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THE DISTINCTION BETWEEN ACCIDENTAL MEANS AND ACCIDENTAL RESULTS IN ACCIDENTAL DEATH INSURANCE

JOHN DWIGHT INGRAM* AND LYNNE R. OSTFELD**

Most insurance policies which provide for the payment of benefits upon the "accidental death" of the insured do not define the word "accidental" anywhere in the policy. Certain acts such as suicide are often excluded, but the concept of what is truly an "accidental" event is left to the interpretation of the reader. Where there is a conflict in the interpretations urged by the insurance company and the insured's designated beneficiary, courts tend to favor the beneficiary. Thus courts generally give the word "accidental" what they consider to be its ordinary meaning,¹ such as "something which happens by chance or fortuitously, without intention or design, and which is unexpected, unusual and unforeseen."²

The corollary of this construction is that a result which is foreseeable³ and which is the natural and probable consequence of an act or course of action cannot be said to be produced by "accidental means."⁴ However, over the years most courts have adopted an increasingly liberal attitude in their interpretation of accidental

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1. See, e.g., *Farm & City Ins. Co. v. Potter*, 330 N.W.2d 263, 265 (Iowa 1983).
2. *Taylor v. John Hancock Mut. Life Ins. Co.*, 142 N.E.2d 5, 6 (Ill. 1957).
3. Foreseeable: a contingency "known to all sensible men as likely to follow" as a natural result of one's conduct. *Hutton v. States Acc. Ins. Co.*, 108 N.E. 296, 297 (Ill. 1915).
4. See, e.g., *Korfin v. Continental Cas. Co.*, 74 A.2d 312, 312 (N.J. 1950) (death from postvaccinal encephalitis resulting from smallpox vaccination voluntarily undergone by insured; court held that insured's reaction to vaccine was wholly unanticipated, thereby constituting "accidental means").

death provisions in insurance policies.⁵ In some states we seem to have reached the point where death will be considered "accidental" unless the insured's actions were so likely to result in death that his conduct was tantamount to attempting suicide. Not only do some states seem to be rapidly draining Justice Cardozo's Serbonian Bog⁶ of its capacity to engulf us in endless litigation, but they may well be close to creating an endless desert where insurers will be left without hope for defending against accidental death claims.

I. EARLY HISTORY

The question of what constitutes "accidental means" is not a new one. It was at issue in the United States Supreme Court almost one hundred years ago in *United States Mutual Accident Association v. Barry*.⁷ Dr. Barry had jumped about four feet from a platform to the ground. When he landed on the ground, he received a jar and sudden wrenching of his body, which resulted in a stricture of the duodenum, from the effect of which he soon died. Dr. Barry had been insured under a policy providing a death benefit if death was occasioned by "bodily injuries . . . effected through . . . accidental means."⁸ The jury was instructed, in substance, that death was by "accidental means" if there had been some unexpected movement of the insured's body, or if he had landed on the ground in an unintended manner. If, however, his movements and landing during the jump were just as he had intended, then only the resulting injury was "accidental," and therefore his death was not by "accidental means."⁹ Finding these instructions to be correct, the Supreme Court affirmed the judgment of the trial court on a jury verdict for the beneficiary. The Court found that there was evidence from which the jury could have found that

5. See, e.g., *Taylor v. John Hancock Mut. Life Ins. Co.*, 142 N.E.2d at 6 (death of insured in fire which started accidentally while insured and others were preparing to burn down the insured's house in order to recover on fire policy; held, death by "accidental means").

6. In his dissenting opinion in *Landress v. Phoenix Mut. Life Ins. Co.*, 291 U.S. 491, 499 (1934), Justice Cardozo warned that distinguishing between "accidental means" and "accidental results" "will plunge this branch of the law into a Serbonian Bog." (Lake Serbonis was a marshy lake in Egypt in which whole armies were engulfed, according to reports of Herodotus, a Greek Historian circa 400 B.C.)

7. 131 U.S. 100 (1889).

8. *Id.* at 107.

9. *Id.* at 109-10, 117-18.

something unusual or unexpected occurred during the jump.¹⁰

Barry set forth the rules which guided the courts for many years thereafter:

1. An injury may be caused by "accidental means" even though "the act which precedes the injury" was a voluntary and intentional act, if "something unforeseen, unexpected, [and] unusual occurs which produces the injury. . . ."¹¹

2. An injury is not caused by "accidental means" if it is "such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way."¹²

During the next forty-five years a number of courts applied these rules and distinguished between "accidental means" and "accidental results." Recovery was denied where there was nothing unusual or unexpected in the act preceding the injury, and only the result was unexpected. If, however, something unforeseen or unexpected occurred during an otherwise voluntary and intentional act, recovery would be permitted.

