Commentary: Responsibility and Insurance Coverage of the Mentally Ill

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Should criminal law principles be applied to life insurance claims made by the beneficiaries of an insured person who commits suicide? Any discussion of the criminal law and the M'Naghten test of criminal responsibility, as sometimes used by the courts and recommended by the authors, obfuscates the resolution of contemporary issues.

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In their paper "On Sound and Unsound Mind: Role of Suicide in Tort and Insurance Litigation," Robert I. Simon, James L. Levenson, and Daniel W. Shuman[1] point out that penal statutes against suicide have been repealed or are not enforced and that they had to search the books to find cases mentioning suicide as a crime. In fact, even when the laws were on the books of the various states, they were not implemented. At common law, the property of a person who committed suicide was forfeited to the Crown, but that provision was not adopted in the United States. Hence, it was a law without penalty. The issue that the authors discuss is the applicability of criminal law principles to life insurance claims made by the beneficiaries of an insured who commits suicide.

According to the National Institute of Mental Health, about 90 percent of those who commit suicide have a diagnosable mental disorder—most commonly, depression—often complicated by comorbid substance abuse. In law, the issue of suicide arises in tort (did the individual die as a result of a wrongful act or was it suicide?) as well as in insurance cases. Any discussion of the criminal law and the M'Naghten test of criminal responsibility, as sometimes used by the courts and recommended by the authors, obfuscates the resolution of contemporary issues. The authors suggest that particularly in states that criminalize suicide, the role of the court is to determine whether the suicide constitutes a criminal act for which recovery should be denied. They say:

> A reasonable approach to reach that determination is to apply the criminal responsibility standard that the jurisdiction would use to assess the person's mental state, if it sought to prosecute the person who committed or attempted to commit suicide. Creating another definition of unsound mind is unnecessarily confusing [Ref. 1, p 178].

Yet, in another place they say:

> In malpractice and other tort actions, the concept of comparative fault or responsibility is a much more accurate and practicable way to resolve this question than to attempt to fit it into an all-or-nothing insanity defense standard that seems ill suited to address the multifactorial considerations that may result in a decision to take one's life [Ref. 1, p 181].

Is it a "reasonable approach" to use the criminal law test of criminal responsibility? How would it help resolve a case in which a mentally ill person commits suicide to get to paradise? It is well to recall the distinction in assessing responsibility of the mentally ill in criminal and civil (tort) cases. In criminal law, on the one hand, there is the well-known M'Naghten standard that a person is to be found not guilty by reason of insanity when, on account of mental disease or defect, he does not know the nature and quality of the act or does not know the act was wrong. Tort law, on the other hand, does not include the moral dimension of knowledge of right or wrong. It does not have a verdict of not liable by reason of insanity. Coupled with a number of different explanations given for the liability of the mentally disabled is "an unexpressed fear of introducing into the law of torts the confusion and unsatisfactory tests attending proof of insanity in criminal cases" (Ref. 2, p 1073).

"Intent," as the term is used in the law of torts, is used to denote that "the actor desires to cause consequences of his act, or that he believes that the conse-

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quences are substantially certain to result from it."[3] As one court put it:

> [T]he law will not inquire further into his peculiar mental condition with a view to excusing him if it should appear that delusion or other consequences of his affliction has caused him to entertain that intent or that a normal person would not have entertained it.[4]

In tort law, the requirements of liability for battery are bodily contact, offensiveness of the contact, and intent to make the contact. The absence of intent to do harm and even the presence of good will and pure motives will not prevent liability. Hence, when consent is absent, there may be liability in cases of practical jokes, mistaken identity, and medical treatment (even when the treatment is beneficial). A standard jury instruction in tort cases reads: "An adult who is disabled by reason of mental illness must still observe the same standard of care which a normal and reasonably careful person would exercise under the circumstances which existed in this case" (e.g., Ref. 5).

