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Insurance—Accidental Means v. Accidental Death or Tweedledum v. Tweedledee

The insured in Henderson v. Hartford Acc. & Indem. Co. was a member of the local fire department who entered a burning dwelling in furtherance of his duties as a fireman. While inside the house he inhaled heavy smoke which caused him to collapse. He was revived, but he died after a few minutes from a cardiac arrest brought on by the smoke inhalation. The group accident insurance policy covering the fire department members provided that death or injury must be "effected . . . through accidental means." On the basis of this wording the North Carolina Supreme Court denied recovery to the insured's beneficiary, distinguishing the terms "accidental means" and "accident." The insured's death, the court held, occurred by "accident" and not by "accidental means."

The common definition of an "accident" is an unusual, unexpected and unintended event—an event which happens fortuitously and without design. In light of the fact that the term "accident" has acquired no special technical meaning in law and is to be given its ordinary and common meaning, it would appear that recovery would be had in the above case. The distinction drawn by the North Carolina court to deny recovery, however, is also drawn in many other jurisdictions. On the other hand, some courts, while recognizing the technical distinction between the terms, flatly refuse to drawn any legal distinction between them. The

*In the poem "On the Feuds between Handel and Bononcini," which was written about two feuding schools of musical theory between which there was no real difference, the English poet John Byron wrote this familiar line:

"Strange all this difference should be
Twixt Tweedledum and Tweedledee."

This expression has a special relevance when discussing the terms "accidental means" and "accident" in insurance law.

2 Id. at 130, 150 S.E.2d at 18 (emphasis added). The term "accidental means" is common in accident policies and in double indemnity provisions of life insurance policies. See Franklin, Accidental Death—As It Relates to Health and Accident Policies and Double Indemnity Provisions of Life Policies, ABA Ins., Negl., & Comp. Law Section 91 (1965). The two types of policies will be treated together here since the use of the term has the same effect in both. For a brief history of how the term came into use see M. Cornelius, Accidental Means 1-4 (1932).
resulting controversy is no small one. It is helpful, for purposes of analysis, to regard the courts and legal scholars as divided into two distinct groups, but it is not always clear to which group some courts belong.

The first group, of which North Carolina is a member, follows the “strict approach” or “Georgia rule.” This group distinguishes between the terms and is considered to be in the majority. Basically, the distinction is founded upon the idea that “means” is synonymous with “cause;” that when the term “accidental means” is used in a policy, the cause of the injury or death must be accidental. To these courts it is not sufficient that the result can be classified as an accident. Under this theory an insured’s injury or death may be an “accident” and yet not caused by “accidental means.” The means are not considered accidental when the insured does a voluntary and intentional act and is injured or killed, even though the injury or death does not ordinarily follow such an act and was not in any way intended or expected.

The North Carolina court’s reasoning in the Henderson case provides a clear example of the strict approach. There the insured was voluntarily and intentionally fighting the fire. The court held that the means were not accidental since the insured was voluntarily performing an intentional act, even though the result (i.e. death) was unusual, unexpected, and unforeseen. If a slip or mishap occurs in the doing of a voluntary and intentional act, an element of unexpectedness is added and the means become accidental. Therefore the distinction or strict approach becomes important only where the insured is injured or killed as the result of an intentional act in which no slip or mishap occurred, but where the result was totally unexpected and unintended as in Henderson.

The second group of courts and legal scholars follows the

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6 This “strict approach” stems from the case of United States Mut. Acc. Ass’n v. Barry, 131 U.S. 100 (1889).
7 29A Am. Jur., supra note 2, at § 1166.
8 268 N.C. at 133, 150 S.E.2d at 20.
9 Thus in Henderson the court ruled by implication that if a slip, mishap, or mischance had occurred in the doing of the act, recovery would have been allowed.
"liberal approach" or "New York rule." Mr. Justice Cardozo, dissenting in Landress v. Phoenix Mut. Life Ins. Co., paved the way for this liberal rule by his apparently logical statement to the effect that an accident is an accident throughout or it is no accident at all. To the followers of the liberal approach the terms "accidental means" and "accident" are regarded as being legally synonymous. To these courts the means are accidental when the result is an accident. Therefore, when the result is unusual, unexpected, and unintended, even though resulting from an intentional act in which no slip or mishap occurs, the means are held to be accidental and recovery is allowed.

