# *COTTEN V. WILSON*: TOWARD A NEW APPROACH IN NEGLIGENCE CASES INVOLVING SUICIDE

*ALEX B. LONG*[*]



## INTRODUCTION

Margaret Lancaster jumped to her death from the Memphis-Arkansas bridge.[1] She had been the victim of domestic abuse for a prolonged period of time.[2] Her abuser had, among other things, broken her leg, burned her with cigarettes, and beaten her to the point that she was bruised over large areas of her body.[3] In her suicide note, Lancaster wrote to her mother that she was taking her own life because she could no longer take the abuse.[4] After Lancaster's suicide, her son and mother brought a wrongful death action against her

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* Williford Gragg Distinguished Professor of Law, University of Tennessee College of Law.

1. Lancaster v. Montesi, 390 S.W.2d 217, 219 (Tenn. 1965).
2. *Id.*
3. *Id.*
4. *Id.*

abuser.[5] Despite the sustained period of abuse and the suicide note linking Lancaster's death to that abuse, the Tennessee Supreme Court held as a matter of law that the defendant's actions were not a proximate cause of Lancaster's death.[6]

The court's decision in this case, *Lancaster v. Montesi*, decided in 1965, went on to become one of the leading cases in situations in which a defendant's actions are alleged to have resulted in the suicide of the decedent.[7] Although *Lancaster* was decided over fifty years ago, many courts have committed themselves to a rule that would produce the same result today under similar facts. Known as "the suicide rule" in at least one jurisdiction,[8] the strict version of the rule provides that, as a matter of law, there can be no liability for causing the suicide of another individual unless the decedent was acting pursuant to a delirium or insanity caused by the defendant's negligence.[9]

As this Essay explains, Tennessee courts played a significant role in the early development of this rule. Therefore, it is perhaps fitting that over fifty years after *Lancaster*, the Tennessee Supreme Court has issued a decision that dramatically weakens the suicide rule. This decision, *Cotten v. Wilson*,[10] along with the court's previous decision in a similar case, *White v. Lawrence*,[11] have the potential to reshape the discussion among other courts concerning liability for negligence that leads to suicide.

Suicide is currently the tenth leading cause of death in the United States, with over 40,000 deaths a year attributed to suicide.[12] The suicide rate in the United States increased 33% between 1999 and 2017.[13] In light of this growing public health concern, it is incumbent

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5. *Id.*

6. *Id.* at 222.

7. *See infra* note 127 and accompanying text.

8. *See* Johnson v. Wal-Mart Stores, Inc., 588 F.3d 439, 440 (7th Cir. 2009) (referring to the "Illinois 'suicide rule'").

9. *See* Hooks SuperX, Inc. v. McLaughlin, 642 N.E.2d 514, 520 (Ind. 1994) ("Indiana decisions hold 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.").

10. 576 S.W.3d 626 (Tenn. 2019).

11. 975 S.W.2d 525 (Tenn. 1998).

12. *See* Hannah Nichols, *What Are the Leading Causes of Death in the US?*, MED. NEWS TODAY (July 4, 2019), https://www.medicalnewstoday.com/articles/282929.php; *see also* Sabrina Tavernise, *U.S. Suicide Rate Surges to a 30-Year High*, N.Y. TIMES (Apr. 22, 2016), https://www.nytimes.com/2016/04/22/health/us-suicide-rate-surges-to-a-30-year-high.html (reporting that over 40,000 people died from suicide in 2014).

13. Holly Hedegaard, Sally C. Curtin & Margaret Warner, *Suicide Mortality in the United States, 1999–2017*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 2018), https://www.cdc.gov/nchs/products/databriefs/db330.htm.

upon courts to develop legal rules that reflect the realities associated with suicide. This Essay traces the origins of the modern tort rules regarding suicide to early religious views on the subject, which, in turn, shaped common law forfeiture principles. The Essay then examines nineteenth and early twentieth century life insurance decisions from Tennessee and other jurisdictions involving suicide that ultimately shaped twentieth century tort law. Finally, the Essay explores Tennessee's evolving tort law on the subject and how the evolving Tennessee view might perhaps usher in a new approach among other courts.

## I. A BRIEF OVERVIEW OF THE SUICIDE RULE

The basic rule from *Lancaster*, that a defendant's negligence is not the proximate cause of another's suicide, was already well-established at the time of the Tennessee Supreme Court's decision in *Lancaster* in 1965.[14] In 1881, the United States Supreme Court decided the case of *Scheffer v. Railroad Co.*[15] Scheffer suffered serious physical injuries in a train crash and eventually took his own life.[16] In a subsequent wrongful death action against the railroad company, Scheffer's executors alleged that the negligence of the train company caused Scheffer's suicide.[17] The Supreme Court sustained the defendant's demurrer, concluding that the proximate cause of Scheffer's death "was his own act of self-destruction."[18] The suicide was "not a result naturally and reasonably to be expected from the injury received on the train."[19] As such, "it could not have been foreseen in the light of the circumstances attending the negligence of the officers in charge of the train."[20]

*Scheffer* helped establish the general rule in cases in which a defendant's affirmative act of negligence is alleged to have resulted in the suicide of another. Under the general rule, suicide is treated as an unforeseeable consequence of a defendant's negligence and is therefore the efficient or superseding cause of death.[21] Many courts

14. *See* Lancaster v. Montesi, 390 S.W.2d 217, 222 (Tenn. 1965).
15. 105 U.S. 249 (1881).
16. *Id.* at 250.
17. *Id.*
18. *Id.* at 252.
19. *Id.*
20. *Id.*
21. *See* Tate v. Canonica, 5 Cal. Rptr. 28, 39 (Cal. Dist. Ct. App. 1960) ("[T]he practically unanimous rule is that [suicide] is a new and independent agency which does not come within and complete a line of causation from the wrongful act to the

state the rule in more absolute terms: suicide is not *sometimes* or *potentially* a superseding cause; suicide *is* a superseding cause.[22] Therefore, under this strict version of the rule, there can be no liability on the part of the defendant whose negligence was a factual cause of the death absent an applicable exception.[23]

Almost inextricably linked to this rule is the "delirium or insanity" (or "rage or frenzy") exception. Under this exception, recovery is permitted where the defendant's negligence results in "delirium or insanity" (or "rage or frenzy") on the part of the decedent, which in turn results in suicide.[24] But if the decedent understood the nature of the act and was able to resist the impulse to take their life, the suicide rule generally prevents recovery from another individual.[25]

As Part III of this Essay explains, this general rule and its delirium or insanity exception have remained essentially unchanged for well over a century. And as Part II below explains, the cultural and legal origins of the rule go back centuries.

## II. SUICIDE, FORFEITURE, AND SIN

The modern tort rules regarding suicide have their origins in Judeo-Christian beliefs, common law principles of forfeiture, and pre-twentieth century views of mental illness.

In the Middle Ages, the act of suicide was often viewed as the work of Satan or demonic possession.[26] Those who died by suicide were denied Christian burial rights, and their bodies were subject to public

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death and therefore does not render defendant liable for the suicide." (quoting C. T. Drechsler, Annotation, *Civil Liability for Death by Suicide*, 11 A.L.R. 2d 751, 757 (1950))).

22. *Id.*; *see, e.g.*, Chalhoub v. Dixon, 788 N.E.2d 164, 168 (Ill. App. Ct. 2003) ("[S]uicide is an independent intervening event that the tortfeasor cannot be expected to foresee."); Hooks SuperX, Inc. v. McLaughlin, 642 N.E.2d 514, 520 (Ind. 1994) ("Indiana decisions hold 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." (citing Kimberlin v. DeLong, 637 N.E.2d 121 (Ind. 1994))).

23. *See Chalhoub*, 788 N.E.2d at 168 ("It is well-established under Illinois law that a plaintiff may not recover for a decedent's suicide following a tortious act . . . .").

24. *See* City of Richmond Hill v. Maia, 800 S.E.2d 573, 577 (Ga. 2017) (stating the exception in terms of rage or frenzy); *see also* RESTATEMENT (SECOND) OF TORTS § 455 (AM. LAW INST. 1965) (stating the delirium or insanity exception).

25. *See* RESTATEMENT (SECOND) OF TORTS § 455.

