1997

Fault and the Suicide Victim: When Third Parties Assume a Suicide Victim’s Duty of Self-Care

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Charles J. Williams, Fault and the Suicide Victim: When Third Parties Assume a Suicide Victim’s Duty of Self-Care, 76 Neb. L. Rev. (1997) Available at: https://digitalcommons.unl.edu/nlr/vol76/iss2/4

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Fault and the Suicide Victim: When Third Parties Assume a Suicide Victim's Duty of Self-Care

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I. INTRODUCTION

A fifty-one-year-old man voluntarily admitted himself to a psychiatric hospital for treatment of his depression. Five days after his admission, he accompanied a small group of fellow patients and an occupational therapist on a recreational outing off of the hospital grounds. On the return trip, the man told the therapist that he was about to vomit and asked her to pull off to the side of the road. When she stopped the van, he jumped out, ran to a highway overpass, climbed up on the ledge, and flung himself to his death. His family later sued the hospital for wrongful death.\(^1\)

The hospital asserted as an affirmative defense that the patient was contributorily negligent and sought at trial to have the jury com-
pare the hospital’s fault against the patient’s fault. The trial court held as a matter of law, however, that the hospital assumed the duty to prevent a known suicidal patient from committing suicide. Accordingly, the court reasoned that the very act that the hospital assumed a duty to prevent—the patient’s suicide—could not constitute a basis for contributory negligence. Other courts, faced with similar facts, have reached the same conclusion.

Thus, hospitals, jails, and others who assume some responsibility for suicidal people may discover that they have become the guarantors of the lives of suicidal people, even when these suicidal people knowingly and voluntarily act as agents of their own destruction. In the face of lawsuits, courts may bar these defendants from asserting defenses that would allow juries to consider the role of the suicide victims' own actions when attributing fault among the responsible parties. Exempting suicide victims from the fault analysis places hospitals and other defendants in tenuous positions given that, as a practical matter, it is impossible to prevent a suicide by person driven to kill himself, no matter what preventive steps a defendant may take.

The suicide rate in the United States actually exceeds the country's murder rate. In 1993, for example, more than 31,000 people committed suicide in the United States, compared to 25,470 people who died as victims of homicide. As could be expected, a large number of these suicides result in lawsuits. It is not surprising, therefore, that failure to prevent suicide is one of the leading reasons for malpractice suits against mental health professionals. Jails, prisons, and law enforcement agencies also defend large numbers of suits by inmates who commit suicide while in state custody. These suits are similarly based on allegations that the law enforcement defendants were negligent in failing to prevent the suicides.

2. Id. at 917.
4. The term "suicide victim" refers to both a person who is injured in an unsuccessful attempt to commit suicide, as well as to a person who succeeds, because either situation may serve as a basis for a lawsuit. The term "victim" is used in part as a reflection of the mental diseases that victimize people who attempt or commit suicide and cause them to see suicide as a way out. See Allen C. Schlinsog, Jr., Comment, The Suicidal Decedent: Culpable Wrongdoer, or Wrongfully Deceased?, 24 J. MARSHALL L. REV. 463, 464 n.2 (1991)(listing studies supporting the conclusion of psychiatric scholars that all suicides result from mental illness).
5. See Phyllis Coleman & Ronald A. Shellow, Suicide: Unpredictable and Unavoidable—Proposed Guidelines Provide Rational Test for Physician's Liability, 71 NEB. L. REV. 643, 659 n.80 (1992)("[S]ome physicians contend it is impossible to prevent certain people from killing themselves . . . .").
7. BRUCE BONGER, THE SUICIDAL PATIENT: CLINICAL AND LEGAL STANDARDS OF CARE 39 (1991). The most common claim involving psychiatric care is the failure to reasonably protect patients from harming themselves. Id.
Suicide, however, is a voluntary act by a person who consciously chooses to end his own life. When a person fails to exercise ordinary care to ensure his own safety, the law regards that person as the author of his own injuries. It would seem to follow, therefore, that a court may justifiably bar recovery by the suicide victim. If a court does not bar his recovery completely, the voluntary nature of the suicide victim’s fault would suggest that a jury at least should be able to compare the suicide victim’s fault in causing his own injury or death against a defendant’s alleged share of the fault. What then justifies barring defendants from comparing the suicide victim’s fault in some cases, but not in others?

This Article addresses the treatment of suicide victims under tort law fault analysis in an effort to provide some understanding of and structure to the subject. The Article begins by reviewing fault-based analysis under tort law generally and the defenses of contributory and comparative fault. Next, the Article discusses some of the cases in which courts have addressed the issue of fault on the part of suicide victims, finding that the cases contain confusing analysis and conflicting results. The Article then reviews these cases and derives from them two key factors—custody and knowledge of suicide potential—as necessary elements for a court to find that a hospital, jail, or some other defendant has assumed the duty of self-care that a suicidal person would otherwise owe to himself. The Article concludes by analyzing and clarifying three issues that have caused confusion as they relate to the fault of suicide victims: simple negligence of an otherwise suicidal person, proximate causation, and the lower standard of care for someone with reduced mental capacity.