Added to the controversy is confusion. Mr. Justice Cardozo predicted in his celebrated dissent in Landress that "[t]he attempted distinction between accidental results and accidental means will plunge this branch of the law into a Serbonian Bog." The confusion that has resulted has prompted one writer to the conclusion that this "prophecy . . . is now close to fulfillment. This whole

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11 291 U.S. 491 (1934).


13 291 U.S. at 499. The term "Serbonian Bog" is from 2 J. MILTON, PARADISE LOST line 392 (1667):

A gulf profound as that Serbonian Bog
Betwixt Damiato and Mount Casius old,
Where armies whold have sunk. . . .
branch of insurance law has become shrouded in a semantical and polemical maze. . . . The situation is fast approaching a point where the slight frame of legal theory involved is being smothered.\textsuperscript{14}

Part of the confusion is created by the fact that different courts following the strict approach will often reach contradictory results on similar fact situations. The Michigan court allowed recovery where an insured hunter froze to death on a hunting trip,\textsuperscript{15} but the Montana court denied recovery on similar facts.\textsuperscript{16} Another example is the division among the courts following the strict approach as to whether sunstroke is caused by accidental means.\textsuperscript{17} The reason for these inconsistent results is that many courts which draw the distinction have modified the approach in particular cases in an effort to achieve more equitable results.\textsuperscript{18} Thus it appears that some courts have abolished the distinction without repudiating it.\textsuperscript{19}

Another source of confusion in this area is that the courts which attempt to achieve a more equitable result often do so by resorting to a confusing analysis of the case in order to preserve the distinction. An example of such an analysis is found in \textit{Traveler's Ins. Co. v. Ansley}.\textsuperscript{20} There the insured died from an overdose of a "nerve remedy." There was no slip or mishap causing the insured to take a poisonous quantity. He intentionally took the precise amount involved without knowing it was deadly in that quantity. That the Tennessee court professes to follow the strict rule is evidenced by the statement that an accidental means policy "does not insure against an injury that may be caused by a voluntary, natural, ordinary movement, executed exactly as was intended."\textsuperscript{21} Applying this strict rule to the facts of the case, there would normally be no recovery since the insured voluntarily, intentionally, and with an ordinary movement, took the medicine. But, in allowing recovery

\textsuperscript{14} Annot., 166 A.L.R. 469, 477 (1934).
\textsuperscript{17} E.g., The \textit{Landress} majority held sunstroke not to be by accidental means, but the Wisconsin court holds that it is. O'Connell v. New York Life Ins. Co., 220 Wis. 61, 264 N.W. 253 (1936).
\textsuperscript{18} Kirsch, \textit{Accidental Means}, 1953 \textit{Insur. L.J.} 545, 547 [hereinafter cited as Kirsch].
\textsuperscript{19} "Id."
at 459, 124 S.W.2d at 39.
\textsuperscript{20} 22 Tenn. App. 456, 124 S.W.2d 37 (1938).
\textsuperscript{21} "Id. at 459, 124 S.W.2d at 39.
\textsuperscript{22} 166 A.L.R. 469, 477 (1934).
\textsuperscript{24} Tuttle v. Pacific Mut. Life Ins. Co., 58 Mont. 121, 190 P. 993 (1920).
\textsuperscript{25} E.g., The \textit{Landress} majority held sunstroke not to be by accidental means, but the Wisconsin court holds that it is. O'Connell v. New York Life Ins. Co., 220 Wis. 61, 264 N.W. 253 (1936).
\textsuperscript{26} Kirsch, \textit{Accidental Means}, 1953 \textit{Insur. L.J.} 545, 547 [hereinafter cited as Kirsch].
\textsuperscript{27} "Id."
at 459, 124 S.W.2d at 39.
the Tennessee court reasoned that while insured intentionally consumed the medicine taken, and in the precise quantity taken, his real intent was only to take a "harmless nerve remedy."\textsuperscript{22} The apparent meaning of this is that while the insured intentionally took an amount that was toxic, in the sense that the taking was a deliberate act, he unintentionally took a toxic amount, in the sense that death was not his desire. In other words, an intentional act is intentional only up to the point that it has the effect that the actor thought it would have. From that point on, to the actual result that follows the intentional act, the act is unintentional and the means are therefore accidental. It is apparent that this logic could be used to allow recovery in spite of the distinction in any case where the insured does an intentional act that has an unintended or unexpected result. For example, if applied to Henderson, recovery would be allowed since the insured there was doing a voluntary and intentional act, but he did not intend the result that followed that act.

