Insurance -- Accident Policies -- Construction of "Accidental Means" in Policy

Hal W. Broadfoot

a conviction,[45] or where the solicitor had failed to give notice for the production of documentary evidence which he deemed essential to the establishment of the state's case,[46] and finally, the circumstances of the present case, where the state procured a mistrial in order to obtain the testimony of witnesses not available at the trial.

The principal case is wholly consistent with prior North Carolina decisions; however, here for the first time, the Supreme Court of the United States has affirmed the application of the North Carolina rule of discretion in an extreme case. Should a case with similar facts come before the North Carolina court again, it is submitted that the present procedure should be re-examined to assure that the fundamental rights of the defendant are not violated.

JAMES T. HEDRICK

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Deceased was insured under a health and accident policy the pertinent clauses of which provided indemnity against ". . . bodily injuries sustained . . . through purely accidental means . . . independently and exclusively of disease and all other causes. . ."[1] On the date of his death he was employed by a roofing company and engaged in shingling a house. Following a brief rest in the shade he ascended a ladder carrying a 70-pound bundle of shingles, reached the top, and in attempting to move the bundle higher on the roof, collapsed and slumped over it. Minutes later he was dead. The coroner's report showed death to have resulted from acute coronary occlusion antecedently produced by heat exhaustion.

In beneficiary's action on the policy the jury found that (1) death resulted from bodily injuries, (2) such injuries resulted in death independently and exclusively of disease and all other causes, (3) such injuries resulted through purely accidental means, and (4) death was not caused solely by coronary occlusion but that heat exhaustion and

[45] In State v. Dove, 222 N. C. 162, 22 S. E. 2d 231 (1942), the solicitor moved to be permitted to offer additional evidence at a later trial *since such evidence was not then available.* The trial court ordered a mistrial over the defendant's objection. On appeal, the action was affirmed, and, since the ordering of a mistrial in cases of felonies less than capital is discretionary, the appeal is premature. State v. Guice, 201 N. C. 761, 161 S. E. 533 (1931); State v. Andrews, 166 N. C. 349, 81 S. E. 416 (1914); State v. Weaver, 35 N. C. 204 (1891).

[46] In State v. Collins, 115 N. C. 716, 20 S. E. 452 (1894), the solicitor requested the withdrawal of a juror and time allowed to serve the defendant with notice to produce an order which the solicitor deemed essential to the state's case. The withdrawal was ordered and this action was affirmed on appeal since a mistrial in a case not capital is a matter of discretion.

[1] 109 N. E. 2d 649 (Ohio 1952).

coronary occlusion contributed to cause death. These findings were affirmed by a divided court in *Hammer v. Mutual Benefit Health and Accident Ass'n.*[2]

And so arise again the oft-litigated and much disputed questions of the line of demarcation between injury and disease, and of the interpretation to be given the term "accidental means"[3] in an accident[4] insurance policy. These questions have plagued the courts for over sixty years. The authorities have taken hopelessly irreconcilable positions; consequently it is deemed necessary that a general analysis of the applicable law be propounded.

Accidental Injury as Contrasted with Disease.[5] It frequently occurs that deceased suffered what is admittedly an "accident" within the meaning of that term,[6] but the result is further complicated by reason of a previously existing and independent disease, or by a disease which is directly produced by the accident. Such cases fall within one of four categories, following:

(1) "When an accident caused a diseased condition, which together with the accident resulted in the injury or death complained of, the accident alone is to be considered the cause of the injury or death."[7] Thus, where deceased suffered coronary occlusion due to the strained position of his body as he wielded a blowtorch on a tank, recovery was allowed on the theory that the accident, *i.e.,* strain, produced the diseased condition, *i.e.,* coronary occlusion.[8]

(2) "When at the time of the accident the insured was suffering from some disease, but the disease had no causal connection with the injury or death resulting from the accident, the accident is to be considered as the sole cause."[9] Accordingly, recovery was allowed where

[2] Hammer v. Mutual Ben. Health and Acc. Ass'n., *supra* note 1.

