. The duty of a defendant in a special relationship with the decedent is to prevent the suicide, not to refrain from causing it.

Finally, the court concluded that the "intentional act of a third person is a superseding cause of harm and relieves the original actor of liability unless such act was reasonably foreseeable or the failure to foresee such act was a factor in the original negligence,"[169] relying upon Restatement (Second) of Torts section 448.[170] That section addresses the effect of a third person's intentional tort or crime on the defendant's liability. Since suicide is neither a tort nor a crime in California,[171] and since the voluntary nature of the decedent's suicide is

164. 60 Cal. App. 3d at 348, 131 Cal. Rptr. at 474.

165. *See* text accompanying note 62 *supra*.

166. Grant v. F.P. Lathrop Constr. Co., 81 Cal. App. 3d 790, 797, 146 Cal. Rptr. 45, 49 (1978). *See* text accompanying notes 68-71 *supra*.

167. *See* text accompanying notes 106-08 *supra*.

168. *See* text accompanying note 105 *supra*.

169. 60 Cal. App. 3d at 351, 131 Cal. Rptr. at 476.

170. RESTATEMENT (SECOND) OF TORTS § 448 (1965) provides:

The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

171. *See* Tate v. Canonica, 180 Cal. App. 2d 898, 903, 5 Cal. Rptr. 28, 33 (1960).

relevant only to the action for causing suicide, reliance upon section 448 was improper. The court of appeal did not rely upon the unforeseeability of the suicide in holding that as a matter of law the defendants were not liable for Steven's death, and it seems almost a fortuity that the proper result was reached in the case.[172]

V. CONCLUSION

A suicidal death is traumatic and stigmatizing, often creating feelings of guilt in the members of the decedent's family.[173] To alleviate these feelings, the heirs may choose to bring a wrongful death action against a person who is thought to have caused the suicide. Unfortunately, a wrongful death action for causing suicide often serves only to maintain or renew their emotional stress,[174] because the majority of suicides cannot be attributed to the conduct of any person other than the decedent himself. As a result, attorneys may render a disservice to these clients if they fail to review and discuss the facts forming the basis of the action in an effort to disclose the very low probability of recovery.[175]

There are some occasions when another person's conduct is one of the actual causes of the suicide and a wrongful death action may be appropriate. In actions premised on conduct that actively causes a suicide, the plaintiff must establish that the defendant's conduct produced the mental condition that prompted the decedent to kill himself. In a negligence action, the plaintiff must also offer proof of proximate cause, *i.e.*, that the suicide was either foreseeable or within the risk of harm created by the defendant. It is rare that negligent conduct creates a foreseeable risk of suicide and, thus, liability for causing suicide should require a finding that the suicide was within the risk of harm created by the defendant's conduct. It is proposed here that a suicide is within

172. This is not the only instance in which a wrongful death action for failing to prevent suicide has been treated as an action for causing suicide. The same has occurred in actions brought against pharmaceutical dispensers for the wrongful death of a consumer who committed suicide by ingesting the drugs. *See* Riesbeck Drug Co. v. Wray, 39 N.E.2d 776 (Ill. App. Ct. 1942) (en banc); Trumbaturi v. Katz & Besthoof, Ltd., 158 So. 16 (La. Sup. Ct. 1934); Ronker v. St. John, 11 Ohio C.C. 39 (1900); Runyon v. Reid, 510 P.2d 943 (Okla. Sup. Ct. 1973); Scott v. Greenville Pharmacy, Inc., 48 S.E.2d 324 (S.C. Sup. Ct. 1948); Eckerd's, Inc. v. McGhee, 86 S.W.2d 570 (Tenn. Ct. App. 1935).

173. *See* note 2 *supra* and accompanying text.

174. Shneidman, *supra* note 2, at 352 (1976).

175. Shneidman has proposed a process called "postvention," which "consists of those activities that serve to reduce the aftereffects of a traumatic event in the lives of the survivors. Its purpose is to help survivors live longer, more productively, and less stressfully than they are likely to do otherwise." *Id.* at 348. He also indicates that postvention is a technique that can be practiced by lawyers, as well as by other professionals and friends. *Id.* at 355.

such risk of harm created by the defendant's conduct only when it is truly involuntary, which most suicides are not. However, the proximate cause tests adopted by the majority of jurisdictions do not accurately measure voluntariness, and hence recovery is permitted when it should not be.

The wrongful death action premised upon a defendant's *failure to prevent* the suicide must be distinguished from the action for causing suicide, for the elements are different. The causes of the suicidal impulse are irrelevant, because the duty is to prevent, not to refrain from causing, the suicide. The voluntariness of the suicide is equally irrelevant, although some commentators question this, advocating a protected right to commit suicide. Other psychiatric professionals, however, have offered evidence that a suicidal person is in a transient crisis during which he is ambivalent about his desire to kill himself. It is concluded here that the duty to prevent suicide is proper. It does not make sense to suggest that a person has a right to do that which he only half wants to do at the moment and would not do after the crisis passes. Therefore, this comment proposes that liability for *causing* suicide is rarely appropriate, not only because most suicides are not caused by another person, but because the act of suicide is usually a voluntary one for which another person cannot be held liable; but, liability for *failing to prevent* suicide is proper when a person or entity in a special relationship with a suicidal person breaches its duty to prevent a foreseeable suicide.

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