Some courts were willing to make rather fine distinctions in characterizing the "act" or "means" which produced the injury, thereby affording the beneficiaries relief. For example, where an insured died from typhoid fever after unknowingly drinking polluted water, the court held that he had intended to drink pure water. Therefore, the means was drinking polluted water, an unintended act, and hence was accidental.¹³ In another case, where the insured got lost on a hunting trip and froze to death, the court said that the means which caused the death was accidental exposure to the storm and frost, rather than the voluntary and intended act of tracking game.¹⁴

Other courts have shown a willingness to look for something unforeseen and unusual in the means, but have required the plaintiff to show clearly that something unexpected was indeed present in the act.¹⁵ For example, where an insured contracted a streptococcic

10. *Id.* at 121.

11. *Id.*

12. *Id.*

13. *Christ v. Pacific Mut. Life Ins. Co.*, 144 N.E. 161 (Ill. 1924). *Accord Newsoms v. Commercial Cas. Ins. Co.*, 137 S.E. 456 (Va. 1927) (ptomaine poisoning or acute indigestion after eating canned beans; court said insured intended to eat nourishing food, but instead ate tainted food; thus means was accidental).

14. *Ashley v. Agricultural Life Ins. Co. of America*, 217 N.W. 27 (Mich. 1928).

15. In both *Newsoms* and *Ashley*, the court found accidental means as a matter of law.

infection through a cut on his chin, the court said that the plaintiff had to show both that the cut was inflicted by accidental means and that the infection entered his body at the same time.¹⁶ However, where it was clear that germs had entered an insured's body through an opening which was not caused by accident, the cause of death was held to be disease, which did not constitute "accidental means."¹⁷

Where the insured has done exactly what he intended to do, however, courts applying the *Barry* test have denied recovery, even when the "result" of the act was unforeseen.¹⁸ In these cases the courts have found that the "insured did nothing but that which he intended to do," and injury or death was the natural result from a natural cause.¹⁹ Similarly, where a medical or dental procedure was intentionally and skillfully performed, but an unexpected and unfortunate result ensued, the courts following the *Barry* test have held that death was not by "accidental means" because only the result was accidental.²⁰

A few courts have shown a willingness to depart from the *Barry* distinction between "accidental means" and "accidental results," and to adopt the position that "accident," "accidental" and "accidental means" are synonymous.²¹ In some cases the courts' statements of this view were undoubtedly dictum, because the means might well have been found to be "accidental" anyway.²² In other

16. *Lincoln Nat. Life Ins. Co. v. Erickson*, 42 F.2d 997 (8th Cir. 1930) (judgment for beneficiary reversed; remanded for new trial).

17. *Kimball v. Massachusetts Acc. Co.*, 117 A. 228 (R.I. 1922) (doctor had open boil on neck; erysipelas germs from patients he was treating entered his body through the open boil).

18. *See, e.g., Smith v. Travelers' Ins. Co.*, 106 N.E. 607 (Mass. 1914) (insured used nasal douche; sniffed too hard; this carried germs into middle ear and eventually to the brain, causing spinal meningitis).

19. *New Amsterdam Cas. Co. v. Johnson*, 110 N.E. 475, 476 (Ohio 1914) (insured took a cold bath after horseback riding; the shock of the cold water caused a heart attack). *Accord Rock v. Travelers' Ins. Co.*, 156 P. 1029 (Cal. 1916) (heart failure from overexertion in carrying heavy casket down stairs); *Husbands v. Indiana Travelers' Acc. Ass'n*, 133 N.E. 130 (Ind. 1921) (ruptured blood vessel due to exertion in shaking down ashes in furnace).

20. *Caldwell v. Travelers' Ins. Co.*, 267 S.W. 907 (Mo. 1924) (hernia operation, skillfully performed; intestinal obstruction developed and caused death). *But cf. International Travelers' Ass'n v. Francis*, 23 S.W.2d 282, 283 (Tex. 1930) (infection following extraction of tooth; court affirmed the appellate court's reversal of a judgment for the insurer; result "so extraordinary and rare, and so unrelated to the surgical act performed, that it must be regarded as accidental").

21. *See, e.g., the cases cited by Justice Cardozo in his dissent in Landress v. Phoenix Mut. Life Ins. Co.*, 291 U.S. 491, 499-500 (1934).