II. FAULT-BASED ANALYSIS UNDER TORT LAW

Tort law is based upon the premise that liability lies with those who have a duty of care for another, breach that duty, and cause injury as a result. The goal of tort law is to discourage unreasonable
behavior. The duty of care can encompass either the duty not to do some act that injures another (a misfeasance tort)\textsuperscript{11} or the duty to do some act to prevent injury to another (a nonfeasance tort).\textsuperscript{12} Claims by a suicide victim or his family alleging that a third party failed to take steps to prevent a suicide are nonfeasance claims. For a plaintiff to prove a nonfeasance tort, the plaintiff must show that (1) the plaintiff had a special relationship with the defendant that gave rise to a duty on the part of the defendant to take care of the plaintiff, and (2) the harm that befell the plaintiff was of the type the defendant should have foreseen. In a suicide case, the plaintiff therefore must demonstrate that both a special relationship existed between the defendant and the suicide victim that gave rise to a duty of care,\textsuperscript{13} and the suicide attempt was foreseeable.\textsuperscript{14}

Often in tort cases, a defendant blames the injured party as being solely or partially responsible for his own injuries. Depending on the applicable state statutory scheme, the injured party's own fault may limit,\textsuperscript{15} or even bar,\textsuperscript{16} his recovery from the defendant, or the injured party may share the fault for the plaintiff's injury. Defendants often assert defenses of contributory or comparative fault\textsuperscript{17} when sufficient evidence shows that the injured party shares some of the fault for his own injury. The burden is upon the defendant, however, to prove each

\begin{enumerate}
\item \footnote{11}57A AM. JUR. 2d Negligence § 15 (1989)("Misfeasance' is the improper doing of an act which a person might lawfully do, or active misconduct which causes injury to another."),
\item \footnote{12}Restatement (Second) of Torts §§ 314A, 315 (1965); W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 56 (5th ed. 1984)(stating that nonfeasance or passive inaction is an exception to general tort liability based on misfeasance or active misconduct).
\item \footnote{13}See, e.g., Figueroa v. State, 604 P.2d 1198, 1202 (Haw. 1979).
\item \footnote{14}See, e.g., Kanayurak v. North Slope Borough, 677 P.2d 893, 897 (Alaska 1984).
\item \footnote{15}Under a comparative fault or comparative negligence statutory scheme, the fault of all parties, including the plaintiff, is compared. Plaintiff's recovery is reduced by the percentage of fault attributable to his own negligence. 57A AM. JUR. 2d Negligence §§ 845, 856 (1989). Under some comparative fault statutory schemes, the plaintiff is barred from any recovery if the jury finds the plaintiff was 50% or more at fault. See, e.g., Kan. Stat. Ann. § 60-2589 (1995)(stating that contributory negligence of a party shall not bar recovery "if such party's negligence was less than the causal negligence of the party or parties against whom claim for recovery is made").
\item \footnote{16}Under the common law defense of contributory negligence, a plaintiff's breach of duty of reasonable care to himself acts as a complete bar to any recovery against other parties. 57A AM. JUR. 2d Negligence § 842 (1989).
\item \footnote{17}Contributory fault exists when a plaintiff fails to act with the care required of a reasonably prudent person and the plaintiff's conduct contributes as a legal cause of the injury. Restatement (Second) of Torts § 463 (1965); Keeton et al., supra note 12, § 65. Comparative fault requires proof of the same elements as contributory fault. The difference is that unlike contributory negligence, contributory fault is not a complete bar to recovery. Restatement (Second) of Torts § 467 (1965).
\end{enumerate}
element necessary to establish fault on the part of the victim. Defense claims that the suicide victim was at fault for his own injuries is a claim of misfeasance.

Thus, the defendant must establish that the injured party owed himself a duty of care, that he breached that duty, and that this breach was a proximate cause of the injury sustained. It is axiomatic that people have the duty to take care of themselves, to avoid danger, and to refrain from actions that may cause themselves harm. A person who voluntarily and intentionally subjects himself to an unreasonable risk of personal injury or death, the danger of which was or should have been foreseen, violates the duty imposed upon all persons to use ordinary care for their own safety.

If, in fact, most suicides are voluntary and intentional acts of self-destruction, it stands to reason that suicide victims should seldom, if ever, recover damages from third parties for the consequences of their own acts. At the very least, their own voluntary, self-destructive act should drastically limit their recovery under a comparative fault analysis. In practice, however, suicides result in some of the highest number of lawsuits and awards. This can be explained by a class of cases involving suicides in which defendants are, or should be, barred from asserting defenses focusing on the suicide victim's own fault. Courts repeatedly have struggled with these cases over the years, resulting in a muddled collection of conflicting decisions.