26. *See* Alex B. Long, *Abolishing the Suicide Rule*, 113 NW. U. L. REV. 767, 773–74 (2019).

mutilation as a warning to others.[27] St. Thomas Aquinas, writing in *Summa Theologiae*, argued that suicide was a sin against God because "life is a gift made to man by God," and God alone has the power over life and death.[28]

The law during this time viewed suicide not only as an offense to God but an offense to the King.[29] Suicide was classified as a felony, and one of the consequences of the offense was that the property of the decedent was subject to forfeiture to the crown.[30] The blood of one who committed such a felony was deemed to be corrupted, and their family members could not inherit their property.[31] The exception to this rule of forfeiture was where the suicide was the result of insanity. If the decedent was insane at the time of death, the act of suicide was not treated as being wrongful, so the individual's family members could inherit the individual's property.[32] This rule obviously was of potential benefit to the crown, but it also permitted wealthy families to "persuade" medical coroners that the decedent was insane at the time of suicide, thereby permitting family members to inherit.[33]

English common law regarding suicide influenced American law on the subject. A majority of the original colonies continued to classify suicide as a felony, and some continued the practice of requiring forfeiture in the case of suicide.[34] But in keeping with common law, where suicide was deemed a crime, taking one's own life did not result in forfeiture where the decedent was determined to be insane.[35]

While suicide was still frequently viewed as an immoral act, societal attitudes regarding suicide evolved during the eighteenth and nineteenth centuries. Suicide was no longer classified as a crime in

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27. HOWARD I. KUSHNER, SELF-DESTRUCTION IN THE PROMISED LAND: A PSYCHOCULTURAL BIOLOGY OF AMERICAN SUICIDE 18–19 (1989).

28. GEORGE HOWE COLT, THE ENIGMA OF SUICIDE 159 (1991) (quoting 38 ST. THOMAS AQUINAS, SUMMA THEOLOGIAE: INJUSTICE 33 (Marcus Lefébure ed. & trans., Blackfriars 1975)).

29. *See* Hales v. Petit (1562) 75 Eng. Rep. 387, 400 (KB) (explaining that suicide is an offense against God and the King).

30. *See* Helen Y. Chang, *A Brief History of Anglo-Western Suicide: From Legal Wrong to Civil Right*, 46 S.U. L. REV. 150, 160 (2018); Long, *supra* note 26, at 778.

31. *See* Avery v. Everett, 18 N.E. 148, 150 (N.Y. 1888) (describing the corruption of blood concept at common law).

32. *See* Chang, *supra* note 30, at 162.

33. *See id.* at 163 ("In addition, the financial incentive for coroners to find a suicide worked in the reverse for the wealthy who may have offered the coroner a share of the goods, escaping forfeiture, in exchange for a finding of non-compos mentis.").

34. *See* Long, *supra* note 26, at 778.

35. *See* Washington v. Glucksberg, 521 U.S. 702, 711–13 (1997) (summarizing the law of the time).

the majority of colonies by the end of the eighteenth century.[36] During the nineteenth century, suicide increasingly became associated with insanity, with one journal suggesting that the majority of suicide cases actually resulted from insanity.[37]

The judicial decisions of the time reflect the prevailing societal attitudes on the subject of suicide. The decisions contain numerous references to the supposed immorality of suicide.[38] But they also reflect—in sometimes frightening and pejorative terms—prevailing societal views concerning mental illness and the supposed connection between suicide and uncontrollable impulses.[39]

## III. SUICIDE AND LIFE INSURANCE POLICIES IN THE NINETEENTH AND EARLY TWENTIETH CENTURIES

The modern tort rules involving suicide have some of their roots in nineteenth and early twentieth century insurance cases. In these cases, insurance companies would refuse to pay the proceeds of a life insurance policy to the family members of an individual who had died by suicide. In some instances, the policies were silent on the subject of non-payment in the event of suicide, but others contained an exclusion barring payment if the decedent "shall die by suicide, or by his own hands."[40] There were a remarkable number of these cases during this time, and the question in them frequently came down to the issue of whether the decedent was "insane" at the time of the suicide.

For example, in *Phadenhauer v. Germania Life Ins. Co.*, an 1872 Tennessee decision, an insurance company denied recovery to a widow on the grounds that the decedent had taken his own life.[41] The policy

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36. *See* GEORGES MINOIS, HISTORY OF SUICIDE: VOLUNTARY DEATH IN WESTERN CULTURE 297 (Lydia G. Cochrane trans., Johns Hopkins Univ. Press 1999) (1995); *see also Glucksberg*, 521 U.S. at 713–14.

37. *See* Long, *supra* note 26, at 776 (stating that "in most cases of suicide, 'the individual was known to be melancholy, and partially insane.'" (quoting *Cases of Insanity, Illustrating the Importance of Early Treatment in Preventing Suicide*, 1 AM. J. INSANITY 243, 243 (1845))).

38. *See, e.g.*, Life Ass'n of Am. v. Waller, 57 Ga. 533, 537 (1876) (discussing the moral element involved in suicide); Commonwealth v. Mink, 123 Mass. 422, 425 (1877) (referring to suicide as a "sinful and immoral act").

39. *See, e.g.*, Eastabrook v. Union Mut. Life Ins. Co., 54 Me. 224, 224 (1866) (discussing suicide in terms of an irresistible impulse); Breasted v. Farmers' Loan & Tr. Co., 8 N.Y. 299, 305 (1853) (describing decedent as a madman).

40. Phadenhauer v. Germania Life Ins. Co., 54 Tenn. 567, 570 (1872).

41. *Id.*

contained the common exclusion denying recovery in the case of suicide.[42] In deciding whether the insurer was nonetheless required to make payment, the Tennessee Supreme Court first looked to English common law, which took the position that suicide "'by an insane man or a lunatic, is not an act of suicide within the meaning of the law.'"[43] As suicide remained "a crime of the highest grade" in Tennessee, the court then looked to criminal law to help define the concept of insanity.[44] While noting that there were conflicting conceptions of insanity under the law, the court concluded that "the decided preponderance" of the authorities took the position that one who was incapable of distinguishing right from wrong was insane and thus could not legally commit the crime of suicide.[45] Accordingly, the fact that one was "insane" in the sense of not being able to appreciate the wrongfulness of taking one's own life permitted the survivors to collect under a life insurance policy.[46]

While Tennessee courts took the position that the inability to distinguish right from wrong would "excuse" an individual's suicide, other courts focused on whether the deceased was "incapable of using a rational judgment in regard to the act which he was committing."[47] Drawing upon the other strand of criminal law's insanity defense,[48] these courts focused on whether the deceased was capable of understanding the nature and consequence of the action.[49] Eventually, the Supreme Court agreed with the prevailing view among state courts that one who took their own life and was insane at the time did not commit suicide under the terms of an insurance

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42. *Id.*

43. *Id.* at 575 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *189). Other courts in the United States in the nineteenth century repeated this same rule. *See, e.g.*, Breasted v. Farmers' Loan & Tr. Co., 4 Hill 73, 75 (N.Y. 1843) ("Self-slaughter by an insane man or a lunatic is not an act of suicide within the meaning of the law." (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *189)).

44. *Phadenhauer*, 54 Tenn. at 576.

45. *Id.*

46. *Id.* at 577. Later policies apparently sought to avoid this result by providing that a policy was void if the insured died "by his own hand or act, *whether sane or insane*." Metro. Life Ins. Co. v. Staples, 5 Tenn. App. 436, 439 (1927) (emphasis added); *see also* Renfandt v. N.Y. Life Ins. Co., 419 P.3d 576, 579 (Colo. 2018) (discussing life insurance policy exclusions for suicide, whether sane or insane).

47. *See, e.g.*, Terry v. Life Ins. Co., 23 F. Cas. 856, 857 (Cir. Ct. D. Kan. 1871) (No. 13,839).

48. *See* M'Naghten's Case (1843) 8 Eng. Rep. 718, 719 (HL).

49. *See Phadenhauer*, 54 Tenn. at 576 (noting the conflict among American courts regarding the issue).

contract, and the survivors therefore could recover.[50] The Court defined "insanity" in terms of the inability to understand the physical consequences or the moral aspect of the act.[51]

Regardless of the precise reasoning, the concept of "insanity" in these cases was often defined by reference to an irresistible impulse to take one's own life. In *Phadenhauer*, for example, the court agreed with the earlier observation by the United States Circuit Court for Kansas that if one was "impelled to the act by an insane impulse which the reason that was left him did not enable him to resist," the individual was insane and the insurance company was liable.[52]

Courts also gradually began to define the concept of insanity in these insurance companies by reference to one acting pursuant to a "frenzy." The term "frenzy" in this context most likely has its origins in the Middle Ages' understanding of mental illness, which attributed the condition of "frenzy" to the overheating of the brain, supposedly caused by yellow bile.[53] *Phadenhauer* is noteworthy for being one of the first United States decisions to articulate the link between suicide and "frenzy."[54] Several state courts had already taken the position that one who took one's own life "in a fit of delirium" had not died by suicide.[55] In *Phadenhauer*, the circuit judge spoke in terms of "frenzy"

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50. Manhattan Life Ins. Co. v. Broughton, 109 U.S. 121, 131 (1883).

51. *Id.*

52. *Phadenhauer*, 54 Tenn. at 577 (quoting *Terry*, 23 F. Cas. at 857); *see also* Dean v. Am. Mut. Ins. Co., 86 Mass. (4 Allen) 96, 101 (1862) (discussing a decedent's suicide in terms of "an insane impulse").

