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Insurance - Suicide - Insurer Has to Prove Suicide More Probable Than Any Other Theory

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In general the "collateral source rule" has found favor with many courts and has been liberally applied in a variety of situations. A reason for this favor, it is submitted, is the basic proposition that the duty of the wrongdoer is to answer for the damages wrought by his wrongful act, and that such damages are measured by the whole loss so caused.[12]

For these reasons, and in light of the fact that *Ostmo v. Tennyson* seems to have brought the spirit of the "collateral source rule" to North Dakota, it is felt that this principle should not be overlooked in computing damages and should be applied in North Dakota litigation.

MAURICE E. COOK

INSURANCE—SUICIDE—INSURER HAS TO PROVE SUICIDE MORE PROBABLE THAN ANY OTHER THEORY—A life insurance policy provided that in the event that death was caused by suicide the policy would be void. The insured's body was found amid circumstances which showed death could have been a suicide and the insurance company defended on that ground. The trial judge's instruction to the jury, consistent with a well established rule in Iowa,[1] was, in effect, that the insurer had to produce evidence sufficient to exclude every other reasonably probable theory as to the cause of death. On appeal the Supreme Court of Iowa, abrogating the above mentioned rule, *held*, three justices dissenting and one justice dissenting in part, that evidence showing suicide was more probable than any other theory was sufficient. *Bill v. Farm Bureau Life Ins. Co.*, 119 N.W. 2d 768 (Iowa 1963).

The law of England imposed a severe penalty for the taking of one's own life.[2] The resulting hardship on the

12. Francis v. Atcheson, T. & S. F. Ry., 113 Tex. 202, 253 S.W. 819, 822 (1923).

1. See, e.g., Wilkinson v. National Life Ass'n, 208 Iowa 246, 225 N.W. 242 (1929); Green v. New York Life Ins. Co., 192 Iowa 32, 182 N.W. 808 (1921); Mickalek v. Modern Bhd. of America, 179 Iowa 33, 161 N.W. 125 (1917); Wood v. Sovereign Camp of Woodmen of the World, 166 Iowa 391, 147 N.W. 888; Stephenson v. Bankers Life Ass'n, 108 Iowa 637, 79 N.W. 459 (1899).

2. Blackstone relates that the law of England required the forfeiture of all of the deceased's goods and chattels to the Crown and required an ignominious burial on the public highway with a stake driven through the body. 4 BLACKSTONE, COMMENTARIES 190 (Lewis' ed. 1897).

deceased's family is said to be the historical basis for the presumption against suicide.[3] That presumption is universally accepted although love of life and the immorality of self-destruction are usually given as the reasons for its existence.[4]

Generally, proof of death coupled with the presumption against suicide makes a prima facia case for the plaintiff benificiary in a life insurance litigation.[5] There is disagreement, however, as to the function of the presumption subsequent to that step in the controversy. Wigmore's assertion that the presumption disappears when confronted by evidence of suicide[6] is followed by some courts.[7] Others maintain that the presumption itself is evidence.[8] In those jurisdictions there is much confusion as to the weight and effect of that evidence.[9]

North Dakota views the presumption in much the same light as did Iowa prior to the instant decision.[10] The presumption does not disappear when confronted by evidence of suicide,[11] it has the weight of affirmative evidence,[12] and circumstantial evidence must exclude *every other reasonably*

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3. See Hartman, **The Presumption Against Suicide as Applied in the Trial of Insurance Cases,** 19 Marq. L. Rev. 20 (1934).

4. See, **e.g.,** Perringer v. Metropolitan Life Ins. Co., 241 Mo. App. 521, 244 S.W.2d 607 (1951); Grosvenor v. Fidelity & Cas. Co., 102 Neb. 629, 168 N.W. 258 (1937); Fehrer v. Midland Cas. Co., 179 Wis. 431, 190 N.W. 910 (1922).

5. See, **e.g.,** Canada Life Assur. Co. v. Houstan, 241 F.2d 523 (9th Cir. 1957); Gulf Life Ins. Co., 257 App. Div. 656, 15 N.Y.S.2d 51 (1939); Swihovec v. Woodmen Acc. Co., 69 N.D. 259, 285 N.W. 447 (1939).

