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OVEREXERTION AS ACCIDENTAL DEATH PERMIT-
TING RECOVERY OF DOUBLE INDEMNITY
BENEFITS UNDER AN INSURANCE POLICY
—A “SERBONIAN BOG”?

HOWARD A. LAWRENCE†

THE PRACTICING LAWYER'S DILEMMA

A PRACTICING lawyer, in his conscientious effort properly to advise a client as to the likelihood of the latter's recovering a verdict in his favor (for after all, that is what the client is really interested in), quite often is faced with the situation that there are either (a) none or too few authorities or (b) too many, concerning the particular problem upon which a sound conclusion may reasonably be based.

The construction of an insurance contract as related to a particular set of facts, more often than not, presents a situation where a plethora of decisions, often contradictory and inconsistent in their application of principles of insurance contract law to seemingly similar or analogous factual circumstances, will be such as almost to defy logical analysis. Consequently, despite the wealth of authority, the lawyer in his despair will often wish that there were fewer cases on the subject with which he is concerned.

At best the attorney can merely high light for his client the applicable legal and factual problems and rationalize on the difficulties inherent in the case, and assume his precarious fence-sitting posture with as much aplomb as possible. With the purpose of (a) rendering the benefit of his research to the practicing lawyer in the hope that it may be of some assistance, and (b) illustrating to the undergraduate law student the manifold problems that often beset attorneys arising out of a seemingly simple set of facts, this article has been written.

Facts

One Smythe and his newly married wife had recently removed to a respectable Catskill town, where he had purchased at the town's outskirts a house on an acre plot, practically on the edge of an adjacent forest. One late fall Saturday afternoon, while Smythe and his wife in near darkness were enjoying television, something crashed through the picture window of Smythe's new home.

There was Mrs. Smythe's fearful scream, accompanied by a near-by heavy thud on the floor of the room, the excited barking of several dogs and virtual darkness since the television set had become disconnected.

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Smythe felt his wife slump against him; he jumped up, supporting her, and turned on the table lamp switch. This is what he saw. A huge deer, bloody, stretched out lifeless on the floor; by the broken picture window were two of his neighbor's hunting dogs baying furiously for all they were worth. Just as Smythe's wife came out of her faint, a neighbor, dressed in a deer hunting costume and carrying a rifle, came running up, breathless, and stood aghast, outside the window.

After some of the excitement had died down, Smythe and his neighbor half-dragged, half-carried the buck, a splendid specimen weighing approximately 225 pounds, out of the house, across the newly fallen snow, up a slight incline, to the neighbor's home, about 400 feet away. Then, by the dint of much effort, they managed to carry the deer upstairs into the attic. Smythe went back to his home and had a cocktail before dinner in an attempt to get over the tired feeling that he had after all the excitement and exercise. The Smythes kept their engagement that evening to play canasta at another neighbor's house. However since Smythe still seemed upset and tired, he went home early, a little before midnight.

Soon after reaching home, Smythe complained of chest pains and about one in the morning he died, presumably of a heart attack induced by the excitement and overexertion. In accordance with his wishes, Smythe's body was cremated and at that time apparently no one was aware of the desirability or the necessity of an autopsy in case a claim should be asserted for double indemnity.

One of the life insurance policies issued by a Massachusetts company to Smythe provided for double indemnity benefits in case of accidental death. The pertinent clause at bar set forth an undertaking by the insurance company to pay such additional death benefit if death of the assured

“. . . resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means, which injury is evidenced by a contusion or wound on the exterior of the body (except in case of accidental drowning or an internal injury revealed by an autopsy), and . . . such death occurred within ninety days after such injury was sustained. . . .

“The aforesaid accidental death benefit shall not be payable . . . if the death of the insured occurred directly or indirectly from or was contributed to by physical or mental disease or infirmities or bacterial infection other than that occurring simultaneously and through an accidental cut or wound.”

THE LEGAL PROBLEM

To the attorney for Smythe's estate a fairly exhaustive examination of the law regarding the recovery of double indemnity benefits in case of accidental death appear to be in order. The main purpose of such

research was to attempt to evaluate the likelihood of success in the light of the cases on the subject and to have available a summarization of the applicable law and decisions in order to determine in the first instance whether claims for double indemnity should be asserted. There are here discussed in some detail a number of decisions on the subject of accidental death that will serve to illustrate the perplexity and ramifications inherent in a problem of this nature. The writer believes that the principles herein set forth represent the present status of the applicable law.

For the purposes of this discussion it is assumed (although actual proof undoubtedly will be difficult) that it can be medically proven that Smythe's death was caused by physical damage to his heart which occurred as a result of the excitement engendered by the incident and the consequent exertion of carrying the deer a considerable distance and upstairs. Assuming that fact, is it likely that it can be established that Smythe died as the result of an accident within the terms, conditions and provisions of the policy previously quoted?

Discussion

The answer to that question is not easy especially since there are a number of collateral questions involved which are referred to, *infra*. In any event the primary question of double indemnity divides itself into these two propositions:

- (1) Did Smythe die as the result of "bodily injury effected solely through external, violent and accidental means"?—the answer is probably yes.
- (2) Will the policy provision requiring evidence of "a contusion or wound on the exterior of the body" nevertheless prevent recovery?—the answer is again probably in the affirmative.

Naturally the decision of a court construing an insurance contract will depend to a great extent upon its particular phraseology; in this connection, two general principles of construction should be kept in mind: (a) insurance contracts are to be construed strongly against the insurer, but (b) they also are to be interpreted in the light of language commonly used and understood, *i.e.*, our common speech as used by the ordinary businessman or the average person.

Nevertheless, despite the availability of these general rules of construction, it is impossible to reconcile the many different results arrived at by the courts on apparently the same set of facts. Moreover the various judges continually indulge in "distinctions without a difference." For example, many conflicting decisions arise as a result of an attempt to draw a distinction between "accidental death and accidental means" or between "accidental means and accidental results."

Without essaying to delve into all the subtle refinements pertaining to such distinctions (*i.e.*, "accidental death and accidental means"), which "few can understand until pointed out by lawyers and judges,"¹ it appears that the primary reason for the conflict in the reports interpreting insurance contracts is the attempt of some courts to make such refined distinctions. To put it succinctly, if the assured voluntarily and intentionally embarks upon a certain course of action, such as taking an overdose of veronal² to cure an earache and thereby causes his unintended death, an insurance company will often contend that the accident policy did not insure against accidental death but only against death caused by an accidental means and that there were no accidental means. Or put another way, "if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that 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."³

If this purported explanation of the distinction seems like just so much logomachy, perhaps most of the blame should be put upon the courts, for an ordinary mortal, even with a respectable experience in the law, is often hard put to understand the rationale of the attempted distinctions.

Fortunately for the practicing attorney, at least in New York, such distinctions are no longer made. Yet, illustrating the sharp conflict, we have the Supreme Court of the United States holding that there can be no recovery for death from sunstroke suffered while the decedent was playing golf, under an accident policy insuring against death resulting from "bodily injuries effected through external, violent and accidental means,"⁴ whereas the Court of Appeals of New York decides the identical question to the contrary and permits a recovery.⁵ Justice Cardozo, vigorously dissented in the Supreme Court. He spiritedly pointed out that the action of the majority would plunge the law of accident insurance into a "Serbonian Bog."⁶ There is no doubt that the law of accident in-

1. *Mansbacher v. Prudential Ins. Co.*, 273 N. Y. 140, 144, 7 N. E. 2d 18, 20 (1937).