53. *See* Long, *supra* note 26, at 774 (citing Claire Trenery & Peregrine Horden, *Madness in the Middle Ages*, *in* THE ROUTLEDGE HISTORY OF MADNESS AND MENTAL HEALTH 62, 67 (Greg Eghigian ed., 2017)).

54. *Phadenhauer*, 54 Tenn. at 571–72. Perhaps the first reported instance was from an 1862 Massachusetts case, in which the court observed:

> Doubtless there may be cases of delirium or raving madness where the body acts only from frenzy or blind impulse, as there are cases of idiocy or the decay of mental power, in which it acts only from the promptings of the lowest animal instincts. But, in the great majority of cases where reason has lost its legitimate control, and the power of exercising a sound and healthy volition is lost, the mind still retains sufficient power to supply motives and exert a direct and essential control over the actions.

*Dean*, 86 Mass. at 100.

55. Eastabrook v. Union Mut. Life Ins. Co., 54 Me. 224, 228 (1866) ("The madman, who in a fit of delirium commits suicide, as much dies by his own hand as does the individual who accidentally and unintentionally takes his own life. They each die by their own hands, but without moral responsibility or legal blame."); *see also* Cooper v. Mass. Mut. Life Ins. Co., 102 Mass. 227, 230 (1869) (discussing the issue in terms of delirium on the part of the deceased).

and provided a somewhat melodramatic example of a situation in which an individual's act of taking his own life would not be wrongful:

> [I]f the party is so insane that he knows not what he is about, or if his imagination is haunted by frightful spectres, so that he jumps out of a high window to escape them and is killed, etc., and a thousand other cases that might be supposed where the death is the work of his own hands, but at the same time an involuntary act into which he has been madly drawn by the frenzy of the moment, not knowing or understanding the danger on which he is rushing, and neither willing nor intending to produce the result; in none of these cases would he be guilty of suicide, or death by his own hands, within the meaning of the contract.[56]

Shortly after *Phadenhauer*, more nineteenth century courts in the insurance cases began to equate excusable suicide with an individual acting out of a delirium or frenzy.[57] In addition, *Phadenhauer* was frequently cited in support of the idea that recovery under a life insurance policy was permissible where the insured had died by suicide while insane.[58]

By the early twentieth century, the rule in insurance cases that suicide caused by an uncontrollable frenzy or delirium was not, in fact, suicide for purposes of the language of an insurance policy was

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56. *Phadenhauer*, 54 Tenn. at 571–72.

57. *See* Parish v. Mut. Benefit Life Ins. Co., 49 S.W. 153, 155 (Tex. Civ. App. 1898) (explaining that if the deceased had been "under the influence of insane frenzy," he was not responsible for taking his own life); Pierce v. Travelers' Life Ins. Co., 34 Wis. 389, 391–92 (1874) ("No self-destruction is outside of the condition unless committed by mistake, or during a frenzy of insanity which destroys the mental faculties to such an extent that the person is incapable of judging the effects of his acts."). Even insurance companies were incorporating this language into proposed jury instructions. *See* Hathaway's Adm'r v. Nat'l Life Ins. Co., 48 Vt. 335, 353 (1875) (rejecting insurance company's proposed jury instruction to the effect that "no degree of insanity short of delirium or frenzy, and whereby the deceased lost all power of self-will and control, will excuse the [suicide].").

58. *See* Scheffer v. Nat'l Life Ins. Co. of U.S., 25 Minn. 534, 537 (1879); Pagenhardt v. Metro. Ins. Co., 6 Ohio Dec. 190, 191 (Ct. Com. Pl. 1897); *see also* Supreme Commandery of Knights of the Golden Rule v. Ainsworth, 71 Ala. 436, 448 (1882) (addressing the issue in the context of recovery under a benevolent association). In 2018, the Colorado Supreme Court cited *Phadenhauer* as one of the leading examples of early American decisions adopting this view. Renfandt v. N.Y. Life Ins. Co., 419 P.3d 576, 582 (Colo. 2018).

common.[59] However, there were still courts that refused to require insurance companies to pay out in such cases. These courts typically took the position that to permit recovery in such cases would be contrary to public policy.[60]

In order to reach this result, courts based their decision expressly on moral grounds. Suicide was still frequently associated in judicial decisions of the time with immoral conduct.[61] But by the turn of the twentieth century, suicide was increasingly no longer treated or prosecuted as a crime.[62] With suicide decriminalized in many states by this time, the arguments in favor of denying recovery on public policy grounds were somewhat weakened. But some courts nonetheless held that to permit recovery under a policy in such a case would be "subversive of sound morality"[63] and that such concerns overrode "all mere formal rules procedure."[64]

The picture that emerges from the insurance cases of the time is that suicide was an immoral act that would ordinarily bar recovery under an insurance policy. However, the deceased policyholder was not blameworthy where the deceased was—variously stated—insane or acting pursuant to a frenzy, delirium, or irresistible impulse. The deceased had not truly died by suicide in such a case. Therefore,

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59. *See, e.g.*, Peterson v. Time Indem. Co., 140 N.W. 286, 288 (Wis. 1913) (citing the rule).

60. *See* Ritter v. Mut. Life Ins. Co. of N.Y., 169 U.S. 139, 154 (1898) (holding that even in the absence of a suicide exclusion, recovery was not permissible because suicide was not within the contemplation of the parties and a contrary approach would be against public policy); Davis v. Supreme Council Royal Arcanum, 81 N.E. 294, 295–96 (Mass. 1907) (citing *Ritter*, 169 U.S. at 154); Sec. Life Ins. Co. of Am. v. Dillard, 84 S.E. 656, 656–57 (Va. 1915) (basing decision "upon the soundest considerations of public policy").

61. For example, in 1902, a Pennsylvania court opined that the act of suicide "may be a sin, but it is not a crime." Commonwealth v. Wright, 11 Pa. D. 144, 146 (Phila. Cty. Ct. Quarter Sessions 1902); *see also* Blackstone v. Standard Life & Accident Ins. Co., 42 N.W. 156, 160 (Mich. 1889) (explaining that there could be no recovery where the decedent was "conscious of the immorality of the act"); John Hancock Mut. Life Ins. Co. v. Moore, 34 Mich. 41, 45 (1876) (concluding that an insurance policy could not result in forfeiture where the decedent died by suicide but lacked an "evil will"); Van Zandt v. Mut. Benefit Life Ins. Co., 55 N.Y. 169, 175 (1873) (referring to the "the moral obliquity of the crime of suicide").

62. *See* Thomas J. Marzen et al., *Suicide: A Constitutional Right?*, 24 DUQ. L. REV. 1, 99 (1985); *see also* State v. Melchert-Dinkel, 844 N.W.2d 13, 19 (Minn. 2014) (noting that the Minnesota legislature repealed the statute criminalizing suicide in 1911). *But see* Wackwitz v. Roy, 418 S.E.2d 861, 864 (Va. 1992) ("Suicide . . . remains a common law crime in Virginia as it does in a number of other common-law states.").

63. *Ritter*, 169 U.S. at 154.

64. *Sec. Life Ins. Co. of Am.*, 84 S.E. at 658.

permitting recovery would not frustrate the public policy against suicide.[65]

## IV. TORT LAW'S TREATMENT OF SUICIDE CASES

### *A.* Scheffer v. Railroad Co. *and the Development of the Suicide Rule*

There were significantly more insurance cases in the nineteenth and early twentieth centuries involving the question of whether to permit recovery in the event of suicide than there were tort cases involving a decedent who was alleged to have died by suicide as a result of another's negligence. And the insurance cases clearly influenced the tort law in this area. As the tort decisions arose more frequently, they sometimes cited the insurance decisions in the area and referenced the insanity/frenzy/delirium/irresistible impulse standards that developed in the insurance decisions.[66] In some instances, the borrowing from the insurance cases was express.[67]

One obvious difference between the two lines of cases is that in the tort cases, courts purported to base their decisions on causation grounds. The Supreme Court's 1881 decision in *Scheffer v. Railroad Co.*—discussed in the Introduction to this Essay—helped establish the standard tort rule in suicide cases.[68] The decision focused exclusively on the issue of proximate cause.[69] Suicide, in the Court's view, was not the "natural and probable consequence" of the defendant's negligence, so Scheffer's decision to take his own life became the sole proximate

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65. Given the conflicting decisions on the issue of whether a life insurance policy was void in the event an individual took his own life while insane, insurance companies began including language to the effect that the policy was void if the deceased took their own life whether "sane or insane." Moore v. Nw. Mut. Life Ins. Co., 78 N.E. 488, 489–90 (Mass. 1906).

66. *See, e.g.*, Brown v. Am. Steel & Wire Co., 88 N.E. 80, 85 (Ind. App. 1909) (referencing the delirium/frenzy standard from insurance cases); Daniels v. New York, N.H. & H.R. Co., 67 N.E. 424, 425 (Mass. 1903) (referencing the uncontrollable frenzy standard); *see also* Salsedo v. Palmer, 278 F. 92, 101 (2d Cir. 1921) (Mayer, J., dissenting) (referencing the insurance cases involving suicide).

