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RECOVERY UNDER ACCIDENTAL DEATH POLICY FOR DEATH FROM ANESTHETIC.

John Hancock Mutual Life Ins. Co. v. Plummer[1]

The Insurance Company in 1932 issued a life insurance policy agreeing to pay $3,000 upon the death of the insured. By a supplemental contract, the Company agreed to pay an additional sum of $3,000 upon proof that the death of the insured occurred directly and exclusively as the result of bodily injury "caused solely by external, violent and accidental means, of which there is a visible wound or contusion on the exterior of the body (except in case of drowning or of internal injuries revealed by an autopsy)."

The insured, a shipyard worker 28 years old, died on April 7, 1941, after he had been given an anesthetic by his dentist for the purpose of extracting his teeth. The beneficiary brought suit in the Baltimore City Court for the accidental death benefit. The Chief Medical Examiner for the State, who performed an autopsy, testified that the cause of death was asphyxiation due to the administration of nitrous oxide. On the contrary, another medical expert testified that in his opinion, based on a chemical analysis of the insured's blood, the nitrous oxide gas was not the cause of death. The dentist testified that he administered the gas in the customary way, and that the gas was similar to that used by all hospitals and dentists and was checked and certified by the City of Baltimore as to purity. He further declared that the patient was breathing well during the operation and that no mishap or anything unusual or unexpected occurred while he was administering the anesthetic. He was unable to express an opinion as to the cause of the insured's death. The jury rendered a verdict in favor of the plaintiff for $3,154.50 and judgment thereon was entered. The insurance company appealed. The Court of Appeals reversed, without a new trial, holding that "there was no evidence legally sufficient to show that a mistake or mishap occurred in the use of the anesthetic, and it was not shown that the insured's death was caused by external, violent and accidental means independently of any other cause as required by the contract."

The question, presented by this case for the first time in Maryland, was whether the death of an insured resulting from the permitted proper use of an anesthetic while he

[1] 28 A. (2d) 856 (Md., 1942).

is undergoing an operation is covered by a policy insuring against death from bodily injuries caused solely by external, violent and accidental means. The Court of Appeals stated in its opinion that "in accordance with the weight of authority, we specifically hold" that such death is not covered by such policy. The Court conceded that "it is beyond question that the death was accidental, for the term 'accidental' means that which happens without intention or design, and which is unexpected, unusual and unforeseen", but it drew a distinction between an "accidental death" and a "death by accidental means", pointing out that only the latter is covered by the terms of the contract sued on.

The Court, recognizing that there is a conflict of opinion in the construction of accident insurance policies on the issue raised by this case, declared that it adopts "the majority view that a means is not made accidental, within the terms of a policy providing for double indemnity in case of death resulting from bodily injury caused solely by external, violent and accidental means, merely because death results unexpectedly, where the means consists of a voluntary and intentional act occurring in the usual manner." In support of this view, the Court relied on the Tennessee golfer's sunstroke case, *Landress v. Phoenix Mutual Life Ins. Co.*,[2] decided by the Supreme Court of the United States in 1934, and quoted with approval the language of Mr. Justice Stone, speaking for the Court: "But it is not enough, to establish liability under these clauses, that the death or injury was accidental in the understanding of the average man . . . for here the carefully chosen words defining liability distinguish between result and the external means which produces it. The insurance is not against an accidental result."

On this question as to whether, under the wording of such a policy, a distinction should be made between accidental *means* and accidental *results*, the courts are widely divided. Some deny recovery where the *result* was accidental but the *means* not,[3] as was done both in the instant

[2] 291 U. S. 491, 90 A. L. R. 1382 (1934).

[3] In accord: Brunson v. Mutual Life Ins. Co. of N. Y., 180 So. 211, 213 (La. App., 1938), where the court said: "To warrant recovery on the double indemnity provision of a policy insuring against injury through 'accidental means', there must be something unforeseen or unexpected in the act which precedes and causes the injury, and a mere showing that the death was accidental is insufficient." *Cf.* the language of Mr. Justice Blatchford, speaking for the Supreme Court of the United States, in U. S. Mutual Accident Ass'n. v. Barry, 131 U. S. 100 (1889): "If a result is such as follows from ordinary means, voluntarily employed, in a not unusual or

case by the Maryland Court and in the *Landress* case by the Supreme Court. Others hold there is no such difference in common speech and therefore none under the wording of the policies, and so they permit recovery.