2. *Ibid.*

3. *United States Mut. Accident Ass'n v. Barry*, 131 U. S. 100, 121 (1889). See note 72 *infra*.

4. *Landress v. Phoenix Mut. Life Ins. Co.*, 291 U. S. 491, 495 (1934).

5. *Gallagher v. Fidelity & Casualty Co.*, 163 App. Div. 556, 148 N. Y. Supp. 1016 (2d Dep't 1914), *aff'd*, 221 N. Y. 664, 117 N. E. 1067 (1917).

6. MILTON, *PARADISE LOST* Bk. II, line 592:

"A gulf profound as that Serbonian bog
Betwixt Damiatra and Mount Casius old,
Where armies whole have sunk."

insurance is bogged down to such an extent that a traveler in that branch of the law well-nigh despairs of ever being able to come up with a firm opinion out of such treacherous footing.⁷

The necessity and the importance of the preceding discussion concerning "accidental death" and "accidental means" should become more apparent as numerous authorities are considered in detail, for it is only by realizing that some judges make such distinctions that a person can expect to keep his head above water in the maze of irreconcilable conflicts in the cases.

Referring more specifically to the Smythe situation at hand, in essence it resolves itself down to a case of overexertion. Did the physical act of exertion, necessitated by the lifting and carrying of the deer, coupled possibly with the emotion and excitement generated by the occasion, cause Smythe's death? The cases on the subject of overexertion are legion, and just as many can be found denying recovery as permit recovery.

Overexertion Cases

As the writer views the problem, medical testimony as to (a) the cause of Smythe's death, (b) the relationship between the exertion of carrying the deer and the cause of death, and (c) evidence of an external wound (or some proof that a heart rupture or embolus is an external wound), constitutes the crux of the matter for the successful prosecution of a suit to recover double indemnity benefits for Smythe's death as accidental. Such medical proof in the writer's opinion must be forthcoming for the case will actually turn upon that factual question. While the decisions are often inconsistent, the writer believes that there is sufficient authority in favor of a recovery for accidental death provided *there is present the factual medical proof* necessary to sustain a plaintiff's contention that death resulted from an accident, induced by overexertion. (The problem of proof of an "external wound" is separately discussed, *infra*.)

Applicable decisions on the point of overexertion will now be considered in some detail. (Naturally this discussion has generally been

An excellent, recent editorial on the *Serbonian Bog* aspect of accident insurance is contained in 123 N. Y. L. J. 1732, Col. 2 (Correspondence May 16, 1950).

7. Another writer has also commented along these lines as follows: "This whole branch of insurance law has become shrouded in a semantic and polemical maze, and the result has been 'almost a wilderness of cases in which varying facts and situations have been applied to varying principles.' The situation is fast approaching a point where the slight flame of legal theory involved is being smothered. Some of the courts have felt it necessary to resort to tortuous and tortured legal jiu-jitsu to distinguish and differentiate between 'accidental means' and 'accident,' 'accidental result,' 'accidental death,' 'accidental injury,' etc." Note, 166 A. L. R. 477 (1934).

restricted to the situation where there was no physical blow, fall, etc., as such.)

A good case with which to start this phase of the discussion, is *Rock v. Travelers' Insurance Co.*,⁸ involving death occasioned by the strain of carrying a heavy casket at a funeral. There the insured was acting as a pallbearer but collapsed while engaged in that operation and almost immediately died of an acute dilation of the heart. The beneficiary sought to obtain benefits under an insurance policy for death "resulting from bodily injuries effected directly and independently of all other causes, through external, violent and accidental means." Although the California court conceded that decedent's heart had not been able to withstand the strain put upon it by the exertion of carrying the casket and that such strain had produced the dilation and consequent death, it denied recovery upon the ground that the policy did "not insure against accidental death or injuries, but against injuries effected by accidental means." The basis for this logomachy was the fact that nothing unusual, such as slipping or falling, had occurred in the carrying of the casket.

Despite the result reached in this California case, the writer does not believe that it represents the best authority on the subject today. Its attempted distinction between "accidental death" and "accidental means", as the rationale of its decision, would probably not be followed today, at least in New York. Assuming that the overexertion affected the heart, such death should now be considered as coming within policy coverage for death arising out of external, violent and accidental means. A late New York decision will serve to demonstrate the validity of this contention: *Burr v. Commercial Travelers Mutual Accident Ass'n.*⁹

The facts of that case are worthy of detailed examination. It involved a policy insuring the decedent against loss of life "caused solely and exclusively by external, violent and accidental means." In early March the decedent was driving his automobile in central New York State during a severe snow storm. The blizzard became so bad that it was possible to travel only upon one-half of the roadway, with a snow plow being unable to keep the road entirely open. It was bitter cold, visibility was poor and there was a very high wind. The decedent met another car going in the opposite direction which sideswiped the decedent's fender, throwing his vehicle into the ditch.

Having been unable to get his car back onto the road, the decedent left the automobile, obtained a snow shovel from a neighboring farm house, and tried to shovel the snow away in the high wind. The decedent apparently hit himself against the shovel and the car, and had to be

8. 172 Cal. 462, 156 Pac. 1029 (1916).

9. 295 N. Y. 294, 67 N. E. 2d 248 (1946).

helped back into the automobile.¹⁰ Thereupon he sat down, breathing heavily for a moment, and then died. The court in its opinion went into great length in discussing the nature of accidents and the authorities thereon. In this connection it definitely declared that "In this State there is no longer any distinction made between accidental death and death by accidental means, nor between accidental means and accidental results."¹¹ In the course of its opinion the court also reaffirmed its holding that insurance policies should be written in English that the average man can comprehend, stating:

"We pointed out that insurance policies upon which the public relies for security in case of accident should be plainly written in understandable English 'free from fine distinctions which few can understand until pointed out by lawyers and judges.' A distinction between 'accidental means' and 'accidental results' is certainly not understood by the average man and he is the one for whom the policy is written."¹²

The decision of the Court of Appeals was to the effect that it was a jury question on all the facts of the case whether, among other things, the decedent's death was caused by overexertion. Although there seems to exist a distinction concerning the legal effect of overexertion when the act inducing overexertion is natural or customary with a householder in or about his home or of a workman at his work, as contrasted with an act of overexertion under different circumstances, the following quotation from the *Burr* opinion should indicate that the effects of overexertion can be such as to bring that act within the accidental death clause of the insurance policy:

"It is true that the trial court in the portion of its charge quoted (*supra*, p. 301) used the word 'overexertion.' In this State we have not permitted recovery under a policy insuring against a loss 'which is the direct and proximate result of and which is caused solely and exclusively by external, violent and accidental means' when the act was the natural and customary act of a householder in or about his house, or of a workman within the scope of his duties in his calling. (*Allendorf v. Fidelity Casualty Co.*, 250 N. Y. 529; *Silverstein v. Metropolitan Life Ins. Co.*, 254 N. Y. 81, 85; *Wilcox v. Mutual Life Ins. Co.*, 265 N. Y. 665; see, also, *Fane v. National Assn. of Railway Postal Clerks*, 197 App. Div. 145; *Niskern v. United Brotherhood*, 93 App. Div. 364; *Appel v. Aetna Life Insurance Co.*, 86 App. Div. 83, *aff'd*, 180 N. Y. 514.)