III. ASSUMING THE SUICIDE VICTIM'S DUTY OF SELF-CARE

Many courts have been presented with the issue of whether a third person at some point assumed the duty of self-care that a suicide victim owed to himself. Suicides at hospitals or psychiatric facilities are frequent sources of these cases. Most courts that have directly addressed this type of case have held that when hospitals admit known suicidal patients, hospitals assume the duty that patients normally

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18. Restatement (Second) of Torts § 477 (1965); Keeton et al., supra note 12, § 65.
22. Keeton et al., supra note 12, § 44. See also Schwartz, supra note 10, at 217 (stating that courts are disinclined to impose liability on third parties as a result of suicide because it is an intentional act by the victim).
23. Bonger, supra note 7, at 33 (stating that between 1980 and 1985, patient suicides resulted in the highest number of lawsuits and largest cash settlements in claims against psychiatrists).
would owe to themselves to refrain from taking actions that could harm them.\textsuperscript{25}

A hospital's assumption of the patient's duty of self-care thus prohibits it from later asserting affirmative defenses of comparative or contributory negligence if the patient is injured in a suicide attempt. Likewise, courts have sometimes found that doctors and nurses have personally assumed the duty of care that the patient owes to himself, therefore also barring the jury's comparative fault analysis.\textsuperscript{26} This situation has arisen in settings other than hospitals. For example, courts have found in some cases that prisons and jails have assumed the duty of care to prevent known suicidal prisoners from harming themselves, consequently barring juries from considering the fault of the prisoner in apportioning liability.\textsuperscript{27}

\textsuperscript{25} See, e.g., Vistica v. Presbyterian Hosp. & Med. Ctr., 432 P.2d 193 (Cal. 1967)(en banc)(holding that when a mentally ill patient is committed to the psychiatric ward of a hospital, the duty imposed by law on the hospital includes safeguarding the patient from dangers due to the patient's mental incapacity); Brandvain v. Ridgeview Inst., 372 S.E.2d 265 (Ga. Ct. App. 1988)(holding that the defendant's proposed contributory negligence instruction was improper when shown that the mental institute was aware of the patient's suicidal behavior and assumed care to protect him), aff'd per curiam, 362 S.E.2d 597 (Ga. 1989); Lomayestewa v. Our Lady of Mercy Hosp., 589 S.W.2d 885 (Ky. 1979)(holding that the trial judge erred in submitting the element of contributory negligence of the patient to the jury when the patient sustained injuries while attempting to jump out of window from a floor of hospital's psychiatric ward); Frain v. State Farm Ins. Co., 421 So. 2d 1169 (La. Ct. App. 1982)(holding that when the defendant's duty extends to protect the plaintiff against his own negligence, then comparative negligence should not be invoked); McNamara v. Honeyman, 546 N.E.2d 139 (Mass. 1989)(holding that the decedent who hanged herself in the state mental hospital cannot be contributorily negligent because the patient's self-destructive behavior was behavior that the hospital assumed a duty to prevent); Tomfohr v. Mayo Found., 450 N.W.2d 121 (Minn. 1990)(holding comparative fault inapplicable when a patient committed suicide by hanging in a mental ward of a hospital because the hospital's duty of care included preventing the patient from harming himself); Bramlette v. Charter-Medical-Columbia, 393 S.E.2d 914 (S.C. 1990)(holding that as a matter of law, a patient's suicide in a mental hospital cannot constitute contributory negligence or assumption of risk).


These courts generally have reasoned that allowing such a defendant to blame the suicide victim "would serve to excuse [the defendant's] own failure to exercise reasonable care."\textsuperscript{28} Courts have found that the "defendant's duty of care is coextensive with the plaintiff's ability to avoid self-damaging acts."\textsuperscript{29} This justification eliminates the need for contributory or comparative negligence on the part of the suicide victim. Holding victims responsible in such cases, the reasoning follows, fails to further the goals of a fault-based system of tort law when the purpose in tort law is to discourage unreasonable conduct.\textsuperscript{30}

Cases involving the care of suicidal patients are distinguishable from the typical medical malpractice case in which the hospital and patient share the same goal of making the patient well. Thus, if such a nonsuicidal patient fails to take medicine prescribed to make him well, for example, some or all of the blame rightfully falls on the patient.\textsuperscript{31} Holding the patient at fault thereby furthers the objective of tort law in that it discourages unreasonable behavior.

Nevertheless, the suicidal patient by definition does not share the hospital's goal of making the patient well. Rather, "while the doctor is working to assist the patient to suppress suicidal tendencies, the patient, by the nature of his illness, may be working at cross-purposes to his doctor's suggestions and may not be interested in following instructions."\textsuperscript{32} In such cases, holding the suicidal patient blameworthy for failing to conquer his illness fails to further the objective of tort law to discourage unreasonable behavior.

Not all courts have adhered to this line of reasoning. Some have barred defendants from asserting comparative fault defenses even when the defendant no longer had control of the suicide victim. For example, one court suggested that a hospital's assumption of the sui-
cidal patient's own duty of self-care may continue even after the hospital has discharged the patient from its custody. Another court even extended the assumption of the duty of care so far as to prevent a woman, who loaned her car to her suicidal friend, from asserting a comparative fault defense when the friend used the car to commit suicide.