67. For example, in *Daniels*, the Supreme Judicial Court of Massachusetts concluded the reasons underlying the decisions in the insurance cases compelled the conclusion that a defendant in a tort action could only be liable "when the death is the result of an uncontrollable impulse, or is accomplished in delirium or frenzy caused by the" defendant's negligence. *Daniels*, 67 N.E. at 426; *see also* Koch v. Fox, 75 N.Y.S. 913, 921 (App. Div. 1902) ("[T]he rule stated in the insurance cases involving suicide, as to what constitutes insanity, may be properly applied here.").

68. *See* Scheffer v. R.R. Co., 105 U.S. 249 (1881).

69. *See id.* at 251–52.

cause of his death.[70] American courts gradually began to cite *Scheffer* for this same causation rule in subsequent tort cases involving suicide.[71] In doing so, however, courts also frequently referenced the insurance decisions as well.[72] The reverse was also true: some insurance decisions cited *Scheffer* approvingly.[73] Thus, it appears that decisions in the two fields influenced each other.

*Scheffer* did not address the possibility of a delirium or insanity exception to its general rule of causation.[74] This is somewhat odd in that the complaint actually alleged that the injuries caused by the train accident resulted in physical injuries, which caused the decedent to become "disordered in mind and body" and produced "phantasms, illusions, and forebodings of unendurable evils," which eventually "overcame and prostrated all his reasoning powers, and induced him . . . to take his life."[75] Instead, the decision focused solely on the causation issue.[76] But the delirium or insanity concept was already well established in the insurance cases,[77] and other courts, expressly borrowing from the insurance decisions, soon began to recognize the delirium or insanity exception in their wrongful death decisions.[78]

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70. *Id.* at 252.

71. *See Salsedo*, 278 F. at 94; *Brown*, 88 N.E. at 84; Long v. Omaha & Council Bluffs St. Ry. Co., 187 N.W. 930, 931 (Neb. 1922); *see also Daniels*, 67 N.E. at 426 (citing *Scheffer* for the proposition that the representative of a deceased who dies by suicide may not recover).

72. *See Brown*, 88 N.E. at 85; *Daniels*, 67 N.E. at 425; Arsnow v. Red Top Cab Co., 292 P. 436, 443 (Wash. 1930).

73. *See* Crandal v. Accident Ins. Co. of N. Am., 27 F. 40, 47 (C.C.N.D. Ill. 1886) (referencing *Scheffer*); Bohaker v. Travelers' Ins. Co. of Hartford, Conn., 102 N.E. 342, 344 (Mass. 1913) (same).

74. If anything, *Scheffer* seems to not recognize a decedent's delirium or insanity as being an exception to its general proximate cause rule. *See Scheffer*, 105 U.S. at 252 ("His insanity, as a cause of his final destruction, was as little the natural or probable result of the negligence of the railway officials, as his suicide, and each of these are casual or unexpected causes, intervening between the act which injured him, and his death."). Furthermore, the *Salsedo* court asserted that:

> [I]f the man does not kill himself deliberately, but his death is due to suicidal mania, which results from torture, we hold that the act of suicide cannot be regarded as the natural and reasonable result of the torture or misconduct alleged, and that the New York act affords no remedy.

*Salsedo*, 278 F. at 99.

75. *Scheffer*, 105 U.S. at 250.

76. *Id.* at 252.

77. *See supra* notes 53–59 and accompanying text.

78. *See* Brown v. Am. Steel & Wire Co., 88 N.E. 80, 85 (Ind. App. 1909) ("From the cases bearing upon the subject now being considered the rule seems to be that an

### *B. The Restatement of Torts' Delirium or Insanity Rule*

In 1934, the first Restatement of Torts adopted a rule that speaks directly to the situation in which a defendant's negligence is alleged to have resulted in the suicide of another.[79] Section 455 explains that one who "brings about the delirium or insanity of another" is liable for the harm done to that person by himself if the delirium or insanity "prevents him from realizing the nature of his act and the certainty or risk of harm involved" or "makes it impossible for him to resist an impulse caused by his insanity."[80] The comments make clear that the fact that the defendant's negligence caused the decedent to suffer from depression (or "extreme melancholia" as the authors referred to it) that resulted in suicide was not a sufficient basis upon which to impose liability.[81] The accompanying illustrations also make clear that the authors classified this delirium or insanity exception under the heading of causation.[82]

The Restatement heavily influenced the developing law in this area, with subsequent tort decisions using some variation of this

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action under the statute may be maintained when the death is self-inflicted, only where it is the result of an uncontrollable influence, or is accomplished in delirium or frenzy, caused by the defendant's negligent act or omission, and without conscious volition of a purpose to take life; for then the act would be that of an irresponsible agent."); Daniels v. New York, N.H. & H.R. Co., 67 N.E. 424, 425 (Mass. 1903) ("[T]he liability of a defendant for a death by suicide exists only when the death is the result of an uncontrollable impulse, or is accomplished in delirium or frenzy caused by the [defendant's negligence] . . . ."); *see also* Long v. Omaha & Council Bluffs St. Ry. Co., 187 N.W. 930, 933–34 (Neb. 1922) (citing *Brown* and *Daniels* and referencing the lack of any irresistible impulse on the part of the decedent to take his life).

79. *See* RESTATEMENT OF TORTS § 455 cmt. a (AM. LAW INST. 1934) (explaining that "[t]he situation to which this Section is most frequently applicable is that in which another whom the defendant's negligence has made insane does some act which results in his own death. It is also applicable when the other's acts inflict less serious harm upon him."). The original Restatement does not contain any illustrations. However, the corresponding section of the Restatement (Second) of Torts contains several illustrations based on earlier tort cases, some of which expressly drew from the earlier insurance cases. *See* RESTATEMENT (SECOND) OF TORTS § 455 Reporter's Notes (AM. LAW INST. 1966) (citing *Daniels*, *Koch*, and *Arsnow* as the basis for illustrations and a comment).

80. RESTATEMENT OF TORTS § 455.

81. *Id.* § 455 cmt. d.

82. Each illustration in Section 455 involves an explanation that the defendant's negligence was a legal cause of the plaintiff's injuries. *Id.* § 455.

language or the frenzy language.[83] As a result, the near-universal general rule in cases involving negligence that results in suicide is that the decedent's own act of suicide breaks the chain of causation, unless the negligence resulted in delirium or insanity so extreme that the decedent is unable to understand the nature of the act or its consequences or is unable to resist the resulting impulse to take the individual's own life.[84]

The Restatement's rule has resulted in several problems. Following the adoption of Section 455, courts tended to treat suicide as *always* constituting an efficient or superseding cause unless it resulted from delirium or insanity. In the typical case, a court did not explain that suicide was *usually* or *ordinarily* a superseding cause of the decedent's death. Instead, the rule was often stated in absolute terms, without any regard for whether suicide might actually have been foreseeable under the particular facts of a case.[85] This, in turn,

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83. *See, e.g.*, Prill v. Marrone, 23 So. 3d 1, 8 (Ala. 2009) (stating that there was no evidence that others caused decedent to enter a "delirium, frenzy, or rage" that resulted in the suicide).

84. *See* Long, *supra* note 26, at 787–88 (discussing the general rule). Courts also generally recognize that liability may also attach where the defendant knows or should know of an individual's suicidal tendencies and has assumed an affirmative duty on behalf of the individual, such as in the case of a hospital treating a patient. *See* Rural Educ. Ass'n v. Anderson, 261 S.W.2d 151, 152 (Tenn. Ct. App. 1953) (permitting recovery where hospital was allegedly negligent in failing to use reasonable care to prevent mental patient from taking his own life); *see also* McLaughlin v. Sullivan, 461 A.2d 123, 125 (N.H. 1983) (identifying other institutions who may potentially be held liable, including jails and reform schools).