[3] The vast majority of cases examined involved policies containing the clauses, "accidental means" or "external, violent, and accidental means." Such policies do not insure against mere accidental injury or death, but rather injury or death effected through "accidental means."

[4] Some of the cases herein cited involve the construction of similar clauses in the accident provisions (double indemnity) of *life* insurance policies.

[5] The policies under consideration do not purport to insure against bodily injuries caused by disease.

[6] "An event that takes place without one's foresight or expectation; an undesigned, sudden and unexpected event." WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1940).

[7] Penn v. Standard Life Ins. Co., 160 N. C. 399, 405, 76 S. E. 262, 263 (1912); Harris v. Provident Life and Acc. Ins. Co., 193 N. C. 485, 137 S. E. 430 (1937); Bouchard v. Prudential Ins. Co., 135 Me. 238, 194 Atl. 405 (1937); Hutchinson v. Aetna Life Ins. Co., 182 Ore. 639, 189 P. 2d 586 (1948); 1 APPLEMAN, INSURANCE LAW AND PRACTICE § 404 (1941).

[8] Metropolitan Casualty Ins. Co. v. Fairchild, 215 Ark. 416, 220 S. W. 2d 803 (1949).

[9] Penn v. Standard Life Ins. Co., 160 N. C. 399, 405, 76 S. E. 262, 263 (1912); Harris v. Provident Life Ins. Co., 193 N. C. 485, 137 S. E. 430 (1927); Bouchard v. Prudential Ins. Co., 135 Me. 238, 194 Atl. 405 (1937); Hutchinson v. Aetna Life Ins. Co., 182 Ore. 639, 189 P. 2d 586 (1948); 1 APPLEMAN, INSURANCE LAW AND PRACTICE § 403 (1941).

death resulted from brain concussion following a fall, although deceased was afflicted with nephritis (inflammation of the kidneys) at the time.[10]

(3) "When at the time of the accident there was an existing disease, which, cooperating with the accident, resulted in the injury or death, the accident cannot be considered as the sole cause or as the cause independent of all other causes."[11] Recovery has been denied under this rule where deceased had previously suffered a severe attack of angina pectoris, then suffered a second and fatal one due to sudden strain;[12] and where adhesions, present for twenty years following an appendectomy, were aggravated by a blow in the side incurred when deceased fell.[13] The courts in both cases found that the previously existing conditions cooperated with the accidents to cause death.

(4) When a pathological condition itself caused the accident which resulted in injury or death, at least one opinion has intimated that the accident alone is to be considered the cause of the injury or death.[14] Thus, if one subject to dizzy spells suffers one and fractures his skull in a resulting fall, the fall alone will be considered the cause of the injury or death. However, this latter category has not generally been treated by the majority decisions.

Thus it can readily be seen that the facts in each particular case assume paramount importance, with the ultimate determination of liability or lack thereof dependent in large measure upon acceptance or rejection of expert medical testimony.

External, Violent, and Accidental Means. It must be remembered that the overwhelming majority of policies insure against not merely accidental injury or death, but rather injury or death effected solely through external, violent, and accidental means.[15] Hence the interpretations assume importance. This clause is less susceptible of analysis

[10] Bristol v. Mutual Ben. Health and Acc. Ass'n., 305 Mich. 145, 9 N. W. 2d 38 (1943); *accord,* North American Acc. Ins. Co. v. Allentharp, 164 F. 2d 9 (10th Cir. 1947) (action for disability benefits).

[11] Penn. v. Standard Life Ins. Co., 160 N. C. 399, 405, 76 S. E. 262, 263 (1912); Harris v. Provident Life Ins. Co., 193 N. C. 485, 137 S. E. 430 (1927); Prudential Ins. Co. v. Gaines, 271 Ky. 496, 112 S. W. 2d 666 (1938); Bouchard v. Prudential Ins. Co., 135 Me. 238, 194 Atl. 405 (1937); McQuade v. Prudential Ins. Co., 166 Misc. 524, 2 N. Y. S. 2d 647 (1938); Hutchinson v. Aetna Life Ins. Co., 182 Ore. 639, 189 P. 2d 586 (1948); 1 APPLEMAN, INSURANCE LAW AND PRACTICE §403 (1941). *Contra:* Preston v. Aetna Life Ins. Co., 174 F. 2d 10 (7th Cir. 1949); Brooks v. Metropolitan Life Ins. Co., 27 Cal. 305, 163 P. 2d 689 (1945); Rebenstorf v. Metropolitan Life Ins. Co., 299 Ill. App. 71, 19 N. E. 2d 420 (1939).