In regard to insurance coverage, disputes arise in connection with two different types of insurance policies: liability policies and life insurance policies, each involving a different definition of intent. For the vagaries of the meaning of intent, let us first discuss liability policies, then life insurance policies, the topic of the authors' article.[1]

Most litigated cases of torts of the mentally ill involve coverage under a liability insurance policy. A mentally ill person can be found to have intended or expected the results of his actions within the meaning of a liability insurance policy's exclusionary clause for bodily injured coverage when "expected or intended by an insured person."[6] That language has evolved over the past 40 years. Prior to 1966, liability policies generally stated that damage or injury would be covered by the policy only if it was "caused by an accident that occurs during the policy period." Any duty of the insurer to defend or indemnify the insured was restricted by this "accident" requirement. Owing to the difficulties in construing the word accident—including conflicting opinions about whether the term was to be understood from the viewpoint of the insured or the victim—the National Bureau of Casualty Underwriters and the Mutual Insurance Rating Bureau rewrote the standard policy language in 1966. The revision provided coverage "for damage- . . .caused by an occurrence" and defined "occurrence" as "an accident. . .which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured."

The revision, defining "accident" from the standpoint of the insured, not of the victim, takes a position favorable to insurers, since it denies coverage to the insured who commit intentional torts. Two lines of cases, however, have developed in the interpretation of this provision. One line has adopted the view that the insured's subjective intent must be explored in determining coverage. If the insured did not have the specific subjective intent of causing harm to the plaintiff, his or her acts are deemed accidental, thus falling within the meaning of "occurrence." The result is a decision in favor of coverage, thereby providing compensation for the victim. Psychiatric testimony is usually involved when a subjective approach is taken. Another line of cases, taking a contrary approach, focuses on an objective analysis of the insured's actions. In so doing, most of these courts have found that the intent to inflict injury may be inferred as a matter of law when the insured's actions are of a reprehensible character (such as sexual molestation). Under this objective analysis approach, a finding of no coverage is inevitably the result.

In 1963, the New Jersey Supreme Court handed down a much publicized decision, though a minority one, on the effect of insanity on the operation of intentional-exclusionary clauses in liability insurance policies. In *Ruvolo v. American Casualty Co.*,[7] a physician, Anthony Ruvolo, shot and killed another physician with whom he practiced medicine. At the time, Ruvolo had a personal liability insurance policy that provided that the insurer would pay all sums that Ruvolo "shall become legally obligated to pay as damages because of the death of any person resulting from [his] activities." The coverage was limited by an exclusionary clause providing that the policy did not apply to death "caused intentionally by or at the direction of the insured" (Ref. 7, p 206).

The victim's widow filed a wrongful death suit, which Ruvolo's insurer refused to defend on the grounds that the death had been caused by Ruvolo's intentional act. The guardian of the insured then filed a declaratory judgment action against the insurer, seeking to establish that the policy afforded coverage. Relying on the affidavits of psychiatrists that Ruvolvo was insane at the time of the killing and lacked the capacity to form a rational intent, the trial court granted summary judgment for the plaintiff. The trial court held that an act performed under such

circumstances could not be considered intentional. Likewise, on appeal, the New Jersey Supreme Court concluded that if an insured would have been excused from responsibility under the state's criminal standard (at the time, the M'Naghten test), then the act was not intentional for the purposes of the insurance policy. The court also provided for a finding of volitional incapacity, like the "capacity to conform conduct" test used in the American Law Institute's criminal standard. *Ruvolo* has been followed in few other cases. In effect, the decision provides compensation for victims by way of insurance. In any event, in every jurisdiction the mentally ill offender would be personally held liable in tort.

