Psychiatric Perspectives on Civil Liability for Suicide

Albert M. Drukteinis, MD, JD

Suicide is a complex event for which psychodynamic, social, cultural, and biochemical factors have been studied.[1-3] In spite of these multiple factors, courts are more and more willing to impose civil liability on a defendant for the suicide of another.[4] Psychiatrists are naturally most concerned with liability for failing to prevent suicide as it arises in the context of a malpractice suit. Where the psychiatrist or psychiatric hospital is found to be negligent, liability is based on a breach of an affirmative duty of care.[5] However, liability not only for failing to prevent suicide, but also for causing suicide has been found recently with increasing frequency. In many instances courts have moved away from a proximate causation analysis to a simple "but for" causation test to more easily find liability for suicide. Decisions in these areas have broad-reaching consequences which need to be analyzed in light of their psychosocial implications and recent psychiatric knowledge on the causes, predictability, and prevention of suicide. In particular, this article intends to show that such broadening of liability on the basis of simple direct causation is not in line with modern psychiatric thinking, perpetuates the criminal character of suicide, and becomes a convenient method of shifting the naturally expected guilt of survivors. In addition, studies are reviewed which indicate that suicide is not predictable and, therefore, even where a proximate causation test is used the use of foreseeability does not coincide with actual facts or actual foresight. The implications of this in cases of direct causation of suicide as well as failure to prevent suicide are discussed.

Early Legal Views on Suicide

In English common law suicide was considered to be a crime. The deceased was guilty of a felony that was punished by a shameful burial at the cross roads of a public highway "with a stake through the heart and a stone on the face."[6,7] In addition, the deceased would often suffer forfeiture of his/her estate.[8] His/her crime, however, was contingent on the fact that he/she was "in his senses, and with the capacity of discerning right from wrong."[9] This very standard was later formulated in the well-known M'Naghten Rule for criminal responsibility.[10] While this severe type of

Address correspondence to Dr. Drukteinis. Dr. Drukteinis' address is 30 Canton Street, Suite 12, Manchester, NH 03103

punishment was generally not followed by American courts, many jurisdictions still made suicide a crime.[11,12] As psychiatric knowledge and public awareness of mental disorders grew, the suicide "victim" was gradually viewed as emotionally disturbed and therefore not culpable for the criminal act of self-destruction. So, for the most part, the criminal categorization of suicide and criminal penalties have been abandoned.[13]

In common law there was no civil action for suicide since a deceased person's right of action died with him/her. Therefore, he/she could not sue another for torts that may have contributed to his/her death. Likewise, his/her survivors could not make a claim against the tortfeasor, since the death of another human being was not considered their injury.[14] Modern wrongful death and survivor statutes have now been enacted so that third parties can bring a tort action for their loss upon a relative's death and on behalf of the deceased himself/herself for injuries incurred by him/her prior to his/her death.[15] However, courts were reluctant originally to grant recovery where death was by suicide, because the killing of oneself was a willful intervening act which broke the chain of causation and could not have been foreseeable.[16,17]

Since those early decisions, courts have gradually recognized civil liability for the suicide of another and allowed recovery in a variety of circumstances. These have included actions for failure to prevent suicide, injuries in the work place, and both intentional and negligent infliction of bodily injury or emotional distress leading to suicide. Since suicide is the ninth leading cause of death in the United States[18] and litigation is generally increasing in this country,[19] it is likely that claims for causing or failing to prevent suicide will also increase in frequency. This is especially likely since survivors of a suicide victim are so prone, at least in our culture, to feel extreme guilt and to obsess over the death, trying to find reasons and causes and to cast blame.[20] So now, we must determine whether or not the enlightened abandonment of a suicide victim's criminality has merely been replaced by finding criminality in the defendant under the guise of civil liability.

