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Civil Liability for Causing Suicide: A Synthesis of Law and Psychiatry

*Victor E. Schwartz**

I. INTRODUCTION

If suicide is a deliberate, intentional act by an individual, how can one person be "civilly liable for causing the suicide of another"? The paradox suggested by this question has caused many courts to shy away from imposing civil liability for causing suicide.¹ In certain situations, however, a growing number of courts are permitting recovery.² Since suicide is on the increase both in numerical terms and in rank as a cause of death in the United States,³ it can be expected that even more tort claims will be brought by parties attempting to fix civil responsibility on someone other than their beloved decedent.

Psychiatrists tell us that the very topic of suicide produces considerable uneasiness in most people.⁴ This may explain why few courts have articulated meaningful standards for deciding whether to impose civil liability for causing suicide. A study of the psychiatric literature on the causes of suicide reveals the complexity of the environmental factors that may lead to an individual's "decision" to

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1. See, e.g., *Salsedo v. Palmer*, 278 F. 92 (2d Cir. 1921); *Brown v. American Steel & Wire Co.*, 43 Ind. App. 560, 88 N.E. 80 (1909); *Lancaster v. Montesi*, 216 Tenn. 50, 390 S.W.2d 217 (1965).

2. E.g., *Meier v. Rosa Gen. Hosp.*, 69 Cal. 2d 420, 455 P.2d 519, 71 Cal. Rptr. 903 (1968); *Tate v. Canonica*, 180 Cal. App. 2d 898, 5 Cal. Rptr. 28 (1960).

3. See BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 58 (90th ed. 1969). Suicide now ranks among the 10 leading causes of death in this country. N.Y. Times, Mar. 30, 1969, at 48, col. 3; Wall Street Journal, Mar. 6, 1969, at 1, col. 1.

4. See C. LEONARD, UNDERSTANDING AND PREVENTING SUICIDE 3 (1967); E. SHNEIDMAN & P. MANDELKORN, PUBLIC AFFAIRS COMM. PAMPHLET NO. 406, HOW TO PREVENT SUICIDE 6-9 (1968).

take his own life.⁵ Nevertheless, when claims have been brought on the ground that one individual has "caused" the suicide of another, courts tend to focus on the state of mind of the suicide at the very second he terminates his life⁶—a fact that, if ascertainable at all, is only a small part of the total psychiatric picture of what caused the suicide to occur. Courts, moreover, camouflage with the use of the talisman "proximate cause" the difficult cause in fact question before them: how important from the psychiatric viewpoint was the defendant's act in bringing about the suicide?⁷

It has long been supposed that in certain instances tort law can serve as an auxiliary arm of criminal law to deter wrongful conduct.⁸ If it is assumed that suicide is conduct that society seeks to prevent, should tort law play any role in achieving that goal by imposing or denying liability in tort cases? This question is one that some courts have failed to address even in those cases bringing the issue sharply into focus. For example, in a case in which a sadistic male defendant physically and emotionally tortured a young lady who in turn committed suicide, the court did not think it meaningful to discuss the fact that the defendant had acted with culpability that tort law might serve to deter.⁹ Instead, the court denied liability because the girl's final act was "an abnormal thing."¹⁰ Another court found the "proximate cause" of a suicide in the taking, not the illegal selling, of barbiturates.¹¹ Even if a psychiatrist would not consider the pharmacist's sale to be an actual cause of the suicide, perhaps the seller of prescription drugs is in such a position that tort law should impose an affirmative duty upon him to prevent a suicide. This article will consider alternative approaches to these cases and will organize them in a meaningful way.

5. See notes 83-111 *infra* and accompanying text.

6. *E.g.*, *Salsedo v. Palmer*, 278 F. 92 (2d Cir. 1921); *Daniels v. New York, N.H. & H.R.R.*, 183 Mass. 393, 67 N.E. 424 (1903); *Cauverien v. De Metz*, 20 Misc. 2d 144, 188 N.Y.S.2d 627 (Sup. Ct. 1959); *McMahon v. City of New York*, 16 Misc. 2d 143, 141 N.Y.S.2d 190 (Sup. Ct. 1955).

7. The question involves distinguishing the problem of whether the defendant's conduct was an important cause in fact of the suicide from the problem of whether, assuming a substantial factual connection exists, liability should be imposed. See notes 100-08 *infra* and accompanying text. This distinction has become a basic one in tort law analysis. See C. MORRIS, *TORTS* 197 (1953); W. PROSSER, *TORTS* § 41, at 240 (3d ed. 1964) [hereinafter cited as PROSSER]; Malone, *Ruminations on Cause-in-Fact*, 9 *STAN. L. REV.* 60 (1956).

8. See PROSSER § 4, at 23. Conversely, tort law also can promote conduct that will serve to further the interests of society. *Id.* § 3, at 14.

9. *Lancaster v. Montesi*, 216 Tenn. 50, 390 S.W.2d 217 (1965).

10. *Id.* at 61, 390 S.W.2d at 222; see note 39 *infra* and accompanying text.

11. *Riesbeck Drug Co. v. Wray*, 111 Ind. App. 467, 479, 39 N.E.2d 776, 781 (1942).

II. INTENTIONALLY INFLICTED HARM CAUSING SUICIDE

Present tort law rules with regard to civil liability for causing suicide can only be understood in light of legal history.¹² English criminal law absorbed from church doctrine the conclusion that the act of suicide was both immoral and culpable.¹³ Although suicide was not treated as a crime in the United States,¹⁴ probably because legislatures thought it impractical to do so, the idea that a person who committed suicide was usually¹⁵ a culpable wrongdoer did become fixed in tort law.¹⁶ It is not surprising, therefore, that when civil claims were brought on the ground that a defendant caused a suicide, courts generally thought it immaterial to consider the culpability of the defendant and did not distinguish between intentionally and negligently caused suicide.¹⁷

In the past decade, a few progressive decisions have indicated that

12. See L. DUBLIN & B. BUNZEL, *TO BE OR NOT TO BE* 239 (1933); N. ST. JOHN-STEVAS, *LIFE, DEATH AND THE LAW* 233-36, 241-52 (1961) [hereinafter cited as ST. JOHN-STEVAS]; G. WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 248-86 (1957); Larremore, *Suicide and The Law*, 17 HARV. L. REV. 331-41 (1904); Mikell, *Is Suicide Murder?*, 3 COLUM. L. REV. 379-94 (1903).

13. 4 BLACKSTONE'S COMMENTARIES *189. The sanctions against the decedent included escheat of his property to the crown and an ignominious burial wherein a stake was driven through the decedent's heart. See L. DUBLIN, *supra* note 12, at 247; G. WILLIAMS, *supra* note 12, at 258-60; Mikell, *Is Suicide Murder?*, 3 COLUM. L. REV. 379-80 (1903). The legal concept of "self-murder" is predicated on St. Augustine's analogy of the killing of another to the killing of the self. G. WILLIAMS, *supra* note 12, at 254-56. By 1961 all sanctions against a person who committed suicide had been abolished in England. See Suicide Act of 1961, 9 & 10 Eliz. 2, c. 60. This change reflected the belief that criminal law could not deter a person who wanted to commit suicide and that such a person was not really culpable but rather represented a problem that could be best handled by psychiatric medicine. G. WILLIAMS, *supra* note 12, at 278-79; Shulman, *Suicide and Suicide Prevention: A Legal Analysis*, 54 A.B.A.J. 855, 862 (1968).

14. See *Burnett v. People*, 204 Ill. 208, 68 N.E. 505 (1903); *State v. Campbell*, 217 Iowa 848, 251 N.W. 717 (1933), Annot., 92 A.L.R. 1176 (1934); *Blackburn v. Ohio*, 23 Ohio St. 146 (1872); *Sanders v. State*, 54 Tex. Crim. 101, 112 S.W. 68 (1908); ST. JOHN-STEVAS 241-46. *But see Commonwealth v. Mink*, 123 Mass. 422 (1877). For a brief period of time Massachusetts did deny the decedent a Christian burial. The sanction of forfeiture of property never was accepted. See G. WILLIAMS, *supra* note 12, at 260.

15. English criminal law, following church practice excused the "involuntary" suicide. See L. DUBLIN, *supra* note 12, at 243-44; G. WILLIAMS, *supra* note 12, at 261.

16. See *Scheffer v. Railroad Co.*, 105 U.S. 249 (1882); *Brown v. American Steel & Wire Co.*, 43 Ind. App. 560, 88 N.E. 80 (1909); *Daniels v. New York, N.H. & H.R.R.*, 183 Mass. 393, 67 N.E. 424 (1903); *Koch v. Fox*, 71 App. Div. 288, 75 N.Y.S. 913 (1902).

The New York Penal Code of 1909, in force until September 1967, condemned suicide as "a grave public wrong," but imposed no penalty. N.Y. PENAL CODE OF 1909 § 2301. A few states treated a person who committed suicide as having a criminal character when the question has a collateral bearing on another legal issue. See *Wallace v. State*, 232 Ind. 700, 116 N.E.2d 100 (1954); *State v. Carney*, 69 N.J.L. 478, 55 A. 44 (Sup. Ct. 1903); *State v. Willis*, 255 N.C. 453, 121 S.E.2d 854 (1961).

17. *E.g.*, *Salsedo v. Palmer*, 278 F. 92 (2d Cir. 1921); *Stevens v. Steadman*, 140 Ga. 680, 79 S.E. 564 (1913); *Lancaster v. Montesi*, 216 Tenn. 50, 390 S.W.2d 217 (1965).

the intent to harm should be considered in deciding whether to hold a defendant civilly liable for causing the suicide of another.¹⁸ This approach is consistent with the traditional tort law concept that the increased culpability of a defendant who intentionally causes harm is material in determining the range of consequences for which he is to be held responsible.¹⁹ Judicial analysis in the area of civil liability for causing suicide could be substantially sharpened if courts made a further distinction between defendants who actually desire to cause suicide and those who merely commit one of the traditional intentional torts.

A. *Conduct Designed to Induce Suicide*

To date, there have been no reported cases in which a plaintiff has sought to hold a defendant civilly liable for specifically desiring and assisting in the decedent's suicide.²⁰ There have been numerous criminal cases, however, charging a defendant with aiding and abetting a suicide.²¹ Although it would not be helpful simply to transpose criminal law into tort law,²² the criminal law rules do provide some guidelines.

It is clear that if the defendant was the actual agent of death, he has committed murder²³ and should be held liable in a civil action. Liability also should be imposed if the defendant knowingly provided the means to assist another in committing suicide²⁴ or caused another to do the act

18. *Derosier v. New England Tel. & Tel. Co.*, 81 N.H. 451, 463-64, 130 A. 145, 152-53 (1925); see Prosser, *Transferred Intent*, 45 TEXAS L. REV. 650, 662 (1967).

19. *Tate v. Canonica*, 180 Cal. App. 2d 898, 5 Cal. Rptr. 28 (1960); *State ex rel. Richardson v. Edgeworth*, 214 So.2d 579 (Miss. 1968); *Cauverien v. De Metz*, 20 Misc. 2d 144, 188 N.Y.S.2d 627 (Sup. Ct. 1959).

20. There is dictum in *Stevens v. Steadman*, 140 Ga. 680, 686, 79 S.E. 564, 567 (1913), to the effect that the defendant would be liable in this situation.

21. *E.g.*, *McMahan v. State*, 168 Ala. 70, 53 So. 89 (1910); *Burnett v. People*, 204 Ill. 208, 68 N.E. 505 (1903); *Commonwealth v. Hicks*, 118 Ky. 637, 82 S.W. 265 (1904); *People v. Roberts*, 211 Mich. 187, 178 N.W. 690 (1920); *Blackburn v. State*, 23 Ohio St. 146 (1872); *Aven v. State*, 102 Tex. Crim. 478, 277 S.W. 1080 (1925); *Sanders v. State*, 54 Tex. Crim. 101, 112 S.W. 68 (1908); *ST. JOHN-STEVAS* 243-45.

22. See PROSSER § 2, at 7-8.

23. MODEL PENAL CODE § 201.5, Comment 2, at 57 (Tent. Draft No. 9, 1959) states in part: "[I]f he is himself the agent of the death, the crime is murder notwithstanding the consent or even the solicitation of the deceased." See also *Sanders v. State*, 54 Tex. Crim. 101, 112 S.W. 68 (1908).

24. In jurisdictions in which suicide is not a crime, aiding and abetting suicide is not sanctioned because of the necessity at common law of linking the aider and abettor to the principal crime. See *Sanders v. State*, 54 Tex. Crim. 101, 112 S.W. 68 (1908). Several states, however, consider that aiding and abetting a suicide is a crime even though the conduct of the decedent himself was not criminal. See FLA. STAT. ANN. § 782.08 (1965); KAN. STAT. ANN. § 21-408 (1964); MINN. STAT. ANN. § 609.215 (1964); MISS. CODE ANN. § 2375 (1957); MO. REV. STAT. § 559.080 (1953); N.Y. PENAL LAW §§ 120.30, .35, 125.05, .25 (McKinney 1967); WIS. STAT. ANN. § 940.12 (1958); Note, *Suicide—Criminal Aspects*, 1 VILL. L. REV. 316, 320-21 (1956). MODEL PENAL CODE § 210.5 (1962) provides:

(1) *Causing Suicide as Criminal Homicide.* A person may be convicted of criminal homicide

by persuasion, force, or threat.²⁵ The only viable argument for denying liability in these situations would be that the victim consented.²⁶ Obviously, if the defendant used duress or fraud to bring about the victim's apparent consent, there is no true consent and the defendant should be held liable.²⁷ Even when the consent is real, it should not operate as a bar to civil liability.²⁸ Careful psychiatric study has made it clear that although a person who might commit suicide is a medical problem and cannot be deterred by criminal or civil sanctions, the individual who assists him can be deterred.²⁹ Tort liability may also be

for causing another to commit suicide only if he purposely causes such suicide by force, duress or deception.

(2) *Aiding or Soliciting Suicide as an Independent Offense.* A person who purposely aids or solicits another to commit suicide is guilty of a felony of the second degree if his conduct causes such suicide or an attempted suicide and otherwise of a misdemeanor.

One article has described this situation as a "paradox." Schulman, *supra* note 13, at 859. See ST. JOHN-STEVAS 243 (suggesting that the logical position would be that aiding and abetting a suicide is not a criminal act). But the separate treatment appears sound; the aider and abettor brings about objective physical injury to another and this is the type of conduct that criminal law classically has sought to deter. Cf. *American Motorcycle Ass'n v. Davids*, 158 N.W.2d 72 (Mich. Ct. App. 1968), noted in 82 HARV. L. REV. 469 (1968). Even this approach, however, may be hampered by the requirement that the aider and abettor be present at the time of the suicide. At common law, one who encouraged another to commit suicide was guilty as a principal if he was present when the act occurred and as an accessory before the fact if he was absent. Since a principal had to be convicted before any accessories were tried, the aider and abettor could not be prosecuted unless the suicide occurred while he was present. See *Commonwealth v. Hicks*, 118 Ky. 637, 82 S.W. 265 (1904). In civil matters, the focus should be on the totality of the conduct of the defendant rather than on pursuing the technicalities of the common law aider and abettor doctrine. Cf. *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. App. 2d 330, 240 P.2d 282 (1952).

25. Cf. MODEL PENAL CODE § 201.5 (1962).

26. See PROSSER § 18, at 102; RESTATEMENT OF TORTS § 892 (1939). The consent of the person damaged will ordinarily preclude liability for intentional interference with the person. F. HARPER & F. JAMES, TORTS § 3.10, at 232 (1956) [hereinafter cited as HARPER & JAMES]; Bohlen, *Consent as Affecting Civil Liability for Breaches of the Peace*, 24 COLUM. L. REV. 819 (1924).