85. *See* Cleveland v. Rotman, 297 F.3d 569, 572 (7th Cir. 2002) ("It is well-established under Illinois law that a plaintiff may not recover for a decedent's suicide following a tortious act because suicide is an independent intervening event that the tortfeasor cannot be expected to foresee."); Jamison v. Storer Broad. Co., 511 F. Supp. 1286, 1291 (E.D. Mich. 1981) ("If the person commits suicide in response to a mental condition, as distinguished from a mental illness, a prior tortfeasor, perhaps in part responsible for that condition, will not be liable because the act of the deceased is viewed as an independent intervening cause."); Gilmore v. Shell Oil Co., 613 So. 2d 1272, 1278 (Ala. 1993) (holding that in the absence of a special relationship between the parties, "suicide and/or deliberate and intentional self-destruction is unforeseeable as a matter of law, and civil liability will not be imposed upon a defendant for a decedent's suicide"); Tonn v. Moore, No. 1 CA-CV 12-0372, 2013 WL 1858773, at *3 (Ariz. Ct. App. Apr. 23, 2013) ("Suicide, however, is almost universally considered a superseding cause that is [not] foreseeable . . . ."); *see also* Soto v. City of Sacramento, 567 F. Supp. 662, 693–94 (E.D. Cal. 1983) (holding that an attempted suicide is only actionable where it is non-volitional).

enabled courts to apply the rule in a rote fashion and to decide issues of proximate cause—typically a jury question—as a matter of law.[86]

Another problem was the decision of the Restatement authors to frame the delirium or insanity exception in terms of causation to begin with. The issue of proximate cause has historically centered around the foreseeability of the ensuing result.[87] For example, the Restatement (Third) of Torts now explains that "[a]n actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious."[88] Therefore, if the harm that directly resulted from the defendant's conduct was different than the kind that the defendant foreseeably risked, there should be no liability.[89] The fact that an individual was "insane" at the time of a suicide has no logical bearing on the issue of whether suicide was foreseeable, except to the extent that the defendant's negligence might foreseeably trigger insanity.

The legal rules dating back to the Middle Ages that formed the basis for the more modern rule regarding suicide make plain that the delirium or insanity exception reflects a moral judgment concerning the decedent's conduct.[90] As is the case with the *M'Naghten*/insanity defense in criminal law, the tort rule is based on an assessment of the culpability of the decedent.[91] One who does not understand the nature and quality of an act lacks the culpability necessary for prosecution.[92] Under the reasoning of the insurance cases, the same individual who takes his or her own life has not died by suicide for this same reason.[93]

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86. There were exceptions in which courts did not draw such bright lines. *See* City of Belen v. Harrell, 603 P.2d 711, 714 (N.M. 1979) ("[I]t cannot be said that in every case suicide is an independent intervening cause as a matter of law.").

87. *See* King v. Anderson Cty., 419 S.W.3d 232, 248 (Tenn. 2013) ("Foreseeability is the crucial factor in the proximate cause test because, if the injury that gives rise to a negligence case could not have been reasonably foreseen, there is no proximate cause and thus no liability despite the existence of negligent conduct." (citing Rathnow v. Knox Cty., 209 S.W.3d 629, 633–34 (Tenn. Ct. App. 2006))).

88. RESTATEMENT (THIRD) OF TORTS § 29 (AM. LAW INST. 2010).

89. *Id.* § 29 cmt. d.

90. *See supra* notes 26–32 and accompanying text.

91. *See* Jenny E. Carroll, *Brain Science and the Theory of Juvenile Mens Rea*, 94 N.C. L. REV. 539, 552 (2016) (noting that considerations of culpability take into account the insanity of the criminal defendant); *see also* Delaney v. Reynolds, 825 N.E.2d 554, 557 n.1 (Mass. App. Ct. 2005) (noting that "the historic notion that suicide is an immoral or culpable act" is a policy underlying the general rule).

92. *See* Bruce J. Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 B.C. L. REV. 785, 832 (2009) (discussing differing conceptions of the insanity defense in terms of culpability).

93. *See supra* note 45–46 and accompanying text.

The suicide rule and its delirium or insanity exception were expressly derived from these legal rules. The decision of the Restatement authors to treat the plaintiff's delirium or insanity as an issue of proximate cause is a moral judgment regarding the blameworthiness or responsibility of the plaintiff masquerading as an issue of proximate cause. If the issue is truly one of blameworthiness or responsibility, the issue of the plaintiff's delirium or insanity should be addressed as an issue of comparative fault.[94]

A final problem with the Restatement rule was the decision to recognize the delirium or insanity exception to begin with. The exception is based on an outdated medical understanding of suicide and mental illness that trivializes the primary cause of suicide and perpetuates unhelpful stereotypes of suicide and mental illness. While there are unquestionably people who die by suicide as a result of their psychoses or sudden impulses, depression is far more likely to be the cause of suicide than psychosis.[95] But the Restatement rule is clear that depression (or "extreme melancholia" as the authors referred to it back in 1934) resulting in suicide is not compensable.[96] By denying recovery in one instance and permitting it in the other, courts are expressing a value judgment as to the blameworthiness of the individual who dies by suicide. And it is a judgment that is based on an outdated understanding of the causes of suicide and mental health. Indeed, the fact that American courts in the twenty-first century continue to use such terms as "delirium" or "rage or frenzy" in connection with suicide is something of an embarrassment in terms of the justice system's purported understanding of mental illness. Ultimately, the Restatement's rule gives the law's seal of approval to the notion that thoughts of suicide are things to be ashamed of, a notion that discourages many individuals from seeking help.[97]

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94. In fairness, at the time of the first Restatement, the all-or-nothing defense of contributory negligence was the standard rule. *See* RESTATEMENT OF TORTS § 467 (AM. LAW INST. 1934).

95. *See* DEPRESSION AND SUICIDE PREVENTION, CTR. FOR SUICIDE PREVENTION 1 (2015), https://www.suicideinfo.ca/wp-content/uploads/2015/01/Depression-Toolkit_Print.pdf ("People with depressive illnesses carry out the majority of suicides."); Alex Lickerman, *The Six Reasons People Attempt Suicide*, PSYCHOL. TODAY (Apr. 29, 2010), https://www.psychologytoday.com/us/blog/happiness-in-world/201004/the-six-reasons-people-attempt-suicide (stating that depression is "without question" the most common reason why people attempt suicide).

96. RESTATEMENT OF TORTS § 455 cmt. d.

97. *See Depression*, WORLD HEALTH ORG. (Dec. 4, 2019), https://www.who.int/news-room/fact-sheets/detail/depression (listing "social stigma

Importantly, the Restatement (Third) of Torts does not retain the delirium or insanity rule.[98] The omission was most likely intentional. The authors devoted considerable attention to the traditional concept of proximate cause, rewriting the chapters on factual and proximate cause, partially redefining the traditional approach to proximate cause, and addressing a host of special causation rules.[99] Therefore, it would be surprising if the authors intended to retain the exception but failed to address it along with these other issues.

## V. *COTTEN V. WILSON*: TOWARD A NEW APPROACH IN NEGLIGENCE CASES INVOLVING SUICIDE

Tennessee tort decisions in the twentieth century are representative of the courts' handling of such cases more generally. As more tort cases involving suicide began to emerge, early Tennessee decisions quickly adopted the prevailing Restatement rule regarding proximate cause and its delirium or insanity exception.[100] But as this Part argues, more recent Tennessee decisions have taken a different turn that may potentially lead to a re-evaluation of the traditional suicide rule and its exceptions.

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associated with mental disorders" as one of the primary barriers to proper treatment of depression). One article explained how stigma may impede treatment:

> Research suggests that the stigma of mental illness can impair treatment utilization in two ways: (a) through perceived public stigma, individuals with mental illness may seek to avoid the public label and stigmatization of mental illness by choosing not to seek treatment or to discontinue treatment prematurely; and (b) through internalized stigma, individuals with mental illness may seek to avoid the negative feelings of shame and guilt about themselves by choosing not to seek treatment.

Charlotte Brown et al., *Depression Stigma, Race, and Treatment Seeking Behavior and Attitudes*, J. COMMUNITY PSYCHOL. 350, 352 (2010), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3026177/.

98. *See generally* RESTATEMENT (THIRD) OF TORTS (AM. LAW INST. 2010).

99. *See* RESTATEMENT (THIRD) OF TORTS chs. 5–6.

100. Like nearly every state, Tennessee recognizes exceptions to the general causation rule involving suicide and negligence cases. *See* Potts v. First Peoples Bank of Jefferson Cty., CA No. 03A01-9303-CV-00116, 1993 WL 276858, at *3 (Tenn. Ct. App. July 22, 1993) (identifying two exceptions to the general rule refusing to impose liability for causing another's suicide).