Modern Developments of Causation

Failure to Prevent Suicide Liability for failing to prevent suicide is based on the breach of a specific affirmative duty of care owed to the person committing suicide.[21] This specific duty can fall on a variety of potential defendants. *Bellah v. Greenson* is a typical example of a case where a psychiatrist was found to breach a special duty of care.[22] In *Bellah* there was sufficient cause of action against a doctor whose patient killed herself, because it was determined that a psychiatrist-patient relationship had existed, the psychiatrist had knowledge that she was likely to commit suicide

and recorded it in his notes, and the psychiatrist allegedly failed to take appropriate preventative measures.[23] The nature of the appropriate measures then became a question of fact for the jury. Although it is generally accepted that the duty owed to a patient in an institutional setting may be greater than in outpatient treatment, nonetheless it is the trial court which will resolve the adequacy of any precautionary steps taken, based on the merits of the case.

Not only psychiatrists and hospitals have been found negligent and therefore liable for a patient's suicide,[24–27] but courts have ruled that a special duty of care was also owed to a suicide victim by liquor dispensers, jailers, and pharmacists.[28]

As indicated above, liability for failing to prevent suicide generally requires that the one owing the special duty was in a position to know about the suicide potential (i.e., it was foreseeable) and that he/she failed to take measures to prevent the suicide from occurring.[29] It would not be surprising to see this kind of liability extended further to others who may be in a special relationship to a person committing suicide and, therefore, deemed to have a special duty of care, such as guidance counselors, employers, public carriers, hotel managers, attorneys, and even parents.[30,31] In contrast to cases where liability is imposed for causing suicide and the deceased's intentional act of killing himself/herself may be a superseding cause which breaks the chain of causation;[32] in failure to prevent suicide actions, the main issue is the breach of a special duty. The voluntary act of the deceased is irrelevant and does not break the chain of causation since the breach of duty implies a capacity on the part of the defendant to prevent the suicide anyway.

Workmen's Compensation Cases Civil liability for causing suicide most often arises in the context of a workmen's compensation action.[33] Typically, workmen's compensation statutes allow recovery if an injury arises out of and in the course of employment.[34,35] While these statutes create a no-fault remedy for the injured worker, a proper defense for the employer is that the injury was purposely self-inflicted.[36] Where the injury claimed is a suicide, courts have mainly focused on the causal relation between the employment and the suicide, applying one of several tests.

The earliest of these tests was stated by *In re Sponatski*.[37] In *Sponatski* an employee sustained an injury to his eye through a splash of molten lead and later during treatment at the hospital became depressed, suffered hallucinations, and leaped to his death through a window. The suicide was compensable because of the following criteria: (1) There was a prior physical injury. (2) The act was due to an uncontrollable impulse (or the individual was in a delirium or frenzy). (3) The deceased had no conscious intent to kill himself. (4) He did not realize the consequences of his acts.[38]

While a number of jurisdictions followed the *Sponatski* rule,[39-43] a more frequently used test now is known as the "chain of causation rule" as asserted in *Burnight v. Industrial Accident Commission.*[44] There, an employee with a history of a previous depressive episode was sent to supervise the conversion of a recently acquired paint plant. Allegedly, because of long hours, irregular diet, and other employment frustrations he became depressed and, although treated, released, and talking rationally, he later slashed his wrists with a razor killing himself. The employer was found liable under workmen's compensation law. Simply stated, the rule says that if the injury and its consequences directly cause the employee to become "devoid of normal judgment and dominated by a disturbance of the mind which leads to the suicide" then the suicide is compensable.[45]

Rejecting the notion that liability can only be found if the deceased did not know what he/she is doing, the California court reasoned that a "conscious volition to produce death does not necessarily make the suicide a separate agency unconnected with the primary injury." The Court reviewed previous cases of suicide linked with industrial injury and concluded that "in practically all ... the suicide is the result of a manic depressive state resulting from the injury." The Court went on to say that the manic depressive condition "operates to break down rational mental processes" and provides the "irresistible impulse" for suicide.[46] Therefore, if it can be shown that without the injury there would have been no suicide and that the individual, because of a disturbance of the mind, could not control his actions, then the suicide is in the direct chain of causation. Essentially then, the rule substitutes a "but for" analysis coupled only with an irresistible impulse.[47] In this way an individual who would not have committed suicide "but for" his work-related injury can be compensated if the injury caused him/her to be devoid of normal judgment in controlling his/her actions. Furthermore, the injury need not be physical and may include "overstress, heavy responsibility, and frustration."[48-51]