The essential difference between the two views may be shown by comparing the language of Mr. Justice Stone in the *Landress* case, quoted above, with that of Mr. Justice Cardozo in his vigorous dissenting opinion in the same case. Mr. Justice Cardozo declared that in fixing the meaning of the terms of a contract of accident insurance, the interpretation must be that of the average man, who would say that a death has been caused by accidental means when the deceased died in such a way that his death is spoken of as an accident; and that the distinction between accidental results and accidental means cannot survive if we apply the rule that ambiguities and uncertainties in a policy of insurance must be resolved against the company. He approved *Mutual Life Ins. Co. v. Dodge*,[4] one of the leading cases supporting this view (to be discussed later in this note), and referred to two earlier decisions of his in which he had taken the same position. One was *Lewis v. Ocean Accident and Guarantee Corp.*,[5] decided while he was a member of the Court of Appeals of New York, and the other, *Silverstein v. Metropolitan Life Ins. Co.*,[6] decided while he was Chief Judge of that Court.

Substantially the same idea was expressed by Judge Sanborn in the other of the two leading cases supporting this view, *Western Commercial Travelers' Ass'n. v. Smith.*[7] He declared that "an effect which is not the natural or probable consequence of the means which produced it, an effect which does not ordinarily follow and cannot be reasonably anticipated from the use of those means, an effect which the actor did not intend to produce, and which he cannot be charged with the design of producing . . . is produced by accidental means. It is produced by means which were neither designed nor calculated to cause it. Such an effect is not the result of design, cannot be rea-

unexpected way, it cannot be called a result effected by accidental means; but if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs, which produces the injury, then the injury has resulted through accidental means." An annotation in 59 A. L. R. 1295 (1929) says that no better statement of the general rule applicable to this sort of cases can be found than that laid down by Mr. Justice Blatchford.

[4] 11 F. (2d) 486, 59 A. L. R. 1290 (C. C. A. 4th, 1926), cert. denied 271 U. S. 677 (1926).

[5] 224 N. Y. 18, 120 N. E. 56 (1918).

[6] 254 N. Y. 81, 171 N. E. 914 (1930).

[7] 85 F. 401, 40 L. R. A. 653 (C. C. A. 8th, 1893).

ably anticipated, is unexpected, and is produced by an unusual combination of fortuitous circumstances; in other words, it is produced by 'accidental means'."

While it is true that the strict construction adopted by the Maryland Court has been followed in some other jurisdictions, it may be doubted that it represents the majority view. Certainly there is a substantial body of respectable authority for the more reasonable and natural construction contended for by Mr. Justice Cardozo and Judge Sanborn. The rule in New York is clearly settled to be the liberal one, as is pointed out by Judge Chesnut in *Denton v. Travelers' Ins. Co.*,[8] in which he makes an exhaustive review of all recent New York cases bearing on the issue. The suit in that case was on an accident insurance policy delivered and taking effect in New York and providing payment for death "resulting directly and independently of all other causes from bodily injuries . . . effected solely through accidental means." The insured died from the effects of an anesthetic administered in preparation for a tonsillectomy. The death resulted from an idiosyncrasy of the insured for ether. While the case was tried in the Federal court sitting in Maryland, under the rule of *Erie Ry. Co. v. Tompkins*[9] the Court found that it was necessary to ascertain and apply the New York law. Judge Chesnut's review of the cases decided by the New York Court of Appeals led to his conclusion that the death was caused by accidental means within the meaning of the policy.[10]

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[8] 25 F. Supp. 556 (D. C. Md., 1938).

[9] 304 U. S. 64, 114 A. L. R. 1487 (1938).