On the other hand, some courts confuse the element of duty with that of proximate cause. These courts allow juries to compare the suicide victim's fault or bar recovery completely. For example, some courts have ruled as a matter of law that suicide is an intervening force that breaks the causal connection between a defendant's negligence and the suicide victim's injuries. Other courts, however, have recognized that the act of suicide does not always constitute an intervening force. If the suicide was a foreseeable risk assumed by the defendant, then the suicidal act does not constitute an intervening force.

Still other courts simply have held, without a thorough analysis, that a jury can compare the fault of any suicide victim to the fault of other potentially responsible parties. For example, in Scheidt v. Denney, the Louisiana Court of Appeals rejected the plaintiff's assumption of duty argument, ruling that the recent passage of the Louisiana Comparative Fault Act allowed the jury to compare the victim's fault. The Scheidt court failed to explain, however, how the passage

33. Id. (holding that a psychiatrist assumed the duty of self-care of a suicidal patient when the patient overdosed on prescribed medication, even though the patient had been discharged from the hospital).
34. Frain v. State Farm Ins. Co., 421 So. 2d 1169, 1173-74 (La. Ct. App. 1982). In Frain, the court reasoned that a cautious person would not loan her car to a known suicidal person, that it is a foreseeable risk that the suicidal person would harm himself with a car, and that "[t]he scope of the duty therefore includes this risk." Id. Accordingly, the court reasoned the defendant should be unable to reduce her liability by seeking to compare the suicidal person's own fault in causing her own death. Id.
35. See infra text accompanying notes 58-67.
36. See Laytart v. Laytart, No. 5-94-11, 1994 WL 463777 (Ohio Ct. App. August 26, 1994) (holding that suicide of a sexually abused child constitutes an intervening force that breaks the line of causation stemming from the father's wrongful act, unless the intervening act was foreseeable or was a normal incident of risk involved; plaintiff did not argue the latter, and the court found no evidence of the former).
38. Id. at 816. The Scheidt court's decision is at odds with an earlier decision, Argus v. Scheppegrell, 472 So. 2d 573 (La. Ct. App. 1985), in which the court held that when a health care provider's malpractice results in a patient's suicide, the health care provider is not entitled to raise the patient's contributory negligence as an absolute bar to recovery. The Scheidt court purported to distinguish Argus merely by noting that the decision was issued before the adoption of comparative fault in Louisiana. The Argus decision, however, was based on the finding that the health care provider had assumed the duty of care that the patient owed to
of the act affected whether or not the defendant had assumed the suicide victim’s duty of self-care.

Thus, a review of the case law reflects that most courts have recognized that in some cases a defendant can assume a suicidal person’s duty of self-care so as to preclude a jury from considering the suicide victim’s fault. Other courts, however, have struggled with this issue. No court has clearly explained why some cases call for a comparison of the suicide victim’s fault while other cases do not. Finding a rational explanation depends on identifying factors that distinguish one case from the other.

IV. FACTORS ESTABLISHING A DEFENDANT’S ASSUMPTION OF A SUICIDE VICTIM’S DUTY OF SELF-CARE

The courts’ analyses in the above cases generally fail to identify the key factors that determine who, the defendant or the victim, carries the duty to protect the suicide victim from himself. In other words, what facts distinguish these cases from each other and why are these facts relevant? Once these facts are identified, the question is whether they should be distinguishing factors.

A review of the cases reveals two key factors, although these factors are not identified as such by the courts. Two key facts are common in the cases finding that third parties have assumed a suicidal person’s duty of care: (1) the defendant exercised custody or control over the suicide victim, and (2) the defendant knew or had reason to know that the suicide victim was a danger to himself. When these facts are not present in a case, courts often have subjected the suicide victim’s own fault to comparison with the defendant’s alleged fault.

Therefore, when a defendant does not have the suicide victim effectively within his custody and control, the defendant may compare the victim’s fault against the defendant’s own alleged negligence. Like-wise, juries can compare the patient’s fault against the defendant’s fault when there is insufficient evidence that the defendant was aware of the person’s suicidal tendencies. These two elements can be inter-

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40. See, e.g., Saunders v. County of Steuben, 664 N.E.2d 768, 771-72 (Ill. App. Ct. 1996)(finding contributory negligence by a suicide victim when the jail staff had
related; the defendant will likely have more knowledge of the person's suicidal tendencies when the person is within the defendant's custody or control. A closer examination of these factors clarifies why they should determine whether the defendant has assumed the suicide victim's duty of self-care.

A. Custody and Control

Custody and control of the suicide victim is often the key factor in determining whether the defendant has assumed the victim's duty of self-care, although courts have not clearly articulated the importance of this fact. Custody of the suicide victim, whether actual or constructive, constitutes evidence of the defendant's voluntary assumption of care of the suicidal person. Further, custody means that the suicidal person has lost some of his freedom to take steps to care for himself. Thus, it follows that in situations where the defendant has effectively taken custody of, or exercises control over, a suicidal person, then the defendant has assumed that person's duty of self-care. (This is premised, of course, on the assumption that the second factor is present—the defendant knows the person is suicidal.)