27. See PROSSER § 18, at 106-07.

28. See *McCulloch v. Goodrich*, 105 Kan. 1, 181 P. 556 (1919), Annot., 6 A.L.R. 388 (1920); *Colby v. McClendon*, 85 Okla. 293, 206 P. 207 (1922), Annot., 30 A.L.R. 199 (1924); *Royer v. Belcher*, 100 W. Va. 694, 131 S.E. 556 (1926), Annot., 47 A.L.R. 1092 (1927); *Condit v. Hewitt*, 369 P.2d 278, 279 (Wyo. 1962); HARPER & JAMES § 3.10, at 236-37 ("numerical weight of authority"); PROSSER § 18, at 108-09 ("considerable majority of courts"); RESTATEMENT (SECOND) OF TORTS § 61 (1965) (the principal examples given involve violation of a statute forbidding intercourse with a girl below the age of consent and statutes forbidding prize fighting). There is some authority for the proposition that although consent is not a defense to a criminal charge, it should be a defense to a civil claim if given by a "sane" man. *E.g.*, *Gioia v. State*, 16 App. Div. 2d 354, 359, 228 N.Y.S.2d 127, 132 (1962) (dictum). This consent defense seems to be based on the erroneous belief that the victim of the civil wrong should not be allowed to recover since a finding of sanity means that his fault was as great as and as preventable as the defendant's. See note 29 *infra* and accompanying text.

29. See MODEL PENAL CODE § 210.5 (2) (1962). See also *Suicide Act of 1961*, 9 & 10 Eliz. 2, c. 60.

predicated on the fact that the defendant has violated a law designed to protect persons with suicidal tendencies from their own misguided judgment.

There are circumstances in which the imposition of civil liability would be harsh. A particularly difficult situation would be presented if an individual had a terminal illness and urged the defendant to assist in causing his death. In this event, liability should be imposed and the mitigating circumstances should be allowed to exercise their influence on the issue of damages.

One special case should be distinguished—the suicide pact. If both parties die, the equities would appear to be in balance. If one party survives, however, he may be considered partially “responsible” for the death of the other. Nevertheless, since the survivor also intended to commit suicide, his conduct could not have been deterred by penal sanctions,³⁰ and liability should not be imposed.

B. *Conduct Designed to Cause Severe Emotional Distress*

Proof will rarely be available to show that the defendant specifically intended to cause another's suicide, but cases have arisen in which a defendant committed an intentional tort that was likely to cause an individual severe emotional distress and the result was a suicide. The courts have taken a number of approaches in dealing with these cases. Some courts have denied liability on the ground that suicide is not the “natural” result of emotional distress. Other courts have been more willing to impose liability by holding that the defendant's conduct created an “uncontrollable impulse” in the decedent to take his own life or by focusing on the relationship between the defendant's conduct and the decedent's suicide.

The clearest example of the restrictive nature of the “natural” result theory is found in *Salsedo v. Palmer*,³¹ in which the Second Circuit held that suicide is not a “natural” result of a defendant's conduct unless the defendant directly assists in causing the death. In *Salsedo*, the plaintiff alleged that during a two-month period, Palmer, the attorney general, had his agents inflict mental and physical torture upon the decedent,³² causing him to commit suicide by jumping from the fourteenth story window of the room in which Palmer had confined him.

30. See G. WILLIAMS, *supra* note 12, at 305; cf. MODEL PENAL CODE § 201.5, at 56-57 (Tent. Draft No. 9, 1957).

31. 278 F. 92 (2d Cir. 1921), noted in 22 COLUM. L. REV. 601 (1922), and 31 YALE L.J. 667 (1922), Annot., 23 A.L.R. 1271 (1923).

32. 278 F. at 93 n.1.

The court conceded that the torture might have been a substantial cause of the suicide but denied liability, stating that while it is conceivable that a tortured man may kill himself,

if he so kills himself deliberately . . . there is an intervening act of his own will If, on the other hand, it is contended that his self-killing is not his own act, but is the result of suicidal mania, we hold that suicidal mania is not a natural or reasonable result of either mental or physical torture.³³

If suicide is not a “natural” result in the *Salsedo* fact pattern, it obviously is not so if a defendant falsely and maliciously accuses a bank teller of financial misfeasance in office,³⁴ or if a defendant falsely accuses an “upright industrious” teenager of being a housebreaker.³⁵ Since the *Salsedo* court denied liability despite its concession that the defendant’s conduct may have been a substantial cause of the suicide,³⁶ the case also served as an effective shield for a defendant who allegedly inflicted such mental and physical torture upon a young lady that she leaped from a bridge.³⁷

A number of courts have indicated a willingness to allow recovery if the plaintiff proves that the defendant caused the decedent to commit suicide. Nevertheless, these courts allow recovery only if the plaintiff also proves that the decedent would not have been “at fault” under sixteenth century English criminal law standards: in effect, the person who committed suicide must not have understood the nature of his act.³⁸ Courts employing this cognitive test have uniformly found that the decedent had the requisite understanding. A few courts have been more lenient and have allowed plaintiffs to recover if they prove that the decedent acted solely because of an “uncontrollable impulse” caused by

33. *Id.* at 99. Aside from using the *Stevens v. Steadman* rationale, the court relied on a Supreme Court opinion dealing with negligently caused suicide. For a discussion of *Scheffer v. Railroad Co.*, 105 U.S. 249 (1882) see notes 51-53 *infra* and accompanying text. Thus, the court did not distinguish intentional wrongdoing from negligent harm in this context. The decision may have been motivated by the court’s desire to protect Attorney General Palmer from the implication of serious criminal acts—recall that the *Stevens* court held that the alleged tort of causing suicide had to be an analogue of the crime of homicide. The implication is not entirely speculative—another court let a murder case go to the jury under facts somewhat analogous to *Salsedo*. *Stephenson v. State*, 205 Ind. 141, 179 N.E. 633 (1932).

34. *Waas v. Ashland Day & Night Bank*, 201 Ky. 469, 473, 257 S.W. 29, 31 (1923).

35. *Jones v. Stewart*, 183 Tenn. 176, 191 S.W.2d 439 (1946), *noted in* 12 Mo. L. REV. 89 (1947), *and* 19 TENN. L. REV. 855 (1947).

36. 278 F. at 99.

37. *Lancaster v. Montesi*, 216 Tenn. 50, 390 S.W.2d 217 (1965).

38. *See Lancaster v. Montesi*, 216 Tenn. 50, 390 S.W.2d 217 (1965); *Jones v. Stewart*, 183 Tenn. 176, 178, 191 S.W.2d 439-40 (1946). The same test was applied in English criminal law in deciding upon the guilt or innocence of persons who committed suicide. *See G. WILLIAMS, supra* note 12, at 261.

the defendant.³⁹ Under the plain meaning of these words, the decedent's act would not bar a claim if he were unable, because of mental disease, to control his act even though he knew its nature.⁴⁰ Nevertheless, some courts have found the decedent was in control of his actions when the facts indicate that he was aware of the meaning of his act of self-destruction.⁴¹

The first case to give substantial content to the words "uncontrollable impulse" was *Cauverien v. De Metz*.⁴² Rather than focus on the decedent's awareness of his impending death, the court sought to determine whether he was in control of his faculties at the time of suicide.⁴³ The essence of the defendant's wrongdoing was that he had converted a diamond consigned to the decedent. Both the decedent and the defendant were diamond merchants and it was the custom in the trade to deal in informal consignments. The consignor of the converted diamond desired its return, and the decedent could not comply with this request because of the defendant's conversion; the pressure arising from this situation was alleged to have caused the suicide. The claim seems questionable on a cause in fact basis since it seems likely that the decedent's action resulted from prior psychological difficulties.⁴⁴ Further, the defendant's conduct does not seem to reach the "extreme and outrageous" level present in the intentional infliction of emotional harm cases.⁴⁵ The court's opinion was helpfully innovative, however, in its realistic interpretation of the words "uncontrollable impulse"; it did not dismiss the plaintiff's claim simply because the decedent's actions were not sudden or because they showed a conscious awareness of his impending suicide.

39. See *Brown v. American Steel & Wire Co.*, 43 Ind. App. 560, 88 N.E. 80 (1909); *Daniels v. New York, N.H. & H.R.R.*, 183 Mass. 393, 67 N.E. 424 (1903); *Long v. Omaha & C.B. St. Ry.*, 108 Neb. 342, 187 N.W. 930 (1922); *Arsnow v. Red Top Cab Co.*, 159 Wash. 137, 292 P. 436 (1930).

40. See A. GOLDSTEIN, *INSANITY AND THE LAW* 49-50 (1967).

41. See cases cited note 38 *supra*. But see *Elliott v. Stone Baking Co.*, 49 Ga. App. 515, 176 S.E. 112 (1934); *Trumbaturi v. Katz & Besthoff*, 180 La. 915, 158 So. 16 (1934).

42. 20 Misc. 2d 144, 188 N.Y.S.2d 627 (Sup. Ct. 1959), noted in 9 BUFFALO L. REV. 370 (1960), 20 LA. L. REV. 791 (1960), 35 N.D.L. REV. 473 (1960), and 13 VAND. L. REV. 594 (1960).

43. In addition, the court indicated that when a suicide is alleged to have been caused by an intentional rather than a negligent wrong, the question of whether death by suicide was the natural, proximate, or legal consequence of the tort is generally for the jury to decide. 20 Misc. 2d at 149, 188 N.Y.S.2d at 632.

44. Cf. RESTATEMENT (SECOND) OF TORTS § 869, at 175 (Tent. Draft No. 16, 1970). The cause in fact question might have been decisive if the case had been tried. Mrs. Cauverien died prior to trial, however, and the family no longer wished to pursue the matter.

45. See *State Rubbish Collectors Ass'n v. Siliznoff*, 39 Cal. 2d 330, 240 P.2d 282 (1952); *Turner v. ABC Jalousie Co.*, 251 S.C. 92, 160 S.E.2d 528 (1968); RESTATEMENT (SECOND) OF TORTS § 46 (1965).

The insight of *Cauverien* was retained in the more recent case of *State ex rel. Richardson v. Edgeworth*.⁴⁶ In *Richardson*, the defendants allegedly had illegally arrested the decedent on numerous occasions and threatened him with imprisonment, causing him to become mentally unstable and commit suicide. At the close of the plaintiff's case, the trial court directed a verdict for the defendant. The Supreme Court of Mississippi reversed, holding that whether the defendant's conduct was a "substantial factor" in producing the decedent's mental illness and whether the decedent took his own life in an "uncontrollable impulse" were questions of fact for the jury. In reaching this conclusion, the court relied on a psychiatrist's testimony that detailed a substantial causal link between the defendant's conduct and the decedent's suicide. Thus, as in *Cauverien*, the court applied the words "uncontrollable impulse" realistically, but it improved on the prior decision by more carefully focusing on the relationship between the defendant's conduct and the decedent's suicide. The *Richardson* court's concern with the cause in fact question is an important step toward a reasonable approach to intentional wrongdoing suicide cases.⁴⁷

It may be preferable to eliminate the "uncontrollable impulse" limitation altogether in cases of intentional infliction of serious emotional or physical harm. This is because the complexities of causation in any suicide case make it relatively easy for a defendant to present competent psychiatric evidence that the decedent had some control over his actions.⁴⁸ This factor perhaps was an underlying reason why one court found a defendant liable because his intentional tortious conduct was a "substantial factor" in producing a suicide.⁴⁹ In applying a "substantial factor" test, a court should first consider whether the defendant's conduct was in fact a substantial cause of the decedent's suicide, and psychiatric testimony should be required to sustain the claim. Assuming that the cause in fact question is resolved in the plaintiff's favor, the remaining question is one of policy, or proximate cause. Was the defendant's conduct culpable enough to allow the jury to

46. 214 So. 2d 579 (Miss. 1968). See also *Lum v. Fullaway*, 42 Hawaii 500 (1958).

47. If additional liability is to be imposed because a defendant is more culpable, the defendant's culpability must be related to the damage claimed. Cf. *Derosier v. New England Tel. & Tel. Co.*, 81 N.H. 451, 463-64, 130 A. 145, 152-53 (1925). See generally *Bauer, The Degree of Moral Fault as Affecting Defendant's Liability*, 81 U. PA. L. REV. 586 (1933).

48. See 30 NACCA L.J. 162, 168-69 (1964). See generally 12 AM. JUR. PROOF OF FACTS *Suicide* § 11, at 234-80 (1962).

49. *Tate v. Canonica*, 180 Cal. App. 2d 898, 5 Cal. Rptr. 28 (1960), noted in 60 COLUM. L. REV. 1047 (1960), 15 RUTGERS L. REV. 134 (1960), 12 SYRACUSE L. REV. 125 (1960), and 7 WAYNE L. REV. 386 (1960). Judge Duniway's opinion is among the best written on the topic of civil liability for causing suicide.

hold him liable for suicide? The courts may find it appropriate to adopt the standard applied by the *Restatement (Second) of Torts* to cases involving intentional infliction of mental distress. Under this standard, although the plaintiff proves that the defendant's conduct was a substantial factor in the decedent's act of suicide, the defendant would be liable for causing suicide only if his conduct was "extreme and outrageous."⁵⁰

III. NEGLIGENTLY INFLICTED HARM CAUSING SUICIDE

A. *The Judicial Approach in Ordinary Negligence Cases*

In 1881, the Supreme Court held in *Scheffer v. Railroad Co.*⁵¹ that a defendant who negligently inflicts injuries on another is not liable for the subsequent suicide of the injured party. The Court reasoned that suicide is not a "foreseeable" result of even severe physical and mental injuries.⁵² Subsequent psychiatric studies, however, have indicated that mental illness leading to suicide may indeed be a foreseeable result of severe injury⁵³ and have prompted most courts to refuse to apply *Scheffer* mechanically. In seeking alternative approaches, some courts have held the defendant liable if the decedent did not understand the nature of his act or acted under an uncontrollable impulse. Other decisions, primarily in the workmen's compensation area, have allowed liability when the defendant's conduct was a "substantial factor" in causing the suicide, or when the suicide would not have resulted "but for" the defendant's conduct.

The narrowest of the post-*Scheffer* approaches invokes a strict cognitive test. *Daniels v. New York, N.H. & H.R.R.*⁵⁴ exemplifies the

50. See *Savage v. Boies*, 77 Ariz. 355, 272 P.2d 349 (1954); *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 240 P.2d 282 (1952); *Flamm v. Van Nierop*, 56 Misc. 2d 1059, 291 N.Y.S.2d 189 (Sup. Ct. 1968); *Turner v. ABC Jalousie Co.*, 251 S.C. 92, 160 S.E.2d 528 (1968). In both *Cauverien* and *Richardson*, the defendant had committed a recognized intentional tort; nevertheless, it would seem that such an act should not be utilized as a mere "peg" to impose liability for causing a suicide. See RESTATEMENT (SECOND) OF TORTS § 47 (1965). As in the emotional harm cases, the focus should be on whether the defendant's conduct was "extreme and outrageous." See *id.* § 46. The court may be more likely to deem the defendant's actions more culpable if he intentionally caused mental distress to one he knew to be emotionally unstable or if a special relationship existed between the parties. See *Nickerson v. Hodges*, 146 La. 735, 84 So. 37 (1920) (intentional conduct); *Turner v. ABC Jalousie Co.*, 251 S.C. 92, 160 S.E.2d 528 (1968) (special relationship).

51. 105 U.S. 249 (1881).