### *A. Early Tennessee Tort Law Decisions: Toward the Narrow Version of the Suicide Rule*

#### 1. *Eckerd's, Inc. v. McGhee*

The first reported Tennessee decision involving the allegation of negligence in a tort action concerning an attempted suicide was *Eckerd's, Inc. v. McGhee*, a 1935 decision from the Tennessee Court of Appeals.[101] In *Eckerd's*, a pharmacist was allegedly negligent in selling poison to a minor, who then attempted to take her own life.[102] Consistent with the standard approach, the court focused on whether the minor was insane or delirious at the time.[103] According to the court, the evidence tended to establish that the minor knew exactly what she was doing and concluded that there were "no facts in the record which afford a reasonable basis for an inference that she was insane or mentally incompetent."[104] As such, the minor's own actions were the proximate cause of her injuries.[105]

#### 2. *Jones v. Stewart*

By the time the next case reached the Tennessee Supreme Court in 1946, the rule that suicide was an intervening cause of an individual's death except where the decedent acted pursuant to a delirium or insanity was well established. In *Jones v. Stewart*,[106] the defendant accused the deceased, an eighteen-year-old boy, of breaking into his home and stealing $70–$75.[107] The boy later hung himself, "frightened with [the] charge of crime."[108] There was also evidence that, following the accusation, the boy had met with friends and indicated that he may be planning to take his own life.[109] The administrator of the boy's estate later brought suit, alleging that the

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101. 86 S.W.2d 570 (Tenn. Ct. App. 1935).
102. *Id.* at 571.
103. *Id.* at 576.
104. *Id.* at 577.
105. *Id.* at 576–77.
106. 191 S.W.2d 439 (Tenn. 1946).
107. *Id.* at 439.
108. *Id.*
109. *Id.* This allegation undercut any argument that the deceased acted pursuant to an uncontrollable impulse insofar as it appears his actions were thought out in advance.

suicide was the result of the unfounded accusation made by the defendant.[110]

The Tennessee Supreme Court applied the prevailing rule and held that the plaintiff's act of hanging himself was the sole proximate cause of his death.[111] In support of its decision, the court quoted from a decision from the Second Circuit Court of Appeals in which the decedent killed himself after allegedly being tortured by the defendant.[112] In that case, the Second Circuit acknowledged that it might be conceivable that a torture victim would attempt to take his own life as a result of the torture, "[b]ut, if he so kills himself deliberately, we hold that there is an intervening act of his own will for which [the law] affords no remedy."[113] This, then, represents the hard and fast version of the rule that always treats suicide as a superseding cause rather than a rule of thumb. The Tennessee Supreme Court also cited an older Massachusetts decision in which the court likewise articulated the bright-line rule that an "act of suicide resulting from a moderately intelligent power of choice, even though the choice is determined by a disordered mind, should be deemed a new and independent, efficient cause of the death that immediately ensues."[114]

Thus, while the Tennessee Supreme Court may have couched its decision in the language of foreseeability,[115] it was relying heavily upon decisions that took the view that the act of suicide is always an independent, efficient cause of death unless the suicide resulted from a delirium or frenzy.[116] The end result in *Jones* is typical of the cases in this area. But the decision is noteworthy in that the case was decided on a demurrer in which the allegations were taken as true.[117] Proximate cause is typically an issue for the jury to resolve.[118] But as *Jones* illustrates, courts applying the hard version of the suicide rule are able to apply the rule in a rote manner without any real

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110. *Id.*

111. *Id.* at 441.

112. *Id.* at 440 (quoting Salsedo v. Palmer, 278 F. 92, 99 (2d Cir. 1921)).

113. *Id.* (quoting *Salsedo*, 278 F. at 99).

114. *Id.* (quoting Daniels v. New York, N.H. & H.R. Co., 67 N.E. 424, 426 (Mass. 1903)).

115. *Id.* at 440–41 (discussing whether the decedent's act of suicide was foreseeable).

116. *Salsedo*, 278 F. at 100 (discussing the delirium or frenzy exception to the general rule); *Daniels*, 67 N.E. at 399–400 (same).

117. *Jones*, 191 S.W.2d at 440.

118. *See, e.g.*, Haynes v. Hamilton Cty., 883 S.W.2d 606, 612 (Tenn. 1994) (citing McClenahan v. Cooley, 806 S.W.2d 767, 775 (Tenn. 1991)).

consideration of foreseeability and decide proximate cause issues as a matter of law.

### 3. *Lancaster v. Montesi*

*Lancaster v. Montesi*[119] is the case discussed in the Introduction to this Essay. In *Lancaster*, the Tennessee Supreme Court applied the strict version of the suicide rule in the rote fashion typical of many courts. Margaret Lancaster died by suicide in June of 1962 after a sustained period of alleged physical and emotional abuse at the hands of Louis Montesi.[120] According to the complaint, Montesi had "broken [Lancaster's] leg, burned her with a cigarette, blacked her eyes, kicked her, and caused her to be bruised and discolored over large areas."[121] Lancaster had tried to escape from Montesi on multiple occasions but each time was forcibly brought home.[122] Lancaster eventually wrote a suicide note telling her mother that "[Montesi] has beat me enough" before taking her own life.[123]

The Tennessee Supreme Court affirmed the trial court's dismissal of the wrongful death case filed against Montesi following the defendant's demurrer.[124] The court summarily concluded, based solely on the pleadings, that Lancaster's act of taking her own life was unforeseeable.[125] In addition, the court concluded that the delirium or insanity exception did not apply because the facts as alleged indicated that she understood the nature of her act.[126]

*Lancaster* went on to become the leading case in Tennessee, and one of the leading cases in the nation, on the subject of suicide and proximate cause.[127] The case has been cited numerous times by Tennessee courts and others for the bright-line rule that suicide is an unforeseeable, efficient cause that breaks the chain of causation in a negligence case.[128] At least one Tennessee decision has cited

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119. 390 S.W.2d 217 (Tenn. 1965).

120. *Id.* at 219.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 222.

125. *Id.*

126. *Id.* at 221–22.

127. The rule from *Lancaster* does not apply in the custodial setting in which a custodian (like a jailer) knows or should know that the other person poses a foreseeable risk of suicide. *See* Cockrum v. State, 843 S.W.2d 433, 436 (Tenn. Ct. App. 1992).

128. *See* White v. Lawrence, 975 S.W.2d 525, 530 (Tenn. 1998); Potts v. First Peoples Bank of Jefferson Cty., No. 03A01-9303-CV-00116, 1993 WL 276858, at *2

*Lancaster* for the proposition that "where a defendant injures another either willfully or negligently and as a result of the injury, the injured person commits suicide the act of suicide is, *as a matter of law*, an intervening independent cause."[129] In other words, the question of foreseeability is irrelevant, provided the decedent understood the nature and consequences of his or her actions. The strictness of the court's holding has not gone unnoticed, with the Sixth Circuit Court of Appeals referring to Tennessee's approach to suicide cases as embodied by *Lancaster* "parsimonious."[130]

### *B.* White v. Lawrence: *Toward a More Reasonable Suicide Rule*

More recent Tennessee decisions involving suicide have adopted a more reasoned approach that better reflects traditional tort law principles of foreseeability. The first case to take this approach was *White v. Lawrence*, decided in 1998.[131] In *White*, the defendant was a physician who had been treating the decedent for several years prior to the decedent's suicide.[132] Through his treatment of the decedent, the physician learned that the decedent suffered from chronic alcoholism and had said on two or three occasions that he had no desire to live.[133] The physician believed the patient was a "likely candidate" for suicide.[134] In an attempt to curtail the patient's drinking, the physician prescribed Antabuse, a substance designed to produce highly unpleasant physical reactions upon consumption of even small amounts of alcohol.[135] However, the physician did not

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(Tenn. Ct. App. July 22, 1993); Weathers v. Pilkinton, 754 S.W.2d 75, 78 (Tenn. Ct. App. 1988); Inman v. Wilson, C.A. No. 61, 1988 WL 9798, at *3 (Tenn. Ct. App. Feb. 8, 1988); Walters v. Strong, C.A. No. 744, 1986 WL 13958, at *2 (Tenn. Ct. App. Dec. 12, 1986); *see also* Watkins v. United States, 589 F.2d 214, 231 (5th Cir. 1979) (Skelton, J., dissenting) (citing the *Lancaster* rule regarding suicide constituting an intervening cause); Focke v. United States, 597 F. Supp. 1325, 1351 (D. Kan. 1982) (same); State v. Edgeworth, 214 So. 2d 579, 586 (Miss. 1968) (same); Fagan v. Summers, 498 P.2d 1227, 1229 n.1 (Wyo. 1972) (same).

129. *Weathers*, 754 S.W.2d at 78 (emphasis added).

130. MacDermid v. Discover Fin. Servs., 488 F.3d 721, 738 (6th Cir. 2007); *see also Weathers*, 754 S.W.2d at 78 (noting that the court in *Lancaster* "sustained a demurrer even though the declaration alleged that the defendant had deliberately tormented the decedent in a most sadistic way and that, despite the decedent's threats of and prior attempts at suicide, the defendant continued to abuse her unmercifully.").

131. 975 S.W.2d 525 (Tenn. 1998).

132. *Id.* at 527.