22. *E.g., Travelers' Protective Ass'n v. Stephens*, 49 S.W.2d 364 (Ark. 1932) (insured came to aid of friend who unexpectedly got into a fight with a man not known to be armed;

cases, however, it was clear that only the result was "accidental," and the means was not, as where a common anesthetic was given to the insured,²³ or where the insured died of carbon monoxide poisoning and was found in an enclosed garage with the car motor running.²⁴

These attempts by the courts to find a rational and acceptable basis for their decisions in "accidental means" cases were sharply crystalized in *Landress v. Phoenix Mutual Life Insurance Co.*,²⁵ decided by the Supreme Court in 1934. Despite the fact that *Landress* was never binding on the state courts, and after *Erie*²⁶ in 1938 was also not binding on federal courts in diversity actions, both the majority and dissenting opinions have been looked to for guidance throughout the ensuing fifty years.

In *Landress*, the insured, "while in good health and while playing golf in his accustomed manner at a place where many others were playing without injury, was suddenly and unexpectedly overcome from the force of the sun's rays . . . and . . . shortly afterward . . . died."²⁷ In affirming the judgments of the lower courts in favor of defendant insurer, the majority of the Supreme Court noted that "the carefully chosen words [in the policy] defining liability distinguish between the result and the external means which produces it."²⁸ There was nothing in the pleadings to suggest that there was anything unknown or unforeseen in the sun's rays, the weather or any other circumstances,²⁹ and thus the test for "accidental means" set down in *Barry*³⁰ had not been satisfied.

In his now famous dissent, Justice Cardozo stated that it is the

insured was cut with a knife, either by accident or on purpose; judgment on jury verdict for disabled insured affirmed); *Hoff v. Mutual Life Ins. Co.*, 254 N.W. 137 (Mich. 1934) (abrasion, which was caused by being left on bedpan too long, became infected; judgment on jury verdict for plaintiff affirmed; a liberal court might find that the cause of the abrasion was accidental); *Carter v. Standard Acc. Ins. Co.*, 238 P. 259 (Utah 1925) (death was caused either because insured became dizzy and fell, or because he took overdose of sleeping pills).

23. *Wheeler v. Title Guar. & Cas. Co.*, 251 N.W. 408 (Mich. 1933) (injection of nupercaine; judgment for plaintiff affirmed; effect was not the natural and probable consequence of the means).

24. *Wiger v. Mutual Life Ins. Co.*, 236 N.W. 534 (Wis. 1931) (judgment on jury verdict for plaintiff affirmed; jury found that death was not suicide and could have found that the result was not foreseeable).

25. 291 U.S. 491 (1934).

26. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

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

28. *Id.* at 496.

29. *Id.*

30. *United States Mut. Acc. Ass'n v. Barry*, 131 U.S. 100 (1889).

reading of the policy [by the average man] that is to be accepted as our guide, with the help of the established rule that ambiguities and uncertainties are to be resolved against the [insurance] company. . . . When a man has died in such a way that his death is spoken of as an accident, he has died because of an accident, and hence by accidental means.³¹

Thus the two conflicting views were clearly presented: where the insured's act is intentional and voluntary, must there be something unexpected, unusual and unforeseen in the act itself in order to constitute "accidental means," or is it sufficient if only the "result" is "accidental"? During the ensuing fifty years many courts have wrestled with this issue, and a broad spectrum of views has developed.

II. THE STRICT TEST

A number of courts have continued to apply the strict test set down by the majority in *Landress*.³² Under this approach, the difference between "accidental means" and "accidental results" is analogous to that between cause and effect.³³ When nothing unforeseen or unintended occurs in the performance of the injurious act, and the only unanticipated factor is the result—that is, death or injury—then the consequence is an "accidental result." Because the act was performed as intended, such consequences are not caused by "accidental means." Only when an unusual, unforeseen and unintended mishap occurs in the performance of the act itself are the results considered the product of "accidental means."³⁴ The rationale for this strict interpretation is that to refuse to make a distinction between "means" and "results" would be to create a contract for the parties different from that into which they actually entered.³⁵

While there are a substantial number of states which must still be listed as adhering to the "means/results" distinction,³⁶ the likelihood of their continued loyalty to this strict test is questionable.

31. *Landress v. Phoenix Mut. Life Ins. Co.*, 291 U.S. at 499 (Cardozo, J., dissenting) (citations omitted).

32. See Appendix, *infra*, for a state-by-state listing.

33. Note, "Accident" and "Accidental Means" in *Indiana*, 36 IND. L.J. 376, 376-77 (1961).

34. *Kluge v. Benefit Ass'n of Ry. Employees*, 149 N.W.2d 681 (Minn. 1967).