52. *Id.* at 252.

53. See *Palmer, Mental Reactions Following Injuries in Which There is no Evidence of Damage to Nervous Tissues*, 1 J. FOR. MED. 222, 225 (1954); 30 NACCA L.J. 162, 169 (1964). See also 1A A. LARSON, WORKMEN'S COMPENSATION LAW § 36.30 (1967) [hereinafter cited as LARSON]; 29 NACCA L.J. 212 (1963).

54. 183 Mass. 393, 67 N.E. 424 (1903).

position that liability should be found when the decedent did not comprehend the nature of his act of self-destruction. In *Daniels*, the decedent suffered severe head injuries when he was negligently struck by the defendant's train at a grade crossing. During the seven weeks preceding his suicide, he was constantly delirious. The court stated that it would allow recovery if he did not know "the physical nature and consequences of his act."⁵⁵ The possibility of recovery was severely limited by the court when it stated that, "[a]n act of suicide resulting from a moderately intelligent power of choice, even though the choice is determined by a disordered mind, should be deemed a new and independent, efficient cause of the death that immediately ensues."⁵⁶ Courts that deny civil liability for causing suicide unless the decedent did not know "the physical nature and consequences of his act" arguably are not deviating from the *Scheffer* nonliability for suicide rule. Accepted definitions of the word "suicide" in the fields of psychiatry,⁵⁷ sociology,⁵⁸ and criminal law⁵⁹ exclude an individual who takes his own life when he is unaware of what he is doing.

Another alternative to *Scheffer* is predicated upon a finding that the decedent acted under an "irresistible" or "uncontrollable" impulse.⁶⁰ This approach allows recovery when the decedent knew his act would cause his death but, as a result of emotional distress caused by the defendant's negligent conduct, was unable to control himself.⁶¹ In actually applying this standard, however, some courts have found that the decedent possessed sufficient control over his conduct to bar recovery when he left a note,⁶² purchased a shell for his gun for the purpose of killing himself,⁶³ merely used a gun,⁶⁴ or was efficient in the manner in which he cut his throat.⁶⁵ The stringent requirements of this narrow

55. *Id.* at 400, 67 N.E. at 426.

56. *Id.*; accord, RESTATEMENT (SECOND) OF TORTS § 455, comment *d* at 494 (1965).

57. See BLAKISTON'S NEW GOULD MEDICAL DICTIONARY 1173 (2d ed. N. Hoerr & A. Osol 1956); Primost, *Definition of Suicide*, 1 LANCET 326 (1967).

58. See J. DOUGLAS, THE SOCIAL MEANINGS OF SUICIDE 355-56 (1967).

59. See ST. JOHN-STEVAS 242.

60. See *Brown v. American Steel & Wire Co.*, 43 Ind. App. 560, 88 N.E. 80 (1909); *Wallace v. Bounds*, 369 S.W.2d 138 (Mo. 1963); *Long v. Omaha & C.B. St. Ry.*, 108 Neb. 342, 351-52, 187 N.W. 930, 934 (1922); *Cauverien v. De Metz*, 20 Misc.2d 144, 148-49, 188 N.Y.S.2d 627, 632 (Sup. Ct. 1959); RESTATEMENT (SECOND) OF TORTS § 455(b) (1965).

61. See A. GOLDSTEIN, *supra* note 40.

62. *Jones v. Traders & Gen. Ins. Co.*, 140 Tex. 599, 605-06, 169 S.W.2d 160, 163-64 (1943) (workmen's compensation case).

63. *Long v. Omaha & C.B. St. Ry.*, 108 Neb. 342, 351, 187 N.W. 930, 933-34 (1922).

64. *Arsnow v. Red Top Cab Co.*, 159 Wash. 137, 292 P. 436 (1930). As indicated in note 69 *infra* and accompanying text, the holding in *Arsnow* was later modified or perhaps overruled sub silentio in *Orcutt v. Spokane County*, 58 Wash. 2d 846, 364 P.2d 1102 (1961).

65. *Brown v. American Steel & Wire Co.*, 43 Ind. App. 560, 88 N.E. 80 (1909).

construction of "control" in effect make the uncontrollable impulse test not much broader than the cognitive test.

A more realistic but minority view of control is evident in the decision in *Orcutt v. Spokane*,⁶⁶ in which recovery was allowed when a decedent committed suicide 22 months after suffering serious injury in a traffic accident. The trial court had held for the defendant upon a finding that the decedent knew the nature of her act because she used reasoning in carrying it out.⁶⁷ The Supreme Court of Washington reversed, holding that use of reason in carrying out an act of suicide should not be determinative if there is competent medical testimony "that the injury sustained by the decedent caused a mental condition which resulted in an uncontrollable impulse to commit suicide, in the sense that decedent could not have decided against and refrained from killing himself, and because of such uncontrollable impulse, the decedent committed suicide."⁶⁸ In reaching its decision, the court indicated that an "uncontrollable impulse" could be caused by a realization on the part of the decedent that she would be permanently disfigured. Clearly, this kind of consideration would not be persuasive of the existence of an "uncontrollable impulse" under the approach that essentially equates the "uncontrollable impulse" test with the cognitive test.⁶⁹

A hypothetical may illustrate the position that the great majority of American courts have taken with respect to recovery for negligently caused suicide. Suppose that while negligently driving an automobile, the defendant hits a pedestrian, throwing him fifteen feet through the air. In a state of half-consciousness, the victim crawls to the middle of the highway seeking help, not realizing he has placed himself in a position of further danger. Assume the victim is then killed by another negligently driven car. The defendant clearly would be responsible for the death; a court probably would not even discuss suicide.⁷⁰ If the decedent went into an uncontrolled frenzy and literally walked in front of a truck, however, most courts would label this a suicide but allow a wrongful death claim against the original defendant because the decedent committed suicide during an "uncontrollable" impulse.⁷¹ Consider the same situation

66. 58 Wash. 2d 846, 364 P.2d 1102 (1961).

67. *Id.* at 849-50, 364 P.2d at 1103.

68. *Id.* at 853, 364 P.2d at 1105.

69. *See* cases cited notes 62-65 *supra*. The dissent in *Orcutt* was probably correct in stating that *Arsnow* has been overruled *sub silentio*. 58 Wash. 2d at 860, 364 P.2d at 1110. The majority did have one weapon in its arsenal to distinguish *Arsnow*: the plaintiff in *Arsnow* had not presented detailed medical testimony on the issue of causation.

70. *Cf.* *Hill v. Peres*, 136 Cal. App. 132, 28 P.2d 946 (1934); *Adams v. Parrish*, 189 Ky. 628, 225 S.W. 467 (1920); *Morrison v. Medaglia*, 287 Mass. 46, 191 N.E. 133 (1934).

71. *See* cases cited notes 63-65 *supra*.

altered again. Imagine that as a result of the accident, the decedent loses both legs, becomes paralyzed in one arm, and suffers serious impairment of his speech and hearing. He becomes extremely frustrated and depressed because he cannot continue his prior employment or fulfill his role as husband and father, has great trouble sleeping, and suffers extreme and constant pain. One evening, six months after the event, while in a state of extreme melancholia, he takes his own life. A psychiatrist at the trial testifies that the accident was a substantial cause of mental illness that led to the decedent's suicide, and is clear in his opinion that if the accident had not occurred, there would have been no suicide. In such a situation, most courts would conclude that this is a case in which "a sane man, depressed it is true, but sane nevertheless, superimposed upon defendant's negligence, acts of his own will to destroy himself."⁷² The *Scheffer* court would justify denying liability in this third factual situation on the theory that the result was unforeseeable.⁷³ It seems obvious, however, that "foreseeability" literally cannot reconcile the results in these cases.⁷⁴ It does not seem any more or less foreseeable that the decedent would die in any one of the three ways suggested above. The underlying reason for denying liability in cases in which the decedent "thought about" his act must rest on the premise that he was sufficiently responsible for his own death to bar his representative's claim against the defendant. The courts believe that the decedent was either solely at fault or his fault contributed to the suicide to such an extent that relief must be denied. Use of the cognitive test and, to a greater extent, the uncontrollable impulse test demonstrates the willingness of a few recent decisions to explore the issue of relative fault.⁷⁵

While originally applying negligence law rules with respect to civil liability for causing suicide,⁷⁶ a number of workmen's compensation

72. *McMahon v. City of New York*, 16 Misc. 2d 143, 144, 141 N.Y.S.2d 190, 192 (Sup. Ct. 1955); see PROSSER § 61, at 398 n.1 ("[o]n parallel facts, the decisions are unanimous").

73. *E.g.*, *Waas v. Ashland Day & Night Bank*, 201 Ky. 469, 257 S.W.29 (1923); *Lancaster v. Montesi*, 216 Tenn. 50, 390 S.W.2d 217 (1965).

74. See 1A LARSON § 36.30.

75. See *Tuscon Rapid Transit Co. v. Tocci*, 3 Ariz. App. 330, 414 P.2d 179 (1966) (court explored in detail the relationship between the accident and the mental illness that triggered the suicide; this discussion would not be relevant under the traditional "uncontrollable" impulse approach); *Tate v. Canonica*, 180 Cal. App. 2d 898, 909, 5 Cal. Rptr. 28, 40 (1960) (court's explanation of "resisting an impulse" indicates that a claim will not be dismissed merely because the decedent did not act in a delirium or frenzy); *Little v. Chicago Hoist & Body Co.*, 32 Ill. 2d 156, 203 N.E.2d 902 (1965) (court distinguished a workman's compensation case on factual rather than legal grounds).

76. The leading decision was *In re Sponatski*, 220 Mass. 526, 108 N.E. 466 (1915), which employed the cognitive test. *Sponatski* has been modified by statute. MASS. ANN. LAWS ch. 152,

cases have gone a step farther in allowing recovery. They have rejected the "uncontrollable impulse" test as a standard⁷⁷ and instead have allowed recovery for suicide when a work-connected injury results in the decedent "becoming devoid of normal judgment and dominated by a disturbance of mind directly caused by his injury and its consequences."⁷⁸ Courts following this approach, which might be referred to as the "substantial factor test," have rejected the uncontrollable impulse test because they believe that the way most courts construe the words "uncontrollable impulse" is too absolute to reflect the realities of mental illness. Courts tend to find an

§ 26A (1961) ("if it be shown by the weight of the evidence that, due to the injury, the employee was of such unsoundness of mind as to make him irresponsible for his act"). Nevertheless, it has been ostensibly followed in numerous jurisdictions. *Schofield v. White*, 250 Iowa 571, 95 N.W.2d 40 (1959); *Lehman v. A.V. Winterer Co.*, 272 Minn. 79, 136 N.W.2d 649 (1965); *Anderson v. Armour & Co.*, 257 Minn. 281, 101 N.W.2d 435 (1960); *Mershon v. Missouri Pub. Serv. Corp.*, 359 Mo. 257, 221 S.W.2d 165 (1949); *Kazazian v. Segan*, 14 N.J. Misc. 78, 182 A. 351 (Workmen's Comp. Bur. 1936); *Industrial Comm. v. Brubaker*, 129 Ohio St. 617, 196 N.E. 409 (1935); *Zimmiski v. Lehigh Valley Coal Co.*, 200 Pa. Super. 524, 189 A.2d 897 (1963); *Jones v. Traders & Gen. Ins. Co.*, 144 S.W.2d 689 (Tex. Civ. App. 1940), *aff'd*, 140 Tex. 599, 169 S.W.2d 160 (1943); *McKane v. Capital Hill Quarry Co.*, 100 Vt. 45, 134 A. 640 (1926); *Karlen v. Department of Labor & Indus.*, 41 Wash. 2d 301, 249 P.2d 364 (1952); *see Annot.*, 15 A.L.R.3d 616 (1967); IA LARSON § 36.20. Paralleling the developments in negligence law, a number of workmen's compensation cases substituted the "uncontrollable impulse" test for the cognitive test. *See Schofield v. White*, 250 Iowa 571, 95 N.W.2d 40 (1959) (decedent's suicide was result of an uncontrollable impulse produced by brain injury); *Anderson v. Armour*, 257 Minn. 281, 101 N.W.2d 435 (1960) (decedent's conduct clearly indicated he thought about his suicidal act); *Speece v. Industrial Comm'n*, 46 Ohio L. Abs. 453, 70 N.E.2d 387 (Ct. App. 1945) (court affirmed Board's finding that decedent did not realize the nature of his act although decedent's conduct would seem to belie this); *Gasperin v. Consolidation Coal Co.*, 293 Pa. 589, 143 A. 187 (1928) (facts indicated gradual mental breakdown); *Vandal v. Krsul-Kutehel Coal Co.*, 149 Pa. Super. 269, 27 A.2d 709 (1942) (decedent's suicide was result of an uncontrollable insane impulse attributable to disabling accident).

77. *E.g.*, *Terminal Shipping Co. v. Traynor*, 243 F. Supp. 915 (D. Md. 1965); *Graver Tank & Mfg. Co. v. Industrial Comm'n*, 97 Ariz. 256, 399 P.2d 664 (1965); *Burnight v. Industrial Accident Comm'n*, 181 Cal. App. 2d 816, 5 Cal. Rptr. 786 (1960); *Whitehead v. Keene Roofing Co.*, 43 So. 2d 464 (Fla. 1949); *Harper v. Industrial Comm'n*, 24 Ill. 2d 103, 180 N.E.2d 480 (1962); *Trombley v. State*, 366 Mich. 649, 115 N.W.2d 561 (1962); *Brenne v. Department of Indus., Labor & Human Relations*, 38 Wis. 2d 84, 156 N.W.2d 497 (1968). New York apparently would allow a recovery if a physical injury to the brain has been a substantial factor in causing decedent's suicide. *See Delinousha v. National Biscuit Co.*, 248 N.Y. 93, 161 N.E. 431 (1928). A recent New York case indicates that physical injury might not be necessary if the factual causation chain is sufficiently proved. *Franzoni v. Loew's Theatre & Realty Co.*, 20 N.Y.2d 889, 232 N.E. 857 (1968).

78. *Graver Tank & Mfg. Co. v. Industrial Comm'n*, 97 Ariz. 256, 399 P.2d 664, 668 (1965). Under both the old and the new test there have been cases allowing recovery although the work-connected injury was not a physical one. *E.g.*, *Burnight v. Industrial Accident Comm'n*, 181 Cal. App. 2d 816, 5 Cal. Rptr. 786 (1960) (new test—overworked plant supervisor); *Wilder v. Russell Library Co.*, 107 Conn. 56, 139 A. 644 (1927) (old test—overworked librarian); *Trombley v. State*, 366 Mich. 649, 115 N.W.2d 561 (1962) (new test—decedent depressed as a result of investigation of hospital where she was employed); *Anderson v. Armour & Co.*, 257 Minn. 281, 101 N.W.2d 435 (1960) (old test—decedent severely depressed after running down pedestrian).

uncontrollable impulse only in circumstances marked by some violent or eccentric method of self-destruction and fail to "recognize the role pain or despair may play in breaking down a rational mental process."⁷⁹ Some workmen's compensation cases have moved even farther away from consideration of the decedent's control over himself at the time of his act; they would allow recovery if the suicide would not have occurred "but for" the decedent's injuries.⁸⁰

It can be seen, then, that the courts have articulated at least five possible approaches to determine whether civil liability will be imposed for a negligently caused suicide. (1) Recovery will be denied because suicide is an unforeseeable consequence of a negligently inflicted injury. (2) Recovery will be allowed if the decedent did not know the nature of his act. (3) Recovery will be allowed even though the decedent knew the nature of his actions if, because of mental illness, he was unable to control them. (4) Recovery will be allowed if the injury caused mental illness and the mental illness was a "substantial factor" in producing the suicide. (5) Recovery will be allowed if the suicide would not have occurred "but for" the injury. The first and second rules, and to some extent the third, were merely carried over from English criminal law.⁸¹ The newer tests represented by the fourth and fifth rules have been rejected by negligence law on the ground that they do not comport with the fault principle because the rules evolved in the workmen's compensation area.⁸² The courts that have rejected the fourth and fifth tests have not looked to the field of psychiatry for assistance in determining the relationship between an accident and a subsequent suicide. Thus, the question of whether the "substantial factor" test or the "but for" test should be adopted in the law of negligence remains

79. 97 Ariz. at 260, 399 P.2d at 667-68; cf. MODEL PENAL CODE § 4.01, Appendix (Tent. Draft No. 4, 1955).