"It seems quite clear here, however, that on the facts presented, a chain of causation was set in motion beginning with the *automobile accident* in the course of and brought about by travel in a very heavy snow and wind storm, followed in turn by what may be termed an emergency resulting from the fact that the deceased had his wife and thirteen-year-old son with him at a time when the cold was bitter and the

10. Although apparently there was sort of a fall, the decision did not turn on such point but was decided simply as an overexertion case.

11. *Burr v. Commercial Travelers Mut. Accident Ass'n*, 295 N. Y. 294, 302, 67 N. E. 2d 248, 252 (1946).

12. *Id.* at 302, 6 N. E. 2d at 252.

automobile was being filled with sifting snow, and it was necessary for the deceased to act to protect his family. The court referred in conclusory terms and in the disjunctive to possible causes of death after correctly stating the applicable law as quoted (*supra*, p. 301), but neither the court nor the jury on this record could have understood the word 'overexertion' in the sense in which it might have been used in the *Allendorf* and *Wilcox* cases. This case is no more comparable to the conventional overexertion case than if the deceased had, by an accident, been thrown into a pit and in endeavoring to clamber out in order to save his life had died by reason of overexertion in climbing, or had been thrown by an accident into the water and had died from overexertion in attempting to swim ashore."¹³

This decision also stands for the proposition that usually the jury will be given the right to make a determination as to the facts. Since that theme runs throughout most of the opinions on the subject at hand, no further specific reference to that self-evident principle will be made in this memorandum. It is also noteworthy to observe that in the *Burr* decision, the jury was permitted to overrule medical opinion, based upon an autopsy, that the decedent had died of a pre-existing heart condition.

Several years later the Appellate Division followed the *Burr* decision in the case of *Rankin v. New York State Employces' Retirement System*.¹⁴ That case involved a construction of the Civil Service law pertaining to disability arising "as a natural and proximate result of an accident sustained in service." On a bitter, cold winter's day, a truck driver's gas line and fuel mechanism froze. After working on them unsuccessfully for three-quarters of an hour, he walked in deep snow to a building where he arrived in an exhausted condition. After resting, he assisted in the removal of his truck. He then proceeded home in the afternoon and went to bed, running a temperature. A few days later it was discovered that he was suffering from pleurisy and tuberculosis. Eventually he became totally disabled.

The Appellate Division, in its decision permitting a recovery, relied upon the *Burr* opinion and declared:

" . . . In another field a recovery under an accident insurance policy was upheld where a decedent died of a heart attack in attempting to extricate his car from a ditch (*Burr v. Commercial Travelers Mut. Accident Assn.*, 295 N. Y. 294). While each case must be determined on its own set of facts the authorities cited denote considerable latitude in passing upon findings of accidental injuries. Many injuries occasioned by heavy or unwonted exertion following an unusual event or mishap have been classed as accidental. Doubtless the correct test to apply is to determine how the primary event would be styled in the speech of common men. And this ordinarily is a matter of fact, not of law.

13. *Id.* at 305, 6 N. E. 2d at 253.

14. 274 App. Div. 160, 80 N. Y. S. 2d 772 (3d Dep't 1948).

"Defendants urge, as a matter of law, that there was nothing catastrophic or extraordinary in the chain of events which caused the reactivation of tuberculosis in plaintiff's left lung. We think to the contrary that the genetic event was unusual and out of the ordinary as a matter of fact. Assuming the weather conditions were not abnormal for the time and place, as defendants suggest, we do not believe that the freezing of a gas line and pump in a moving motor vehicle to be a usual and common occurrence. If such were the fact the operation of any automobile after the same had been started would be most uncertain in subzero weather. There is nothing before us to indicate that such an occurrence is common. We are, therefore, of the opinion that the happening of such an event would be termed accidental in common speech.

"Plaintiff's exposure and physical effort followed as a matter of course and as a natural consequence of the primary mishap. All of the medical testimony agrees that his subsequent physical disability was the direct result of that exposure and effort."¹⁵

Another excellent case is *Simson v. Commercial Travelers Mutual Accident Ass'n*.¹⁶ There the trial judge had set aside the verdict of the jury in plaintiff's favor, on the ground that the injury had not been caused by "violent, external and accidental means." The appellate court reversed, and reinstated the jury's verdict because the trial judge had erroneously taken the case away from the triers of the facts. The facts contained in this report are most pertinent. Plaintiff claimed that while attempting with considerable force to open a desk which had become jammed, he felt a sharp and sudden internal pain. Apparently plaintiff had ruptured himself in the process for shortly thereafter he underwent an operation for a strangulated hernia. In holding it was a factual question for the jury, the court observed:

"A rupture resulting from an unusual exertion in opening a drawer may well be held by the triers of the facts to be an accidental consequence of violent and external exertion. The occurrence clearly falls within the causes defining accidents from violent, external and accidental means. (*Meyer v. New York Life Ins. Co.*, 249 App. Div. 243; *Lewis v. Ocean Accident & Guarantee Corp.*, 224 N. Y. 18.)"¹⁷

Similarly, in *Hunter v. Federal Casualty Co.*,¹⁸ plaintiff wrenched his back while engaged in physical exertion, felt something give way in his back, and paralysis developed. The jury's verdict for plaintiff on the disputed question of fact as to whether his disability had been caused by an accidental injury or by infantile paralysis, was upheld by the appellate court.¹⁹ Likewise, in *Cambareri v. Metropolitan Life Insurance*

15. *Id.* at 163, 80 N. Y. S. 2d at 774.

16. 263 App. Div. 297, 32 N. Y. S. 2d 615 (1st Dep't 1942), *aff'd*, 289 N. Y. 700, 45 N. E. 2d 457 (1942).

17. *Id.* at 298, 32 N. Y. S. 2d at 616.

18. 199 App. Div. 223, 191 N. Y. Supp. 474 (4th Dep't 1921).

19. This *Hunter* decision is also pertinent on the problem of "visible wound"; further discussed on that point at p. 303 *infra*.

Co.,²⁰ the Appellate Term recently held that it was a jury question as to whether plaintiff had unusually exerted himself, while transferring a heavy bundle of magazines, so as to come within the coverage of the accident insurance policy.

Illustrative of the difficulties inherent in accident matters and the conflicting views of judges in the very same state, is the history of the recent New York case of *Kleinman v. Metropolitan Life Insurance Co.*²¹ Plaintiff claimed accidental death benefits under a life insurance policy providing for double indemnity upon proof of the "death of the insured, as a result, directly and independently of all other causes, of bodily injuries sustained solely through external, violent and accidental means, provided . . . that death shall not have occurred as the result . . . or by the contribution, directly or indirectly, of disease or of bodily or mental infirmity." It appeared that the insured was a traveling salesman and while making a call, playfully put his arm around another person's neck. That person, who was at that moment bent over, suddenly straightened up and turned, causing the insured to fall to the floor. The insured remained there several minutes and was pale when he finally got to his feet. Death ensued several months later and plaintiff contended that the assured died of a heart attack caused by the fall. There was the usual conflict of medical opinion. Plaintiff's doctor was of the opinion that the fall caused a rupture of a *small* coronary artery (coronary thrombosis) which resulted in heart failure. Defendant's witness testified as to the heart condition revealed by an autopsy and ascribed the death to a pre-existing sclerosis of the *largest* coronary artery. Under these circumstances, the Appellate Division declared that the positive proof furnished by the autopsy made any jury's finding based upon opinion testimony speculative. But the Court of Appeals reversed the Appellate Division and held that the evidence presented a question of fact as to whether decedent's death resulted from an accident within the meaning of the policy.