133. *Id.*

134. *Id.*

135. *Id.* at 527 n.1.

inform the patient that he had prescribed the medication.[136] Instead, he instructed the patient's wife to secretly place it in the patient's food.[137] Not surprisingly, the medication made the patient physically sick after drinking, to the point that he went to the emergency room for treatment.[138] After being released, the patient took his own life several hours later.[139]

After the decedent's wife brought a medical malpractice action against the physician, an expert opined that "'[i]t was reasonably foreseeable for Dr. Lawrence to realize that secretly prescribing Antabuse to an alcoholic and depressed patient under his care and control would cause severe physical symptoms, which is a major risk factor for suicide.'"[140] Another expert similarly opined that the physician "should have reasonably foreseen that secretly prescribing and administering Antabuse to an alcoholic and depressed patient would cause severe physical problems and lead to the suicide of the patient."[141] Under the strict approach to the suicide rule applied by prior Tennessee courts and others, this testimony would probably have been treated as irrelevant. Unless the physician's actions resulted in insanity, delirium, or frenzy, the decedent's own act of suicide should have been treated as the proximate cause of his death. And, in fact, this is what the Tennessee Court of Appeals decided in holding that the physician was entitled to summary judgment:

> [W]here a defendant injures another either willfully or negligently and as a result of the injury, the injured person commits suicide the act of suicide is, *as a matter of law*, an intervening independent cause if the decedent knew and understood the nature of his or her act or the act resulted from a moderately intelligent power of choice.[142]

But on appeal, the Tennessee Supreme Court reversed the Court of Appeals and articulated a rule more in keeping with traditional tort principles of proximate cause. The court acknowledged that the plaintiff's act of suicide may constitute an intervening cause, but "the

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136. *Id.* at 527.
137. *Id.*
138. *Id.*
139. *Id.* at 528.
140. *Id.*
141. *Id.*
142. White v. Lawrence, No. 2997, 1996 WL 489204, at *3 (Tenn. Ct. App. Aug. 28, 1996). (emphasis added) (quoting Weathers v. Pilkinton, 754 S.W.2d 75, 78 (Tenn. Ct. App. 1988)), *rev'd*, 975 S.W.2d 525 (Tenn. 1998).

act of suicide is not *always* viewed as an intervening act that relieves the negligent actor from liability."[143] Instead, "the crucial inquiry is whether the defendant's negligent conduct led to or made it reasonably foreseeable that the deceased would commit suicide."[144] Thus the suicide "rule" is more a rule of thumb than a hard and fast rule, with the ultimate focus always on whether suicide was a kind of harm foreseeably risked by the defendant's negligence. As importantly, the court acknowledged the limitations of previous decisions that permitted liability only where the decedent was acting under a delirium or insanity:

> [T]he foreseeability or likelihood of a suicide does not necessarily depend upon the mental capacity of the deceased at the time the suicide was committed. The fact that the deceased was not insane or bereft of reason does not necessarily lead to the conclusion that the suicide, which is the purported intervening cause, is unforeseeable.[145]

The court then took the opportunity to expressly overrule any decisions that were inconsistent with this conclusion.[146] Based on the record, the court concluded that a reasonable jury could conclude that the suicide was the foreseeable result of the defendant's negligence.[147] *White* represents a more enlightened approach to issues of causation and suicide in torts cases. Questions as to insanity or outdated notions of "frenzy" or "delirium" take a backseat to traditional notions of foreseeability under *White*'s holding. The fact that the plaintiff was not insane at the time does not necessarily preclude a finding that the defendant's negligence was a proximate cause of the suicide.[148] Instead, as in other torts cases, the focus in terms of proximate cause is simply on proximate cause.[149]

Tennessee courts subsequently applied *White* in a somewhat inconsistent manner. Despite *White*'s criticism of the focus on the delirium or insanity exception to the exclusion of foreseeability analysis, some decisions continued to cite *Lancaster* prominently or

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143. *White*, 975 S.W.2d at 530 (emphasis added).
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *See id.*

focus heavily on the delirium or insanity exception.[150] But more courts applying Tennessee law recognized that *White* represented a shift in the Tennessee Supreme Court's treatment of suicide cases, through which the focus is increasingly less on whether the plaintiff was insane at the time of the suicide and more on whether the suicide was foreseeable under traditional foreseeability principles.[151]

For example, in *Smith v. Pfizer, Inc.*, a federal court in Tennessee noted the effect of *White* in negligence cases.[152] *Smith* involved claims against a drug manufacturer that the manufacturer's failure to warn physicians about the increased risk of suicide caused by the drug resulted in the decedent's suicide.[153] The defendant relied upon *Lancaster*'s superseding cause rule and argued that the rule should bar recovery absent an applicable exception, such as the delirium or insanity exception.[154] But the court noted that *White* had emphasized that suicide *may* constitute a superseding cause, but the rule is not absolute.[155] Nor, following *White*, does the analysis turn on whether the plaintiff was insane at the time.[156] "[T]he touchstone," the court

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150. *See, e.g.*, Haynes v. Wayne Cty., No. M2016-01252-COA-R3-CV, 2017 WL 1421220, at *11 (Tenn. Ct. App. Apr. 19, 2017) ("Generally, the act of suicide is, as a matter of law, an intervening act that breaks the chain of causation and relieves a negligent actor of liability if the decedent knew and understood the nature of his or her act or the act resulted from a moderately intelligent power of choice." (citing Lancaster v. Montesi, 390 S.W.2d 217, 222 (Tenn. 1965))).

151. *See* Tumminello v. Father Ryan High Sch., Inc., 678 F. App'x 281, 287 (6th Cir. 2017) (characterizing the litigants as complicating the issue by referencing "three specific scenarios in which Tennessee courts have found suicide not to be an independent intervening cause" and instead stating the determinative question as being whether the decedent's suicide was a reasonably foreseeable consequence of the defendant's negligence); *In re* Estate of Cotten, No. M2016-02402-COA-R3-CV, 2017 WL 4083645, at *12 (Tenn. Ct. App. Sept. 15, 2017) ("Contrary to the trial court's holding in the instant action, applicability of the independent, intervening cause doctrine hinges on foreseeability, rather than whether the situation fits a particular exception."); Ramsey v. Cocke Cty., No. E2016-02145-COA-R3-CV, 2017 WL 2713213, at *6 (Tenn. Ct. App. June 23, 2017) (citing Smith v. Pfizer, Inc., 688 F. Supp. 2d 735, 748 (M.D. Tenn. 2010)) (discussing *White* and denying defendants' motion for summary judgment); *see also* Rains v. Bend of the River, 124 S.W.3d 580, 593–94 (Tenn. Ct. App. 2003) (focusing on foreseeability of suicide). *Rains* is unusual in that, like *White*, it seriously considers whether the decedent's suicide was foreseeable but mistakenly characterizes *White* as involving a "special relationship" exception to the general rule regarding suicide and intervening cause. *Id.* at 594.

152. 688 F. Supp. 2d 735 (M.D. Tenn. 2010).

153. *Id.* at 738–39.

154. *Id.* at 747.

155. *Id.* at 747–48 (citing White v. Lawrence, 975 S.W.2d 525, 530 (Tenn. 1998)).

156. *Id.*

explained, "is foreseeability, not whether a given case fits into a previously carved-out exception."[157]

### *C.* Cotten v. Wilson: *Two Steps Up and Two Steps Back*

In June 2019, the Tennessee Supreme Court decided *Cotten v. Wilson*, the latest Tennessee decision involving the issue for liability for suicide.[158] The case involved the issue of potential liability for the ex-boyfriend of a woman with a history of depression and other psychiatric issues who died by suicide.[159] The two had a somewhat tempestuous on again, off again relationship, and on one instance the decedent had attempted suicide at the defendant's house.[160] The decedent was experiencing significant personal issues in the weeks leading up to her death.[161] During this time, the defendant, a board-certified psychiatrist, showed the decedent a handgun he had recently acquired.[162] Roughly two weeks later, the decedent took her life in the decedent's house with the gun.[163] Acting on behalf of the decedent, the plaintiff alleged that the defendant engaged in misfeasance by keeping the firearm and ammunition in locations known and accessible to the decedent.[164]

After the trial court and appellate court reached different conclusions on the issue, the Tennessee Supreme Court granted summary judgment in favor of the defendant, holding as a matter of law that the defendant's conduct was not a proximate or legal cause of the decedent's suicide.[165] The decision is somewhat surprising in that proximate or legal cause is typically a jury question and, if, as *White* made clear, foreseeability is truly the "crucial inquiry,"[166] there were several facts that might lead a reasonable juror to conclude that suicide was reasonably foreseeable under the circumstances.

But putting aside the ultimate outcome, the decision, at first glance, reads like a retreat from the earlier progress made in *White*. First, the decision not only leaves the delirium or insanity exception in place, it also unsuccessfully attempts to recast the exception as a

157. *Id.* at 748.
158. 576 S.W.3d 626 (Tenn. 2019).
159. *Id.* at 629.
160. *Id.* at 630–31.
161. *Id.* at 632–33.
162. *Id.* at 629, 632.
163. *Id.* at 633.
164. *Id.* at 634.
165. *Id.* at 653.
166. White v. Lawrence, 975 S.W.5d 525, 530 (Tenn. 1998).

benign rule about foreseeability. According to the *Cotten* majority, the exception applies when it "is reasonably foreseeable that the defendant's conduct will cause a mental condition in the decedent that would lead to the self-destructive act."[167] This description of the exception represents a substantial revision of the traditional formulation of the exception, few if any of which focused on whether it was foreseeable that the defendant's conduct would result in any sort of mental injury. Recharacterizing the exception in this manner also requires one to ignore or overlook the centuries-old history of the exception, which reveals the exception has little to do with foreseeability or causation.[168] Moreover, it is unclear whether the court's substitution of the phrase "mental condition . . . that would lead to the self-destructive act" in place of the traditional "delirium or insanity" language was meant to suggest a significant change.[169] Unfortunately, *Cotten* takes a concept that serves little purpose and adds an element of uncertainty to it.