An illustration of a case raising the question of the expert's evaluation of the competency of the insured is the decision in Minnesota in 1991, *State Farm Fire & Cas. Co. v. Wicka*.[8] In this case, at issue was whether the exclusion of coverage in a homeowner's liability policy of "bodily injury. . .which is expected or intended by the insured" applied to the insured who, allegedly because of mental illness, lacked the capacity to form the intent to injure. The insurer argued that there was no liability under the policy for injuries suffered by the victim, who was shot by the insured. Shortly thereafter, the insured killed himself, and so he was not available for evaluation (as in the case of a life insurance policy in which the insured allegedly committed suicide). Testifying in response to a hypothetical question based on the shooting and the insured's unusual behavior days before it, a psychiatrist opined that at the time of the shooting the insured had "a deranged mental intellect which did deprive him of the capacity to govern his conduct in accordance with reason" (Ref. 8, p 331). The trial court rejected this opinion as lacking foundation, stating:

> [I]t is this court's opinion that there was insufficient foundation for the tender of the [psychiatrist's] opinion. [The psychiatrist] did not ever interview [the insured], nor did he ever treat him for any problem, either physical or mental, nor did he review any medical records of [the insured]. There was no evidence of [the insured's] being treated for any psychiatric problems. . . . [T]he psychiatrist's opinion is perhaps best described as "informed speculation," not the type of certainty courts require of most opinion evidence. It is apparent that the American Psychiatric Association's standards for rendering an opinion were not met here. The association's standards set forth that one should not testify regarding anyone's mental capacity without directly knowing that person [Ref. 8, pp 331–2].

Portraying this ruling as one questioning "whether [the psychiatrist's] opinion would be helpful to the trier of fact because of his lack of personal contact with [the insured]," the intermediate court of appeals held that the trial court abused its discretion in excluding the psychiatrist's testimony, because there had been no personal contact with the insured. The Minnesota Supreme Court agreed with the result reached by the court of appeals, but for a different reason. It said:

> [T]he trial court questioned whether the hypothetical question itself presented sufficient facts to support [the psychiatrist's] opinion, not whether [the psychiatrist] was qualified or his opinion helpful. The foundational sufficiency of a hypothetical question, however, is judged by the contents of the question itself and not by whether the witness has ever examined the person, place or thing in question. . . . So long as the expert witness is qualified and the question contains sufficient facts to permit that witness to give a reasonable opinion based not on mere speculation or conjecture, the opinion of an expert witness may be adequately obtained upon hypothetical data alone [Ref. 8, p 332].

What about life insurance policies, the type of policy discussed by the authors in their article?[1] A different interpretation of intent is given than in tort law or in cases involving liability policies because of the concern about the stigma of a suicide and the financial needs of the surviving family. Social and judicial attitudes regarding suicide have gradually turned away from assessing guilt and toward protecting suicidal persons and their beneficiaries. It is in this area, as the authors discuss in their article, that mental illness may undercut intent, as it does in criminal responsibility. Reviewing a suicide exclusion clause, the United States Supreme Court in 1873 said:

> If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not within the contemplation of the parties to the contract and the insurer is liable [Ref. 9, p 242].

Life insurance policies usually include exclusionary language for self-inflicted injuries that occur within two years of the date of issue. (In that event, premiums are returned to the beneficiaries.) The clause is subjected to heightened scrutiny. It is required to be precise in language, must be conspicuous within the policy, and must contain words that

are clear and plain. The insurer bears the burden of pleading and proving the applicability of the suicide exclusion. This burden includes overcoming a strong legal presumption that the insured did not commit suicide.