[10] The latest New York case cited by Judge Chesnut is Manchester v. Prudential Ins. Co., 273 N. Y. 140, 7 N. E. (2d) 18 (1937). The insured died of an accidental overdose of veronal. Judge Crane, in his opinion, refers to the attempt to draw a distinction between "accidental death" and "death by accidental means" as "logomachy". He said: "His death was by accident and, as we use those words in common parlance, we would speak of it as an accidental death. Contracts are to be interpreted in the light of the language which we commonly use and understand; in other words, our common speech. Such at least should be the rule applied to the interpretation of these policies, and which we sometimes refer to as a liberal construction. . . . The authorities in this state sustain this conclusion. Lewis v. Ocean Accident and Guarantee Corp., 224 N. Y. 18, 120 N. E. 56, 7 A. L. R. 1129 (1918), where the puncturing of a pimple on insured's lip causing death was held death by accidental means. Infection resulting from use of a hypodermic needle was held to be caused by accidental means, Marchi v. Aetna Life Ins. Co., 205 N. Y. 606, 98 N. E. 1108 (1912); Townsend v. Commercial Travelers' Mutual Accident Ass'n., 231 N. Y. 148, 131 N. E. 871, 17 A. L. R. 1001 (1921). Unexpected consequences may constitute accidental means. See, also, Gallagher v. Fidelity and Casualty Co., 163 App. Div. 556, 148 N. Y. S. 1016 (1914), affirmed 221 N. Y. 664, 117 N. E. 1067 (1917)."

The same rule has likewise become the settled law in Virginia. *Ocean Accident and Guarantee Corp. v. Glover*,[11] decided since the *Landress* case, involved the death of the insured from septicaemia caused by an infection carried into the blood stream when he picked a pimple or boil in his nose with a knife or needle. The decision was based on the idea that the word "accidental" in the policy was used in the ordinary and popular sense as meaning "happening by chance or not according to the usual course of things", and since septicaemia was not the probable consequence of the insured's act, recovery under the policy was justified. The Virginia Court adopted the view expressed by Mr. Justice Cardozo in his dissenting opinion in the *Landress* case, quoted at length from his decision in *Lewis v. Ocean Accident and Guarantee Corp.* and reaffirmed its own earlier approval of the *Dodge* case. Numerous other courts have taken the same position.[12]

When it comes to the application of its rule (distinguishing between "accidental death" and "accidental means") to cases involving death through anesthesia, where the contention is that such death, standing alone, constitutes death by accidental means, the Maryland Court is on even less solid ground when it states that its holding is in accord with the weight of authority. On the contrary, while the results are by no means uniform, an outstanding authority in the field of insurance law[13] states that the majority of jurisdictions have held, in such situations, that the death is covered by the contract and was caused by accidental means,[14] and there is no difference

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[11] 165 Va. 283, 182 S. E. 221 (1935).

[12] Schleicher v. General Accident Fire and Life Assurance Corp., 240 Ill. App. 247 (1926); Vollrath v. Central Life Ins. Co., 243 Ill. App. 181 (1928); Taylor v. N. Y. Life Ins. Co., 176 Minn. 171, 222 N. W. 912, 60 A. L. R. 959 (1929); Brown v. Continental Casualty Co., 161 La. 229, 108 So. 464 (1926). This list of cases is not intended to be exhaustive, by any means, but is merely illustrative.

[13] 1 APPLEMAN, INSURANCE LAW AND PRACTICE (1940) Sec. 424.

[14] Mutual Life Ins. Co. v. Dodge, 11 F. (2d) 486 (C. C. A. 4th, 1926), certiorari denied 271 U. S. 677, 59 A. L. R. 1290 (1926) (novocaine); Denton v. Travelers' Ins. Co., 25 F. Supp. 556 (D. C. Md., 1938) applying N. Y. law; American National Ins, Co. v. Belch, 100 F. (2d) 48 (C. C. A. 4th, 1938) applying Virginia law; Schleicher v. General Accident, Fire, and Life Assurance Corp., 240 Ill. App. 247 (1926) (nitrous oxide gas); Vollrath v. Central Life Ins. Co., 243 Ill. App. 181 (1928) (paralysis of respiratory system by ether during tonsillectomy); Beile v. Travelers' Protective Ass'n. of America, 155 Mo. App. 629, 135 S. W. 497 (1911) (chloroform,—it should be noted that death was really caused by defects of the heart and other organs); Brown v. Continental Cas. Co., 161 La. 229, 108 So. 464 (1926) (physician attempted to inhale chloroform for headache and insomnia, and accidentally took an overdose); Burch v. Prudential Ins. Co. of America, 294 N. Y. S. 458, 250 App. Div. 450 (1937).

in the results obtained under the contract proper and under double indemnity portions of the policy.[15]

The situation has frequently arisen where the insured is hypersensitive to some particular drug or anesthetic used, and the substance, harmless to the normal person under average circumstances, causes death in his case. Although a few jurisdictions have held to the contrary,[16] the majority of jurisdictions have held in such instance that death from the administration of anesthetics is by "accidental means" and that such death is covered under the contract.[17]