If, on the other hand, the suicidal person is not within the custody or control of the defendant, it is inequitable to hold the defendant responsible to protect the suicidal person from himself. If the defendant lacks custody over the suicidal person, then the defendant likewise lacks the means to control the suicidal person's environment and to protect the suicidal person from himself. It does not further tort law's goal of discouraging unreasonable behavior to impose liability on a defendant who is void of any power to prevent the injury.

The test for custody or control should perhaps mirror that used in the criminal law context. In the criminal arena, a person is considered "in custody" if a reasonable person in the suspect's position would believe that the police have denied them their freedom of movement. In relation to suicide victims, the reasonable person analysis makes it irrelevant whether a suicidal person is mentally incapable of knowing whether he is in custody. If the suicide victim is located on a locked ward of a psychiatric unit or is a prisoner, there is little question that the suicide victim is within the defendant's control. The more difficult

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41. See Berkemer v. McCanty, 468 U.S. 420, 442 n.35 (1984)(holding that a suspect is in "custody" when a reasonable person in the suspect's position would understand that he or she was not free to leave).
question arises when a suicidal patient, like the one discussed in Part I of this Article, has some degree of freedom. Courts must answer such questions on a case-by-case basis, just as they do in criminal cases.

Of course, the plaintiff may allege that the defendant's failure to place the suicide victim in the defendant's custody was a negligent omission that caused his injuries in the first place. This is a wholly different question, however, from how to evaluate a suicidal victim's share of fault when a court has determined that the defendant actually did take custody of the suicidal person. The viability of this claim will often rest on the proximity in time between the defendant's contact with the suicide victim and the time of the suicidal act. The shorter the period between the time when the defendant should have taken custody of the suicide victim and the time of the suicide, the greater the likelihood that a court will find proximate causation. The viability of this type of claim, that the defendant is negligent for failing to take custody of the suicide victim, also will depend upon the defendant's knowledge of the victim's suicide potential.

B. Knowledge of Suicidal Ideation

Knowledge that the person is suicidal is the other key factor that must exist before a court should find that a defendant assumed the duty of care that the suicidal person owed to himself. If a defendant does not know of the person's suicidal tendencies, the defendant cannot knowingly assume that person's duty of self-care. Again, the goal of tort law—to discourage unreasonable behavior—is not furthered by

42. See Perona v. Township of Mullica, 636 A.2d 535 (N.J. Super. Ct. App. Div. 1994)(dismissing a father's suit against police officers upon a finding that the officers' decision not to take a suicidal person into custody was protected by qualified immunity). Of course, a defendant may face criminal or civil liability for taking custody of a person who does not need it. See Pellegrini v. Winter, 476 So. 2d 1363, 1366 (Fla. Dist. Ct. App. 1985)(finding the defendant liable for malicious prosecution for wrongfully initiating commitment proceedings for a person who the officer erroneously believed was suicidal).

43. Thus, in Peoples Bank v. Damera, 581 N.E.2d 426 (Ill. App. Ct. 1991), the question should have been whether the defendant was negligent in discharging the patient. If the patient abused the medication while not in the hospital's custody, the patient's own fault should be subject to comparison because the hospital is not in a position to effectively assume the duty of protecting the patient from himself. Compare Darren v. Saifer, 615 N.Y.S.2d 926, 927 (N.Y. App. Div. 1994)(finding the hospital's alleged failure to follow psychiatric guidelines when it released a patient not to be the proximate cause of the patient's suicide 1 month after discharge), with Chisholm v. St. Vincent's Hosp. & Med. Ctr., 607 N.Y.S.2d 674 (N.Y. App. Div. 1994)(denying summary judgment motion and holding that a material factual dispute existed regarding proximate cause when misclassification of the patient allowed him to discharge himself from a psychiatric hospital and he killed himself the same day he was discharged).
finding that defendants assumed a duty they did not know needed to be assumed. The test for knowledge, however, should be based in the same way as in custody cases: a reasonable person standard. Thus, it should be enough if the defendant actually knew or reasonably should have known that the suicide victim was suicidal.

Consequently, courts have allowed defendants to compare a suicide victim's fault as contributing to his own injuries when the defendant lacks actual or constructive knowledge of the suicide victim's suicidal potential. Suicidal ideation is subjective, however. A determination of suicidal tendencies often depends in large measure upon information obtained from the victim himself, which itself is open to subjective interpretation. Many people at some point in their lives passively think of suicide without any real intent to act on those thoughts. Those people are often difficult to distinguish from people who are truly suicidal. Whether a defendant knew or should have known that a person was suicidal may be the most hotly contested issue in a case.

Defendants are in a difficult position with respect to the issue of knowledge. The plaintiff will argue, of course, that the defendant knew that the victim was suicidal; but, if the defendant did not know, it still was the defendant's fault for failing to make the inquiry necessary to determine whether the victim was suicidal. In response, the defendant could argue that it could not have known that the victim was suicidal because the victim did not truthfully answer the defendant's questions concerning suicidal ideation. The problem, however, is that the victim may not precisely answer those questions because he wants to commit suicide. In such cases, courts should allow the jury, as finders of fact, to resolve this issue. Whether the jury could com-

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45. See, e.g., Maricopa County v. Cowart, 471 P.2d 265 (Ariz. 1970)(en banc)(holding supervisors at a juvenile home not liable for a juvenile's suicide because the supervisors did not possess information from which to anticipate that the juvenile would commit suicide); State v. Washington Sanitarium & Hosp., 165 A.2d 764 (Md. 1960)(finding for the hospital, doctors, and nurses in an action for wrongful death because nothing in the record supported placing the defendants on notice that the patient was suicidal).