By and large, the courts have tempered the exclusion by reading into it an intent requirement. The decisions are result-oriented. In the absence of policy language providing that the exclusion applies whether the insured was sane or insane, the courts have allowed recovery when the deceased was not able to form a conscious intention to kill himself and to carry out that act, realizing its physical and moral consequences. This standard calls for psychiatric testimony that addresses the mental state of the insured at the time of his or her death. However, on the one hand, where the policy contains a suicide, sane or insane, clause, which is now typical, most jurisdictions exclude all nonaccidental acts of self-destruction, regardless of the insured's mental condition or understanding of the moral character of the act. On the other hand, in a minority of jurisdictions, even where there is exclusionary suicide, sane or insane, language, the courts have held that the exclusion does not apply when the insured was so mentally disordered as not to understand that his act would result in death or that the act was committed under an insane impulse. Thus, in *Searle v. Allstate Life Ins. Co.*,[10] the leading case supporting the minority view, the California Supreme Court stated, "If the insured did not understand the physical nature and consequences of the act, whether he was sane or insane, then he did not intentionally kill himself" (Ref. 10, p 1314). The authors cite the case, but it is not made clear that it is a minority position.

In various areas of the law, a mental illness excuse is tendered as a last resort. Thus, in criminal law an accused enters a plea of not guilty by reason of insanity only when his complicity in the commission of a criminal act is incontrovertible. Likewise, in a dispute over life insurance coverage, it is claimed that insanity undercuts intent when the insured dies by self-destruction. That type of case—the type of case discussed by Simon *et al.*[1]—is relatively infrequent, as most jurisdictions hold that a suicide, sane or insane, clause excludes all nonaccidental acts of self-destruction, regardless of the insured's state of mind. More often than not, the issue is not the meaning of an exclusionary clause but rather whether the death was a suicide.

How to assess whether a death was a suicide? To be sure, there is a broad borderline area between clear-cut suicide and other modes of death that are equivocal, and there is tremendous variability in the information about the personality and behavior of the deceased. Unless there is a suicide note, it is not easy to evaluate the intention of a dead person—did the person die of natural causes, by accident, by suicide, or was he or she murdered? It is often difficult, for example, to decide whether a death in an automobile collision was by accident or suicide. Those with a drug addiction are disturbed persons on the edge of deliberate suicide, but there is the possibility of accident in the course of the barbiturate habit. Individuals who enact masturbation fantasies of being tied up and abused, with partial hanging as part of the fantasy, may accidentally be asphyxiated. Those who engage in repeated acts of self-injury do not wish to kill themselves but use their self-injury to relieve pain, while suicidal persons seek to terminate unendurable pain by ending their lives.

For cause of death, insurance companies look to police reports, hospital reports, or the death certificate (only rarely does the insurer obtain an investigator). One of the important roles of the coroner or medical examiner is to classify the manner of death among the categories of natural, accident, suicide, or homicide. Is the coroner or medical examiner up to the task? Most coroners are elected (many are funeral directors); few pathologists are medical examiners. In more than 80 percent of cases, manner of death is readily and unambiguously assigned to one of these four categories on the basis of scant investigation, witness interviews, autopsy findings, and toxicology results. In some cases, however, manner of death is not so readily established and will be listed as pending until further investigation, analysis, or consultation is completed.

During the latter half of the 20th century, coroners and medical examiners began to turn to psychiatrists, psychologists, and criminologists for assistance in determining manner of death in equivocal cases, resulting in the development of the approaches known as psychological autopsy, psychiatric autopsy, and behavioral reconstruction. Apparently, however, no coroner or medical examiner's office has a psychiatrist on its staff. The *Daubert*[11] ruling on scientific evidence has apparently not been held to apply to psychological testimony on manner of death.

In determining the manner of death, coroners do not routinely secure psychological data. Only a few cases of self-inflicted gunshot head wound are referred for a psychological autopsy, and those are instances in which the manner of death was contested by members of the decedent's family. Thus, nearly all cases of self-inflicted gunshots to the head are classified as suicide without the benefit of a psychological autopsy.[12]

Under the law of evidence, the psychiatric records of an individual can be obtained to ascertain whether the individual was suicidal or died as a result of the wrongful act of another. Likewise, as in the case illustration set out by the authors,[1] the records may be obtained in a malpractice claim against a psychiatrist or hospital alleging failure to exercise due care in preventing the suicide.

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