Perhaps the leading case in support of this rule is *Mutual Life Ins. Co. v. Dodge*, mentioned above. The policy sued on contained a double indemnity clause substantially the same as that in issue in the Maryland case. The insured's death resulted from paralysis of the respiratory center, caused by the local administration of novocaine preliminary to removal of tonsils. He was in good health but, unknown to him and to the physician, he had an "idio-

[15] Mutual Life Ins. Co. v. Dodge, *supra*, n. 14. A recent Illinois case, however, refused to find for the insured on the ground that the operation was necessitated by a diseased condition, and it could not, therefore, be stated that the diseased condition did not contribute to cause death. Upon that ground, based on a relevant policy provision, recovery was denied. Ebbert v. Metropolitan Life Ins. Co., 289 Ill. App. 342, 7 N. E. (2d) 336 (1937), aff'd. 369 Ill. 306 (1938), 16 N. E. (2d) 749.

[16] Death from anesthetic due to hypersusceptibility to particular anesthetic held not result of "bodily injuries, effected directly and independently, through external, violent and accidental means", Hesse v. Travelers' Ins. Co., 299 Pa. 125, 149 A. 96 (1930). Death caused because of insured's unknown idiosyncrasy, as to butyn, held not death effected through "accidental means", Order of United Commercial Travelers of America v. Shane, 64 F. (2d) 55 (C. C. A. 8th, 1933). Death from injection of novocaine for tonsillectomy, as a result of hypersensitiveness of insured to novocaine, not "death resulting from accidental means", within the provisions of a policy, Otey v. John Hancock Mut. Life Ins. Co., 120 W. Va. 434, 199 S. E. 596 (1938).

[17] The same result is reached regardless of the anesthetic or drug used. Thus, ether has been sufficient to qualify under "accidental means", Denton v. Travelers' Ins. Co., 25 F. Supp. 556 (D. C. Md., 1939) (the operation being a tonsillectomy, something clearly not caused by accident); policy provided for double indemnity if death resulted from an injury effected by "accidental means", unless the death resulted from (a) infirmity of body, or (b) taking of poison, or (c) bacterial infection. The surgeon, preparing to remove tonsils, administered novocaine, which, because of her unknown hypersusceptibility to this drug, caused her death. Held: Death resulted from injury effected by "accidental means" and not from bodily infirmity or taking poison or bacterial infection, Taylor v. New York Life Ins. Co., 176 Minn. 171, 222 N. W. 912, 60 A. L. R. 959 (1929); Whatcott v. Continental Casualty Co., 39 P. (2d) 733, 85 Utah 406 (1935) (appendectomy); Wheeler v. Title Guaranty and Casualty Co. of America, 251 N. W. 408, 265 Mich. 296 (1934) (nupercaine); Berkowitz v. N. Y. Life Ins. Co., 10 N. Y. S. (2d) 106, 256 App. Div. 324 (1939) (neo-salvarsan); Beile v. Travelers' Protective Ass'n., 155 Mo. App. 629, 135 S. W. 497 (1911) (chloroform).

syncrasy" or "hypersusceptibility" to the drug. The defendant insurance company raised three points: (1) that the death was not due to accidental means; (2) that the idiosyncrasy of the insured was a bodily infirmity within the meaning of the double indemnity clause exempting the insurer from liability if death resulted "directly or indirectly from bodily or mental infirmity or disease of any sort"; and (3) that the idiosyncrasy was at least a contributing cause, and hence the administration of the anesthetic was not the sole means even if accidental. The Fourth Circuit Court of Appeals speaking through Judge Parker, held that not only was the death of the insured an "accidental death" but that it was also a death caused by "accidental means" within the meaning of the double indemnity clause. Moreover, the "idiosyncrasy" or "hypersusceptibility" was held not to be a bodily infirmity or disease excusing the insurer. Judge Parker approved and paraphrased the language of Judge Sanborn in *Western Commercial Travelers' Association v. Smith,* above. Certiorari was denied by the Supreme Court of the United States. (Apparently, however, this decision was disapproved by the Supreme Court in the later *Landress* case.)