46. Murphy, supra note 8, at 417 ("A great many people, perhaps the majority, have fleeting thoughts of suicide. In and of itself, such a thought may reflect fear, anger, frustration or other negative emotion. It is only in the context of certain psychiatric illnesses that suicidal thinking takes on grave significance.").

47. Whether the defendant should have known that the victim was suicidal may entail an inquiry into whether factors showed that the defendant should have recognized a suicide potential. Authorities are widely divided on the ability to predict suicide in anyone, even in a clinical setting. See generally Coleman & Shellow, supra note 5 (presenting a thorough examination of issue of predictability). Parties may consider using experts to evaluate the objective and subjective indicators of suicide potential within the scope of the defendant's knowledge at the time of the suicide. The experts may help determine whether the defendant should have known that the victim was suicidal.
pare the victim's fault to the defendant's fault would turn on whether they first found that the defendant knew or should have known of the victim's suicidal tendencies.

C. Summary of Factors

When a plaintiff can demonstrate that the defendant effectively exercised control over the suicide victim and had knowledge that the person was suicidal, a court should prohibit the defendant from seeking to escape responsibility by claiming that the suicide victim shared fault for his own injuries. The goal of tort law is furthered when a court finds in such cases that the defendant has assumed the suicide victim's duty of self-care: the defendant is aware of the potential for harm and is physically capable of acting in a reasonable manner to protect the suicidal person from himself. The burden should rest on the plaintiff, however, to make the initial showing necessary to eliminate comparison of the suicide victim's fault.48

V. SOURCES OF CONFUSION

In cases discussing the issue of a suicide victim's fault, three issues have often confused courts and advocates. The first is how to treat cases in which simple negligence on the part of a suicidal person, not a suicide attempt, caused the person's injuries. The second issue is whether the voluntary and intentional act of suicide constitutes an intervening cause, breaking the causal connection between the defendant's negligence and the suicide victim's injuries. The third issue is how to take into account the reduced mental capacity of a person who suffers from suicidal ideation. Each of these issues is addressed below.

A. Simple Negligence by Suicidal Persons

It is sometimes unclear whether or not a suicidal person's injuries resulted from a suicide attempt. Thus, can a defendant compare the fault of a known suicidal person who accidentally, that is, unintentionally injures himself while in the defendant's custody? The simple answer is yes because these cases are indistinguishable from other negligence cases. These cases do not involve "suicide victims," but rather tort victims who happened also to be suicidal at the time of the incident.

48. It is clearly advantageous for the plaintiff to raise this issue early in a case and to obtain a ruling from the court barring the defendant from attempting to apportion fault to the suicide victim. Some factual basis is almost always needed, as the factors of custody and knowledge are largely factually based. Thus, a motion for partial summary judgment is best suited to raise the issue and has been the vehicle most often used by parties to resolve the matter.
Therefore, in cases where the plaintiff's injuries are allegedly due to the plaintiff's simple negligence and not a suicide attempt, a jury should be free to compare the plaintiff's own fault against that of other possibly negligent parties, even if the victim was a known suicidal person in defendant's custody.\textsuperscript{49} When a defendant assumes the duty of care with respect to a suicidal person, it assumes the duty to protect the plaintiff from intentionally injuring himself. That duty does not necessarily include protecting the suicidal person from his own acts of simple negligence. For example, if a suicidal person accidentally fell out of a window, as opposed to intentionally jumped out of a window, the defendant may still be liable for negligence (say, for failing to have it locked), but the person who fell may likewise be guilty of contributory negligence.

In many cases, whether a person's injuries were due to simple negligence or an intentional attempt at self-destruction may be unclear from the facts. Thus, a defendant may argue in some cases that what appeared to be an intentional, self-inflicted injury (e.g., jumping from a hospital window), was in fact merely an accident (e.g., falling from a hospital window). If successful, the jury may compare the defendant's fault, albeit probably under a reduced capacity-based standard of care.\textsuperscript{50} Plaintiffs, of course, will want to assert that the injuries were the result of an intentional suicide attempt that the defendant assumed the duty to prevent. If unsuccessful, the plaintiff will want to fall back on the argument that his behavior should be judged under a reduced-capacity standard of care.\textsuperscript{51}

\section*{B. Capacity-Based Fault Determinations}

Some courts have shown confusion in dealing with another concept of tort law: reducing the standard of care expected of people with reduced mental capacities. In some suicide cases, evidence will show that the suicide victim lacked full control of his mental capacities. The very mental disease driving the victim to commit suicide arguably limits the victim's ability to appreciate the dangerousness of his own self-destructive acts. In some cases, the mental disease may be so great that the victim cannot be said to have acted voluntarily in any real sense of the word. Therefore, some courts have attempted to ad-

\textsuperscript{49} See, e.g., Badrigian v. Elmcrest Psychiatric Inst., 505 A.2d 741 (Conn. 1986)(affirming the jury finding of comparative negligence on the part of a psychiatric patient who died when crossing the street).