Upon a subsequent trial plaintiff again obtained a jury verdict in her favor. Nevertheless the Appellate Division once more reversed on the ground that it was against the weight of the credible evidence. Plaintiff's doctor had again testified that the death was caused by a thrombosis resulting from the accidental fall whereas defendant's doctor contended that the autopsy conclusively proved that the occlusion was due to a

20. 185 Misc. 273, 56 N. Y. S. 2d 455 (1st Dep't 1945).

21. 298 N. Y. 759, 83 N. E. 2d 157 (1948), *reversing*, 273 App. Div. 252, 76 N. Y. S. 2d 618 (1st Dep't 1948); subsequent trial, 276 App. Div. 142, 93 N. Y. S. 2d 511 (1st Dep't 1949).

coronary sclerosis. The Appellate Division gave complete weight to defendant's testimony, stating:

"It thus appears that the absolute diagnosis after autopsy shows no factual basis for the tentative determinations of thrombosis and dilatation of the heart in the clinical diagnosis, on which the medical expert for the plaintiff rested his opinion."²²

Subsequent developments, if any, in this *Kleinman* case are unavailable at present writing. However it does illustrate (a) the importance of adequate medical preparation and presentation, upon which the case at bar would probably turn, (b) the variation in thinking among the judges, and (c) the likelihood that a close and borderline case would have to be vigorously fought, probably through several trials and appeals.

In lieu of discussing any more cases in detail wherein recovery was allowed in overexertion cases (which would be merely cumulative, for the decisions on this point are veritably legion, a representative number, particularly from other jurisdictions, *pro* and *con*, will be here briefly referred to. Recovery has been allowed in these instances as being caused by "external, violent and accidental means"—:

- (1) for a heart attack incurred when attempting to right an automobile after it had skidded into a ditch;²³
- (2) where fright and exertion induced by an impending automobile crash caused a cerebral hemorrhage;²⁴
- (3) for a coronary thrombosis suffered when tripping over a garden hose while carrying a heavy load;²⁵
- (4) when a brain abscess developed after lifting a sack of cement;²⁶
- (5) as the result of a rupture of the heart vessels suffered in lifting some cotton bales at noon (death occurring at 5 P.M. the same day);²⁷
- (6) for a hernia occurring while trying to start a pump engine;²⁸
- (7) when the lunging of a horse caused a coronary thrombosis;²⁹
- (8) after a fall resulted in a coronary thrombosis;³⁰
- (9) for a rupture of the pancreas while pitching hay;³¹

22. 276 App. Div. 142, 144, 93 N. Y. S. 2d 511, 512 (1st Dep't 1949).

23. *Standard Accident Ins. Co. v. Heatfield*, 141 F. 2d 648 (9th Cir. 1944).

24. *Pierce v. Pacific Mut. Life Ins. Co.*, 7 Wash. 2d 151, 109 P. 2d 322 (1941).

25. *Breese v. Fidelity & Casualty Co.*, 247 App. Div. 850, 286 N. Y. Supp. 488 (3d Dep't 1936).

26. *Paoli v. Loyal Protective Ins. Co.*, 289 Ill. App. 87, 6 N. E. 2d 909 (1937).

27. *Pledger v. Business Men's Accident Ass'n*, 228 S. W. 110 (Tex. 1921).

28. *Bankers Life Co. v. Nelson*, 56 Wyo. 260, 108 P. 2d 584 (1940).

29. *Clay County Cotton Co. v. Home Life Ins. Co.*, 113 F. 2d 856 (8th Cir. 1940).

30. *Mutual Benefit Health & Accident Ass'n v. Francis*, 148 F. 2d 590 (8th Cir. 1945); this case contains excellent data regarding medical terms and medical testimony, particularly in question and answer form.

31. *Shurtz v. National Life & Accident Ins. Co.*, 150 Kan. 169, 92 P. 2d 70 (1939).

- (10) where inhalation of smoke and overexertion caused a coronary occlusion;³²
- (11) for a rupture of sacroiliac muscles suffered in supporting a heavy weight;³³
- (12) where the gall bladder was ruptured when lifting a heavy stove;³⁴
- (13) for angina pectoris resulting from a fall;³⁵
- (14) as the result of a rupture of the lumbo-sacral intervertebral disc incurred when lifting a patient out of bed;³⁶
- (15) when a stomach ulcer was ruptured in lifting a sack of flour;³⁷
- (16) upon drowning;³⁸
- (17) as the result of overexposure and freezing;³⁹
- (18) from an overdose of sleeping pills;⁴⁰
- (19) as the result of carbon monoxide poisoning;⁴¹
- (20) in the case of ptomaine poisoning or acute indigestion;⁴²
- (21) where a dentist utilized an x-ray machine in treating patients but developed ulcers on his fingers;⁴³
- (22) heat prostration induced by lifting heavy bags of coffee on a hot day;⁴⁴
- (23) where vomitus lodged in the throat, causing asphyxiation;⁴⁵

32. *Police & Firemen's Ins. Ass'n v. Blunk*, 207 Ind. App. 279, 20 N. E. 2d 660 (1939).

33. *Commercial Casualty Ins. Co. v. Mathews*, 57 Ga. App. 446, 195 S. E. 887 (1937).

34. *Nelson v. Business Men's Assurance Co.*, 108 F. 2d 363 (7th Cir. 1939).

35. *Root v. London Guarantee & Accident Co.*, 92 App. Div. 578, 86 N. Y. Supp. 1055 (4th Dep't 1904), *aff'd*, 180 N. Y. 527, 72 N. E. 1150 (1905).

36. *Inter-Ocean Casualty Co. v. Brockman*, 123 F. 2d 1006 (5th Cir. 1942), *cert. denied*, 315 U. S. 816 (1942).

37. *Sentinel Life Ins. Co. v. Blackmer*, 77 F. 2d 347 (10th Cir. 1935), *cert. denied*, 296 U. S. 602 (1935).

38. *Mutual Life Ins. Co. v. Hess*, 161 F. 2d 1 (5th Cir. 1947).

39. *Wills v. Midland Nat. Life Ins. Co.*, 108 Mont. 536, 91 P. 2d 695 (1939).

40. *Meyer v. New York Life Ins. Co.*, 249 App. Div. 243, 291 N. Y. Supp. 912 (2d Dep't 1936), *appeal dismissed*, 276 N. Y. 557, 12 N. E. 2d 573 (1937). Incidentally, after reviewing the authorities on accidents, the Appellate Division made this pertinent observation concerning "external force":

"So we may say that in this State the definitions of 'accident' and 'accidental' are not strictly limited to the sudden application of some external and violent force, but include something that happens which causes injury or death, where the original act was a voluntary one leading not to the natural and probable consequences, but to an unforeseen result. This in the common speech of men is deemed an accident, and the cause accidental.

"Likewise, the words 'external' and 'violent' are not so limited in legal effect that the insurer may escape liability by strict definition of the terms. It is not always necessary that these words shall be interpreted as related to a blow or fall; but they are given a wider sweep as elements of causation where bodily injuries follow. (*Paul v. Travelers' Ins. Co.*, 112 N. Y. 472, 478, 479). In the ordinary understanding of men, the unexpected result in this case of taking a sedative would be an accident caused by some violent reaction of the drug taken, exercising a force external to its natural effects; and with death resulting from an accidental cause." *Id.* at 246, 291 N. Y. Supp. at 917.