80. *Burnight v. Industrial Accident Comm'n*, 181 Cal. App. 2d 816, 826, 5 Cal. Rptr. 786, 793 (1960) ("if it be shown by competent expert testimony that without the injury, there would have been no suicide, the injury is the proximate cause of the death"); *Whitehead v. Keene Roofing Co.*, 43 So. 2d 464 (Fla. 1949) (where the injury caused the workman to lose his normal judgment and "incontrovertible evidence shows that, without the injury, there would have been no suicide"); *Harper v. Industrial Comm'n*, 24 Ill. 2d 103, 109, 180 N.E.2d 480, 481 (1962) ("evidence shows a clear connection between . . . injury . . . and his ultimate suicide").

81. See notes 12-13 *supra* and accompanying text.

82. See *Tucson Rapid Transit Co. v. Tocci*, 3 Ariz. App. 330, 334, 414 P.2d 179, 183 (1966). Nevertheless, the *Tocci* court went on to factually distinguish workmen's compensation cases that applied the "substantial factor" rule. *Id.* at 337, 414 P.2d at 186. Similarly, in *Stasiof v. Chicago Hoist & Body Co.*, 50 Ill. App. 2d 115, 122, 200 N.E.2d 88, 92 (1964), the court found the workmen's compensation cases inapplicable to a claim based on negligence. On appeal, however, the Supreme Court of Illinois distinguished rather than rejected the workmen's compensation cases. *Little v. Chicago Hoist & Body Co.*, 32 Ill. 2d 156, 159, 203 N.E.2d 902, 904 (1965).

unresolved. In the next section these newer tests will be evaluated in light of current psychiatric knowledge to determine whether either can be harmonized with the fault system.

B. *The Approach of Psychiatry Toward Suicide and its Causes*

The psychiatric approach toward suicide and its causes has, of course, not focused on the question of whether an individual should be deemed civilly liable for causing a particular suicide.⁸³ Nevertheless, psychiatric studies on the causes of suicide provide information that is helpful in answering this question.⁸⁴

Isaac Ray stated in 1900 that doctors who had studied mental illness were then unable to answer understandingly the question of "whether a suicide is always or ever the result of insanity."⁸⁵ Today there are firmer conclusions. Dr. Edmund Bergler has stated that:

[N]o person of 'sound mind,' to use the popular misnomer, commits suicide. Suicide starts long before the actual act of self-destruction. *All suicides act under pressure of unconscious forces* and are, psychiatrically speaking, *no more or less responsible for the act than is a person for having cancer*⁸⁶

Another psychiatrist, Dr. A. A. Brill, has indicated that "about 85 to 90 per cent of all suicides" are caused by serious mental illness.⁸⁷ A recent edition of a standard textbook of psychiatry states that "it is generally accepted that the large majority of those who attempt or commit suicide are mentally ill or suffer from serious personality disorders."⁸⁸

83. See J. EWALT & D. FARNSWORTH, *TEXTBOOK OF PSYCHIATRY* 312 (1963) (the law is primarily concerned with people at odds with one another; psychiatry is primarily concerned with people at odds with themselves); M. GUTTMACHER & H. WEIHOFFEN, *PSYCHIATRY AND THE LAW* 406 (1952); F. REDLICH & D. FREEDMAN, *THE THEORY AND PRACTICE OF PSYCHIATRY* 778-79 (1966).

84. Cf. *Blake v. United States*, 407 F.2d 908 (5th Cir. 1969); *United States v. Chandler*, 393 F.2d 920 (4th Cir. 1968); *United States v. Freeman*, 357 F.2d 606 (2d Cir. 1966); *United States v. Currens*, 290 F.2d 751 (3d Cir. 1961); *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954), modified in *McDonald v. United States*, 312 F.2d 847 (D.C. Cir. 1962); *Commonwealth v. McHoul*, 352 Mass. 544, 226 N.E.2d 556 (1967).

85. I. RAY, *MEDICAL JURISPRUDENCE OF INSANITY* 267 (Belknap Press ed. 1962).

86. Bergler, *Suicide: Psychoanalytic and Medicolegal Aspects*, 8 LA. L. REV. 504, 533 (1948).

87. A. BRILL, *FUNDAMENTAL CONCEPTIONS OF PSYCHOANALYSIS* 262 (1921).

88. D. HENDERSON & R. GILLESPIE, *TEXTBOOK OF PSYCHIATRY* 69 (10th ed. 1969), see Havens, *Recognition of Suicidal Risks Through the Psychological Examination*, 276 N. ENG. J. MED. 210 (1967) (bulk of suicidal efforts spring from despair and helplessness). Tort law's concern with the individual's responsibility or "fault" means that the sociologist's approach to the causes of suicide generally will not be very helpful. The sociologist studies the relationship between the suicide note and factors in the natural environment, such as weather, or the social environment, such as inflation. See Ohara, *A Study on the Factors Contributing to Suicide from the Standpoint of Psychiatry*, 120 AM. J. PSYCH. 798 (1965). This type of analysis is of little value to tort law because it fails to explain why one person seeks self-destruction while another does not. A study has indicated that isolated sociological factors thought to have a causal relationship to suicide did not

After hearing a psychiatrist take this position in a recent tort case, the judge stated that although he had "never been trained in psychiatry," he could recall "many figures in history and literature who have deliberately chosen self-destruction and who have not been considered insane, as the captain who prefers to go down with his ship and the hero who falls on his sword after his army has been conquered."⁸⁹ The case did not involve a ship captain but rather a state hospital patient diagnosed as suffering from severe depression.⁹⁰ The judge's opinion is an example of the failure of some courts to avail themselves of the data that would best assist them in this area.

Psychiatrists appear to agree that the tests generally applied in tort law are not the best available standards for determining how much responsibility should be placed on the suicide victim himself. More specifically, psychiatric opinion indicates that the mere fact that a decedent knew he was about to commit suicide does supply enough information about his mental condition to determine his "fault."⁹¹ Some courts have given partial recognition to the inadequacy of the cognitive test by their general acceptance of the "uncontrollable impulse" rule.⁹² Nevertheless, the restriction that most courts have

prove valid when various countries were compared. N.Y. Times, Mar. 27, 1960, at 14, col. 1. Durkheim's well-known study of suicide is relevant, however, in determining whether courts are correct in deeming an individual's suicide an "unforeseeable" result of serious injury. The "anomic" suicide postulated by Durkheim was said to occur when the individual's integration with society received a severe jolt and he was left without his customary norms of behavior. See E. DURKHEIM, SUICIDE 241, 276 (Free Press ed. 1950). Although Durkheim was focusing on major socially disruptive events such as economic depression, an accident may have the same kind of disruptive effect on an individual's living pattern. See Palmer, *The Psycho-Dynamics of Suicide*, 5 J. FOR. SCI. 39, 40 (1960).

89. *Gioia v. State*, 38 Misc. 2d 833, 834-35, 238 N.Y.S.2d 758, 760 (Ct. Cl. 1963).

90. The Appellate Division reversed in *Gioia v. State*, 22 App. Div. 2d 181, 254 N.Y.S.2d 384 (1964), finding that the decedent had acted under an uncontrollable impulse. The court never examined the merits of the liability rule it applied. In this case the trial court cannot be faulted since an earlier appellate decision in the same case clearly indicated that the individual in question did have the modicum of control necessary to rebut a finding that he acted under an uncontrollable impulse. 16 App. Div. 2d 354, 228 N.Y.S.2d 127 (1962).

91. See Hendin, *Psychiatric Emergencies*, in A. FREEDMAN & H. KAPLAN, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 1174 (1967); Allen, *Suicidal Impulse in Depression and Paranoia*, 48 INT'L J. PSYCHO-ANALYSIS 433, 434 (1967); Furst & Ostow, *Psychodynamics of Suicide*, 41 BULL. N.Y. ACAD. MED. 190 (1965); Havens, *supra* note 88; cf. MODEL PENAL CODE § 4.01, Comment (Tent. Draft. No. 4, 1955); M. GUTTMACHER & H. WEIHOFFEN, *supra* note 83, at 314 (1952).

92. See cases and materials cited note 60 *supra*. Additionally, a number of courts in the criminal law area have adopted the view that psychiatrically defined mental disease either reduces or eliminates the individual's fault. See *Wade v. United States*, 426 F.2d 64 (9th Cir. 1970); *Blake v. United States*, 407 F.2d 908 (5th Cir. 1969); *United States v. Chandler*, 393 F.2d 920 (4th Cir. 1968); *United States v. Shapiro*, 383 F.2d 680 (7th Cir. 1967); *United States v. Freeman*, 357 F.2d 606 (2d Cir. 1966); *United States v. Currens*, 290 F.2d 751 (3d Cir. 1961); *Durham v. United States*,

placed on the rule—confining the definition of uncontrollable impulse to a sudden frenzied act⁹³—does not comport with modern medical knowledge of mental illness. A failure to recognize that serious depression and psychosis are often marked by a gradual weakening of the individual's mental capabilities⁹⁴ is exemplified by decisions finding a decedent totally responsible for his own death because the fact that he wrote a suicide note showed that he deliberated.⁹⁵ A psychiatrist might find the content of the note more relevant in determining the decedent's responsibility.⁹⁶

Assuming that every person who commits suicide is not "insane," the sharp dividing line necessitated by a restrictive application of the "uncontrollable impulse" test is one that psychiatrists find does not exist.⁹⁷ Psychiatric studies indicate that either an expanded interpretation of the "uncontrollable impulse" test or the substantial factor test comes closest to enabling a court to determine whether the decedent was responsible for his actions.⁹⁸ Nevertheless, an important question remains: should the defendant who caused the serious injury that led through a chain of events to a suicide be held civilly liable? The focus of courts traditionally has been solely on the decedent's responsibility; this perspective has led them away from the tort law question of cause in fact.⁹⁹

Both psychiatric studies and testimony can be of value in determining the relationship between an injury and the ultimate suicide. Dr. Karl Menninger, who has devoted a great deal of time to the study of suicide,¹⁰⁰ has stated that assigning a cause or even more than one cause for the final act is "grossly misleading."¹⁰¹ Nevertheless, a court could

214 F.2d 862 (D.C. Cir. 1954), *modified in* McDonald v. United States, 312 F.2d 847 (D.C. Cir. 1962).

93. See cases cited notes 62-65 *supra*.

94. See Trueblood, *Contemporary Psychiatry and Responsibility*, in *PSYCHIATRY AND RESPONSIBILITY* 37 (H. Schoeck & J. Wiggins eds. 1962); *Cf.* ALI MODEL PENAL CODE § 4.01, Comment at 158 (Tent. Draft No. 4, 1955).

95. See *Widdis v. Collingdale Millwork Co.*, 169 Pa. Super. 612, 616-17, 84 A.2d 259, 261 (1951). See also *Terminal Shipping Co. v. Traynor*, 243 F. Supp. 915, 917 (D. Md. 1965) (while court did not find note to be conclusive on the issue of "willfulness" of the suicide, it did utilize it in determining whether suicide was voluntary).

96. See *CLUES TO SUICIDE* 197-99 (E. Schneidman & N. Faberow eds. 1957).

97. See materials cited notes 94-95 *supra*, and accompanying text.

98. *Cf.* A. GOLDSTEIN, *THE INSANITY DEFENSE* 78-79 (1967).

99. See *PROSSER* § 41; Malone, *supra* note 7.

100. See K. MENNINGER, *MAN AGAINST HIMSELF* (1938).

101. K. MENNINGER, *Forward*, in *CLUES TO SUICIDE* vii (E. Schneidman & N. Faberow eds. 1957); see Capstick, *The Methods of Suicide*, 29 *MEDICO-LEGAL J.* 33, 35 (1961); Stengel, *The Complexity of Motivations to Suicide Attempts*, *BULL. OF SUICIDOLOGY*, Dec. 1967, at 35.

attempt to discover what the probable causes of the suicide were, with the ultimate objective of determining the importance of a defendant's negligent act in the chain of causation.

In approaching the cause in fact question, the court should first consider whether there is any objective sign of damage to the nervous system. If there is, a psychiatric expert may be able to indicate the relationship between such damage and the suicide.¹⁰² If there is no objective physical injury of this type, the court may obtain guidance from psychiatric interpretation of facts relating to the decedent's heredity, early life, and later experience.¹⁰³ The psychiatrist will probably be concerned with the decedent's psychological makeup prior to the accident and his pre-injury adjustment to disturbing situations. Recent psychiatric studies reveal that the vast majority of suicidal efforts spring from despair and helplessness in the face of one or another of life's crises;¹⁰⁴ it is quite possible that an accident that seriously disfigures or substantially interferes with productive living is a crisis of this dimension.¹⁰⁵ On the other hand, the court should be aware of the tendency of patients to trace depression to "screen causes."¹⁰⁶ Thus, a lady whose arm has been negligently injured may locate the pain from her injury as the cause of her depression, while the true roots of her sorrow lie elsewhere.¹⁰⁷

The possibility that the defendant's act may have been only a "screen" or "trigger" cause of the suicide demonstrates a possible weakness in the "but for" approach to liability. It is arguable that a suicide might not have occurred at a particular time "but for" the defendant's negligent infliction of physical injury, either because the decedent would not otherwise have been provided with a screen cause for the suicide, or because he was in such an unstable condition that even the most minor upsetting event would have produced a suicide. Liability

102. See Rezek, *Morphological Findings in Some Endogenous Mental Disorders*, 2 J. FOR. MED. 86 (1955).

103. See Hendin, *supra* note 91; Capstick, *supra* note 101, at 35; Jackson, *Suicide*, 191 SCIENTIFIC AMER. 88, 91-93 (Nov. 1954); Stengel & Cook, *Recent Research Into Suicide and Attempted Suicide*, 1 J. FOR. MED. 252-53 (1954).

104. See Havens, *supra* note 88.

105. See J. WHITE & W. SWEET, PAIN, ITS MECHANISMS & NEUROSURGICAL CONTROL, 100-01 (1965); Jackson, *supra* note 103, at 93.

106. See, C.G. JUNG, THE PSYCHOGENESIS OF MENTAL DISEASE 72 (1960). The court should, of course, have the assistance of a psychiatric expert to distinguish a mere "screen" or "trigger" cause from a cause that played an important role in the mental illness that led to the suicide. See Capstick, *supra* note 103, at 35.

107. Statements of the decedent may be admitted under an exception to the hearsay rule that deals with the declarant's state of mind. See *Glatstein v. Grund*, 243 Iowa 541, 548, 51 N.W.2d 162, 167 (1952); *Commonwealth ex rel. Harvey v. Marhoefer*, 375 Pa. 1, 99 A.2d 276 (1953).

probably should not be imposed in either of these situations, and for that reason the "but for" test seems unacceptable. Although the so-called "thin skull" rule in cases involving physical injury might provide some support allowing recovery in cases involving pre-existing instability,¹⁰⁸ it is submitted that an imposition of such liability would be wholly out of proportion to the hazard risked in many cases of negligently inflicted injury.