35. Van Schaick, *Accidental Means In New York—A Rational Approach*, 32 CORNELL L.Q. 378, 382 (1947).

36. See Appendix, *infra*.

There appear to be only five jurisdictions in which the highest court has, in the last twenty years, announced its adherence to the strict test in a case where the distinction would determine the outcome of the case.³⁷ In a number of other jurisdictions the court's statement of the rule was dictum, because both the means and the result were "accidental,"³⁸ because neither the means nor the result was "accidental,"³⁹ or for other reasons.⁴⁰ Furthermore, in several states the question of what test to apply has not been presented to the highest courts for many years.⁴¹ Where a state's

37. *Chelly v. Home Ins. Co.*, 293 A.2d 295 (Del. 1972), *aff'g* 285 A.2d 810 (Del. Super. Ct. 1971) (insured sustained herniated lumbar disc while bowling; summary judgment for insurer; affirmed); *Smith v. Continental Cas. Co.*, 203 A.2d 168 (D.C. 1964) (heart attack after exertion in climbing embankment in performance of regular duties as engineer; directed verdict for insurer; affirmed); *Gordon v. Metropolitan Life Ins. Co.*, 260 A.2d 338 (Md. 1970) (death caused by hypersensitivity to heroin insured injected, or impurities therein, or synergistic reaction; directed verdict for insurer; affirmed); *Kluge v. Benefit Ass'n of Ry. Employees*, 149 N.W.2d 681 (Minn. 1967) (heart attack after lifting and moving railroad handcar; judgment n.o.v. for insurer; affirmed); *Henderson v. Hartford Acc. & Indem. Co.*, 150 S.E.2d 17 (N.C. 1966) (fireman died from heart attack due to smoke inhalation after fighting fire; demurrer sustained; affirmed). In each of these cases it would appear that the result was accidental.

38. *Commercial Ins. Co. v. Orr*, 379 F.2d 865 (8th Cir. 1967) (applying Missouri law) (aspiration of vomitus by alcoholic after drinking; court said that jury could find cause of death was failure of epiglottis to close air passage, which was unexpected); *Wiecking v. Phoenix Mut. Life Ins. Co.*, 116 F.2d 90 (7th Cir. 1940) (applying Indiana law) (sunstroke while playing golf; court said sunstroke could be accidental means in Indiana, but did not say what unusual or unexpected occurrence produced the injury in this case); *Emergency Aid Ins. Co. v. Dobbs*, 83 So. 2d 335 (Ala. 1955) (carpenter was walking up ramp on job; saw sparks falling, and looked up into flash of electric torch, which injured his eyes; court said that jury could find he did not voluntarily expose his unprotected eyes to the flash of the torch); *Ells v. Order of United Commercial Travelers of America*, 125 P.2d 457 (Cal. 1942) (insured fell on bathroom floor); *King v. Travelers Ins. Co.*, 192 A. 311 (Conn. 1937) (injury due to dentist's overexposure to x-ray over period of time; court said he intended exposure to x-ray, but did not intend overexposure); *Wills v. Midland Nat'l Life Ins. Co.*, 91 P.2d 695 (Mont. 1939) (death from exposure and freezing when insured got off street car at wrong stop in minus-40-degree weather; court said exposure to severe weather was not intended); *Dalbey v. Equitable Life Assur. Soc'y*, 74 P.2d 432 (Mont. 1937) (death of fireman from smoke inhalation while manning hose outside burning barn; court said smoke inhalation was not expected under the circumstances).

39. *National Life & Acc. Ins. Co. v. Jones*, 86 S.W.2d 139 (Ky. 1935) (insured was aggressor, and victim shot him in self-defense; court held that insured knew or should have anticipated that intended victim might kill him); *Smith v. Combined Ins. Co. of America*, 120 S.E.2d 267 (Va. 1961) (insured, a fugitive, hid in barn and shot at police; tear gas shells fired into barn set it on fire, and insured burned to death; court said injury or death was foreseeable, and was not an accident).

40. *Lavender v. Volunteer State Life Ins. Co.*, 157 So. 101 (Miss. 1934) (there was no visible contusion or wound, as required by the policy, and a "violation of law" exclusion applied because insured was attacking a constable).

41. *King v. Travelers Ins. Co.*, 192 A. 311 (Conn. 1937); *Lavender v. Volunteer State Life Ins. Co.*, 157 So. 101 (Miss. 1934); *Wills v. Midland Nat'l Life Ins. Co.*, 91 P.2d 695 (Mont.

adherence to the "means/results" distinction rests either upon dictum or upon an old case, it is certainly possible that the court would abolish the distinction if the question were directly presented in a future case.