The justification for the chain of causation rule was outlined in *Whitehead v. Keene Roofing Co.*, on which the *Burnight* court relied, namely, that the rule is most consistent with "the general socio-economic purpose of workmen's compensation statutes, so that benefits for survivors are most properly taken from employers and ultimately consumers."[52] It can be seen that the use of this test appears to be mainly based on public policy considerations. Not only is the *Burnight* court psychiatrically naive when it says that suicide associated with work-related injury is typically due to a manic depressive condition caused by the injury, but problems in relying on an irresistible (uncontrollable) impulse test have been noted in its use as a standard for criminal insanity. Most importantly, it is hard to distinguish afterward whether an act was uncontrollable or just uncontrolled.[53] Recent outcries

against the insanity defense have even prompted the American Psychiatric Association's Insanity Defense Work Group to propose the elimination of the irresistible impulse aspect altogether from the American Law Institute test of insanity.[54]

Intentional and Negligent Torts Intentional acts of the defendant to induce suicide by aiding the victim, by being the agent of death, or by forcing another to suicide have resulted in criminal prosecution for murder.[55-57] Not only can the defendant be found criminally liable but civil liability can be imposed for an intentional tort. Where the intentional conduct, however, is not designed to cause suicide itself, but only physical injury or emotional distress which then leads to suicide, courts have grappled with various types of analyses.

In earlier cases, even after an intentional tort, there was no liability for suicide since suicide is not the "natural result" of the tortious conduct.[58-60] Later, courts acknowledged that recovery is possible if, first, the victim did not understand the nature of his act or, second, he/she acted by an uncontrollable impulse.[61,62] Now, some courts have allowed even greater liability if the defendant either intended the same type of harm or his/her actions were a substantial factor in bringing about the suicide.[63,64] Although some jurisdictions still require that the victim acted under an uncontrollable impulse, others following *Restatement of Torts Section 279* (1934) utilize only a "substantial factor" test to determine liability.[65] So, if the defendant intended by his/her conduct to cause serious mental distress and this was a substantial factor in bringing about the suicide, he/she will be liable regardless of the absence of insanity or the absence of an uncontrollable impulse.

Employing a substantial factor test is equivalent to a but for analysis, since "no case has been found where the defendant's act could be a substantial factor when the event would have occurred without it, nor will cases very often arise where it would not be such a factor when it was so indispensable a cause that without it the result would not have followed."[66] Therefore, liability is found if but for the defendant's intentional acts the suicide would not have occurred. Again, as in workmen's compensation cases, this appears to be a public policy decision. The defendant's intention to invade the legally protected interest of another is weighed more than the degree of his/her moral wrong or the seriousness of the harm which he/she intended. Much as someone who intentionally strikes "the thin skull" of another causing his death unintentionally, the defendant who intends to inflict bodily injury alone or serious emotional distress will be held liable for a suicide that follows. The suicide is regarded as the same "type of harm" as that intended.

In negligence actions, early case law held that suicide was not a foreseeable result of even severe physical and emotional injuries. In *Scheffer v. Railroad*

Co. a passenger who was injured in a train collision, severely disfigured, and later, after becoming psychotic, took his life was denied recovery because his own act was the proximate cause of his death.[67] In the years that followed, only a few courts made determinations of liability for suicide resulting from negligent acts. For example, in *Daniels v. New York*[68] a man struck by a train became delirious and in this state killed himself. The negligent defendant was found liable for the suicide because the victim did not comprehend the nature of his act. Also, in *Brown v. American Steel and Wire Co.*,[69] it was determined that the defendant was liable if the victim acted under an "uncontrollable impulse." In both cases the presence of a condition of "insanity" was necessary. Although insanity is not a psychiatric term but is defined by applicable legal standards, here the implication is that insanity is equivalent to mental illness since the very standards which might legally define it are additional requirements. The basis for this liability is summarized in *Restatement (Second) of Torts Section 455* (1965), which provides that if the negligent conduct brings about the insanity of another so as to make the negligent actor liable, he/she is also liable for harm done by the injured party to himself/herself, if the party did not realize the nature of his/her act or could not resist an impulse. The lack of cognitive awareness or the irresistible impulsiveness, which are analogous to criminal responsibility standards here, prevents the deceased's intervening actions from becoming an independent and superseding cause, thereby the insanity and subsequent suicide can both be viewed as a type of harm that was foreseeable and proximately caused by the tortfeasor's negligence.