The "substantial factor" test resolves the cause in fact issue more realistically in suicide cases resulting from negligently inflicted injury: Did the decedent, because of the accident, become devoid of his normal judgment and dominated by a disturbance of mind substantially caused by his injury and its consequences? Such a test can adequately resolve the difficult questions of the suicide's responsibility as well as the cause in fact issue. There should be one reservation, however, to the automatic imposition of liability upon a finding that the injuries the defendant negligently inflicted were a substantial cause of the decedent's mental illness and subsequent suicide.¹⁰⁹ Some psychiatrists may determine that a minor injury was a substantial cause, rather than a trigger cause, of a suicide in an individual who was mentally unstable before the injury. From the psychiatrist's point of view, this is perhaps correct. But from the point of view of tort law, a finding of liability would not be in harmony with the fault system because it would place an undue burden of responsibility upon the defendant. This consequence could be avoided by permitting the jury to consider the decedent's unstable condition in awarding damages. In such a situation, assuming that the defendant's act was one that was likely to produce death or serious injury, the defendant would not be subject to an unfair award of damages¹¹⁰ since his act could then correctly be considered a "substantial" cause of the suicide from the viewpoint of both psychiatric knowledge and tort law policy.¹¹¹ This approach would remove the vestiges of moral condemnation of suicide from tort law, while preserving the concept of fault in relation to a defendant's responsibility.

108. PROSSER § 50, at 299-303.

109. When cause in fact exists but the imposition of liability seems undesirable for policy reasons, the denial of liability may be couched in terms of a lack of "proximate" or "legal" cause. See Malone, *supra* note 7, at 97.

110. See *Steinhauser v. Hertz Corp.*, 421 F.2d 1169, 1172 (2d Cir. 1970) (fact that plaintiff had latent psychotic tendencies before accident would not defeat recovery if accident was a precipitating cause of schizophrenia); cf. *McCahill v. New York Transp. Co.*, 201 N.Y. 221, 224, 94 N.E. 616, 617 (1911).

111. See L. GREEN, *THE RATIONALE OF PROXIMATE CAUSE* 38 (1927); R. KEETON, *LEGAL CAUSE IN THE LAW OF TORTS* 66 (1963).

IV. AN AFFIRMATIVE DUTY TO PREVENT SUICIDE—THE CATEGORY OF SPECIAL RELATIONSHIPS

An affirmative duty to prevent the suicide of another has been imposed by law upon certain classes of defendants. These defendants may be civilly liable when their acts at most might be considered by psychiatrists as creating some of the conditions leading to the suicide. Thus, a professional dispenser of liquor may be liable for a suicide when he has merely sold a drink to an intoxicated customer, or a hospital that has inflicted no injury on a patient may be responsible for his suicide. In addition, the pharmacist who sells barbiturates without a prescription may be liable for the subsequent suicide of the buyer.

A. Professional Dispensers of Liquor

A professional dispenser of liquor, one who profits from the retail distribution of his wares, was not singled out by the common law for special treatment with respect to civil liability for causing the suicide of another. Generally, dispensers of liquor were not liable in any way to customers who injured themselves as the result of their intoxication,¹¹² and a fortiori, they were not held responsible when their customers committed suicide.¹¹³ The rationale of the cases denying liability usually focused on the issue of proximate cause. Thus, the courts found that the drinking, not the serving, of liquor was the “proximate cause” of the intoxication of the plaintiff and of his subsequent injury.¹¹⁴ Even if a court considered that serving liquor might be a substantial factor leading to a customer’s injury or death, the voluntary participation of the customer in the chain of events was said to be either a supervening cause or contributory negligence that nullified any wrongdoing on the part of the liquor retailer.¹¹⁵

The passage of alcoholic beverage control laws prohibiting the

112. *King v. Henkie*, 80 Ala. 505 (1876); *Cole v. Rush*, 45 Cal. 2d 345, 289 P.2d 450 (1955); *Noonan v. Galick*, 19 Conn. Supp. 308, 112 A.2d 892 (Super. Ct. 1955); *Cruse v. Aden*, 127 Ill. 231, 20 N.E. 73 (1889). In addition, the vendor generally has not been liable to third parties injured by the customer. *Cherbonnier v. Rafalovich*, 88 F. Supp. 900 (D. Alaska 1950); *Beck v. Groe*, 245 Minn. 28, 70 N.W.2d 886 (1955). See generally Annot. 54 A.L.R.2d 1153 (1957); 45 AM. JUR. 2D *Intoxicating Liquors* § 553 (1969); 48 C.J.S. *Intoxicating Liquors* § 430 (1947); *Johnson, Drunken Driving—The Civil Responsibility of the Purveyor of Intoxicating Liquor*, 37 IND. L.J. 317 (1962); Note, *The Common Law Liability of Minnesota Liquor Vendors for Injuries Arising from Negligent Sales*, 24 MINN. L. REV. 1154 (1965); Note, *Common Law Liability of the Liquor Vendor*, 18 W. RES. L. REV. 251 (1966).

113. *King v. Henkie*, 80 Ala. 505 (1876).

114. See materials cited note 112 *supra*.

115. *Cole v. Rush*, 45 Cal. 2d 345, 289 P.2d 450 (1955); *Noonan v. Galick*, 19 Conn. Supp. 308, 112 A.2d 892 (Super. Ct. 1955).

retail sale of liquor to intoxicated persons did not change the result in civil liability cases. These laws were interpreted as designed to protect the general public from the dangers of alcoholic beverages rather than to compensate individuals who were injured as the result of their own consumption.¹¹⁶ In a number of states, however, specific legislative action was taken against the continued denial of liability in the face of findings that the dispensing of liquor to inebriated persons directly led to their harm and to harm to others. Inspired in part by temperance movements, these legislatures enacted so-called "dram shop acts,"¹¹⁷ which specifically imposed civil liability for injuries resulting from sales to intoxicated persons.¹¹⁸ The language and scope of the statutes vary, and some have been construed to not impose liability when an intoxicated person commits suicide.¹¹⁹ Others have been interpreted to allow the imposition of civil liability for suicide if the plaintiff proves that the decedent's consumption of liquor was a substantial cause of the suicide.¹²⁰

In a number of jurisdictions, usually where the dram shop act allows a claim by an individual who loses his financial support as the

116. See *Cole v. Rush*, 45 Cal. 2d 345, 289 P.2d 450 (1955); *Nolan v. Morelli*, 154 Conn. 432, 226 A.2d 383 (1967); *Cavin v. Smith*, 228 Minn. 322, 37 N.W.2d 368 (1949); *Moyer v. Lo Jim Cafe, Inc.*, 19 App. Div. 2d 523, 240 N.Y.S.2d 277 (1963), *aff'd*, 14 N.Y.2d 792, 200 N.E.2d 212, 251 N.Y.S.2d 30 (1964).

117. See McGough, *Dramshop Acts*, in ABA SECTION OF INSURANCE, NEGLIGENCE AND COMPENSATION LAW 448 (1967); Note, *Liability Under the New York Dram Shop Act*, 8 SYRACUSE L. REV. 252, 253 (1957).

118. For a list of 21 states having these laws see McGough, *supra* note 117, at 449-51. See Ogilvie, *History and Appraisal of the Illinois Dram Shop Act*, 1958 U. ILL. L.F. 175, 180 & n.30, Note, *Common Law Liability of the Liquor Vendor*, 18 W. RES. L. REV. 251, 263 & n.59 (1966). The dramshop acts vary with respect to provisions for loss of support. Compare CONN. GEN. STAT. ANN. § 30-102 (1958), with ILL. REV. STAT. ch. 43, § 135 (1944). They also vary on the question of whether notice to the dram shop owner is a prerequisite to liability. Compare OHIO REV. CODE § 4399.01 (1965), with VT. STAT. ANN. tit. 7, § 501 (1958). Any conclusion about the law in a particular state requires a careful reading of the statute. See generally Annot., 64 A.L.R.2d 730 (1959); 45 AM. JUR. 2D *Intoxicating Liquors* §§ 561-613 (1969); 48 C.J.S. *Intoxicating Liquors* §§ 430-85 (1947); Appleman, *Civil Liability Under the Illinois Dramshop Act*, 34 ILL. L. REV. 30 (1939); Matney, *The Illinois Dram Shop Act: Recent Developments*, 1967 U. ILL. L.F. 116; *Symposium—Actions Under Illinois Dram Shop Act*, 1958 ILL. L.F. 173. Usually a person is deemed "intoxicated" for dram shop act purposes when due to his consumption of liquor there is an impairment of his mental or physical faculties resulting in a substantial diminution of his ability to think and act with ordinary care. See *Bass v. Rothschild Liquor Stores, Inc.*, 88 Ill. App. 2d 411, 232 N.E.2d 19 (1967).

119. See *Nolan v. Morelli*, 154 Conn. 432, 226 A.2d 383 (1967); *Moyer v. Lo Jim Cafe, Inc.*, 19 App. Div. 2d 523, 240 N.Y.S.2d 277 (1963), *aff'd*, 14 N.Y.2d 792, 200 N.E.2d 212, 251 N.Y.S.2d 30 (1964).

120. See *Whiteside v. O'Connors*, 162 Ill. App. 108 (1911); *Jack v. Prosperity Globe*, 147 Ill. App. 176 (1909); *Hughes v. State*, 50 Ind. App. 617, 98 N.E. 839 (1912). See also *Currier v. McKee*, 99 Me. 364, 59 A. 442 (1904).

result of an act "by an intoxicated person," courts impose liability when a customer acts while intoxicated in a manner that causes his own death.¹²¹ In these jurisdictions, recovery is often allowed without consideration of whether the apparent "accident" was in fact a suicide.¹²² This approach, of course, precludes consideration of whether the intoxication was a substantial cause of the suicide;¹²³ liability may be imposed if the suicide merely occurred during the state of intoxication. Courts have given reasons for this broad based liability. First, they have fathomed a legislative intention to correct the inequities of the common law rule.¹²⁴ Secondly, they have evolved a presumption that since the act of suicide is "of a character not ordinarily to be expected from a sane and sober person," it must be the result of intoxication.¹²⁵ Finally, courts have indicated that they do not require proof of a causal connection between the state of intoxication and the decedent's suicide because the dram shop acts do not predicate liability on negligence, but establish a form of strict liability.¹²⁶ The application of strict liability rests on a judgment that the dram shop owner must bear the cost of damage to society caused by drink. Although the risk distribution reasoning involved in this judgment is arguably sound, it seems illogical to place upon the dram shop owner the costs of harm he in no way caused. In other tort areas in which "strict liability" has been applied, courts

121. *E.g.*, *Bistline v. Ney Bros.*, 134 Iowa 172, 111 N.W. 422 (1907); *Dice v. Sherberneau*, 152 Mich. 601, 116 N.W. 416 (1908); *Sworski v. Coleman*, 208 Minn. 43, 293 N.W. 297 (1940) (*semble*); *Neu v. McKechnie*, 95 N.Y. 632 (1884); *Dickmann v. Thomas*, 36 S.D. 283, 154 N.W. 811 (1915); *Garrigan v. Kennedy*, 19 S.D. 11, 101 N.W. 1081 (1904); *Annot.*, 11 A.L.R.2d 754, 769-75 (1950).

122. *See* NEW YORK PUBLIC AFFAIRS COMM. PAMPHLET NO. 406, at 22-23 (1968); Porterfield, *Traffic Fatalities, Suicide, and Homicide*, 25 AMER. SOCIOLOGICAL REV. 897-901 (1960). The failure of the courts to explore the possibility of suicide in this context is usually explained by noting that such exploration is unnecessary because the dram shop acts permit recovery even if the "accident" was a suicide. *See* *Bejnarowicz v. Bakos*, 332 Ill. App. 151, 156, 74 N.E.2d 614, 617 (1947).

123. *See* *Bistline v. Ney Bros.*, 134 Iowa 172, 111 N.W. 422 (1907); *Dice v. Sherberneau*, 152 Mich. 601, 116 N.W. 416 (1908). In one case plaintiff's proof of causation was deemed sufficient on an even slimmer reed. *Palmer v. Schurz*, 22 S.D. 283, 117 N.W. 150 (1908) (immaterial that decedent was *not* intoxicated at the time he committed suicide; permitted inference that his mental state was "caused" by liquor).

124. *See* *Hughes v. State*, 50 Ind. App. 617, 622, 98 N.E. 839, 841 (1912). It is not necessary to rely on legislative intention since the common law cases deny liability even when there is sufficient proof that the liquor sold was the cause in fact of the suicide. *See* *King v. Henkie*, 80 Ala. 505 (1876).

125. *Bistline v. Ney Bros.*, 134 Iowa 172, 179, 111 N.W. 422, 426 (1907). *See also* *Poffinbarger v. Smith*, 27 Neb. 788, 792-94, 43 N.W. 1150, 1151 (1889) (court accepted a physician's conclusion that he did not "believe [he] ever knew a person to commit suicide unless they were drinking persons").

126. *E.g.*, *Bistline v. Ney Bros.*, 134 Iowa 172, 111 N.W. 422 (1907).

continue to require proof that the conduct of a defendant was a cause in fact of a plaintiff's injuries.¹²⁷

Although the courts are correct in their observation that suicide or attempts at suicide often occur in the excessive drinker, this does not mean that alcoholic beverages are inevitably a cause of suicide.¹²⁸ Psychiatrists for some time have assumed that alcoholics have a higher than average suicide rate,¹²⁹ but the question of an underlying psychopathology common to excessive drinking and suicide is still only a matter of speculation.¹³⁰ The early "presumption" that the sale of liquor is factually responsible for the suicide perhaps can be explained by an over-exuberant attitude of courts toward the temperance movement, but it seems clear that it is unsupportable as a rule of law.¹³¹ Before a liquor seller is held liable for a suicide, psychiatric testimony should at least establish that the imbibing of the liquor had such an effect on the drinker that without the sale the suicide would not have happened.

Although some dram shop act cases may be criticized for going too far in imposing liability for causing suicide, the blanket common law rule that shielded the liquor seller from all harmful consequences stemming from his sales¹³² perhaps did not go far enough. A number of courts seemingly have wanted to revise the common law rule but have refused to do so because of the absence of a dram shop act in their states.¹³³ In some states, however, the common law rule has been modified without the support of a dram shop act. In these states, when a bartender sells to an individual who is drunk and who later dies, the seller may be held liable.¹³⁴ There is a problem of definition concerning whether these are really suicide cases since at the time the death-

127. See *Golden v. Amory*, 329 Mass. 484, 109 N.E.2d 131 (1952) (plaintiff was engaged in ultrahazardous activity).

128. See C. LEONARD, *supra* note 4, at 290.

129. Recent studies support this thesis. See Stenback & Blumenthal, *Relationship of Alcoholism, Hypochondria, and Attempted Suicide*, 40 A.C.T.A. PSYCH. SCAND. 133 (1964). But see P. YAP, *SUICIDE IN HONG KONG* 43 (1958) (suggests that narcotic addiction replaced the use of alcohol).

130. See C. LEONARD, *supra* note 4, at 290-93; Kessel & Grossman, *Suicide in Alcoholics*, 2 BRIT. MED. J. 1671, 1672 (1961).

131. It has been suggested that the early "presumption" would impose liability on a dram shop owner when a man suffering from an incurable disease decided to take a few drinks to steady himself prior to executing his final plan. Moran, *Theories of Liability*, 1958 U. ILL. L.F. 191, 199.