6. ". . . [T]he peculiar effect of a presumption of law' (that is, the real presumption) is merely to invoke a rule of law compelling the jury to **reach the conclusion in the absence of evidence to the contrary** from the opponent. If the opponent does offer evidence to the contrary (sufficient to satisfy the Judge's requirements of some evidence), the presumption disappears as a rule of law, and the case is in the jury's hands free from any rule." 9 WIGMORE, EVIDENCE § 2491 (3d ed. 1940).

7. See, **e.g.,** New York Life Ins. Co. v. Gamer, 303 U.S. 161 (1938); Ziegler v. Equitable Life Assur. Co. of U.S., 284 F.2d 661 (7th Cir. 1960); Kettlewell v. Prudential Ins. Co. of America, 6 Ill. App. 2d 434, 128 N.E.2d 652 (1955); Headie v. New York Life Ins. Co., 69 S.D. 499, 12 N.W.2d 313 (1943).

8. See New York Life Ins. Co. v. Hunter, 60 Ariz. 416, 138 P.2d 414 (1943); Reddick v. Grand Union Tea Co., 230 Iowa 108, 296 N.W. 800 (1941); Lewis v. New York Life Ins. Co., 113 Mont. 151, 124 P.2d 579 (1942).

9. See, **e.g.,** New York Life Ins. Co. v. Satcher, 152 Fla. 411, 12 So. 2d 108 (1943); Cox v. Metropolitan Life Ins. Co., 139 Me. 167, 28 A.2d 143 (1942); Stuckum v. Metropolitan Life Ins. Co., 283 Mich. 297, 277 N.W. 891 (1938); Falkinburg v. Prudential Ins. Co. of America, 132 Neb. 831, 273 N.W. 478 (1937).

10. **Compare** Mickalek v. Modern Bhd. of America, 179 Lowa 33, 161 N.W. 125 (1917), **with** Paulsen v. Modern Woodmen of America, 21 N.D. 235, 130 N.W. 231 (1911).

11. See Dick v. New York Life Ins. Co., 359 U.S. 437 (1959).

12. See Svihovec v. Woodmen Acc. Co., 69 N.D. 259, 285 N.W. 447 (1939); Paulsen v. Modern Woodmen, 21 N.D. 235, 130 N.W. 231 (1911); Clemens v. Royal Neighbors, 14 N.D. 116, 103 N.W. 402 (1905).

probable theory as to the cause of death before the presumption is rebutted.[13]

No less authority than the Supreme Court of the United States, by implication in one case[14] and by adopting the contra view in at least one other,[15] has shown opposition to North Dakota's approach to this presumption.

Self-destruction is not uncommon.[16] It is submitted that, by holding insurance companies to a standard of proof higher than other litigants, the courts are working a hardship on the insurer. Iowa's change of attitude seems desirable. North Dakota should follow the example.

LARRY KRAFT

STAR DECISIS—SOVEREIGN IMMUNITY—PROSPECTIVE OVERRULING—The plaintiff brought an action against the defendant school district, its principal, and a teacher for injuries sustained through the alleged negligence of the defendants. The action against the school district was dismissed by the District Court on the basis of sovereign immunity. The Minnesota Supreme Court upheld the District Court but prospectively ruled that after the adjournment of the 1963 Minnesota Legislature the doctrine of sovereign tort immunity would not be available to school districts, municipal corporations or other government subdivisions which had previously been granted immunity by the court. Recognizing that the prospective ruling was dictum the court said that equity required that those who had depended on the prior law be given time to protect themselves. *Spanel v. Mound View School Dist. No.* 621, 118 N.W.2d 795 (Minn. 1962).

Sovereign immunity from tort liability has been a well established principle of law.[1] This doctrine has been criticized

13. Svihovec v. Woodmen Acc. Co., 69 N.D. 259, 285 N.W. 447 (1939); see Clemens v. Royal Neighbors, 14 N.D. 116, 103 N.W. 402 (1905).
14. See Dick v. New York Life Ins. Co., 359 U.S. 437 (1959) (dictum).
15. New York Life Ins. Co. v. Gamer, 303 U.S. 161 (1938).
16. In 1961 there were 19,170 suicides reported in the United States which is more than half as many deaths as were caused by motor vehicle accidents. WORLD ALMANAC 304 (Hansen ed. 1963).

1. Mower v. The Inhabitants of Lecester, 9 Mass. 247 (1812); Rogers v. Holmes, 214 Ore. 687, 332 P.2d 608, 611 (1958) "That a sovereign state cannot be sued without its consent is a cardinal principle of law so well established as to require no citation."