\textsuperscript{50} See id. (judging fault on the part of the patient by a reduced standard, taking into account mental capacity); Noel v. McCaig, 253 P.2d 234 (Kan. 1953)(approving the application of a "capacity-based" approach where a psychiatric patient was injured crossing a highway while a patient at psychiatric hospital). See also infra text accompanying notes 52-57.

\textsuperscript{51} See infra text accompanying notes 52-57.
dress the issue of the suicide victim's fault by taking into account the suicide victim's reduced mental capacity. The appropriate approach, however, is to treat reduced capacity as an alternative theory the plaintiff should raise if he is unable to establish the custody and knowledge factors necessary for a finding that the defendant assumed the suicide victim's duty of self-care.

As a general matter, "[t]he modern trend appears to favor the use of a capacity-based standard for the contributory negligence of mentally disturbed plaintiffs."\(^{52}\) In other words, just as tort law holds a child to the standard of care and caution ordinarily exercised by children of like age, intelligence, and capacity,\(^{53}\) tort law also holds mentally ill people to a reduced standard of care. The logical extension of this principle is that "a person who is so absolutely devoid of intelligence as to be unable to apprehend apparent danger and to avoid exposure to it cannot be said to be guilty of negligence."\(^{54}\)

In some cases, courts may use this capacity-based approach to decide whether to allow a jury to consider the fault of the suicide victim in determining liability. In essence, this capacity-based approach requires that juries consider the conduct of a mentally disturbed person by considering the extent of the person's mental capacity.\(^{55}\) If that mental capacity is too diminished to allow for rational thought, then a jury should not consider the person's fault in determining liability.\(^{56}\)

The capacity-based approach has certain appeal because the purpose of fault-based tort law is to discourage unreasonable behavior. To the extent that a person has the mental capacity at some level to prevent injury to himself, it makes sense to hold him to the standard of care that a person with that mental capacity could reasonably exer-


\(^{53}\) See Honeycutt v. City of Wichita, 796 P.2d 549 (Kan. 1990)(requiring a child to exercise that degree of care and caution ordinarily exercised by children of like age, intelligence, capacity, and experience under circumstances then existing); Toetschinger v. Ihnot, 250 N.W.2d 204, 207-08 (Minn. 1977)(applying a flexible fault standard when the injured claimant is a small child).

\(^{54}\) Noel v. McCaig, 258 P.2d 234, 241 (Kan. 1953)(citing 38 Am. JUR. NEGLIGENCE § 201 (1941)).

\(^{55}\) See Avey v. St. Francis Hosp. & Sch. of Nursing, 442 P.2d 1013 (Kan. 1968)(finding reversible error when the trial court failed to instruct the jury to consider a suicide victim's reduced mental capacity when determining the issue of contributory negligence); Quick v. Benedictine Sisters Hosp. Ass'n, 102 N.W.2d 36, 47 (Minn. 1960)(instructing the jury that a patient has a concurrent duty to exercise reasonable care for his own self-protection even though a patient has a reduced capacity due to mental illness); Warner v. Kiowa County Hosp. Auth., 551 P.2d 1179, 1189-90 (Okla. Ct. App. 1976)(discussing the capacity-based approach for a mental patient who committed suicide).

\(^{56}\) Emery Univ. v. Lee, 104 S.E.2d 234 (Ga. 1958)(finding contributory negligence inappropriate when the evidence shows that the victim was entirely without reason at the time of injury).
exercise. Should that capacity be too diminished to allow for reasoned thought, apportioning fault to the injured person fails to advance the goal of tort law.

A capacity-based approach to the issue of liability on the part of the suicide victim is inappropriate, however, when sufficient evidence exists to find that the defendant assumed the suicidal person's duty of self-care. When the defendant has assumed custody or control of the suicide victim and knows of the victim's suicidal tendencies, the defendant has assumed the victim's duty of self-care. Therefore, the victim's mental capacity becomes irrelevant. The reduced-capacity approach is relevant only if the victim's fault is relevant and therefore should constitute a sort of fall-back position for a suicide victim. If the victim is unsuccessful in arguing that the defendant assumed the victim's duty of self-care, he may assert the capacity-based approach as an alternative to have, at the least, his behavior judged under a reduced capacity standard of care.