132. See cases and materials cited note 112 *supra*.

133. See *Carr v. Turner*, 238 Ark. 889, 385 S.W.2d 656 (1965); *Cole v. Rush*, 45 Cal. 2d 345, 289 P.2d 450 (1955); *Nolan v. Morelli*, 154 Conn. 432, 226 A.2d 383 (1967); *Lee v. Peerless Ins. Co.*, 248 La. 982, 183 So. 2d 328 (1966).

134. *Nally v. Blandford*, 291 S.W.2d 832 (Ky. 1956); *McCue v. Klein*, 60 Tex. 168 (1883).

producing beverage is consumed, the drinker may not be acting voluntarily.¹³⁵

In dealing with suicide cases in the liquor sales area, it is essential to remember that the decedent has died by his own hand, not in an accident. Although a purpose of regulations prohibiting sales to intoxicated persons is the protection of an individual from his own indiscretions,¹³⁶ the question remains whether suicide is a significant enough risk upon which to base the imposition of liability. Intoxication does not cause a suicide in the same way that it causes accidents. Pre-existing psychological factors may be entirely or substantially responsible for an individual's act of taking his own life, and the intoxication may be merely a trigger cause.¹³⁷ On the other hand, it may be argued that even though the ingestion of liquor merely triggered the suicide, the death is a social cost of the product that the seller must absorb. In effect, the law would then be imposing liability upon a defendant not because he caused a suicide, but rather because he failed to take an affirmative step to prevent the risk.¹³⁸ The fact that the seller of liquor has a valuable license and deals with a market that generally needs protection may be a sufficient reason to impose this affirmative duty.

B. Professional Dispensers of Pharmaceuticals

Like the professional dispenser of liquor, the pharmacist is licensed by the state, and the sale of his products is regulated by a variety of criminal statutes.¹³⁹ These statutes work primarily to control the pharmacist's sale of potentially dangerous products through the requirement of a doctor's order or prescription for the type and amount of the drug sold.¹⁴⁰ Although many of the drugs so regulated, especially barbiturates, are potential instruments of suicide,¹⁴¹ the pharmacist, unlike the dispenser of liquor, usually has not been held liable when an unlawful distribution has led to suicide.¹⁴² It would seem more than

135. See notes 57-59 *supra* and accompanying text.

136. See *Soronen v. Olde Milford Inn, Inc.*, 46 N.J. 582, 218 A.2d 630 (1966); *Majors v. Brodhead Hotel, Inc.*, 416 Pa. 265, 205 A.2d 873 (1965); *Schelin v. Goldberg*, 188 Pa. Super. 341, 146 A.2d 648 (1958).

137. C. LEONARD, *supra* note 4, at 290; see *Kessel & Grossman*, *supra* note 130.

138. See generally PROSSER § 54, at 344-46.

139. See Rosenthal, *Dangerous Drug Legislation in the United States: Recommendations and Comments*, 45 TEXAS L. REV. 1037 (1967); Weigel, *State Legislation Restricting the Sale of Drugs*, 13 FOOD DRUG COSM. L.J. 48 (1958).

140. See Rosenthal, *supra* note 139, at 1060-61, 1093-94.

141. See materials cited note 148 *infra*.

142. See *Ronker v. St. John*, 21 Ohio C.C.R. 39 (3d Cir. Ct. 1900); *Scott v. Greenville Pharmacy, Inc.*, 212 S.C. 485, 48 S.E.2d 324 (1948); *Eckerd's, Inc. v. McGhee*, 19 Tenn. App. 277,

ironic that in some states a bartender selling one scotch too many is liable for the suicide of his customer while a pharmacist selling a barbiturate without a prescription is not so liable.¹⁴³

The typical claim against a pharmacist for causing the suicide of another is reflected in the leading case of *Scott v. Greenville Pharmacy, Inc.*¹⁴⁴ In *Scott*, the decedent went to the defendant's store to obtain a drug that would "ease his nervousness and promote sleep."¹⁴⁵ The defendant pharmacist had illegally sold barbiturates to the decedent for more than a year. The decedent committed suicide, allegedly while under the influence of barbiturates. The court could have found that the barbiturates were not the cause in fact of the suicide since the plaintiff did not present substantial proof that the decedent was under the influence of drugs at the time he took his life. In a more sweeping holding, however, it found that suicide is not a natural and probable consequence of an illegal sale because it is not reasonably foreseeable.¹⁴⁶ Other cases have invoked unforeseeability to deny liability when a purchaser died from ingesting an overdose of pharmaceuticals.¹⁴⁷ Although there may be some appeal to a finding that suicide by means

86 S.W.2d 570 (1935); Christovich, *Druggists' Liability—The Middle Man*, in ABA SECTION OF INSURANCE, NEGLIGENCE AND COMPENSATION LAW 456, 461-62 (1967); King, *Liability for Negligence of Pharmacists*, 12 VAND. L. REV. 695, 707 (1959). *But cf.* Trumbaturi v. Katz & Besthoff, 180 La. 915, 158 So. 16 (1934).

143. *Compare* Riesbeck Drug Co. v. Wray, 94 Ind. App. 615, 170 N.E. 862 (1930), *reaff'd on second appeal*, 111 Ind. App. 467, 39 N.E.2d 776 (1942), *with* Fountain v. Draper, 49 Ind. 441 (1875). The irony is compounded in states in which the pharmacist is licensed to sell bottled liquor: it seems probable that in these states he could be held civilly liable for an illegal sale of liquor but not of a drug. *See* Layton v. Deck, 63 Ill. App. 553 (1896). *See generally* Annot., 8 A.L.R.3d 1412 (1966).

It should be noted that in one sharply defined fact situation, a pharmacist may be held civilly liable when an illegal sale leads to suicide. In these early cases a husband or wife successfully claimed wrongful interference with marital interests of support and companionship as a result of a pharmacist's illegal sale of a dangerous habit-forming drug knowing the the drug would be used in a harmful way and that the purchaser was in a helpless condition. *Hoard v. Peck*, 56 Barb. 202 (N.Y. Sup. Ct. 1867); *Flandermeyer v. Cooper*, 85 Ohio St. 327, 98 N.E. 102 (1912); *Mobery v. Scott*, 38 S.D. 422, 161 N.W. 998 (1917); *cf.* *Tidd v. Skinner*, 225 N.Y. 422, 122 N.E. 247 (1919). Although these were not "suicide" cases, they could serve as precedent for holding a pharmacist liable in a suicide case for loss of support if the pharmacist knew at the time of purchase that the customer was in an apparently helpless condition and was going to use the drug to harm himself. Obviously, the usual case does not involve such an extraordinary degree of culpability on the part of the druggist.

144. 212 S.C. 485, 48 S.E.2d 324 (1948), *noted in* 1 S.C.L.Q. 293 (1949), *and* 2 VAND. L. REV. 330 (1949), Annot., 11 A.L.R.2d 745 (1950).

145. 212 S.C. at 488, 48 S.E.2d at 325.

146. *Id.* at 495, 48 S.E.2d at 328.

147. *E.g.*, *Riesbeck Drug Co. v. Wray*, 94 Ind. App. 615, 170 N.E. 862 (1930), *reaff'd on second appeal*, 111 Ind. App. 467, 39 N.E.2d 776 (1942); *Meyer v. King*, 72 Miss. 1, 16 So. 245 (1894); *Johnson v. Primm*, 74 N.M. 597, 396 P.2d 426 (1964); *Eckerd's, Inc. v. McGhee*, 19 Tenn. App. 277, 86 S.W.2d 570 (1935).

other than overdose is not a foreseeable result of an unlawful sale of drugs, recent psychiatric research suggests that suicide by overdose may indeed be foreseeable.¹⁴⁸

Liability has also been denied on the theory that the "legal" or "proximate" cause of death is the taking, not the selling, of the drug.¹⁴⁹ Some of the courts adopting this position have suggested, however, that if the customer ingested the drug while acting under an uncontrollable impulse or an inability to determine the nature of his act, the pharmacist would be liable.¹⁵⁰ This is analogous to the ordinary rule in suicide cases involving a negligent act.¹⁵¹ This concern with the decedent's understanding of his act makes clear, and courts have at times been explicit on the point, that it is the customer's contributory negligence that bars his claim against the pharmacist.¹⁵²

The position that contributory negligence should operate as a bar to liability has been rejected as untenable in the area of illegal liquor sales,¹⁵³ and the arguments seem even stronger that a decedent's responsibility should be disregarded when an illegal sale of drugs has led to the suicide. Every indication is that suicide should be held to be within the scope of the risk that prompted the drug sale restrictions. The *Restatement (Second) of Torts*¹⁵⁴ comments that a statute "enacted in order to protect a certain class of persons against their own inability to protect themselves" is "intended to place the entire responsibility for the harm which has occurred upon the defendant."¹⁵⁵ Not only do the drug-sale statutes fall comfortably within the *Restatement's* provision,¹⁵⁶ but there is evidence that they were specifically directed toward the suicide problem. A recent report of the President's Commission on Law

148. A comprehensive study by 2 noted psychiatrists indicates that since barbiturates were first introduced in 1903 there has been a steady increase in the number of fatal poisonings due to their use. Bogen & Smith, *Analytical Investigation of Barbiturate Poisoning—Description of Methods and a Survey of Results*, 7 J. FOR. SCI. 37 (1962). Data compiled by the Office of Vital Statistics makes it clear that this increase has been disproportionate to the general suicide rate: the incidence of suicide by ingestion of drugs tripled during the period 1953-64. Berger, *Drugs and Suicide in the United States*, 8 CLINICAL PHARMACOLOGY & THERAPEUTICS 219 (1967).

149. See note 142 *supra*.

150. *E.g.*, *Eckerd's, Inc. v. McGhee*, 19 Tenn. App. 277, 287, 86 S.W.2d 570, 575 (1935).

151. See cases and materials cited notes 54-75 *supra* and accompanying text.

152. See cases cited note 142 *supra*. See generally Annot., 91 A.L.R.2d 392 (1963).

153. See note 134 *supra* and accompanying text.

154. RESTATEMENT (SECOND) OF TORTS § 483, comment *c* at 539 (1965).

155. *Id.*; see Prosser, *Contributory Negligence as Defense to Violation of Statute*, 32 MINN. L. REV. 105, 118-23 (1948).

156. *Cf.* *Galvin v. Jennings*, 289 F.2d 15 (3d Cir. 1961) (liquor); *Tamiami Gun Shop v. Klein*, 116 So. 2d 421 (Fla. 1959) (sale of firearm to minor); *Soronen v. Olde Milford Inn, Inc.*, 46 N.J. 582, 218 A.2d 630 (1966) (liquor).

Enforcement suggests that a principal reason for the regulation of barbiturates and similar drugs is to keep them out of the hands of potential suicide victims.¹⁵⁷

The strongest argument for not placing legal responsibility for suicide on pharmacists is that the illegal sale of a barbiturate is not a cause in fact of suicide.¹⁵⁸ Although studies have indicated that barbiturates taken without medical supervision may intensify depression and in effect be a psychological cause of suicide,¹⁵⁹ the barbiturate usually is merely an instrument of a suicide rooted in deeper psychological causes.¹⁶⁰ When it is claimed that the use of an illegally sold drug over a period of time caused a suicide, but the instrumentality of suicide was not the illegally sold drug, substantial expert medical proof relating the drug to the suicide should be required to sustain the plaintiff's claim. If the illegally sold drug is used to commit suicide, however, liability should be automatically imposed on the druggist. Although the psychological causes of suicide may lie elsewhere, the laws that forbid the sale of such drugs are based on the well-supported premise that suicides will be reduced if sales of dangerous drugs are made only on orders by registered physicians. Many individuals, although deeply depressed, will not commit suicide by other more violent means.¹⁶¹ Thus, the pharmacist who makes an illegal sale may in fact play a substantial role in bringing about a suicide. His burden is rather light: he simply must not sell prescription drugs without a prescription.¹⁶²

It might be contended that the absence of statutes analagous to dram shop acts indicates a legislative determination that the illegality of a drug sale should be disregarded in a civil case. A similar argument has been used in states without dram shop acts to shield dispensers of liquor from civil liability when their sale to an intoxicated person has resulted

157. See Blum & Funkhouser-Balbaky, *Mind Altering Drugs and Dangerous Behavior: Dangerous Drugs*, in PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: NARCOTICS AND DRUG ABUSE 35 (1967).

158. See 2 VAND. L. REV. 330, 332 (1949).

159. See Bennett, *Suggestions for Suicide Prevention*, in CLUES TO SUICIDE, *supra* note 96; at 189-90. The fact that continued use of drugs over a period of time can deteriorate the mind was recognized at common law. See, e.g., *Hoard v. Peck*, 56 Barb. 202 (N.Y. Sup. Ct. 1867). There has been some dispute over whether barbiturates can have this effect. Cf. L. GOODMAN & A. GILMAN, *THE PHARMACOLOGICAL BASIS OF THERAPEUTICS* 135 (1941).

160. See C. LEONARD, *supra* note 4, at 40, 303.

161. See Mintz, *Some Practical Procedures in the Management of Suicidal Persons*, 36 AM. J. ORTHOPSYCHIATRY 896 (1966).

162. Cf. *Chicago B. & Q. Ry. v. Krayenbuhl*, 65 Neb. 889, 903, 91 N.W. 880, 883 (1902) (where burden is slight, the duty owed to protect another from a known hazard may be amplified). Certainly, the burden is less on the pharmacist than on the dram shop owner who might have difficulty deciding whether his customer is intoxicated.

in injury,¹⁶³ but there has been a strong recent trend to reject the argument since it ignores the apparent legislative policy of deterring sales that are highly dangerous.¹⁶⁴ In the drug-sales area as well, the additional deterrent of civil liability would be a helpful adjunct to the criminal prohibitions of nonprescription sales of barbiturates and other dangerous drugs. Enforcement of these criminal laws has been hampered both by the difficulty of bringing cases to light—pharmacists often restrict illegal sales to “longtime” customers—and by the apparent tendency of courts to be lenient toward pharmacists.¹⁶⁵

M. R. Stephens, former director of the Bureau of Enforcement of the Food and Drug Administration, has stated that in the “scheme of things the pharmacist plays a most vital role. His responsibility as the custodian and dispenser of our national drug supply is both great and grave.”¹⁶⁶ The pharmacist might well be reminded of his responsibility if he were held civilly liable when a drug he unlawfully dispensed led to or was the instrument of suicide.

C. Psychiatrists and Hospitals

Hospitals and psychiatrists may be charged with an affirmative duty to prevent their patients from committing suicide. The duty imposed upon a psychiatrist is based upon his general obligation as a physician to exercise the degree of skill ordinarily employed under similar circumstances by medical specialists in his field in the same or similar communities.¹⁶⁷ In the few studies that have been made, it has been uniformly suggested that a psychiatrist probably should not be held liable unless the patient was under hospital supervision at the time of

163. See cases cited note 133 *supra*.

164. *Ramsey v. Anciau*, 106 N.H. 375, 211 A.2d 900 (1965); *Soronen v. Olde Milford Inn, Inc.*, 46 N.J. 582, 218 A.2d 630 (1966); *Majors v. Brodhead Hotel, Inc.*, 416 Pa. 265, 205 A.2d 873 (1965); *Schelin v. Goldberg*, 188 Pa. Super. 341, 146 A.2d 648 (1958); see Note, *The Common Law Liability of Minnesota Liquor Vendors for Injuries Arising from Negligent Sales*, 24 MINN. L. REV. 1154, 1155-59 (1965); Note, *Common Law Liability of the Liquor Vendor*, 18 W. RES. L. REV. 251, 255-70 (1966).