While many courts following the strict rule have become bogged down in the confusion and have given only lip service to the distinction, the North Carolina Supreme Court has, for the most part, been consistent in denying recovery on the basis of the distinction whenever insured did an intentional act without a slip or mishap. The Henderson case is only the most recent example.\textsuperscript{23} The North Carolina court has not, however, escaped the confusion entirely. In several cases the court has employed a natural and probable consequence approach to the problem.\textsuperscript{24} The use of this approach by

\begin{itemize}
\item \textsuperscript{22} Id. at 462, 124 S.W.2d at 41.
\item \textsuperscript{23} Other cases include Chesson v. Pilot Life Ins. Co., 268 N.C. 98, 150 S.E.2d 40 (1966) (insured, without warning, "jumped straight backward," hit is head on a cement floor and died of a cerebral hemorrhage); Langley v. Durham Life Ins. Co., 261 N.C. 459, 135 S.E.2d 38 (1964) (insured lay face down on his bed, went to sleep, and suffocated); Allred v. Prudential Ins. Co. of America, 247 N.C. 105, 100 S.E.2d 226 (1957) (insured lay in highway to show his companions how brave he was, was hit, and died); Fletcher v. Security Life & Trust Co., 220 N.C. 148, 16 S.E.2d 687 (1941) (insured received a spinal anesthesia preparatory to gall bladder operation which unexpectedly caused a collapse of his respiratory system and death); Scott v. Aetna Life Ins. Co., 208 N.C. 160, 179 S.E. 434 (1935) (insured had a tooth pulled and germs entered the hole and caused swelling which necessitated an operation and insured died from a blood clot following the operation); and Mehaffey v. Provident Life & Acc. Ins. Co., 205 N.C. 701, 172 S.E. 331 (1934) (insured died from liquor poisoning).
\item \textsuperscript{24} Allred v. Prudential Ins. Co., 247 N.C. 105, 100 S.E.2d 226 (1957); Scarborough v. World Ins. Co., 244 N.C. 502, 94 S.E.2d 558 (1956); Mehaffey v. Provident Life & Acc. Ins. Co., 205 N.C. 701, 172 S.E. 331 (1934);
\end{itemize}
some courts is another factor causing confusion in the accidental means area because, as will be seen by an examination of the rule, it is the very antithesis of the strict approach which these courts profess to follow.26

The rule concerning natural and probable consequences in this area of law has been stated as follows:

An effect which is the natural and probable consequence of an act or course of action is not an accident, nor is it produced by accidental means. It is either the result of actual design, or falls under the maxim that every man must be held to intend the natural and probable consequences of his deeds. On the other hand, an effect which is not the natural and probable consequence of the means which produced it, an effect which does not ordinarily follow and cannot be reasonably anticipated from the use of these means . . . , is produced by accidental means.26

Examining the rule, it can be seen that the natural and probable consequence approach is the antithesis of the strict approach since results, instead of means, are being tested by its use.27 Courts, in using it, are examining the result to determine if it is the natural and probable consequence of the act producing it. If it is not, recovery is allowed. Thus, if the result is unexpected and unintended and does not ordinarily follow the act, then that result is produced by accidental means, and this is in effect a restatement of the liberal approach.

