

SECOND RESTATEMENT OF TORTS

§ 435 B. Unintended Consequences of Intentional Invasions

Where a person has intentionally invaded the legally protected interests of another, his intention to commit an invasion, the degree of his moral wrong in acting, and the seriousness of the harm which he intended are important factors in determining whether he is liable for resulting unintended harm.

§ 312. Emotional Distress Intended

If the actor intentionally and unreasonably subjects another to emotional distress which he should recognize as likely to result in illness or other bodily harm, he is subject to liability to the other for an illness or other bodily harm of which the distress is a legal cause,

(a) although the actor has no intention of inflicting such harm, and

(b) irrespective of whether the act is directed against the other or a third person.



Renee CAUVERIEN, as Executrix of the Last Will and Testament of Henry Cauverien, also known as Herman Cauverien and Hyman Cauverien, deceased,
Plaintiff, v. Sam DE METZ and Manuel Pola, Defendants.

Supreme Court, Special Term, New York County, Part I.

May 19, 1959.

Action to recover for the wrongful death of the decedent who committed suicide. The Supreme Court, Special Term, Part I, Edgar J. Nathan, Jr., J., held that the first cause of action purporting to allege a "prima facie" tort was not maintainable but that the third cause of action alleging that the malicious and intentional conversion of a consigned diamond induced in deceased an irresistible impulse to take his own life and that the deceased did so, was sufficient.

Motion to dismiss the first cause of action granted, otherwise denied....

Goodell & Moss, New York City (Edward Goodell, Herbert B. Rose, Benjamin D. Jackman, New York City, of counsel), for plaintiff.

Greenthal & Diemert, New York City, for defendants.

EDGAR J. NATHAN, Jr., Justice.

This is a novel and extraordinary complaint seeking damages for wrongful death of plaintiff's testator who committed suicide. Three causes of action are pleaded. The first alleges that the suicide was brought about by extreme apprehension and severe emotional distress intentionally caused by the wrongful and malicious conduct of defendants. The second cause is solely for conversion of property. The third alleges an irresistible impulse induced by defendants' intentional conversion causing death. Defendants move for dismissal of each of the three causes for insufficiency.

It is with respect to the sufficiency of the first and third causes of action that serious questions are presented. The second cause of action for conversion is clearly sufficient.

The complaint sets forth at great length the usage and custom in the rough and polished diamond business. In accordance with this usage and custom, the deceased, a diamond broker, took possession of a diamond from a wholesaler upon informal written consignment with the understanding that the stone thus received, or the stated value thereof, was to be returned upon demand. The deceased, also in accordance with this

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usage and custom, in turn delivered the stone to the defendants, diamond dealers, upon the same conditions, in order that they might find a prospective purchaser.

The first cause of action alleges that after the stated delivery was made to the defendants in September, 1955 the defendants, with full knowledge of the lack of title in deceased and also with full knowledge of the custom, announced to the deceased that they did not intend to purchase the diamond; that they did not intend to return the diamond to the deceased; and that they would deny having received possession thereof. It further alleges that defendants maliciously, without justification and with intent to cause injury to deceased and to his reputation refused to return the diamond, and that the failure to return the diamond to the deceased was with knowledge and notice that such failure would blacken the reputation of the deceased and destroy his ability to earn his livelihood. Finally, it alleges that these acts caused the deceased extreme apprehension and emotional distress with respect to his failure to return the diamond to its owner; and that by reason of such extreme apprehension and emotional distress, the deceased took his own life on October 6, 1955.

In the third cause of action, plaintiff alleges that the malicious and intentional conversion induced in deceased an irresistible impulse to take his own life and that deceased was impelled by that irresistible impulse to end his life and did so on October 6, 1955.

Defendants urge that neither of the alleged wrongs are cognizable as a basis for an action under section 130 of Decedent Estate Law, and that, in any event, suicide is an independent, intervening cause as matter of law.