[12] Schroeder v. Police and Firemen's Ins. Ass'n., 300 Ill. App. 375, 21 N. E. 2d 16 (1939).

[13] Hutchinson v. Aetna Life Ins. Co., 182 Ore. 639, 189 P. 2d 586 (1948).

[14] *See* Browning v. Equitable Life Assur. Soc., 94 Utah 532, 554, 72 P. 2d 1060, 1070 (1937) (dissenting opinion wherein the writer reasons that ". . . the chain of cause and effect should start from and not before the injury.").

[15] See note 3, *supra.*

than that previously considered, one court frankly stating that there are about as many different constructions of it as there are companies writing this type insurance.[16] Comparatively speaking, the terms "external" and "violent" cause little trouble,[17] the major difficulty centering around the definition or interpretation to be given the term "accidental means." This has proven true as predicted in the staid comment of Mr. Justice Cardozo, dissenting in *Landress v. Phoenix Mutual Life Insurance Co.*,[18] that "The attempted distinction between accidental results and accidental means will plunge this branch of the law into a Serbonian Bog."

Nevertheless, the courts have taken opposite positions, the majority holding that there is a distinction between accidental means and accidental results, and that *both* elements are requisites for recovery under such a policy.[19] In other words, not only must the injury or death be accidental, but also the means which produced that result must be accidental. These courts recognize the rule that a contract is to be construed most strongly against the party preparing it, but refuse to extend unambiguous terminology in favor of the insured. Among their reasons are the fact that accidental injury or death alone is not insured against,[20] and that the low cost premiums generally prevailing in this field make extension of coverage unjust.[21]

Under the majority rule decisions it is held that where the insured does a voluntary and intended act in the manner in which he intended, there can be no recovery in the event of accidental injury or death, the means in such case not being accidental.[22] Closely akin to this rule are three qualifications on it. *First.* Even if insured's act be voluntary, the means employed can still be accidental if he proceeded with ignorance of a material fact.[23] Thus, where deceased engaged in an

[16] *See* Browning v. Equitable Life Assur. Soc., 94 Utah 532, 560, 72 P. 2d 1060, 1073 (1937) (concurring opinion).

[17] 1 APPLEMAN, INSURANCE LAW AND PRACTICE § 393 (1941); VANCE, INSURANCE 879 (2d ed. 1930).

[18] 291 U. S. 491, 499 (1934) (Mr. Justice Cardozo went on to say, "When a man has died in such a way that his death is spoken of as an accident, he has died because of an accident, *and hence by accidental means.*" (Italics supplied.)

[19] Landress v. Phoenix Mut. Life Ins. Co., 291 U. S. 491 (1934); United States Mut. Acc. Ass'n. v. Barry, 131 U. S. 100 (1889); Inter-Ocean Casualty Co. v. Foster, 226 Ala. 348, 147 So. 127 (1933); Fletcher v. Security Life and Trust Co., 220 N. C. 148, 16 S. E. 2d 687 (1941); Scott v. Aetna Life Ins. Co., 208 N. C. 160, 179 S. E. 434 (1935); New Amsterdam Casualty Co. v. Johnson, 91 Ohio St. 155, 110 N. E. 475 (1914).

[20] Landress v. Phoenix Mut. Life Ins. Co., 291 U. S. 491 (1934); Szymanska v. Equitable Life Ins. Co., 7 W. W. Harr. (Del.) 272, 183 Atl. 309 (1936); Fletcher v. Security Life and Trust Co., 220 N. C. 148, 16 S. E. 2d 687 (1941).