The North Carolina court has never stated the natural and probable consequence rule as explicitly as set out above. But, in Harris v. Jefferson Standard Life Ins. Co.28 the insured died as a result of pneumonia which developed from a chest injury received in a high school basketball game when he attempted to block a shot by an opponent. In allowing recovery, the court reasoned that although he "engaged voluntarily in the game . . . , and while he anticipated collisions during the progress of the game . . . , no such injury as that which he suffered . . . was probable as the result of the game."29 In Mehaffey v. Provident Life & Acc. Ins. Co.30 the

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26 Kirsch 547.
27 "Western Commercial Travelers Ass'n v. Smith, 85 F. 401, 405 (8th Cir. 1898) (emphasis added).
28 Kirsch 547.
29 204 N.C. 385, 168 S.E. 208 (1933).
30 Id. at 388, 168 S.E. at 210.
31 205 N.C. 701, 172 S.E. 331 (1934).
court, referring to poisoning of the insured from consumption of alcohol, said that "any poison in the stomach of the deceased was the natural and probable consequence of an ordinary act in which he voluntarily engaged." These cases show the court's implicit acceptance of the natural and probable consequence rule. The *Mehaffey* decision, perhaps, is not surprising. Recovery would have been denied without the use of the natural and probable consequence rule by merely following the normal strict rule, since the means by which insured died was an intentional act and not accidental. The *Harris* decision, however, would have been different without the use of the natural and probable consequence rule. There the means was as much an intentional act as in *Mehaffey*, but recovery was allowed. A possible explanation for the court's use of the natural and probable consequence rule in *Harris* is that the court had not accepted the strict rule at that time. But it did accept it one year later in *Mehaffey* by saying that "[i]f the result, although unexpected, flows directly from an ordinary act in which the insured voluntarily engages, then such is not deemed to have been produced by accidental means." Despite this acceptance of the strict rule, the court proceeded to deny recovery by using natural and probable consequence language. Thus, it can be seen that the court was not using the natural and probable consequence rule in *Harris* merely because it had not accepted the strict rule as yet, since it later applied it in *Mehaffey* after acceptance of the strict rule. Although the court did not accept the strict rule in *Harris*, it discussed it and its acceptance by other courts, concluding that "if conceded to be sound, [it] is not applicable to the instant case." It would seem that if the court considered the rule applicable in any case, it would be applicable in *Harris* since the facts seem to present a clear case for its application. The insured was injured as a result of a voluntary and intentional act although the result was not intended.

Since the court employed the natural and probable consequence rule in *Harris* where the facts seem to call for application of the strict rule, it is not clear why it failed to employ the rule in other

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81 *Id.* at 705, 172 S.E. at 333.
82 *Id.* at 705, 172 S.E. at 333.
83 *Id.* at 705, 172 S.E. at 333.
84 204 N.C. at 388, 168 S.E. at 210.
cases. As much confusion as the approach has caused, however, it does provide a means of achieving a fair result without the necessity of repudiating the strict rule.

There seem to be only three possible justifications for distinguishing between the terms "accidental means" and "accident." The first is that the parties are free to contract as they desire. This argument has lost its appeal in insurance cases and the Utah court disposed of it properly in *Browning v. Equitable Life Ass. Soc.* by stating that

> insurance policies, while in the nature of written contracts, are not prepared after negotiations between the parties, to embrace the terms at which the parties have arrived. . . . They are prepared beforehand by the insurer. Normally, the details and provisions are not discussed. He seldom sees the policy until it has been issued and delivered to him. He signs an application blank in which the policy sought is described either by form number or by general designation, pays his premium, and in due course thereafter receives . . . his policy. Many of the terms and all of its defenses and super-refinements he has never heard of and would not understand them if he read them. . . .