Even the courts in states which still purport to follow the strict view have occasionally gone out of their way to find something unforeseen in the "means" of an insured's death in order to allow recovery. For example, where an insured's death was caused by sunstroke and heat exhaustion, the Ohio court held that the "means" of death was not the insured's voluntary act of working in the sun, but rather was the effect of the heat and rays of the sun upon the insured, which was unexpected and unintended.⁴² Similarly, where an insured suffered from ptomaine poisoning or acute indigestion after eating canned beans, the Virginia court held that he intended to eat nourishing food, but inadvertently ate tainted food, and therefore the "means" was "accidental."⁴³

Finally, some states which still recognize a distinction between "means" and "results" have adopted a definition of "accidental means" which is so liberal that it results in recovery in most cases anyway. Typical of this approach is *Perrine v. Prudential Insurance Co. of America*,⁴⁴ in which the New Jersey court adopted as its test the "reasonable expectations of the average policyholder."⁴⁵ In *Perrine*, peritonitis developed from a break in the insured's intestine caused by pressure on his abdomen from heavy equipment which he was moving. The court, stating that this was a traumatic incident, indicated that the jury could find that the injury was caused by something "accidental."⁴⁶ As pointed out by the dissent,

1939) (It should also be noted that in *Terry v. National Farmers Union Life Ins. Co.*, while the court did not discuss the "means/results" distinction, it did say that "an accidental result may follow an intentional act and be regarded as caused by accidental means." 356 P.2d at 978 (Mont. 1960)); *McGinley v. John Hancock Mut. Life Ins. Co.*, 184 A. 593 (N.H. 1936); *Hammer v. Mutual Beneficial Health & Acc. Ass'n*, 109 N.E.2d 649 (Ohio 1952); *Kimball v. Massachusetts Acc. Co.*, 117 A. 228 (R.I. 1922).

42. *Hammer v. Mutual Beneficial Health & Acc. Ass'n*, 109 N.E.2d 649 (Ohio 1952). See also *King v. Travelers Ins. Co.*, 192 A. 311 (Conn. 1937) (dentist's overexposure to x-ray over period of time; court said he intended exposure to x-ray, but did not intend overexposure).

43. *Newsoms v. Commercial Cas. Ins. Co.*, 137 S.E. 456 (Va. 1927).

44. 265 A.2d 521 (N.J. 1970).

45. *Id.* at 524. The court said:

[T]he issue for the fact-finder to determine is whether the average policyholder would consider that there was something about the preceding acts and events, in the light of the unexpected injurious result . . . which would lead him reasonably to call the means "accidental," even though, strictly speaking, nothing unexpected or unforeseen occurred in the course of the preceding acts.

46. *Id.* at 525.

it is difficult to understand how a jury could reasonably conclude that the injury was caused by "accidental means."⁴⁷ It would seem that a frank elimination of the "means/results" distinction would have little effect on the outcome of cases in New Jersey.⁴⁸

III. TREND TOWARD ELIMINATION OF THE DISTINCTION

A. Evolution

Over the years since *Landress* the trend has clearly been to eliminate the distinction between "accidental means" and "accidental results." Courts which have adopted this approach allow recovery for unintended "results" of the insured's voluntary act, even though nothing unforeseen or unintended has occurred in the performance of the act. Thus, unexpected "consequences" provide the "accidental" element, notwithstanding the fact that the policy provides coverage only against injury arising from "accidental means." These courts base their decisions upon generally accepted rules of construction—that an insurance policy should be interpreted most strongly against the insurer,⁴⁹ that doubt should be resolved in favor of the insured whenever there is an ambiguity in the terms of the policy,⁵⁰ and that in defining the terms of the policy the courts should adopt the ordinary meaning of the language.⁵¹

In some states there has been an evolution over a period of years, with the court first adopting a liberal definition of "accidental means," and eventually abolishing the distinction between "accidental means" and "accidental results." A good example of this can be found in the Arizona cases, beginning with *California State Life Insurance Co. v. Fuqua*.⁵² In *Fuqua*, the insured had been killed by police in a gun battle. In affirming the lower court's judgment for the beneficiary on a jury verdict, the court said that the "test is, what effect should the insured, as a reasonable man, ex-

47. *Id.* at 526 (Haneman, J., dissenting).