[21] John Hancock Mut. Life Ins. Co. v. Plummer, 181 Md. 140, 28 A. 2d 856 (1942).

[22] See note 19, *supra*.

[23] Pope v. Prudential Ins. Co., 29 F. 2d 185 (6th Cir. 1928) (by implication); Provident Life and Acc. Ins. Co. v. Maddox 184 Tenn. 70, 195 S. W. 2d 536 (1946).

affray with a policeman not in uniform, ignorant of the officer's status, beneficiary was allowed recovery for her husband's ensuing death.[24] *Second.* Where injury or death is not the natural, probable, or expected result of insured's voluntary act, but nevertheless occurs, the means will be held accidental.[25] So where deceased, the aggressor in a fist fight, received a fractured skull when knocked to the pavement, insurer was held liable.[26] *Third.* Where some *vis major* or misadventure enters the voluntary act undertaken by insured, this too will constitute the means accidental.[27] Accordingly, recovery was allowed where deceased died from brain inflammation following the puncture of a pimple on his lip, the *vis major* being the driving of germs beneath the skin during the voluntary act of puncturing the pimple.[28]

On the other hand, several courts, though recognizing the difference between the terms "means" and "results," have flatly and frankly refused to draw any legal distinction between them.[29] Consequently, where there has been an accidental injury or death, and notwithstanding the means effectuating it, insured or his beneficiary is allowed recovery even though the policy expressly provided that in order to recover, such injury or death must have been effected solely through external, violent, and accidental means. The rationale behind these decisions is that the public for whom the policies are written do not understand such super-

[24] Provident Life and Acc. Ins. Co. v. Maddox, *supra* note 23.

[25] United States Mut. Acc. Ass'n. v. Barry, 131 U. S. 100 (1889); Inter-Ocean Cas. Co. v. Foster, 226 Ala. 348, 147 So. 127 (1933); Rooney v. Mutual Ben. Health and Acc. Ass'n. 74 Cal. App. 2d 885, 170 P. 2d 72 (1946); Akins v. Illinois Bankers Life Assur. Co., 166 Kan. 648, 203 P. 2d 180 (1949); Pyramid Life Ins. Co. v. Milner, 289 Ky. 249, 158 S. W. 2d 429 (1942); Pacific Mut. Life Ins. Co. v. Fagan, 292 Ky. 533, 166 S. W. 2d 1007 (1942); North Amer. Acc. Ins. Co. v. Henderson, 180 Miss. 894, 177 So. 528 (1937); Korfin v. Continental Cas. Co., 5 N. J. 154, 74 A. 2d 312 (1950); Fletcher v. Security Life and Trust Co., 220 N. C. 148, 16 S. E. 2d 687 (1941); Goethe v. New York Life Ins. Co., 183 S. C. 199, 190 S. E. 451 (1937); McMahon v. Mutual Ben. Health and Acc. Ass'n., 33 Wash. 2d 415, 206 P. 2d 292 (1949).

[26] Rooney v. Mutual Ben. Health and Acc. Ass'n., *supra* note 25.

[27] Landress v. Phoenix Mut. Life Ins. Co., 291 U. S. 491 (1934); Smith v. Aetna Life Ins. Co., 24 Tenn. App. 570, 147 S. W. 2d 1058 (1940); Provident Life and Acc. Ins. Co. v. Wallace, 23 Tenn. App. 697, 137 S. W. 2d 888 (1939); Stone v. Fidelity and Casualty Co., 133 Tenn. 672, 182 S. W. 252 (1916); Pacific Mut. Life Ins. Co. v. Schlakzug, 143 Tex. 264, 183 S. W. 2d 709 (1944); International Travelers' Ass'n. v. Francis, 119 Tex. 1, 23 S. W. 2d 282 (1930).

[28] Lewis v. Ocean Acc. and Guaranty Co., 224 N. Y. 18, 120 N. E. 56 (1918).