The second possible justification is that there is a technical difference between the terms. They are not in fact synonymous. But, insurance policies do not give the reader an opportunity to distinguish between the terms. Policies do not say that "coverage is provided against death or injury by 'accidental means'—as opposed to death or injury by 'accident.'" They contain only the term "accidental means" or the term "accident," not both. The average

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\(^{35}\) If it were applied to other North Carolina cases where the strict rule was applied and recovery was denied, recovery could have been allowed and a more equitable result achieved. For instance if applied to *Fletcher v. Security Life & Trust Co.*, 220 N.C. 148, 16 S.E.2d 687 (1941), recovery would surely be allowed since a collapse of the respiratory system and death are not the natural and probable consequences of a normal spinal anesthesia; neither is death the natural and probable result of a tooth extraction as occurred in *Scott v. Aetna Life Ins. Co.*, 208 N.C. 160, 179 S.E. 434 (1935); nor is death the natural and probable consequence of a fireman fighting an ordinary fire in an ordinary manner with no great risks taken, as occurred in *Henderson*.

\(^{36}\) This fair result is attained by merely not applying it. The Texas court uses this natural and probable consequence analysis in accidental means cases although it purports to follow the strict rule, e.g., *Perry v. Aetna Life Ins. Co.*, 380 S.W.2d 868 (Tex. Civ. App. 1964).

\(^{37}\) 31 N.C.L. REV. 319, 324 (1953).

\(^{38}\) 94 Utah 532, 72 P.2d 1060 (1937).

\(^{39}\) Id. at 561-62, 72 P.2d at 1073.
person would not stop to distinguish between the terms upon seeing one of them, although he probably would if he saw them together. Even if the insured realized that there is a distinction between the terms, that they are not the same, he would not know of the legal ramifications of this distinction.

And yet—despite the entanglement in the decisions, the difficulty which even courts of last resort in several of the states have had with the distinction, and the fact that the problem appeared to so eminent a jurist as Mr. Justice Cardozo to be in such a muddle—the rationale of the courts drawing the distinction would hold the insured to a full knowledge of the distinction and of its ramifications and implications. Certainly, as a practical matter, it can safely be said that the average person taking out accident insurance assumes that he is covered for any fortuitous, undesigned injury, and it can hardly be wondered at that the average person purchasing a policy from an insurance company—even if such person had the time, acumen, and energy to cope with the matter thoroughly—has no conception of the judicial niceties of the problems and no idea of what coverage he is not getting under the term 'accidental means.'

For this reason many courts feel that the term should be given its ordinary meaning. After all, "[i]t is the layman, not the insurance attorney, who is insured. . . ."

The third and final justification for distinguishing between the terms is that by using the term "accidental means" rather than "accident," the insurance company is attempting to restrict liability. To fail to distinguish between the terms would be to provide greater coverage than was intended. While this is undoubtedly the intent of the insurance company, it is hardly the intent of the ordinary policyholder. To make the distinction is to assume the insured intended to make it when, in actuality, he knows nothing of it. Also, courts should be unwilling, as the Pennsylvania court now is, "to recognize such a restriction on the basis of the ambiguous language . . . which the company knew was susceptible of different

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40 Annot., supra note 14, at 478.
42 1A J. APPLEMAN, supra note 5, at 23.
43 Annot., supra note 14, at 478.
interpretations.44 To continue to make the distinction would con
done ambiguity.45 By a judicial ruling that the terms are legally
synonymous, the insurer would be forced to clarify the restriction.
The insurer has the power to remove all doubt by using clear and
simple language to explain all policy exclusions.46 Also in this
connection, many courts give as a reason for not distinguishing
between the terms the well settled rule that since the insurance com-
pany prepared the contract, it is to be construed strictly against
it in the case of ambiguities and uncertainties.47