48. See *Schwartz v. John Hancock Mut. Life Ins. Co.*, 233 A.2d 416, 422 (N.J. Super. Ct. Law Div. 1967), where the court said that this was "the sense of the cases, although not their language." In *Schwartz*, the insured was killed when his car went off the road during a high speed chase by the police. The court said that recovery should be allowed if the injury was not in fact expected, even though the risk of injury was foreseeable. The court found that there was a reasonable basis for the insured's belief that injury was not a virtual certainty.

49. *Aetna Life Ins. Co. v. Evins*, 199 So. 2d 238, 241 (Miss. 1967).

50. *Ziolkowski v. Continental Cas. Co.*, 7 N.E.2d 451, 456 (Ill. 1937).

51. *Thompson v. Ezzel*, 379 P.2d 983, 985 (Wash. 1963).

52. 10 P.2d 958 (Ariz. 1932).

pect from his own actions under the circumstances."⁵³ A similar test of foreseeability was applied some years later in *Malanga v. Royal Indemnity Co.*, where the insured had died from the combined effects of alcohol and barbiturates, neither of which alone would have been sufficient to have caused death.⁵⁴ In reversing the lower courts' judgments for the insurer, the court found that there was

no evidence that the "insured, as a reasonable man," expected or anticipated or desired the injury which resulted from his voluntary acts. . . . He did not suspect, or know, or have any reason to know that alcohol and barbiturates, when consumed in the quantities which he took, would produce an injury resulting in death.⁵⁵

In both *Fuqua* and *Malanga* the court used a definition for "accidental means" based on foreseeability which was essentially equivalent to an "accidental results" approach.

In *Knight v. Metropolitan Life Insurance Co.*,⁵⁶ decided only one year after *Malanga*, the court acknowledged the position it had reached and expressly adopted the view of Justice Cardozo's *Landress* dissent, "that an accident is an accident whether it be in the 'means' or the 'result.'"⁵⁷ The court obviously took this position so that it might avoid the "Serbonian Bog of semantics and polemical maze"⁵⁸ in future cases, because it recognized that the foreseeability test of *Fuqua* and *Malanga* would have justified a judgment for the beneficiary in *Knight* even if applied.⁵⁹

B. Elimination of Distinction

Most of the states which have considered the matter in the last fifty years have abolished the distinction between "accidental means" and "accidental results."⁶⁰ Some have done so by express

53. *Id.* at 960.

54. 422 P.2d 704 (Ariz. 1967).

55. *Id.* at 708. There apparently was no dispute that the insured did not know, or have reason to know, that consumption of alcohol and barbiturates in the quantities taken would result in injury or death. *Id.* at 705-06.

56. 437 P.2d 416 (Ariz. 1968).

57. *Id.* at 420.

58. *Id.* See *supra* note 6 and accompanying text.

59. *Knight*, 437 P.2d at 419. Insured, an experienced diver, was killed when he dove off Coolidge Dam. He had often dived from great heights and had even dived from this dam before. He told friends who were with him that he knew he could make it. Just before he hit the water, he rolled over too far on his back, apparently because he misjudged the distance.

60. See Appendix, *infra*, for a state-by-state listing.

statement,⁶¹ others only by implication.⁶² In some cases the court's statement was necessary to the disposition of the case,⁶³ and in other cases it was merely dictum.⁶⁴ Regardless of how the liberal view was adopted and announced, it seems very likely that it will continue to be applied in those states, and may well be adopted in the future in those states still purporting to follow the strict view, as well as in those states in which the question does not appear to have ever been decided.⁶⁵

IV. TESTS FOR "ACCIDENTAL RESULT"

Most courts use a *foreseeability* test in determining whether a "result" is "accidental."⁶⁶ Some courts hold that the test is an objective one: whether the result was a contingency "known to all sensible men as likely to follow" as a natural result of one's conduct;⁶⁷ a contingency which "any [person] with ordinary intelligence and prudence . . . could have reasonably foreseen."⁶⁸ Other courts hold that foreseeability is determined by whether injury or death was foreseeable by either the insured or by a reasonably pru-

61. *E.g.*, *Knight v. Metropolitan Life Ins. Co.*, 437 P.2d 416 (Ariz. 1968); *Taylor v. John Hancock Mut. Life Ins. Co.*, 142 N.E.2d 5 (Ill. 1957); *Republic Nat'l Life Ins. Co. v. Heyward*, 536 S.W.2d 549 (Tex. 1976).

62. *E.g.*, *Bukata v. Metropolitan Life Ins. Co.*, 67 P.2d 607 (Kan. 1937); *Hoff v. Mutual Life Ins. Co.*, 254 N.W. 137 (Mich. 1934); *Provident Life & Acc. Ins. Co. v. Green*, 46 P.2d 372 (Okla. 1935).