41. *Brady v. Metropolitan Life Ins. Co.*, 331 Ill. App. 114, 72 N. E. 2d 629 (1947).

42. *Newsoms v. Commercial Casualty Ins. Co.*, 147 Va. 471, 137 S. E. 456 (1927).

43. *King v. Travelers Ins. Co.*, 123 Conn. 1, 192 Atl. 311 (1937).

44. *Layton v. Metropolitan Life Ins. Co.*, 89 S. W. 2d 576 (Mo. App. 1936).

45. *Ash v. Mutual Life Ins. Co.*, 170 Misc. 227, 9 N. Y. S. 2d 32 (Sup. Ct. 1938), *aff'd*, 283 N. Y. 718, 28 N. E. 2d 723 (1940).

- (24) pulmonary embolism induced by violent choking, coughing and snoring after an operation even though the embolus was derived from a thrombosis incurred in a previous operation;⁴⁶
- (25) when the act of jumping back suddenly so as to avoid being hit by an automobile resulted in the coil of the small bowel being damaged;⁴⁷
- (26) from fright and strain when driving a runaway horse.⁴⁸

But recovery has been denied under these circumstances:

- (1) for a coronary thrombosis suffered when pushing a stalled automobile;⁴⁹
- (2) where a railway mail clerk ruptured himself when lifting heavy sacks of mail in the course of his customary occupation;⁵⁰
- (3) for appendicitis caused by muscles rubbing against a person's appendix while bicycling;⁵¹
- (4) where a grocery clerk ruptured a peptic ulcer in lifting a case of corn;⁵²
- (5) for overexertion, resulting in a heart attack, caused by driving a car through heavy mud and carrying fence rails;⁵³
- (6) when a sawmill fireman worked unusually hard and suffered a coronary occlusion.⁵⁴

Additional illustrations, *pro* and *con*, could be tabulated, running the gamut of human experience, *ad infinitum* and *ad nauseam*. There are as many decisions denying recovery as allowing recovery for overexertion as constituting "external, violent and accidental means." It should suffice for our purposes simply to set forth in a note⁵⁵ references where pertinent cases are collated and discussed.

Contusion or Wound

The writer's most serious doubt on the question of the likelihood of an eventually successful suit for double indemnity arises from the rigorous provision of the insurance policy requiring proof that the bodily injuries causing the death were "evidenced by a contusion or wound on the exterior of the body (except in case of accidental drowning or an internal injury revealed by an autopsy)."

46. *New York Life Ins. Co. v. Wilson*, 178 F. 2d 534 (9th Cir. 1949).

47. *Cory v. National Casualty Co.*, 120 S. W. 2d 833 (Tex. 1938).

48. *McGlinchy v. Fidelity & Casualty Co.*, 80 Me. 251, 14 Atl. 13 (1888); also discussed on "external wound" point at p. 302 *infra*.

49. *Evans v. Metropolitan Life Ins. Co.*, 26 Wash. 2d 594, 174 P. 2d 961 (1946).

50. *Fane v. National Ass'n Ry. Postal Clerks*, 197 App. Div. 145, 188 N. Y. Supp. 222 (4th Dep't 1921).

51. *Appel v. Aetna Life Ins. Co.*, 86 App. Div. 83, 83 N. Y. Supp. 238 (4th Dep't 1903), *aff'd*, 180 N. Y. 514, 72 N. E. 1139 (1904).

52. *Southern States Life Ins. Co. v. Wilshire*, 203 S. W. 2d 588 (Tex. 1947).

53. *Pope v. Lincoln Nat. Life Ins. Co.*, 103 F. 2d 265 (8th Cir. 1939).

54. *Crowell v. Sunset Casualty Co.*, 21 Wash. 2d 238, 150 P. 2d 728 (1944).

55. 7 A. L. R. 1129 (1918); 14 A. L. R. 784 (1920); 35 A. L. R. 1177 (1924); 90 A. L. R. 1382 (1934); 166 A. L. R. 462 (1946); 5 COUCH, CYCLOPEDIA INSURANCE LAW §§ 1136, 1137 *et seq.*, 1145 *et seq.* (1929); 29 AMERICAN JURISPRUDENCE §§ 930 *et seq.*, 1006.

It is important to bear in mind that the preceding provision of the policy is in the alternative to the effect that *proof is required of an external wound unless an internal injury is revealed by an autopsy*. The writer will assume that no external wound or contusion in the commonly accepted meaning of that term appeared on Smythe's body. Again we have a conflict of authority as to what constitutes such a wound or contusion but the probability this time is that such policy provision will present insurmountable difficulties, thereby barring ultimate recovery; no doubt medical testimony on this subject will be the decisive factor.

However, as the writer views the situation, there are some possible methods of approach available that may present the way by which this difficulty of proof may nevertheless be overcome:

- (1) medical testimony, if available, that a heart attack does reveal itself on the exterior of the body;
- (2) proof that the decedent, at the time of the occurrence of the heart attack, appeared "pale," "weak," "emaciated," or "nauseous," or broke into a "sweat," or his skin was "discolored," or his lips and tongue were "swollen," or he "frothed" at the mouth, or there was some manifestation of inability to control a bodily function, such as the bowels;
- (3) medical testimony that the heart attack would have shown up in the autopsy if one had been held;
- (4) the dead body itself constitutes sufficient proof of a visible sign of injury;
- (5) the fact that the beneficiary has been prevented, without fault on his part, from furnishing proof by autopsy because the decedent was cremated, should not bar recovery on that account;
- (6) the general inclination of the courts to permit recoveries under life insurance policies whenever at all possible.

The relevancy and the importance of the preceding outline of possible arguments in favor of recovery, despite the rigorous policy provision for evidence of an external wound, should become apparent from the following discussion. Illustrative of the inherent difficulties in this problem is the recent case of *Pistolesi v. Massachusetts Mutual Life Insurance Co.*⁵⁶ The facts of this case are most interesting. It appears that the decedent was yachting and for a stunt was traveling hand over hand on a wire suspended between two masts. He missed the wire with one hand and was suspended with the other hand for a short period of time; whereupon he went back to the mast from which he had started. From that time on, until his death of coronary thrombosis three weeks later, decedent complained of a pain in his chest, perspired freely upon physical exercise, his face became pale and lips blue; his breathing was labored and his countenance drawn. Both the lower and the appellate courts took the

56. *Pistolesi v. Massachusetts Mut. Life Ins. Co.*, 64 F. Supp. 427 (N. D. Cal. 1945), *rev'd*, 160 F. 2d 668 (9th Cir. 1947), *cert. denied*, 322 U. S. 759 (1947).

position that it was a case of accidental death. Unfortunately, on the problem of a "visible contusion or wound on the exterior of the body," the Circuit Court of Appeals reversed the District Court and dismissed the complaint on the ground that the plaintiff had been unable to comply with the provision of the policy requiring proof of a visible wound.