Second, despite the clear message from *White* that "the crucial inquiry is whether the defendant's negligent conduct led to or made it reasonably foreseeable that the deceased would commit suicide,"[170] not whether a case fits into a previously carved-out exception, the *Cotten* majority spends an inordinate amount of time discussing these previously carved-out exceptions.[171] If, in fact, foreseeability is the touchstone, the proximate or legal cause analysis should begin with foreseeability. Instead, the court devoted several pages to a somewhat confusing history of the law in the area and an explanation as to why the facts did not fit into any of the recognized exceptions before turning to the issue of foreseeability.[172] By focusing so heavily on the supposed exceptions to the general suicide rule of thumb, the majority opinion creates the potential for future courts and litigants to—in the words of the dissenting opinion in *Cotten*—"get lost in the maze of the suicide rule and its exceptions."[173]

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167. *Cotten*, 576 S.W.3d at 643 (citing Johnson v. Walmart Stores, Inc., 588 F.3d 439, 442 (7th Cir. 2009)).

168. *See supra* Part II, Part III. The court also, contrary to the historical record, suggests that the delirium or insanity exceptions and other exceptions to the suicide rule developed after *Lancaster*. *Cotten*, 576 S.W.3d at 643 (stating that *Lancaster* led courts to adopt exceptions).

169. *Cotten*, 576 S.W.3d at 643 (citing *Johnson*, 588 F.3d at 442). Other parts of the decision continue to refer to the concept of "insanity." *Id.* at 642–48.

170. *White*, 975 S.W.2d at 530.

171. *Cotten*, 576 S.W.3d at 642–48.

172. *Id.*

173. *Id.* at 661 (Lee, J., dissenting).

Despite these problems, there are at least two aspects of the decision that provide cause for optimism. First is the fact that the majority opinion largely disavows the *Lancaster* decision and the *per se* approach to the suicide cases that underlies it. The court noted that "[i]t is difficult to imagine that the facts in *Lancaster* would yield the same result today"[174] and "recognized that suicide is not intrinsically a superseding intervening event that will *always* cut off the liability of the defendant, even if the decedent had some ability to reason and exercise the power of choice at the time of the suicide."[175] Thus, the court expressly rejected the hard and fast rule that there may be no liability for negligently causing suicide because suicide is *per se* a superseding cause. Hopefully, this will prompt courts in other jurisdictions to reconsider their prior precedent establishing such a *per se* approach.

Second, *Cotten* repeats the conclusion in *White* that foreseeability is the touchstone in these cases just as it is with any other tort case.[176] The fact that the particular facts of a case do not fit squarely within some exception to the general rule that suicide is *generally* unforeseeable does not preclude liability.[177] Instead, a court must ultimately look to whether the defendant's conduct created a foreseeable risk of suicide. *Cotten* is not the first decision to make this point,[178] but, when combined with *White*, it contains one of the most explicit discussions of the foreseeability principle in this context.

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174. *Id.* at 642 n.19.

175. *Id.* at 642.

176. *Id.* at 647 (citing White v. Lawrence, 975 S.W.2d 525, 530 (Tenn. 1998)).

177. *Id.*

178. *See* Szimonisz v. United States, 537 F. Supp. 147, 149 (D. Or. 1982) (stating "the standard proximate cause analysis is the appropriate analytical tool in these circumstances"); Scoggins v. Wal-Mart Stores, Inc., 560 N.W.2d 564, 570 (Iowa 1997) (applying factors listed in RESTATEMENT (SECOND) OF TORTS § 442 to determine if decedent's suicide was a superseding cause); Patton v. Bickford, 529 S.W.3d 717, 729 (Ky. 2016) (rejecting the conclusion of the lower courts, in a bullying case, that suicide is always a superseding event that breaks the chain of causation, absent an applicable exception); Zygmaniak v. Kawasaki Motors Corp. U.S.A., 330 A.2d 56, 61 (N.J. Super. Ct. Law Div. 1974) ("[I]t is difficult to understand why in this action seeking compensatory damages . . . special rules should be adopted."); Fuller v. Preis, 322 N.E.2d 263, 266 (N.Y. 1974) ("[R]ecovery for negligence leading to the victim's death by suicide should perhaps, in some circumstances, be had even absent proof of a specific mental disease or even an irresistible impulse provided there is significant causal connection."); Watkins v. Labiak, 723 N.Y.S.2d 227, 227 (N.Y. App. Div. 2002) ("Under certain circumstances, a tortfeasor may be held liable for the suicide of a person that is the result of the tortfeasor's negligent conduct, provided the suicide is a foreseeable consequence of the torfeasor's acts.").

*Cotten* also joins the majority of state courts in the workers' compensation context that have moved away from a rule that permits compensation in the case of suicide only where the claimant acted from an irresistible impulse or in a "delirium or frenzy" and in favor of a rule based strictly on causation.[179] While the compensation goals of tort law and workers' compensation differ, the rule switch in the workers' compensation context is partly attributable to a realization that applies with equal force in both contexts: the delirium or insanity exception is inconsistent with principles of modern medicine.[180] These decisions recognize that "whether an employee committed or attempted suicide in a 'delirium or frenzy' has no bearing on whether a work-related injury caused the suicide."[181]

## CONCLUSION: THE POTENTIAL IMPACT OF *COTTEN*

Despite its flaws, *Cotten* represents another step in the development of a more coherent approach toward suicide cases. Consistent with traditional tort principles, the foreseeability of a suicide, not whether the defendant's negligence produced "insanity or delirium" in the decedent, should be the touchstone in such cases. *Cotten* and *White* emphasize what should be a commonsense notion: that suicide is not always an unforeseeable occurrence that breaks the chain of causation flowing from a defendant's negligence. A little over a month after the Tennessee Supreme Court decided *Cotten*, the South Carolina Supreme Court expressly rejected the notion "that suicide is an intervening act that always breaks the chain of causation in a wrongful death action" and instead instructed that courts must "apply traditional principles of proximate cause" in such cases.[182] These ideas represent welcome advancements in the law in this field and ones that future courts may rely upon as they revisit their own prior precedents. While a decedent's act of suicide will often or even

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179. *See* Kealoha v. Office of Workers Comp. Programs, 713 F.3d 521, 524 (9th Cir. 2013) (explaining that the irresistible impulse rule used to be the prevailing rule but that courts have moved away from it in favor of a chain of causation rule).

180. *See* Vredenburg v. Sedgwick CMS, 188 P.3d 1084, 1090 (Nev. 2008) ("In acknowledging human psychology's role in causation, this test is widely recognized to accord with principles of modern medicine."); Borbely v. Prestole Everlock, Inc., 565 N.E.2d 575, 579 (Ohio 1991) ("[W]e find that a 'chain-of-causation' approach is more logical and enlightened in determining cases involving a suicide that is alleged to be the proximate result of a work-related injury.").

181. *Kealoha*, 713 F.3d at 524.

182. Wickersham v. Ford Motor Co., No. 2018-001124, 2019 WL 3311057, at *4 (S.C. July 24, 2019).

usually be the kind of extraordinary event that is outside the scope of foreseeable risk created by a defendant's negligence,[183] there will be cases in which suicide was reasonably foreseeable. Outdated rules concerning mental health should not be the focus in such cases.

Recognizing that traditional tort notions of foreseeability should guide the analysis in these cases should also eventually lead to the abolition of the "delirium or insanity" exception. This advancement alone would represent an enlightened step forward in the development of tort law. Abolishing this exception would amount to a recognition that, to the extent possible, legal rules should not further unfounded stereotypes and should instead reflect modern scientific principles.

Tennessee court decisions helped shape the modern tort rules regarding suicide. The decisions are something of a mixed bag, but they have tended to be influential. In *Cotten*, the Tennessee Supreme Court declined "to abolish the suicide rule entirely."[184] But the decision is nonetheless another step away from the bright-line rule prohibiting liability against a defendant in the case of suicide and has

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183. RESTATEMENT (SECOND) OF TORTS § 442 lists several factors to consider in determining whether an event is a superseding cause of harm, including the extraordinary nature of the event:

> The following considerations are of importance in determining whether an intervening force is a superseding cause of harm to another:
>
> (a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;
>
> (b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation;
>
> (c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation;
>
> (d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act;
>
> (e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;
>
> (f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

RESTATEMENT (SECOND) OF TORTS § 442 (AM. LAW INST. 1965).

184. Cotten v. Wilson, 576 S.W.3d 626, 648 n.23 (Tenn. 2019).

the potential to influence future courts as they revisit the law in this area.