C. Proximate Cause

Another source of confusion in some of the cases is whether or not a voluntary suicidal act serves as an intervening force that breaks the causal chain between the defendant's negligence and the victim's injuries. An intervening force is one that actively operates to produce harm to the victim after the defendant's negligent act or omission has been committed. Arguably, then, the victim's suicidal act can constitute an intervening force that breaks the chain of legal causation between the defendant's negligence and the victim's injury. To note,

57. See Tomfohr v. Mayo Found., 450 N.W.2d 121, 125 (Minn. 1990).
58. See, e.g., Hooks Superx, Inc. v. McLaughlin, 642 N.E.2d 514, 520 (Ind. 1994) (pharmacy arguing that the plaintiff's intentional overdose of prescription drugs constituted an independent intervening cause, breaking the causation between the negligent prescription of the drugs and the plaintiff's injuries resulting from a suicide attempt); Kimberlin v. DeLong, 637 N.E.2d 121, 126 (Ind. 1994) (holding that suicide constitutes an intervening act, breaking the causal chain so long as the victim was sane and the defendant's conduct was merely negligent); Orosz v. Ohio Dept. of Mental Health, No. 90AP-1065, 1991 WL 132418, at *6 (Ohio Ct. App. July 18, 1991) (holding that suicide was an intervening act, breaking the causal chain, although the defendant would have been liable for accidental injury).
59. See RESTATEMENT (SECOND) OF TORTS § 441(1) (1965); 57A AM. JUR. 2D NEGLIGENCE §§ 565, 591 (1989). See also LeBlanc v. Northern Colfax County Hosp., 672 P.2d 667, 670 (N.M. Ct. App. 1983) ("The independent intervening cause that will prevent a recovery of the act or omission of a wrongdoer must be a cause which interrupts the natural sequence of events, turns aside their cause, prevents the natural and probable results of the original act or omission, and produces a different result, that could not have been reasonably foreseen.").
this assumes that the defendant is not responsible for driving the victim to commit suicide in the first place.\(^{60}\)

For example, in *Orosz v. Ohio Department of Mental Health*,\(^{61}\) a patient admitted to a psychiatric hospital committed suicide by jumping out of a window in which the screen was not properly locked.\(^{62}\) The court reasoned that the purpose of the screen was to prevent accidental injuries and, had the plaintiff's injuries been accidental, the jury may have found the hospital liable. Because the suicide was voluntary, however, the court held that the victim's voluntary act served as an intervening act between the hospital's negligence and the victim's death.\(^{63}\)

Similarly, at least one court has held that suicide constitutes an intervening cause, as a matter of law, if committed by one who is sane enough to realize the effect of his actions.\(^{64}\) The Indiana Supreme Court determined that

[a voluntary, willful act of suicide of an injured person, who knows the purpose and physical effect of his act, is generally held to be such a new and independent agency as does not come within and complete a line of causation from the injury to the death so as to render the one responsible for the injury civilly liable for the death.\(^{65}\)

Under the reasoning adopted in these cases, an intentional and willful suicide attempt excuses any negligence on the part of the defendant. No indication is expressed in either of the cases discussed above, however, that the plaintiffs argued that the defendant assumed the duty of care that the suicide victim owed to himself. Such an argument, if it had been made, should have prevailed. Whether proximate cause exists between a defendant's negligent acts or omissions and the suicidal victim's injuries is best determined by asking, "was the defendant under a duty to protect the plaintiff against the event which did in fact occur?"\(^{66}\)

\(^{60}\) Even in those cases, courts generally have not held tortfeasors liable if a victim attempts or commits suicide as a result of negligently inflicted injuries unless the defendant's acts caused the victim to become insane. *See generally Schlinso*, *supra* note 4 (criticizing current state of law in this regard and arguing for greater defendant accountability when a tortfeasor's act is a substantial factor contributing to suicide).


\(^{62}\) Id. at *1-2.

\(^{63}\) Id. at *4-6. *See also* Speer v. United States, 512 F. Supp. 670, 679 (N.D. Tex. 1981)(finding that the pharmacist's negligence was not the proximate cause of the patient's injuries because the patient's intentional self-destructive overdose constituted an intervening cause).

\(^{64}\) Kimberlin v. DeLong, 637 N.E.2d 121, 127 (Ind. 1994).

\(^{65}\) Hooks Superx v. McLaughlin, 642 N.E.2d 514, 521 (Ind. 1994).

The appropriate analysis would focus on the defendant's knowledge of the person's suicidal potential and whether the defendant exercised custody of the suicide victim. If these factors exist, the defendant has assumed the duty to protect the suicide victim from himself.67 Likewise, if these factors are present, the very act of suicide cannot constitute an intervening force between the defendant's duty to protect the victim from himself and injuries resulting from a suicide attempt. Proximate cause flows directly from the breach of duty by the defendant to the suicide victim's injuries.

VI. CONCLUSION

Suicide victims can pose a quandary to courts and litigants struggling to determine when juries should consider the suicide victim's own actions in apportioning fault among the potentially responsible parties in a tort action. This Article has attempted to sort through the cases in which this quandary has arisen to seek a rational approach that furthers the goal of tort law to discourage unreasonable behavior. Two key factors, custody and knowledge of suicide potential, emerge as the basis upon which to distinguish cases in which courts should find that defendants have assumed the suicide victim's duty of self-care from cases in which juries should be free to compare the victim's own fault against that of other parties. This rational basis for analyzing these difficult cases will clarify the real issues and further the goal of tort law.