165. See Stephens, *Report from the Food and Drug Administration*, 17 FOOD DRUG COSM. L.J. 148, 153-54 (1962) (144 cases terminated, 62 drug stores involved, with only 3 pharmacists imprisoned). Dr. A. E. Bennett, Chief of the Department of Psychiatry, Harrick Memorial Hospital in Berkeley, California, has noted that “the best laws regarding the use of barbiturates are not in force in this country” and that better enforcement would assist in the prevention of suicide. See Bennett, *supra* note 159, at 192.

166. Stephens, *supra* note 165, at 148.

167. See *Frederic v. United States*, 246 F. Supp. 368, 373 (E.D. La. 1965); *Hammer v. Rosen*, 7 N.Y.2d 376, 198 N.Y.S.2d 65, 165 N.E.2d 756 (1960). *But cf.* *Brune v. Belinkoff*, 354 Mass. 102, 235 N.E.2d 793 (1968), noted in 82 HARV. L. REV. 1781 (1969). See generally Prosser, § 32, at 164-68.

suicide.¹⁶⁸ Thus, confinement of the patient is thought to be a *sine qua non* of liability in this area.¹⁶⁹ It is submitted, however, that factual situations may arise in which a psychiatrist should be liable for breaching his affirmative duty of care although the patient was not confined in a hospital at the time of the suicide.

First, it seems clear that liability could be imposed upon a psychiatrist for a gross error in judgment with respect to whether a patient should be confined. Giving full ambit to psychological justifications for not confining patients unless absolutely necessary, suicidal symptoms may be so apparent that confinement would be ordered by a psychiatrist of ordinary skill.¹⁷⁰ For example, if an individual has made serious suicidal attempts, has been deeply depressed, has suffered loss of sleep, appetite, and in effect is almost unable to function in society, but his psychiatrist has declined to have him placed in a hospital, the psychiatrist might be held liable for the individual's subsequent suicide.¹⁷¹

Secondly, a psychiatrist might be deemed liable for the suicide of an unconfined patient because of the psychiatrist's power to prescribe drugs commonly used as instruments of suicide.¹⁷² Although considerable leeway must be allowed for the psychiatrist's medical judgment, there are cases in which the risks of suicide are so great that tort law should deem it negligent for a psychiatrist to write a prescription ordering a

168. See Morse, *The Tort Liability of the Psychiatrist*, 18 SYRACUSE L. REV. 691, 707-09 (1967) (similar versions of this excellent study also appear in 19 BAYLOR L. REV. 208, 228-29 (1967), and 16 BUFFALO L. REV. 649, 665-67 (1967)); Perr, *Suicide Responsibility of Hospital and Psychiatrist*, 9 CLEV.-MAR. L. REV. 427, 432 (1960) (a similar version of this article appears in 122 J. AM. PSYCH. 631, 638 (1966)).

169. This conclusion is based on the theory that a physician should not be liable for the acts of his patients. See Perr, *supra* note 168, at 432 n.19. The cases cited in support of this conclusion deal with patients who aggravated an existing physical injury contrary to their physician's orders. These cases have little bearing on the liability of a psychiatrist for the suicide of his patient. The danger that a psychiatric patient will intentionally injure himself is the very risk the psychiatrist is trained to prevent.

170. Cf. Motto, *Suicide Prevention in Medical Practice*, 210 J.A.M.A. 1229, 1230 (1969); Murphy, *Recognition of Suicidal Risk*, 62 SO. MED. J. 723, 727 (1967); Note, *Will that Patient Commit Suicide*, 2 PATIENT CARE 54 (1968).

171. See *Fernandez v. Baruch*, 52 N.J. 127, 244 A.2d 109 (1968). In *Fernandez*, the court decided that the expert testimony presented by the plaintiff failed to establish a medical standard pertaining to the relationship of homicidal and suicidal tendencies. Since the patient had displayed only the former, the defendant psychiatrists were not held liable for their failure to properly commit him. The court's conclusion that the psychiatrist did not have sufficient warning might be questioned. See CLUES TO SUICIDE, *supra* note 96, at 181. See generally A. HENRY & J. SHORT, *SUICIDE AND HOMICIDE* (1954); K. MENNINGER, *supra* note 100. The case does establish, however, that the psychiatrist might be liable for his misjudgment concerning whether an individual should be confined.

172. See note 148 *supra* and accompanying text.

large number of pills.¹⁷³ Even prescribing a small number of pills may constitute negligence if the patient's requests for pills have been continuous and the patient is considered a suicidal risk. Under these circumstances, the psychiatrist should suspect that the patient may be collecting the pills to commit suicide.

Thirdly, the liability of a psychiatrist for the suicide of a nonhospitalized patient may be grounded on the psychiatrist's negligent or intentional disclosure of confidential communications made to him by a patient. In the course of psychiatric treatment very personal matters may be revealed by the patient and if the psychiatrist makes an unnecessary disclosure of these matters the patient may suffer severe mental distress. This possibility was recognized by the Supreme Court of Utah when it stated:

If a doctor could with impunity publish anything that is true, the patient would be without protection from disclosure of intimacies which might be both embarrassing and harmful to him. This would make him reluctant to tell some things even though they might be important in the treatment of his ills. For this reason, it is obligatory upon the doctor not to reveal information obtained in confidence in connection with the diagnosis or treatment of his patient. It is our opinion that if the doctor violates that confidence and publishes derogatory matter concerning his patient, an action would lie for *any* injury suffered.¹⁷⁴

In *Furness v. Fitchett*,¹⁷⁵ a psychiatrist revealed to a patient's estranged husband confidential information disclosed by the patient, and the husband utilized this information in a separate maintenance suit. The patient suffered serious shock from the disclosure and brought a tort claim against the psychiatrist. The Supreme Court of New Zealand felt that the psychiatrist could reasonably foresee that his disclosure might result in serious harm to the patient and held him liable for the patient's injuries. Suppose the patient had committed suicide. Assuming that foreseeability of serious harm is indicated by substantial competent medical evidence, and assuming further that there is some evidence that the disclosure was a decisive factor in the decedent's decision to commit

173. See Litman, *Medical-Legal Aspects of Suicide*, 6 WASHBURN L.J. 395 (1967). Dr. Litman, while chief psychiatrist of the Suicide Prevention Control Center in Los Angeles, stated that "psychiatrists should be aware of the local standards for prescribing sleeping pills, especially to those persons known to be careless and self-destructive in the use of such pills. When such requests are continuous, careful records should be kept and consultation is advisable." *Id.* at 461. Dr. James J. Brophy has suggested that patients suspected of having suicidal tendencies should never be given enough tablets to be fatal if taken in one dosage. J. BROPHY, SUICIDE ATTEMPTS WITH PSYCHOTHERAPEUTIC DRUGS. See also Note, *Legal Risks in Diagnosing and Treating Depression*, 2 PATIENT CARE 129, 151-52 (1968).

174. *Berry v. Moench*, 8 Utah 2d 191, 196-97, 331 P.2d 814, 817 (1958) (emphasis added). The case did not involve a patient's suicide but the court did recognize a possible court claim.

175. [1958] N.Z.L.R. 396.

suicide, liability should be imposed. A suicide note or oral statement of the decedent concerning the effect of the disclosure would be important in establishing a causal connection as would the time span between the disclosure and the suicide.

There are certain situations, however, in which a psychiatrist should not be held liable, even though his disclosure may have been a cause in fact of the patient's suicide. The psychiatrist, for example, may have been under a legal duty to disclose information obtained from the patient, or the patient may have given an informed consent to the disclosure.¹⁷⁶ If a controversy arises over whether disclosure was necessary, the psychiatrist's action should be reviewed in light of the balance between the probability that disclosure would precipitate suicide and the interest of society in knowing the confidential information.¹⁷⁷

In addition to psychiatrists, general hospitals, psychiatric hospitals, sanitariums, and physicians exercising medical judgment in these institutions have been held liable when a patient commits suicide.¹⁷⁸ The general affirmative duty of hospitals includes the amount of reasonable care for the patient's safety that his medical and physical condition requires.¹⁷⁹ The voluntary nature of the decedent's act is not the focal point in hospital cases as it is in the general negligence cases. Rather, the

176. See *Hammer v. Polsky*, 36 Misc. 2d 482, 233 N.Y.S.2d 110 (Sup. Ct. 1962).

177. See PROP. FED. R. EVID. 5-04(d), Advisory Comm. Note, reported in 46 F.R.D. 259, 261-62 (1969). The Proposed Federal Rules of Evidence give 3 general instances that would call for disclosure. First, when the psychiatrist determines that hospitalization is needed he should be free to disclose facts to proper individuals at the hospital to provide for the care of the patient. Secondly, in a court ordered examination the relationship is likely to be at arms length and the psychiatrist should be free to disclose facts to the court with respect to the particular purpose for which the examination was ordered. Thirdly, when the patient injects his condition into litigation, he must be said to waive the privilege. The case of *Berry v. Moench*, 8 Utah 2d 191, 331 P.2d 814 (1958), exemplifies a careful balancing of the interests of the patient against the needs of others. In that case, physician A passed information about his own patient to physician B in order to protect the mental and physical well-being of physician B's patient. Generally, psychiatrists may need to reveal case histories for the purpose of educating other psychiatrists. This value can be protected as well as the value of maintaining the confidentiality of the communications by the process of "de-identification," by which the reporting physician may for the purpose of preserving an anonymity of the patient change factual data that he considers irrelevant.

178. See *Frederic v. United States*, 246 F. Supp. 368 (E.D. La. 1965) (physician); *Wood v. Samaritan Institution*, 26 Cal. 2d 847, 161 P.2d 556 (1945) (sanitarium); *Santos v. Unity Hosp.* 301 N.Y. 153, 93 N.E.2d 574, 100 N.Y.S.2d 153 (1950) (general hospital); *Spivey v. St. Thomas Hosp.*, 31 Tenn. App. 12, 211 S.W.2d 450 (1947) (general hospital); *Benjamin v. Havens, Inc.*, 60 Wash. 2d 196, 373 P.2d 109 (1962) (general hospital). See generally Annot., 11 A.L.R.2d 751 (1950). The cases suggest that the duty may be breached both when the hospital fails to recognize symptoms and when it fails to properly respond to symptoms it recognizes.

179. See *Lexington Hosp., Inc. v. White*, 245 S.W.2d 927, 930 (Ky. 1952); *State v. Washington Sanitarium & Hosp.*, 223 Md. 554, 557, 165 A.2d 764, 765-66 (1960); *Stallman v. Robinson*, 364 Mo. 275, 278, 260 S.W.2d 743, 745 (1953).

decedent's mental state is material only with respect to the question of whether the hospital should have anticipated the suicide.¹⁸⁰

As might be expected, liability for failure to discover a potential suicide victim is more likely to be imposed on a psychiatric hospital than on a general hospital.¹⁸¹ This distinction is a viable one if a general hospital is hampered in discovering suicidal potential because of circumscribed legal power, limited facilities, or lack of psychiatric training of its staff. Nevertheless, courts should be cautious not to permit the general hospital to ignore symptoms that would be obvious to any physician.¹⁸² In an empirical study of "suicide in a general hospital," Dr. Seymour Pollack has noted that because of the low level of psychiatric orientation among nonpsychiatric physicians, suicides occur that could be avoided.¹⁸³ Perhaps the judiciary should provide a stimulus for better training in this area by circumscribing the leeway given general hospitals with respect to their duty to discover persons who might commit suicide.

Once it is clear that the potential suicide victim should have been or in fact was discovered, a more difficult legal issue must be determined. Was the hospital negligent in its remedial action? In earlier years, the question was not thought to be complex. The hospital was charged with the duty of physically restraining the potential suicide victim,¹⁸⁴ but was not held strictly liable for a suicide because it was recognized that a patient might commit suicide despite all precautions.¹⁸⁵ In recent years, however, a number of courts have recognized the benefits of allowing hospitals to take a calculated risk with respect to the amount of freedom allowed a potentially suicidal patient.¹⁸⁶ The increased risk is considered

180. See *Maki v. Murray Hosp.*, 91 Mont. 251, 7 P.2d 228 (1932). *But see Gioia v. State*, 38 Misc. 2d 833, 834-35, 238 N.Y.S.2d 758, 760 (Ct. Cl. 1963), *rev'd*, 22 App. Div. 2d 181, 254 N.Y.S.2d 384 (1964).

181. See *Clements v. Swedish Hosp.*, 252 Minn. 1, 89 N.W.2d 162 (1958); *Mesedahl v. St. Luke's Hosp. Ass'n*, 194 Minn. 198, 259 N.W. 819 (1935).

182. See *Murphy, Recognition of Suicidal Risks: The Physician's Responsibility*, 62 So. MED. J. 723, 724-27 (1969); Note, *supra* 170.

183. See *Pollock, Suicide in a General Hospital*, in *CLUES TO SUICIDE*, *supra* note 96, at 162-63.

184. See *Emory Univ. v. Shadburn*, 47 Ga. App. 643, 171 S.E. 192 (1933), *aff'd*, 180 Ga. 595, 180 S.E. 137 (1935); *Richardson v. Dumas*, 106 Miss. 664, 64 So. 459 (1914); *Wetzel v. Omaha Maternity & Gen. Hosp. Ass'n*, 96 Neb. 636, 148 N.W. 582 (1914).

185. See *Dahlberg v. Jones*, 232 Wis. 6, 285 N.W. 841 (1939).

186. See *Baker v. United States*, 226 F. Supp. 129 (S.D. Iowa 1964); *Schwartz v. United States*, 226 F. Supp. 84 (D.D.C. 1964); *Stallman v. Robinson*, 260 S.W.2d 743 (Mo. 1960); *Zilka v. State*, 52 Misc. 2d 891, 277 N.Y.S.2d 312 (Ct. Cl. 1967); 12 AM. JUR. PROOF OF FACTS *Suicide* § 9, at 132-33 (1962).

justified by the therapeutic effect that the freedom of movement has in restoring the patient's confidence in himself.¹⁸⁷

Although the courts are to be commended for keeping abreast of psychiatry's freedom of movement or "open door" theory, they should guard against acceptance of this theory as an absolute shield against liability. Some courts that have embraced the theory, for example, have applied it to deny liability when the facts demonstrate that the hospital failed to use reasonable care to minimize the risk of suicide during the periods of increased freedom of action. In *Baker v. United States*,¹⁸⁸ a patient whom the hospital knew to be a potential suicide victim was placed in an open ward; five days after admission to the hospital he went outside, climbed over a three-foot fence, and jumped into an open window well thirteen-feet deep. The court denied liability stating that "[t]he standard of care which stresses close observation, restriction and restraint has fallen in disrepute in modern hospitals and this policy is being reversed with excellent results."¹⁸⁹ Would the patient's freedom have been restricted if the window well, an obvious hazard, had been covered? Similarly, in *Gregory v. Robinson*,¹⁹⁰ the court cited the soundness of the open door policy as the reason for its refusal to impose

187. Perr, *supra* note 168, at 430. This approach to the suicidal patient, known as the "open door" policy, is not applied by thoughtful psychiatrists in a mechanical way. A judgment should be made concerning the degree of suicidal risk present with the individual patient. See Morse, *supra* note 168, at 707-09, in which the author details the suicide precautions of the psychiatric ward at St. Joseph's Hospital in Chicago. There are 3 basic degrees of supervision and a medical judgment is made concerning which degree is necessary with respect to each patient. They are:

SP¹. CONSTANT SUPERVISION—All glass and other self-destructive items are removed from the patient's room. A staff member is assigned to the patient every minute, having him in visible sight.