Many jurisdictions expressly cite *Restatement, Section 455* and follow the test that a negligent actor who brings about the "delirium or insanity" of another is also liable for the harm done by the other to himself/herself if the victim is without cognitive awareness or acting under an irresistible impulse.[70–73] However, in *Tate v. Canonica*[74] a California court further broadened liability in negligence actions for suicide. In deciding liability for suicide in a case that alleged both intentional and negligent infliction of emotional distress leading to suicide where a defendant had made threatening, harassing, and humiliating accusations to the victim, the court rejected the need to find a condition of insanity. Instead it reasoned that if a "mental condition" existed in which the injured person is able to realize the nature of his/her act and control it, the suicide is an independent intervening act breaking the chain of causation. Although the court went on to say that if a "mental illness" results in an uncontrollable impulse to commit suicide, then the tortfeasor can be found liable, there is an implication that a mental condition that creates an uncontrollable impulse would be sufficient to link the suicide to the defendant's negligent injury and *no mental illness need be present.* Resting decisions on such vague terms as a

mental condition and uncontrollable or irresistible impulse is even more arbitrary when some courts hold that an irresistible impulse does not necessarily mean "a sudden" impulse, so that a knowing and intentional suicide can at times be irresistible, allowing liability.[75] In these jurisdictions, the issue for the jury then is reduced to whether or not the defendant's negligence substantially contributed to the suicide.[76] Again, this becomes a substantial factor test in which proximate causation is merely a question of but for the negligent act would the suicide have occurred.

Discussion

From these background observations, we see two shifts in the law regarding suicide. Apart from the clear trend in the United States' courts to attempt to eliminate the criminal label of a suicidal act and not hold the victim criminally responsible, there is, first, an increasing trend to regard the victim's acts as involuntary and to find someone else responsible either for causing the suicide or failing to prevent it. Second, the relationship of cause and effect in these cases has gradually been broadened.

Looking at civil liability for causing suicide, in workmen's compensation cases public attitudes about the purpose of workmen's compensation statutes are said to be most consistent with the simple chain of causation or the but for analysis in finding an employer liable for his/her employee's suicide. Likewise, for public policy reasons, intentional torts committed against another with the subsequent suicide of the injured party have also required only a but for analysis. In some jurisdictions it is implied that even a negligent tort that ends in suicide may need only a but for connection.

Whenever a but for analysis is used, all that is necessary to show is that the action of the defendant was a substantial factor in bringing about the suicide. Further considerations of proximate causation or foreseeability are minimized. This then is the simplest test of causation to prove and supposedly turns on objective facts not policy judgments. It becomes even simpler if suicide is not thought of as voluntary but the product of a disordered mind, because the state of mind of the actor is elusively proven if at all.

While a great many suicides are by individuals suffering with major mental illness, including schizophrenia and the affective disorders,[77] there are also those which occur in people who have personality disorders, chronic patterns of neurotic conflict, situational stress with poor coping mechanisms, and even rational motives.[78,79] Restrospective analysis of a suicide however will invariably reveal some emotional stress regardless of whether or not the individual had a recognized illness. Furthermore, it should be possible to study the background, dynamics, and current stresses of any individual who commits suicide and find a psychologic framework in which

to explain the act. In this way, a "disorder" will quickly become evident and courts can justify finding another class of defendants responsible in money damages.