[1] Under section 130 of the Decedent Estate Law plaintiff herein may maintain an action "to recover damages for a wrongful act, neglect or default," causing the decedent's death, if such action might have been maintained by the deceased had death not ensued. "The condition in the statute, that the action could have been maintained by the deceased if death had not ensued, has reference not to the nature of the loss or injury sustained, but to the circumstances under which the bodily injury arose, and the nature of the wrongful act, neglect, or default complained of" (*Greco v. S. S. Kresge Co.*, 277 N.Y. 26, 33, 12 N.E.2d 557, 561, 115 A.L.R. 1020, quoting from *Pym v. Great Northern Ry. Co.*, 2 B. & S. 759). The "wrongful act" referred to need not be based upon negligence (see *Sullivan v. Dunham*, 161 N.Y. 290, 55 N.E. 923, 47 L.R.A. 715). The statute applies to any wrongful death, whether predicated upon facts which constitute negligence, or any other wrongful act (*Werra v. Cascedy*, 229 App.Div. 590, 243 N.Y.S. 545). While the wrongs here alleged as a basis for suit under the statute do not include a direct physical injury to the person, they are both torts alleged to be wilfully and in-

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tentionally inflicted. The nature of these wrongs is sufficient within the meaning of the statute if the deceased could have maintained actions thereon had death not ensued. . . .

[7, 8] With respect to the third cause of action, there are additional considerations. It is axiomatic that even an intentional wrongdoer is only responsible for the injuries he has directly caused. This is equally true in order to sustain an action under section 130 of the Decedent Estate Law. The wrongful act, neglect or default must have been the proximate cause of the death (*Shapiro v. Tchernowitz*, 3 Misc.2d 617, 155 N.Y.S.2d 1011).

[9] Whether an action for wrongful death will lie where as a result of an intentional wrongful act a person becomes insane, and in response to uncontrollable impulse commits suicide, is an issue that has not yet

been decided in this State (*Koch v. Fox*, 71 App.Div. 288, 75 N.Y.S. 913; see also, *McMahon v. City of New York*, Sup., 141 N.Y.S.2d 190). The overwhelming weight of authority is to the effect that a suicide—absent insanity—is a new and independent agency which breaks the causal connection between the wrongful act and death, precluding an action under the wrongful death statutes (*Scheffer v. Railroad Co.*, 105 U.S. 249, 26 L.Ed. 1070; *Salsedo v. Palmer*, 2 Cir., 278 F. 92, 23 A.L.R. 1262; *Stevens v. Steadman*, 140 Ga. 680, 79 S.E. 564, 47 L.R.A., N.S., 1009; see also, Annotation in 11 A.L.R.2d 751). These cases and others following them are based in part at least upon the conclusion that the voluntary, wilful act of suicide is a new or independent agency which breaks the chain of causation. It has also been recognized, however, that where the suicide is committed in a state of insanity in response to an uncontrollable impulse, recovery may be had if the mental state of the deceased was caused by the defendant's wrongful act (see *Daniels v. New York, N. H. & H. R. Co.*, 183 Mass. 393, 67 N.E. 424, 62 L.R.A. 751; *Elliott v. Stone Baking Co.*, 49 Ga.App. 515, 176 S.E. 112; *Trumbaturi v. Katz & Besthoff*, 180 La. 915, 158 So. 16; *Eckerd's, Inc. v. McGhee*, 19 Tenn.App. 277, 86 S.W.2d 570). The court is of the opinion that this rule, which has been adopted by the Restatement and the text writers, is a more realistic approach to the problem and the one that should be adopted in this State (Restatement, Torts, § 455; Prosser on Torts, 2nd Ed. pp. 273, 274).

[10-12] Defendant relies heavily upon the case of *Salsedo v. Palmer*, 278 F. 92, 23 A.L.R. 1262, a second circuit decision interpreting the New York wrongful death statute. There, a divided court sustained a demurrer to the complaint stating that a death due to suicidal mania as a result of torture was neither the natural nor reasonable consequence of the wrong. The trend merging from the cases in tort liability since that time as well as the advances in medical science and knowledge of mental illness compel the conclusion the dissent in that case should be followed here. It has been said that the law solves these problems pragmatically (*Milks v. McIver*, 264 N.Y. 267, 269, 190 N.E. 487). Upon this complaint the wrong is alleged to be intentional, and therefore the wrongdoer is responsible for the injuries directly caused even though they may be beyond the limits of foreseeability. Where, as here, reliance is placed upon the wilful and malicious intent to commit a wrongful act, the question of whether death by suicide could be the natural, proximate and legal consequence of the tort is one for the jury. The court cannot say, as a matter of pleading and resolving every fair intendment in support of the pleader, that the full coverage of tort liability cannot embrace the facts and circumstances here involved. Nor can it say that the result is too tenuous or speculative merely because of difficulty or improbability of proof. In so holding the court construes the allegation of irresistible impulse in the third cause of action as sufficient to constitute an allegation of insanity. Under the first cause of action, the allegation of mere emotional upset is insufficient even if that cause were otherwise sustainable. Accordingly, the motion is granted to the extent of dismissing the first cause of action, and is otherwise denied.