SP². 15-MINUTE SUPERVISION—Potential suicidal articles are removed from the immediate environment. A specific staff member is assigned to check the patient at least every 15 minutes and be aware of him in between times.

SP³. ALTERED OBSERVATION—Each staff member is made aware that the patient is potentially suicidal and responsible for the general observation of him. *Id.* at 708.

See also C. LEONARD, *supra* note 4, at 23-26, 72-78, 135-39; Faberow, *Suicidal Crisis in Psychotherapy*, in CLUES TO SUICIDE, *supra* note 96, at 120. On occasion, courts unsympathetic to the "open door" policy have allowed jurors, without benefit of expert testimony, to make a judgment on the question of the degree of risk of suicide in the case. *E.g.*, Paulen v. Shinnick, 291 Mich. 288, 289 N.W. 162 (1939); Stallman v. Robinson, 364 Mo. 275, 260 S.W.2d 743 (1953). However, the calculus of risk with respect to whether an individual patient will commit suicide is a highly specialized question, one that is not suited to lay judgment without the benefit of expert testimony. See Fish, *The Suicidal Gesture, A Study of 114 Military Patients Hospitalized Because of Aborted Suicide Attempts*, 111 AM. J. PSYCH. 33 (1954); Perr, *supra* note 168, at 433-40; Rosen, *Detection of Suicide in Patients: An Example of Some Limitations in the Prediction of Infrequent Events*, 18 J. CONSULTING PSYCHOLOGY 397 (1954).

188. 226 F. Supp. 129 (S.D. Iowa 1964).

189. *Id.* at 132.

190. 338 S.W.2d 88 (Mo. 1960).

liability and failed to recognize that the plaintiff never seriously contended that the hospital psychiatrist was negligent in placing the patient in an open ward. The real issues were whether the psychiatrist used due care in leaving the ward and whether the window from which the patient jumped should have been protected. The hospital may very well have been negligent in both these respects regardless of the propriety of its decision to allow the patient some freedom of movement.¹⁹¹ A recent California case, *Meier v. Ross General Hospital*,¹⁹² points up this distinction rather clearly. In *Meier*, the plaintiff's decedent, a known high suicide risk, was placed near an open window on the second floor of the hospital. The court stated that although "issues of medical malpractice did arise in the case, the facts also supported a finding of ordinary negligence without regard to the propriety of any controverted medical diagnosis or treatment."¹⁹³ Courts should be careful not to let the therapeutic value of the open door policy open the door to negligent conduct in its administration.

D. Other Special Relationships—A Route to Expanded Liability

It has been observed that in certain situations the relationship between the defendant and the decedent is so special that the defendant will be held liable for causing the suicide without proof that the decedent did not know right from wrong or operated under an irresistible impulse at the time of his suicide.¹⁹⁴ An examination of some related categories may help establish a common denominator that will indicate whether and in what direction liability predicated on a special relationship should be expanded.

Like the pharmacist and the bartender, sellers of weapons are regulated in many states; at least one purpose of these regulations is to prevent the distribution of weapons to those who might make improper

191. See *id.* at 95 (Storckman, J., dissenting). The same criticism might be made of the hospital in the following cases: *Frederic v. United States*, 246 F. Supp. 368 (E.D. La. 1965) (the patient was permitted to retain a pocket knife); *Rawdin v. Long Island Home, Ltd.*, 21 App. Div. 2d 909, 251 N.Y.S.2d 756 (1964), *aff'd*, 16 N.Y.2d 636, 209 N.E.2d 118 (1965) (hospital failed to discover suicide notes kept in the patient's drawer); *Zilka v. State*, 52 Misc. 2d 891, 277 N.Y.S.2d 312 (Ct. Cl. 1967) (hospital record showed no medical determination that the patient was ready for relaxed supervision).

192. 69 Cal. 2d 420, 445 P.2d 519, 71 Cal. Rptr. 903 (1968).

193. *Id.* at 433, 445 P.2d at 529, 71 Cal. Rptr. at 913. Other courts have noted the distinction with somewhat less clarity. See *Noel v. Menninger Foundation*, 180 Kan. 23, 299 P.2d 38 (1956); *Kardas v. State*, 24 App. Div. 2d 789, 263 N.Y.S.2d 727 (1965); *Benjamin v. Havens, Inc.*, 60 Wash. 2d 197, 373 P.2d 109 (1962). Of course, if the guidelines with respect to a patient were specific enough, laymen might be permitted to determine without the benefit of expert testimony whether the directives were in fact followed.

194. See, e.g., text accompanying notes 167-93 *supra*.

use of them.¹⁹⁵ Although there have been no reported cases on which a weapon sold in violation of a statute or regulation was used by the purchaser to commit suicide, liability might be imposed on the seller in such a situation by relying on the cases holding sellers of liquor liable for injuries to consumers despite the absence of a dram shop act.¹⁹⁶ The determinative question, of course, is whether the risks guarded against by the statute include danger to the purchaser himself. If the statute is directed against injury to the purchaser, suicide would seem to be within the scope of the risk that the statute is designed to reduce.¹⁹⁷ For example, when the statute prohibits the sale of weapons to a person known to have a mental disease and such a person commits suicide with a weapon sold in violation of the statute, the seller should be held liable since one purpose of the statute was to protect mental incompetents from themselves.¹⁹⁸ Even in the absence of a statute, if a customer has indicated to the seller that he plans to use the weapon to commit suicide, and he does so, a wrongful death claim should lie for negligence.¹⁹⁹ This extrapolation of the principle of the drug and liquor cases into the weapon sales area illustrates that there may be other situations in which liability can be predicated upon the unlawful or negligent sale of a product that, if misused, may cause serious injury or death to the consumer.

The duty imposed upon those making unlawful sales of instrumentalities often used for suicide should be narrower in scope than the duty imposed upon psychiatrists and hospitals. The latter must act affirmatively to prevent suicide because of the power they have over the potential suicide victim, their knowledge of the likelihood of suicide, and the nature of the professional obligation involved.²⁰⁰ Two recent cases

195. See ARIZ. REV. STAT. ANN. § 13-918 (1956) (forbids sale to minors under age 18); CAL. PENAL CODE §§ 12550-52 (West 1970) (forbids sale to minors of varying ages depending upon type of weapon); CONN. GEN. STAT. REV. § 29-34 (1961) (forbids sale to minors under age 18); ILL. ANN. STAT. ch. 38, § 24-3 (Smith-Hurd 1970) (forbids sale to addicts, persons with prior convictions, minors, and mentally ill persons); MO. ANN. STAT. § 564.610 (1949) (forbids sale to minors); VA. CODE ANN. § 18.1-344 (1950) (forbids sale to minors). See also CAL. WELF. & INST'NS CODE § 8101 (West Supp. 1971) (forbids sale to mentally ill); N.J. STAT. ANN. § 2A:151-9 (1969) (forbids sale to mentally ill); PA. STAT. ANN. tit. 50, § 4605(2) (1969) (forbids sale to mentally ill); W. VA. CODE ANN. § 27-12-3 (1966) (forbids sale to mentally ill). There have been decisions imposing liability on a seller of weapons when a child has injured himself with an illegally sold weapon. See *Tamiami Gun Shop v. Klein*, 116 So. 2d 421 (Fla. 1959); *Lundy v. Hazen*, 90 Idaho 323, 411 P.2d 768 (1966); *Pezzo v. Wiemann*, 149 Wis. 235, 134 N.W. 899 (1912). See also *McMillen v. Steele*, 275 Pa. 584, 119 A. 721 (1923).

196. See note 164 *supra*.

197. See PROSSER, §§ 35, 64, at 196-98, 431-32.

198. See note 195 *supra*.

199. This fact situation borders on describing an intentionally inflicted harm causing suicide.

200. See cases cited notes 178-79 *supra*.

illustrate, however, that the law may impose this affirmative duty upon other individuals and institutions. Both of the cases involved schools and in both it was argued that the school had sufficient supervisory power and control over a student to be charged with a duty to use reasonable care to prevent his suicide.

In *McBride v. State*,²⁰¹ a fifteen-year old student hanged himself from the rafter over his bed in a dormitory cottage of a state training school. "Substitute parents" had supervised the student, and according to school rules the "parents" were forbidden to use corporal punishment or to leave troubled children in an emergency. On the day of the suicide, the student exposed himself to the female "parent," and the male "parent" responded with corporal punishment. The student was then left alone and hanged himself. The state was treated as having the same duty as a private enterprise, no broader and no narrower. The court held that due to the extensive control the school had over the student, it was obliged to exercise a reasonable degree of care to protect him from injury, "self-inflicted or otherwise."²⁰² Sitting as the finder of fact, the court determined that, apart from school rules, the "parents" did not exercise reasonable care because they knew or should have known that if the young man were hit and left alone "an unfortunate result could be expected."²⁰³

Although schools have an affirmative duty to exercise reasonable supervisory control over their students to prevent accidents,²⁰⁴ it is clear that the amount of knowledge and control a nonboarding school usually has over a student would be insufficient to charge school personnel or the school itself with the duty of protecting a potentially suicidal student. This theory is perhaps an explanation of the result in *Bogust v. Iverson*.²⁰⁵ In *Bogust*, a troubled student enrolled at a state college and sought help from the college guidance counselor. After five months of sessions, the counselor suggested that the girl terminate the interviews. Six weeks later, she committed suicide, and her parents brought a claim

201. 52 Misc. 2d 880, 277 N.Y.S.2d 80 (Ct. Cl. 1967), *aff'd on other grounds*, 30 App. Div. 1025, 294 N.Y.S.2d 265 (1968).

202. *Id.* at 887, 277 N.Y.S.2d at 88.

203. *Id.* at 888, 277 N.Y.S.2d at 89. This seems to indicate that for liability for suicide to attach it is necessary only that there be a foreseeable threat of serious harm.

204. See *Morris v. Ortiz*, 3 Ariz. App. 399, 415 P.2d 114 (1966); *Lilienthal v. San Leandro Unified School Dist.*, 139 Cal. App. 2d 453, 293 P.2d 889 (1956); *La Valley v. Stanford*, 272 App. Div. 183, 70 N.Y.S.2d 460 (1947); *Sullivan v. City of Binghamton*, 271 App. Div. 860, 65 N.Y.S.2d 838 (1946); *Morris v. Douglas County School Dist.*, 241 Ore. 23, 403 P.2d 775 (1965). See generally Annot., 86 A.L.R.2d 489, 554-57 (1962) (liability of public schools); Annot., 32 A.L.R.2d 1163 (1953) (liability of school officials).

205. 10 Wis. 2d 129, 102 N.W.2d 228 (1960), *noted in* 1961 WIS. L. REV. 517.

against the guidance counselor and the college. The court stated that although the individual defendant was a guidance counselor he could not "be charged with the same degree of care . . . as a person trained in medicine or psychiatry" ²⁰⁶ Treating the counselor as a nonexpert, the court found that no facts were alleged that would have apprised him of the girl's suicidal tendencies. The opinion further indicated that even a sufficiently alerted guidance counselor, conceded to have a duty to take some affirmative steps to prevent the suicide of a student, would not be civilly liable for causing suicide unless the student committed suicide in a "rage or frenzy or uncontrollable impulse"—the general negligence approach. ²⁰⁷ This attenuation of the guidance counselor's minimal duty of care does not seem justified since guidance counselors often have an excellent opportunity to detect and prevent suicides. ²⁰⁸ If the college or university provides a counselor to assist students with personal problems as it did in *Bogust*, it should be certain that the counselor has sufficient training to recognize suicidal symptoms. ²⁰⁹ If the college's psychiatric facilities are overburdened, there should at least be a duty to refer students to other sources for psychiatric assistance.

The duty of care to observe and prevent suicide also might be imposed in a number of fact situations in which tort law already has imposed an affirmative duty on one class to protect members of another class. Thus, in appropriate circumstances a jailer, ²¹⁰ an employer, ²¹¹ or even a public carrier ²¹² might be liable for suicide. Liability would depend on the degree of control the defendant had over the person who committed suicide and the degree of manifestation of symptoms of the impending suicide. It is difficult to imagine, for example, that a carrier

206. 10 Wis. 2d at 134, 102 N.W.2d at 230.

207. *Id.* at 137-39, 102 N.W.2d at 232-33.

208. See Temby, *Suicide*, in *EMOTIONAL PROBLEMS OF THE STUDENT* 133 (G. Blaine & C. McArthur eds. 1961). Suicide is the second or third leading cause of death among students. C. LEONARD, *supra* note 4, at 220; Wall Street Journal, Mar. 6, 1969, at 1, col. 1 (approximately 15 per 100,000 students each year).

209. See PROSSER § 32, at 163. The reasonable man may be found negligent when he proceeds conscious of his own ignorance into a situation in which he could cause danger to others. The special relationship between school and student should be sufficient to impose a duty upon the former to discover its own ignorance. RESTATEMENT (SECOND) OF TORTS §§ 323-24 (1965). The definition of "helpless" in § 324 should include mental as well as physical helplessness.

Once psychiatric aid is given to a person having suicidal tendencies, sudden withdrawal of that aid may leave the patient in a worse position than he was in before. It would seem that once psychiatric aid has been given by a school to a student, it should not be able precipitously to withdraw without giving the patient another source toward which to turn.

210. See *Becker v. Beaudoin*, 261 A.2d 896 (R.I. 1970); PROSSER § 54, at 338 & n.58.

211. PROSSER § 54, at 337 & n.56.

212. *Id.* at 337 & n.53.

would be held liable for the suicide of a passenger unless it failed to make a reasonable response to a communicated threat or failed to intervene to prevent a suicide when it could have done so without endangering its employees or other passengers.

V. CONCLUSION

The stigma attached to suicide in early criminal law has adhered to tort law despite the developing psychological understanding of the nature of suicide. Although not teleologically concerned with the fault concept of tort law, this developing knowledge empirically demonstrates that the person who commits suicide is not a blameworthy person and should not be regarded as such. Thus, tort law's use of the cognitive and uncontrollable impulse tests as bars to liability is inappropriate. Assuming the defendant's negligent conduct creates a substantial risk of serious injury, the fact that the injury itself is a substantial factor in causing the suicide should ordinarily be sufficient to hold the defendant liable.²¹³

Although tort law can be only a minor factor in the attempt to combat serious social problems,²¹⁴ in a number of situations it can exercise a limited prophylactic effect to prevent suicide without breaching traditional concepts.²¹⁵ Thus, the individual who intentionally brings about a suicide or who intends to inflict severe emotional harm by engaging in extreme and outrageous conduct that results in suicide can be held liable on the basis of the traditional tort policy of permitting a broader causation reach with respect to intentional torts. Additionally, the protective policy underlying criminal statutes and regulations that restrict the sale of potentially dangerous items can be further implemented by imposing liability when a violation of a statute is a substantial cause in fact of suicide or when the item illegally sold is an instrument for suicide. Finally, tort law has traditionally imposed an affirmative duty of care on some individuals to protect others from injury, and this concept can be profitably expanded as long as the courts impose liability only if the defendant in the exercise of reasonable care had the capacity to prevent the suicide.

A careful consideration of the legal and factual assumptions underlying the area of civil liability for causing suicide will undoubtedly

213. See notes 85-88 *supra* and accompanying text.

214. There is no doubt that suicide is a serious social problem. See *Wall Street Journal*, Mar. 6, 1969, at 1, col. 1.

215. Cf. Katz, *The Function of Tort Liability in Technology Assessment*, 38 U. CIN. L. REV. 587, 606-61 (1969).

require considerable judicial time and energy. It is hoped that a beginning has been made here, and that courts will now be responsive to the task.