For the above reasons, many courts have rejected the strict ap-
proach and there is a definite trend away from it.48 The Pennsyl-
vania court recently decided “to confront the issue directly and to
expressly abandon the artificial distinction. . . .”49 The court noted50
that both Florida51 and New Mexico,52 the only courts to consider
the question as one of first impression in the past decade, have
chosen the liberal approach. So definite is the trend that one au-
thority flatly states that the majority of jurisdictions no longer
maintains the distinction.53 In light of the highly unjust result
achieved in Henderson and other North Carolina cases in which
the distinction was applied and recovery denied, and in light of the
fact that the reasons for removing the distinction far outweigh the
very tenuous justifications for it, it is submitted that North Carolina

44 Beckham v. Traveler’s Ins. Co., 424 Pa. 107, 110, 225 A.2d 532, 537
(1967).
45 Id. at 108, 225 A.2d at 535.
47 Equitable Life Assurance Soc’y v. Hemenover, 100 Colo. 231, 67 P.2d
80 (1937); Mansbacher v. Prudential Ins. Co., 273 N.Y. 140, 7 N.E.2d 18
48 The North Carolina court accepts this well settled rule of insurance law:
“when any provision, condition, or exception is uncertain or ambiguous in
its meaning or is capable of two constructions . . . it should receive that
construction which is most favorable to the insured.” Penn v. Standard
Life Ins. Co., 158 N.C. 24, 26, 73 S.E. 99, 100 (1911). However, the court
refuses to admit that the term “accidental means” is ambiguous or capable
of two constructions. In light of all the confusion caused by the term and
the fact that the courts and legal scholars are divided as to its meaning, it
is not understood how the term could be said to be anything other than
ambiguous and uncertain in its meaning.
49 Kirsch 554.
(1967).
53 2 G. Richards, supra note 4, at 734.
should cease to allow such a spurious distinction to stand between the injured insured and the compensation for which he paid his premium dollar.\(^4\)

PATRICK H. POPE

Local Government—Airport Not a “Necessary Expense” within Meaning of Article VII, Section 6, of North Carolina Constitution

The “necessary expense” exception contained in article VII, section 6, of the North Carolina Constitution\(^1\) affords county and municipal governments limited relief from the onerous burden of submitting proposed expenditures to a vote of the people before taxes can be levied and collected or debts contracted. No clear test exists for determining what expenses of local governments are necessary, and the North Carolina Supreme Court has proceeded in catalogue fashion, classing some public functions as necessary within the meaning of the constitution and others as unnecessary.\(^2\)

In the recent case of *Vance County v. Royster*,\(^3\) the court declined to overrule thirty years of precedent and declare a public airport to be a “necessary expense” within the meaning of article VII, section 6. The decision attracted widespread attention throughout North Carolina when the Federal Aviation Agency immediately suspended payment on all grant agreements with airports


\(^1\) No debt or loan except by a majority of voters.—No county, city, town, or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless approved by a majority of those who shall vote thereon in any election held for such purpose. (emphasis added). Prior to an amendment adopted in the general election of 1948, the last clause of the section read “unless by a vote of the majority of the qualified voters therein.” The amendment reduces the number of voters necessary to approve any proposal submitted. Also note that this section was formerly section 7 of article VII; by amendment adopted November 6, 1962, sections 6, 9, and 10 were deleted from article VII, and the remaining sections numbered accordingly.

\(^2\) See Coates & Mitchell, *“Necessary Expenses” within the Meaning of Article VII, Section 7, of the North Carolina Constitution*, 18 N.C.L. Rev. 93, 94-105 (1940) [Hereinafter cited as Coates].

\(^3\) 271 N.C. 53, 155 S.E.2d 790 (1967).