However, suicide is not merely a symptom of mental illness such as a hallucination or delusion. It is an act, usually aimed at self-destruction, regardless of accompanying delusional thinking or severe despondency. When a major mental illness, which can be considered a true disorder, is present, it does not necessarily account for the suicide. Even if it was a motivating factor, the deceased may still have been competent enough to choose between committing suicide or not, for the act itself should not be viewed inherently as incompetent. Surely not even a majority of patients with mental illness kill themselves and for those who do their death is not just an aspect of their illness, but a result of their actions. In addition, when signs of emotional distress can easily lead to the presumption of a disorder, attributing the suicide to the disorder totally ignores the obvious voluntary component and reduces the actions of the deceased to a symptom of the disorder. It may be that in the patient with a true disorder the hopelessness and despair that he feels are symptoms, but his/her act of suicide and subsequent death are not. When a but for analysis is used, therefore, it links the employment conditions or intentional acts of the defendant to the subsequent disorder and then to the suicide, not only without foreseeability consideration but also without recognizing how overinclusive the term disorder can be and how poorly it alone explains suicide.

Tort law has long served as an auxilliary arm of criminal law and has been used to deter wrongful conduct.[80] Historically, in fact, there was no distinction between intentional torts and criminal acts.[81] Even now, when a defendant strikes another he/she can be both civilly liable for the intentional tort of battery and criminally liable for the crime of battery.[82] Under tort law he/she is also liable for all effects of his/her blow even if the full consequence was unintended. The reasoning is that but for the intentional blow, even those unexpected consequences would not have occurred. Liability is therefore extended under the theory that if one intends to cause harm he/she is also the cause of any harm of the type intended.[83] The criminal features of this analysis rest on the defendant's intent and culpability. However, even if the defendant intended physical or emotional injury but not suicide, is death by suicide that follows the same type of harm? If one intentionally strikes the thin skull of another he/she has risked finding a range of the skull's possible thicknesses and is responsible for the type of harm that comes from his/her blow, even for unforeseen consequences to the victim in the process of obtaining treatment or seeking remedies. But the act of suicide is not remedial, in that it does not preserve life or physical and emotional well being, but aggravates the injury further by bringing the

individual himself/herself to the final stage in the continuum of injury-death. The type of harm that the victim did to himself/herself was not intended by the defendant, could not be expected by the defendant, and did not occur during any remedial measures that the defendant could foresee. So, the but for analysis with regard to suicide masks a judicial policy about social responsibility, since suicide was not the same type of harm as that intended by a defendant intentionally inflicting physical or emotional injury.

Paradoxically, therefore, while the suicide victim's actions are no longer considered to be criminal, the growing reliance on the but for causal connection in civil liability for suicide means that courts are basically applying an intentional tort/criminal standard against the defendant. In essence this relieves the suicide victim of criminal blame, only to find blame or liability in someone else. Since blame is commonly sought in the aftermath of a suicide and the guilt of all survivors intensifies the search, the ease with which a but for analysis can be used to find civil liability conveniently serves to exculpate the guilt-ridden family and to protect the image of the victim. It is known that as a means of social control the law defines not only who is deviant but also who is respectable, thereby ritualistically serving to externalize guilt.[84] So here, the law provides the means by which survivors can establish their own respectability and deal with the powerful emotions generated by the horrifying enigma of suicide.

As noted above, most jurisdictions have not applied a but for analysis alone to negligent torts that result in suicide and instead find that a suicide was forseeable, or proximately caused, if a condition of insanity existed at the time of the act. In most cases a M'Naghten-like standard is used and the party who killed himself/herself must not have known the nature of his/her act or must have been operating under an irresistible impulse. The use of a criminal standard which relieves a suicide victim of responsibility for his acts is now the measure of the defendant's liability. But, even more important than what type of standard is used to determine foreseeability, is the question of whether or not suicide is foreseeable at all.

Proximate causation is generally measured in negligence actions by determining foreseeability.[85] By using this concept, the defendant will be liable only for those consequences of his/her negligent acts which were reasonably foreseeable at the time he/she acted.[86] In other words, the question is whether the consequences were in the defendant's scope of risk. When suicide must be coupled with insanity for liability to be found, then the insanity is considered within the scope of risk and the defendant is liable for both the insane condition and the suicide. Although it can be argued that the criminal standard for insanity should not be the final measure of the defendant's civil liability in causing suicide, at least the foreseeability of

a severe mental disorder, that stems from negligently inflicted physical or emotional injury, is within the scope of risk. However, if the requirement of insanity is eliminated,[87] then very serious questions arise. Is another's suicide ever foreseeable? Can suicide fall within the scope of risk of simple negligence?