[29] Murphy v. Travelers' Ins. Co., 141 Neb. 41, 2 N. W. 2d 576 (1942); Caffaro v. Metropolitan Life Ins. Co., 14 N. J. Misc. 167, 183 Atl. 200 (1936); Burr v. Commercial Travelers' Mut. Acc. Ass'n., 295 N. Y. 294, 67 N. E. 2d 248 (1946), noted in 13 BROOKLYN L. REV. 65 (1947); Mansbacher v. Prudential Ins. Co., 273 N. Y. 140, 7 N. E. 2d 18 (1937); Maryland Cas. Co. v. Hazen, 182 Okla. 623, 79 P. 2d 577 (1938); Provident Life and Acc. Ins. Co. v. Green, 172 Okla. 591, 46 P. 2d 372 (1935); O'Neil v. New York Life Ins. Co., 65 Idaho 722, 152 P. 2d 707 (1944); Comfort v. Continental Casualty Co., 239 Iowa 1206, 34 N. W. 2d 588 (1948).

refinements;[30] the distinction is illogical;[31] and the clauses are not readily distinguishable.[32]

The *Hammer* case falls within the majority rule both as regards injury contrasted with disease, and as to the distinction placed on the term accidental means. The court there held heat exhaustion to be an injury rather than a disease,[33] and found the accidental means in the *rays* of the sun rather than in the heat exhaustion itself.

Disregarding any possible social justification, it is submitted that, in view of the freedom of the parties to contract as they will, and the unambiguous language of the policies, the rules adopted by the majority decisions are those most consonant with settled legal principles.

HAL W. BROADFOOT

Judgment—Vacation Because of Surprise or Excusable Neglect

G. S. 1-220 provides, in part, that:

"The judge shall, upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, verdict or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. . . ."

In 1883, Justice Ashe noted the great number of appeals based on the above statute, commenting, ". . . and still they come."[1] The statement is appropriate at the present time.[2] As the appeals are "still coming," a brief recapitulation of cases in which the statute is involved seems to be in order.

The relief provided by the terms of G. S. 1-220 must be sought by a motion in the cause and cannot be had in an independent action.[3]

[30] Burr v. Commercial Travelers' Mut. Acc. Ass'n., 295 N. Y. 294, 301, 67 N. E. 2d 248, 251 (1946) ("Our guide must be the reasonable expectation and purpose of the ordinary business man when making an insurance contract. . . .").

[31] Murphy v. Travelers' Ins. Co., 141 Neb. 41, 48, 2 N. W. 2d 576, 580 (1942) (". . . the distinction between accidental result and accidental means cannot be said to exist.").

[32] Comfort v. Continental Casualty Co., 239 Iowa 1206, 34 N. W. 2d 588 (1948); Miser v. Iowa State Traveling Men's Ass'n., 223 Iowa 662, 273 N. W. 155 (1937); Lickleider v. Iowa State Traveling Men's Ass'n., 184 Iowa 423, 429, 166 N. W. 363, 366 (1918) (". . . the meaning of these words in law differs in no essential respect from the meaning attributed to them in popular speech.").

[33] The bulk of American authorities refuse to apply a pathological definition to the term, "sunstroke," holding instead that same is an accident within the meaning of an insurance policy. Lower v. Metropolitan Life Ins. Co., 111 N. J. L. 426, 168 Atl. 592 (1933); Continental Casualty Co. v. Clark, 70 Okla. 187, 173 P. 453 (1918); Richards v. Standard Acc. Ins. Co., 58 Utah 622, 200 P. 1017 (1921); 1 APPLEMAN, INSURANCE LAW AND PRACTICE § 447 (1941). *Contra:* Dozier v. Fidelity and Casualty Co., 46 Fed. 446 (C. C. W. D. Mo. 1891).

[1] Kivett v. Wynne, 89 N. C. 39, 41 (1883).

[2] Over 175 cases involving relief sought under the statute have been decided since 1883, an average of more than two cases per year.

[3] Ins. Co. v. Scott, 136 N. C. 157, 48 S. E. 581 (1904); Walker v. Gurley, 83 N. C. 429 (1880).