The lower court's opinion in this *Pistolesi* case represents a very liberal construction of the clause at issue for which attitude there is a respectable number of authoritative decisions upholding the lower court's point of view and upon which the District Court relied.⁵⁷ After reviewing the authorities and holding that changes in bodily appearance constitutes sufficient evidence of a wound or contusion,⁵⁸ District Judge Clark considered that equity and justice was on the side of the plaintiff and made a plea for resolving every possible doubt in favor of the assured. However the Circuit Court of Appeals was of a contrary opinion because it reversed the jury verdict in favor of plaintiff and dismissed the complaint because in its opinion there was "no evidence of any wound and . . . none of a 'contusion,'" declaring:

"We assume as correct the appellee's contention that the happenings to Pistolesi on the yacht's rigging accidentally caused coronary thrombosis and, as a result, his death. We do not agree with appellee's contention that either mere sweating or paleness of skin or recurring blueing of the lips of Pistolesi after such exertion constitutes a 'visible contusion or wound on the exterior of the body.'"⁵⁹

The Circuit Court of Appeals relied upon the following definitions of "contusions" and "bruises":

"Webster's New International Dictionary, 2d Ed., defines a 'contusion' as 'a bruise; and injury attended with more or less disorganization of the subcutaneous tissue and effusion of blood beneath the skin but without breaking the skin.' Funk & Wagnall's New Standard Dictionary as

"'1. The act of bruising by striking or pounding, or the state of being so bruised; also a pulverizing by beating or pounding.

"'2. Surg. A bruise; an injury, as from a blow with a blunt instrument, that does not make an open wound.'"⁶⁰

57. As a matter of interest, no autopsy was possible inasmuch as the decedent's body had been cremated in accordance with the request of the assured; however no mention is made in these *Pistolesi* opinions as to the legal consequences of the failure to have an autopsy made on this account.

58. An excellent review of the authorities upholding the view that any change, however slight, in the body appearance will be sufficient to comply with the requirement as to a "visible wound or contusion," is contained in Notes, 39 A. L. R. 1011 (1942) and 117 A. L. R. 760 (1938); see also 6 COUCH, CYCLOPEDIA INSURANCE LAW § 1265 (1930); 29 AMERICAN JURISPRUDENCE § 940.

59. *Pistolesi v. Massachusetts Mut. Life Ins. Co.*, 160 F. 2d 668, 669 (9th Cir. 1947).

60. *Ibid.* But see the more liberal definition approved by the Illinois court in *People v. Durand*, 307 Ill. 611, 139 N. E. 78 (1923): "In medicine the word 'wounds' means in-

This *Pistolesi* decision also serves to illustrate the importance of medical testimony in the individual case for apparently the uncontradicted medical testimony corresponded with the definitions of "contusions" and "bruises" referred to by the Circuit Court.⁶¹

On the other hand it had early been held in *Gale v. Mutual Aid and Accident Ass'n.*,⁶² that the requirements for "external and visible signs" of injury are not to be technically or literally construed. There the claimant was seeking to recover payments for disability arising out of lifting a heavy iron pot and the point at issue was whether or not there was on his body any "external and visible mark or sign of the injury." Apparently there was no such visible wound in the ordinarily accepted meaning of the term although plaintiff claimed to have strained his diaphragm and recti muscles. However, from statements made by their patient and their manual examination, several doctors were of the opinion that he was suffering from strained muscles. On the basis of such medical testimony the General Term was of the opinion that it is not always necessary that the injury be visible to the eye as long as there is some objective evidence of an injury, which would assure the insurance company of protection against fraudulent claims, holding that while the evidence of the injury must be external, it need not be visible to the eye but may be ascertained by the sense of touch and feeling.

This case was one of the authorities relied upon by the Appellate Division in a very interesting subsequent decision, *Root v. London Guarantee & Accident Co.*⁶³ Its facts are worthy of considerable examination

juries of every description that affect either the hard or soft parts of the body, and it comprehends bruises, contusions, fractures, luxations, etc. In law the word means any lesion of the body, and the correct definition of a lesion is a hurt, loss, or injury." *Id.* at 624, 139 N. E. at 83.

61. *Pistolesi v. Massachusetts Mut. Life Ins. Co.*, 160 F. 2d 668 (9th Cir. 1947):

"Q. State whether blue lips are wounds or contusions? A. Blue lips are not a wound or contusion, not a bruise.

"Mr. Healy: I move to strike the answer as not responsive, it can be answered yes or no. A. The answer is no.

"A. Blueness of the skin is a result of the oxygen content of the blood,—veinous blood is blue and the oxygenized blood is red. When the heart action is insufficient and the blood is not pumped properly and sufficient oxygen does not enter the blood, that imparts a blue color or character to the skin, the blood becomes blue, and that imparts the color to the skin. There is no damage and there is no wound or contusion.

"Q. Is there any damage to the subcutaneous tissue? A. There is not.

"Q. In the case of pallor is there any damage to the subcutaneous tissue? A. There is not.

"Q. In case of pallor is there any effusion of blood beneath the skin? A. No.

"Q. In case of blue lips is there any effusion of blood beneath the skin? A. No." *Id.* at 670.

62. 66 Hun 600, 21 N. Y. Supp. 893 (Gen. Term 1893).

63. 92 App. Div. 578, 86 N. Y. Supp. 1055 (4th Dep't 1904), *aff'd*, 180 N. Y. 527, 72

N. E. 1150 (1905). See note 37 *supra*.

particularly as the opinion represents as good a favorable authority on the problem of a visible wound as has been found. The accident policy involved provided that it did "not cover injuries of which there is no visible mark on the body (the body itself in a case of death not being deemed such mark)."⁶⁴ The decedent fell from a bicycle and fractured his hip. However his death was not ascribed to such injury but to angina pectoris suffered in such fall. Immediately after the accident decedent's "face was pallid, he became emaciated and complained constantly of internal pain in his back . . . and in his chest." The anginal pains increased in intensity until death occurred soon after the accident. The Appellate Division overruled defendant's contention that recovery should be denied because of a failure to prove a visible wound. It based its decision upon two grounds (a) where death clearly results from an accident, "the policy should be construed to hold the defendant liable even though no contusions or marks appear upon the body" and, (b) in any event pallor, emaciation and weakness constitute sufficient visible sign of injuries. In this connection the court declared:

"The physicians testified that the heart spasms were not attributable to a broken femur. There was no visible mark on the back or chest and the appellant contends that the anginal pains even though resulting from the accident do not bring the case within the compass of the policy. We think this is too narrow a construction to put upon its language. Where it is plain that an accident has occurred and severe injuries have resulted and it is a fair deduction from the circumstances that death ensued as the direct consequence of such accident the policy should be construed to hold the defendant liable even though no contusions or marks appear upon the body. A man may be killed by a blow over the heart, or by drowning or by falling from a balloon and death ensue before reaching the ground and in each instance there may be no mark upon the body, yet the death is by accidental means and should be within the purview of the policy.

". . . The defendant evidently intended that this clause should exclude liability in case of death from accident unless there is a visible mark upon the body. It is very doubtful whether the scope of the language will be so extended in any event. (*Paul v. Travelers' Ins. Co.*, 112 N. Y. 472; *McGlinchey v. Fidelity & Casualty Co.*, 80 Me. 251.)"⁶⁵

McGlinchey v. Fidelity & Casualty Co.,⁶⁶ a Maine decision relied upon by the New York court, represents an early example of how a court bent over backwards in order to support a verdict in favor of an

64. This parenthetical clause represents an attempt by insurance companies to circumvent the holdings of some courts to the effect that a policy provision requiring a "visible wound or contusion" would not be applied in case of death because death itself constitutes sufficient proof of the injury. See notes 59 and 50 *supra*.

65. *Root v. London Guarantee & Accident Co.*, 92 App. Div. 578, 581, 582, 86 N. Y. Supp. 1055, 1057, 1058 (4th Dep't 1904), *aff'd*, 180 N. Y. 527, 72 N. E. 1150 (1905).