Even though the legal use of the term foreseeability and the concept of predictability are not synonymous, ultimately we must look at foreseeability in terms of both the subjective likelihood and statistical probability that particular events will occur. So when events are more frequent they are more predictable. When they are infrequent, they are more likely to be random and the risk of occurrence is beyond the scope of prediction. The frequency, risk, and therefore predictability of suicide must also be investigated.

Extensive medical and psychiatric efforts have been made to understand and to treat suicide.[88] Demographic data about suicide are available, a number of risk factors have been identified, and psychiatrists empirically report satisfactory treatment of patients who are in the high-risk groups.[89,90] Indeed, our treatment of mental disorders has grown considerably in the past twenty-five years with the advent of effective psychopharmacologic agents.[91]

Unfortunately, however, the suicide rate has not declined and suicide still remains a leading health problem.[92] In addition, the experience of organized suicide prevention centers in the United States and in Great Britain shows that these centers are ineffective in preventing suicide.[93,94] In general, psychiatric prediction of a patient's potential for suicide is being questioned more and more.[95] A recent important study by Pokorny,[96] involving 4,800 patients consecutively admitted to a Veteran's Administration psychiatric service, concluded that "identification of particular persons who commit suicide is not currently feasible because of the low specificity of available identification procedures and the low base rate for this behavior." Therefore, while statistically suicide is increasing in frequency, its probability of occurrence is still too infrequent to allow accurate prediction in individual cases. This result certainly does not mean that our efforts to treat despairing patients and those with serious mental illness are in vain, but it casts serious doubt on psychiatric ability to effectively prevent suicide. This has great implication in cases of civil liability for failure to prevent suicide, since there the underlying presumption is that such a capacity exists. Likewise, if professionals trained in mental health cannot prevent suicide or even predict it accurately, then the average citizen certainly has no way of predicting it. Suicide should then be viewed as a random infrequent event whose base rate is so low that it cannot reasonably be within the scope of risk of a defendant and therefore not foreseeable.

Summary

In conclusion, the increasing trend to find civil liability for causing or failing to prevent suicide should be viewed in light of current psychiatric data and the broad-reaching social implications of finding such liability. Although the criminality of the suicide victim has been abandoned, it appears to be replaced by finding others liable for the suicide, often by using criminal standards. This is especially convenient since guilt-ridden survivors naturally seek to explain the horrifying act, to cast blame, and to protect the image and character of the deceased.

Courts should avoid moving away from a proximate causation analysis to a but for analysis in actions for causing suicide, since this is not in line with psychiatric knowledge and ignores the multicausal nature of mental illness and suicide itself. Too quickly retrospective analysis of a suicide will reveal signs of emotional distress and a disorder can be assumed. So, when a but for analysis is used, the link between the defendant's acts, the resulting disorder, and the consequent suicide is easily made. Even if the fictional "irresistible impulse" is an added requirement, this standard is too vague and is already finding disfavor in its long-held use as a measure of criminal responsibility. Likewise, using a but for analysis perpetuates the criminal character of suicide, because it weighs liability with the standard found in intentional torts, which were historically indistinguishable from criminal acts.

Even where a proximate causation test is used to measure liability, the ultimate question is one of foreseeability and whether the suicide is in the scope of risk. However, studies show that suicide may be too random an event to be foreseen and predicted by even experts in the field. So, requiring defendants to assume such liability may be unreasonable and discounts the voluntary aggravating harm that the deceased contributed himself/herself.

If suicide cannot be predicted nor effectively prevented, then in failure to prevent suicide actions the affirmative duty of care imposed on a defendant is beyond his/her capability too. Whereas a number of caretakers, including psychiatrists, have been held liable for breaching a duty of care, even gross deviations from their respective standard may in fact be immaterial. Since psychiatrists and psychiatric hospitals are ostensibly in the best position to control suicidal behavior, until research data support the effectiveness of treatment, not just of emotional illness but of suicide itself, liability for failing to prevent suicide should be strictly scrutinized and rarely allowed.

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