Because of the fact that the Maryland Court makes the assertion that the *Dodge* case has been overruled in the Fourth Circuit by *American National Ins. Co. v. Belch,*[18] one of the only three cases cited by the Maryland Court, an examination of this case seems in order. It arose in Virginia, and does not involve death by anesthesia. The insured, while in good health and in normal condition, submitted to a blood transfusion to aid his sick child, and died from shock or heart failure shortly after the transfusion began. On the first hearing of the case, Judge Soper referred to the decision in the *Dodge* case in the same Circuit which, he noted, had subsequently been disapproved by the Supreme Court in the *Landress* case. Since no Virginia statute or case bearing on the question had been brought to the attention of the Court, Judge Soper felt constrained to follow the decision of the Supreme Court in its latest pronouncement, and therefore held that the death was not caused by accidental means. Subsequently, however, a petition was filed for a rehearing on the ground that counsel for the beneficiary had found a Virginia case, decided subsequently to the *Landress* case, in which the contrary view had been expressly adopted. This was

[18] 100 F. (2d) 48 (C. C. A. 4th, 1938).

Lewis v. Ocean Accident and Guarantee Corp., above, which reaffirmed an earlier approval of the *Dodge* case, and quoted from Mr. Justice Cardozo's opinions with respect to the attempted distinction between "accidental death" and "death by accidental means".

On the rehearing granted in the *Belch* case, Judge Soper pointed out the two lines of thought, but he felt that, in view of Virginia's most recent expression, its earlier approval of the *Dodge* decision was significant. Referring to the fact that, under the doctrine of *Erie Ry. Co. v. Tompkins*,[19] he was bound to apply the law of Virginia, he therefore held that an extraordinary and unusual peculiarity of the insured led to his death on performance of a voluntary act which, in the usual and natural course of things, would not have brought about a fatal result. His earlier decision was set aside and the lower court affirmed. It is difficult to see how this result can be said to constitute an overruling of the *Dodge* case.

Another case relied on by the Maryland Court would seem to lend even less support. This was *Davis v. Jefferson Standard Life Ins. Co.*[20] which involved the construction of a double indemnity clause containing the following language: "Except these provisions do not apply . . . in case death results . . . directly or indirectly from bodily or mental infirmity." The anesthetic, administered in performing an abdominal operation, produced death because of an impairment of the insured's heart functions or heart muscle, which condition was caused by an automobile accident occurring shortly before the operation, and which was unknown to the surgeon. The decision, denying recovery, while apparently approving the rule of the *Landress* case, did not rest on the fact that the death was not caused by accidental means. The Court said: "But irrespective of that, it is clear to us that the fatality cannot be said to have been effected *solely* by this external, violent means, because it was due also to the internal bodily weakness without which there would have been no death. This was also a "bodily infirmity" within the clause of exception, for infirmity includes abnormal weakness as well as acute disease. . . . If a bodily infirmity, though unknown at the time, is a concurring cause without which death would not have resulted, the policy does not cover the case." It is clear that this case did not hold that death

[19] 304 U. S. 64, 114 A. L. R. 1487 (1938).

[20] 73 F. (2d) 330, 96 A. L. R. 599 (C. C. A. 5th, 1934), cert. den. 294 U. S. 706 (1935).

resulting from an anesthetic is not covered by a policy insuring against death from injuries caused solely by external, violent and accidental means. The most that can be said is that it contains a dictum to that effect.

So much for two of the three cases cited by the Maryland Court in support of its statement that it holds "with the weight of authority." The third is *Fletcher v. Security Life and Trust Co.*,[21] the only one of the three clearly supporting the view adopted by the Maryland Court. The insured died as a result of the administration of a spinal anesthetic in preparation for a gall bladder operation. The North Carolina court recognized the cleavage of judicial opinion with respect to the issue, and declared that it has previously adopted, in earlier cases, the view that "accidental death" and "death by accidental means" are not synonymous. It placed the emphasis upon "the accidental character of the causation—not upon the accidental nature of the ultimate sequence of the chain of causation." It expressly held that "if death results from the use of ordinary means voluntarily employed in a not unusual or unexpected way, it is not produced by accidental means."

Thus it will be seen that of the cases cited by the Maryland Court in support of its statement that its holding is in accord with the weight of authority, only one case actually so holds. One approves the rule in dictum but bases its decision on another ground, and the third actually holds directly contra.

A count of the cases dealing with death from anesthesia establishes the fact that the clear majority of jurisdictions definitely hold not only is such death an "accidental death", but is also "death from accidental means" within the meaning of the contract. It is submitted that this interpretation is the natural and reasonable one.

[21] 220 N. C. 148, 16 S. E. (2d) 687 (1941).