66. 80 Me. 251, 14 Atl. 13 (1893).

insurance beneficiary. Decedent's horse became frightened, running away for a considerable distance, but there was no collision, upset or blow. As a result of the ensuing fright and exertion in attempting to control the runaway horse, the decedent suffered intense sickness and pain immediately after the accident, dying within the hour of a ruptured heart vessel. After the Maine court had decided that death had been caused by "external, violent, and accidental means," it went on to hold that a requirement for an "external and visible sign upon the body" does not apply to fatal injuries but only to non-fatal injuries, the dead body itself constituting sufficient proof, stating:

"It would be utterly unjust if this condition applied in cases of death. It would preclude recovery in all instances where death occurs by drowning, freezing, poisoning, suffocation, concussion,—means of death leaving no outward mark,—and also where the insured has been killed, and his body is missing. The context shows that the clause is only applicable to injuries not resulting in death. . . . He has unusual chance for feigning an internal injury if disposed to defraud the insurers, but no such protection is required where the accident causes death. The dead body is external and visible sign enough that an injury was received."⁶⁷

The following charge of a trial judge, approved by the Supreme Court of the United States⁶⁸ and frequently cited, indicates the length to which courts will go in an endeavor to find sufficient compliance with the requirement for a visible sign of injury:

"Complaint of internal soreness is not such a sign, for that you cannot see, but if the internal injury produces, for example, a pale and sickly look in the face, if it causes vomiting or retching, or bloody or unnatural discharges from the bowels, if, in short, it sends forth to the observation of the eye, in the struggle of nature, any signs of the injury, then those are external and visible signs, provided they are the direct results of the injury. . . ."⁶⁹

As indicated by the discussion of the preceding cases, it is apparent that some courts will decide that (a) most anything will constitute a visible wound, even an internal injury, or (b) there is no necessity for such proof where there is no doubt that the assured suffered an injury as the result of an accident, and under such circumstances there is no danger of the insurance company being mulcted by fraudulent claims, which was the reason for the insertion of such a clause in the policy in the first place.

Hunter v. Federal Casualty Co. is an excellent authority for those

67. *Id.* at 254, 14 Atl. at 16.

68. *United States Mut. Accident Ass'n v. Barry*, 131 U. S. 100 (1889). Here the decedent had jumped to the ground from a five foot platform and suffered an internal injury, a stricture of the duodenum.

69. *Id.* at 111.

legal principles.⁷⁰ There plaintiff had wrenched his back while engaged in lifting with all his strength, paralysis developed, and he sued for disability payments. After deciding that plaintiff had been disabled as the result of an accident under the policy, the Appellate Division had to construe the clause of the policy providing that disability payments would be reduced 80% if there were "no visible mark on the body." On this point the trial judge left it to the jury to determine whether, within the meaning of the policy, there were any visible marks on the plaintiff's body, charging that there need not be a scar or abrasion on the surface of the body provided there be some manifestation of injury. The Appellate Division affirmed, saying:

" . . . It has been held that where a person had received an internal injury and there was no visible injury to the surface of the body by way of a bruise or cut, or anything of that kind, the fact that the person injured was pale, that perspiration stood out on his face, that he had the appearance of suffering and that he passed blood were all visible marks within the meaning of such a clause, the construction of the court being that the policy insured against an accidental internal injury, like a broken bone, or a rupture, and that it was not limited to an injury received externally but that any visible sign indicating internal injury would satisfy the condition of the policy. It seems to me that that is a reasonable construction and should be followed in this case. (*Root v. London Guarantee & Accident Co.*, 92 App. Div. 578; *aff'd*, 180 N. Y. 527.)"⁷¹

A most interesting case along this line is *Wiecking v. Phoenix Mutual Life Insurance Co.*⁷² In this case an action was brought to recover double indemnity benefits under an accident policy requiring that the injury be evidenced by a visible contusion or wound on the exterior of the body, except in case of drowning or of internal injury revealed by an autopsy. The assured suffered a sunstroke while playing golf. He collapsed on the golf course, dying on that same day of a coronary occlusion. No autopsy was performed and the body was embalmed under a pressure system. At first plaintiff demanded only the principal amount of liability, not asserting a claim for double indemnity inasmuch as the rule in the federal courts under the *Landress v. Phoenix Insurance Co.* decision⁷³ was to the effect that death by sunstroke while playing golf did not constitute accidental means. However the Supreme Court of the United States then enunciated its doctrine that the federal courts should follow the rulings of the local state courts in cases involving diversity of citizenship.⁷⁴ Whereupon plaintiff instituted this action.

70. 199 App. Div. 223, 191 N. Y. Supp. 474 (4th Dep't 1921).

71. *Id.* at 228, 191 N. Y. Supp. at 477.

72. 116 F. 2d 90 (7th Cir. 1940).

73. 291 U. S. 491 (1934).

74. *Erie R. R. v. Tompkins*, 304 U. S. 64 (1937).

The Circuit Court of Appeals, following the Indiana decisions, held that death by sunstroke constituted accidental death by injury under such insurance policy and overruling the insurance company's claim that the trial court erred in its definition of a visible contusion or wound on the exterior of the body as required by the policy, affirmed the decision in favor of plaintiff. However the report does not set forth the trial court's definition of a visible contusion or wound.

Unfortunately the New York decisions on the point of a visible contusion or wound, at least as regards sunburn and sunstroke, cast a great deal of doubt upon the ability of a plaintiff to comply with such policy requirement. This view is sustained by the fairly recent case of *Dupee v. Travelers Insurance Co.*⁷⁵ There the double indemnity provision provided that for such recovery, except in the case of drowning or internal injuries revealed by an autopsy, there must be "visible contusion or wound on the exterior of the body." It appeared that assured's face and head had been reddened by the sun, with the face somewhat swollen. Plaintiff's doctor, who had treated the insured, testified that sunstroke or sunburn is a first degree burn and that inasmuch as a burn is considered to be a wound and sunburn a burn, it must be considered to be a wound. However, on cross-examination, plaintiff's doctor admitted that he had not seen any cut or wound. Despite the fact that another physician, testifying as an expert, stated that in his opinion sunburn is considered a first degree burn and that a first degree burn is medically considered to be a wound, the Appellate Division reversed the verdict in favor of plaintiff and dismissed the complaint on the ground that, giving the policy the meaning the average policy holder would attach to it, there was insufficient evidence of a visible contusion or wound on the exterior of the body. The opinion relied on *Paist v. Aetna Life Insurance Co.*,⁷⁶ where it was held that a flushed, sunburned face is not a wound or contusion.⁷⁷

75. 253 App. Div. 278, 2 N. Y. S. 2d 62 (2d Dep't 1938), *aff'd*, 278 N. Y. 659, 16 N. E. 2d 391 (1938).

76. 60 F. 2d 476 (3d Cir. 1932).