63. *E.g.*, *Schonberg v. New York Life Ins. Co.*, 104 So. 2d 171 (La. 1958) (death resulted from shock produced by a very rare reaction to a blood transfusion); *Thompson v. American Cas. Co.*, 439 P.2d 276 (Utah 1968) (epilepticus allegedly resulted from temporary duty operating a jackhammer in a small, hot space; foreseeability question of fact for jury); *Stoffel v. American Family Life Ins. Co.*, 164 N.W.2d 484 (Wis. 1969) (heart failure after lifting heavy wagon off of tractor wheel).

64. *E.g.*, *Knight v. Metropolitan Life Ins. Co.*, 437 P.2d 416 (Ariz. 1968) (*see supra* note 59 and accompanying text); *Griswold v. Metropolitan Life Ins. Co.*, 180 A. 649 (Vt. 1935) (insured was chopping wood; a stick flew up and cut his lip, which became infected; court said that, even under strict rule, having the stick hit his face was an accidental means).

65. The authors have not discovered any cases in Hawaii, Maine, South Dakota, or Wyoming (*but see* *Smith v. Equitable Life Assur. Soc'y*, 614 F.2d 720, 723 (10th Cir. 1980) (applying Wyoming law)).

66. Most courts treat the words "accident," "accidental" and "accidental bodily injury" as being synonymous with "accidental result" and apply the same tests as they use for "accidental result."

67. *Hutton v. States Acc. Ins. Co.*, 108 N.E. 296, 297 (Ill. 1915).

68. *Cory v. Woodmen Acc. Co.*, 164 N.E. 159, 162 (Ill. 1928). *See also* *International Underwriters, Inc. v. Home Ins. Co.*, 662 F.2d 1084 (4th Cir. 1981) (reasonable person would have recognized that death *could* result from his actions; insured strangled when "fail-safe" mechanism failed during autoerotic act); *Sigler v. Mutual Benefit Life Ins. Co.*, 506 F. Supp. 542 (S.D. Iowa), *aff'd*, 663 F.2d 49 (8th Cir. 1981).

dent person in the same position.⁶⁹ And some courts embrace a completely subjective approach, stating that the test is foreseeability from the viewpoint of the insured.⁷⁰

The majority of courts take the position that injury or death is not an "accidental result" if it was reasonably foreseeable, and that it need not have been the inevitable consequence of the insured's actions.⁷¹ Other courts are much more liberal, however, and allow recovery if injury was not in fact expected, even though the risk of injury was foreseeable.⁷² And some allow recovery for anything short of suicide.⁷³

The liberal attitude of many courts in recent years is well illustrated by the concurring opinion of Justice Musmanno of the Pennsylvania Supreme Court in *Beckham v. Travelers Insurance Co.*:⁷⁴

The person who drives his automobile at 100 miles per hour on a congested highway is, in metamorphical [sic] language, "committing suicide," but if he is killed it does not legally or logically follow that he actually intended to take his life. Many if not perhaps most, fatalities of a violent character, (where crime is not involved) are due to poor reasoning, neglectful conduct, or a reckless attitude on the part of the deceased. An insomniac takes too many sleeping pills because he yearns to erase with a weary arm the slate of exhaustion, pain or sorrow; the swimmer dives into a shallow pool, seeking the exhilaration of cooling waters to drown the fatigue of a tired and weary body; a pedestrian runs across the street in front of a speeding street car because he sees on the other side of the thoroughfare a dear friend whose companionship will be medicine to his loneliness and despair. Where death results in such cases the result is accidental even though the deceased voluntarily rode the thunderbolt which killed him.

69. *E.g.*, *Gulledge v. Atlantic Coast Life Ins. Co.*, 179 S.E.2d 605 (S.C. 1971) (insured dated married man; she called his wife several times to tell her about it; she drove by wife's house with another man; wife followed her; when they stopped, wife shot insured and other man twice, then ran over insured).

70. *E.g.*, *Republic Nat'l Life Ins. Co. v. Heyward*, 536 S.W.2d 549 (Tex. 1976).

71. *McCrary v. New York Life Ins. Co.*, 84 F.2d 790 (8th Cir. 1936) (insured was in bed with a married woman; woman's husband entered room and shot insured).

72. *Schwartz v. John Hancock Mut. Life Ins. Co.*, 233 A.2d 416 (N.J. Super. Ct. Law Div. 1967) (high speed auto chase; court held there was a reasonable basis for insured's belief that injury was not a virtual certainty).