77. 253 App. Div. 278, 2 N. Y. S. 2d 62 (2d Dep't 1938). In following the *Paist* ruling, the Appellate Division stated:

"The most reasonable and unstrained construction of the policy in suit, therefore, would seem to be that it does not contemplate that a very red face and head, with the face somewhat swollen, is evidence of a visible contusion or wound on the exterior of the body. I think this conclusion must be accepted notwithstanding that the courts are disposed to construe policies of insurance liberally and most favorably to beneficiaries, and that there are decisions that have permitted recoveries in cases where no mark visible to the eye was left on the body. These cases, however, do not involve sunstroke nor was there a specification in the contracts that there be 'a visible contusion or wound on the exterior of the body'; [the Appellate Division would seem to be in error as to the validity

Since the Court of Appeals affirmed the *Dupee* decision, although without opinion,⁷⁸ it seems exceedingly doubtful (at least on the basis of the New York sunburn decisions) that proof of an external wound on Smythe's body adequate to satisfy the New York courts can be forthcoming. The well-nigh baffling difficulties and perplexities inherent in the assumed Smythe case are well illustrated by *Rosenthal v. American Bonding Co.*⁷⁹ This decision is most interesting even though it actually concerned the construction of a burglary policy which made it a condition precedent to recovery that there be "visible marks upon the premises of the actual force and violence used in making entry into the said premises or exit therefrom." The burglars simply turned the knob of an unlocked door and walked in, leaving no visible marks within the ordinary, common meaning of the words of that policy. The assured apparently conceded that there were no visible marks of entry but urged that such a requirement was simply an evidentiary fact inserted merely for the purpose of protecting the insurance company against fraudulent claims and that since there existed ample other proof of the fact of burglary, a strict construction of that clause denying recovery on such ground should be rejected. Nevertheless the Court of Appeals refused to follow such a liberal construction and upheld the right of the insurance company to require strict proof of evidentiary facts as an indispensable basis for recovery within the literal language of the clause. Several decisions taking a more liberal view as to the construction of insurance policies were specifically called to the attention of the Court of Appeals, but supposedly distinguished by it, including *Root v. London Guarantee & Accident Co.*,^{supra}.⁸⁰ What makes the Court of Appeals' approving comment thereon all the more baffling, is the fact that the remarks of such Court seem directly contrary to the subsequent sunburn cases

of this observation] and the nature and extent of the holdings have been explained in *Rosenthal v. American Bonding Co.* (207 N. Y. 162). "In the policy in suit there are two causes of accidental death for which the insurer agreed to pay without proof of a visible contusion or wound on the exterior of the body, namely, drowning and internal injuries revealed by autopsy. It is not claimed that there is in the case evidence of either of these causes of death; nor is there in the case any evidence of a visible contusion or wound on the exterior of the body." *Id.* at 281, 2 N. Y. S. 2d at 65.

78. The Appellate Division in the *Dupee* opinion also relied upon an earlier report of a sunstroke case where, despite the fact that the deceased was "pale, cold and clammy and bathed in profuse perspiration," it was held that there was insufficient proof of visible marks of wound upon the decedent's body. *Bender v. Ridgely*, 235 App. Div. 896, 257 N. Y. Supp. 1004 (4th Dep't 1932), *aff'd*, 262 N. Y. 685, 188 N. E. 120 (1933).

79. 207 N. Y. 162, 100 N. E. 716 (1912).

80. 92 App. Div. 578, 86 N. Y. Supp. 1055 (4th Dep't 1904), *aff'd*, 180 N. Y. 527, 72 N. E. 1150 (1905).

denying recovery for failure to prove a visible wound. Judge Hiscock made this pertinent observation anent the *Root* case:

"*Root v. London Guarantee & Accident Co.* (92 App. Div. 578) was an action to recover a death loss under an accident insurance policy excluding injuries 'of which there was no physical mark on the body.' The insured received injuries which produced no immediate outward signs upon the surface of his person, but subsequently he developed a pallor, emaciation and physical decay, and it was held, as it seems to me very reasonably, that these visible, external signs of the accident satisfied the requirement of the policy."⁸¹

It is no wonder that the law of accident insurance is bogged down in a "Serbonian Bog"!

Nor, on the favorable side, should it be overlooked that there are any number of cases wherein recovery for accidental death has been allowed without any mention, either in the enumeration of the facts or in the court's opinion, of the visible wound requirement (although it seems highly improbable that such a standard provision had not actually been incorporated in the insurance policy). Moreover some decisions uphold a verdict for the beneficiary, despite the fact that such external wound clause definitely was a part of the policy, although the opinion will make no direct reference to that point.⁸² Such results, at least inferentially, should constitute authority contrary to an insurer's contention that recovery is barred by virtue of the effect of such clause.

The Autopsy Problem

Assuming that sufficient proof of a visible wound cannot be produced, does that mean that recovery will necessarily be barred? Not entirely, for an argument can be made along the line that (a) an autopsy would have proved that death was caused by a heart attack induced by over-exertion, *i.e.*, an accident, and (b) the decedent was cremated before it was realized that the insurance policy contained an autopsy clause and the beneficiary should not be penalized because of such cremation. The validity of this contention (b) does find considerable support in the reports. The *Wiecking* decision, a sunburn case, previously discussed,⁸³ involved the same clause as the assumed Smythe policy (*i.e.*, "except . . . internal injury revealed by autopsy") and gave the insurance

81. *Rosenthal v. American Bonding Co.*, 207 N. Y. 162, 169, 100 N. E. 716, 718 (1912).

82. *Paoli v. Loyal Protective Ins. Co.*, 289 Ill. App. 87, 6 N. E. 2d 909 (1937). There the policy required proof "upon the body [of] external marks of contusion or wound visible to the eye." A jury verdict for the beneficiary was upheld on appeal without any direct reference being made in the opinion as to the effect of such clause where the assured suffered a brain abscess after lifting a sack of cement.

83. 116 F. 2d 90 (7th Cir. 1940).

company the right to conduct an autopsy where not forbidden by law. Nevertheless plaintiff was entitled to recover double indemnity benefits even though a two year delay in asserting such claim apparently prevented the insurance company from making an autopsy. In several other cases, where cremation of the assured's body took place while the beneficiary was unaware of the autopsy clause in the insurance policy, the fact that the cremation *ipso facto* rendered an autopsy impossible has been held not to constitute a bar for recovery of double indemnity benefits. Apparently the rationale of such decisions is that the autopsy stipulation is neither a condition nor a provision for forfeiture of the insurance.⁸⁴

Other Problems

It is believed that the principles of law herein discussed are those upon which a court would ultimately base its decision on the facts of our assumed Smythe case. The writer recognizes only too well that there may exist a number of collateral problems, such as (a) conflict of laws,⁸⁵ (b) pre-existing disease, (c) the adequacy and timeliness of proofs of death, and (d) due compliance with the other conditions and requirements of the insurance policy. However limitations of space prevent making more than just a passing reference to such collateral questions, particularly since our main purpose has been to evaluate in the first instance the possibility of recovering double indemnity benefits in the general light of the cases on the subject.

Conclusions

(1) It could be readily established that Smythe died of "bodily injury effected solely through external, violent and accidental means."

(2) The policy provision requiring evidence of "a contusion or wound on the exterior of the body" would probably prevent a recovery of double indemnity death benefits.

(3) Nevertheless a borderline and difficult case of this nature could often be won by proper and adequate factual presentation backed up by a persistent will to win no matter what the cost in time and effort.

84. *Mutual Life Ins. Co. v. Hess*, 161 F. 2d 1 (5th Cir. 1947); *Travelers Ins. Co. v. Welch*, 82 F. 2d 799 (5th Cir. 1936); *Ocean Accident & Guarantee Corp. v. Schachner*, 70 F. 2d 28 (7th Cir. 1934).

85. *New York Life Ins. Co. v. Cooper*, 167 F. 2d 651 (10th Cir. 1948), *cert denied*, 335 U. S. 819 (1948); 1 COUCH, *CYCLOPEDIA OF INSURANCE LAW* §§ 193-209 (1929); 2 BEALE, *CONFLICT OF LAWS* § 346.4 (1935).

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