73. "Having thus determined that the insured did not commit suicide . . . , it inevitably follows that his death was accidental." *Gulf Life Ins. Co. v. Nash*, 97 So. 2d 4, 8 (Fla. 1957) (Drew, J., dissenting in part) (insured was playing Russian Roulette).

74. 225 A.2d 532 (Pa. 1967) (Musmanno, J., concurring) (overdose of narcotics).

. . . .
 [The insured in this case] wanted to live, if only to dive again into the shallow pool of artificial exhilaration, if only to cross the street to embrace the morphine sweetheart of heart's ease. He used bad judgment, he was reckless, [but] he did not want to bring bereavement and sadness to his mother, and it is comforting to know that she will not be denied the money he provided to help her along the remainder of her lonely journey when he, even through his own negligence, involuntarily left her.⁷⁶

V. DOES THE *Means/Results* DISTINCTION MAKE A DIFFERENCE?

While in some situations recovery of insurance policy proceeds may not be affected by whether the court distinguishes between "means" and "results,"⁷⁶ it is clear that in many cases this distinction will be the decisive factor in determining the outcome of the case. This is especially true where the insured's own act results in his death or injury, as opposed to those cases where the act is committed by another party.⁷⁷

Perhaps the clearest example of the impact of the "means/results" distinction can be found in cases involving the insured's overexertion or his overexposure to the elements. If a court has abolished the distinction between "accidental means" and "accidental results," it is highly probable that recovery will be allowed, due to the fact that the "result" was almost always unexpected and unforeseen.⁷⁸ Likewise, if the court takes a strict approach to distinguishing between "accidental means" and "accidental results," it should be equally probable that recovery will be denied, because the insured's "act" was usually just what he intended.⁷⁹ Yet courts

75. *Id.* at 537-38.

76. *See, e.g., infra* notes 80-81, 85-86 and accompanying text.

77. *Id. But see infra* notes 92-100 and accompanying text.

78. *See, e.g.,* Bukata v. Metropolitan Life Ins. Co., 67 P.2d 607 (Kan. 1937) (heat stroke or heat prostration); New York Life Ins. Co. v. Wise, 251 P.2d 1058 (Okla. 1952) (ruptured blood vessels after pushing car in snow); Stoffel v. American Family Life Ins. Co., 164 N.W.2d 484 (Wis. 1969) (heart failure after lifting heavy wagon off of tractor wheel); O'Connell v. New York Life Ins. Co., 264 N.W. 253 (Wis. 1936) (double pneumonia following heat prostration).

79. *See, e.g.,* Landress v. Phoenix Mut. Life Ins. Co., 291 U.S. 491 (1934) (sunstroke while playing golf); Rock v. Travelers' Ins. Co., 156 P. 1029 (Cal. 1916) (heart failure from overexertion in carrying heavy casket down stairs); Smith v. Continental Cas. Co., 203 A.2d 168 (D.C. 1964) (heart attack after exertion in climbing embankment in performance of regular duties as engineer); Husbands v. Indiana Travelers' Acc. Ass'n, 133 N.E. 130 (Ind. 1921) (ruptured blood vessel due to exertion in shaking down ashes in furnace); Miller v. Prudential Ins. Co. of America, 331 P.2d 310 (Kan. 1958) (heart attack while doing heavy work as oil field roughneck); Reeves v. John Hancock Mut. Life Ins. Co., 130 N.E.2d 541

purporting to distinguish between "means" and "results" have often shown an astonishing willingness to find that something unforeseen or unexpected took place in the act which caused the injury, so that the "means" of injury was "accidental."⁸⁰ It is difficult, if not impossible, to distinguish these cases from those in which the court says that no distinction between "means" and "results" should be recognized, yet finds in the given case that the means was accidental anyway.⁸¹

A similar range of views is found in the decisions of cases involving overconsumption of alcohol and drugs. Courts which distinguish between "means" and "results" deny recovery where only the "result" is accidental,⁸² while those which have abolished the dis-

(Mass. 1955) (hernia caused by heavy lifting); *Kluge v. Benefit Ass'n of Ry. Employees*, 149 N.W.2d 681 (Minn. 1967) (heart attack after lifting and moving railroad handcar); *Henderson v. Hartford Acc. & Indem. Co.*, 150 S.E.2d 17 (N.C. 1966) (fireman died of smoke inhalation after fighting fire); *Johnson v. Business Men's Assur. Co. of America*, 228 P.2d 760 (Wash. 1951) (insured died after six to eight trips into burning house to salvage belongings); *Evans v. Metropolitan Life Ins. Co.*, 174 P.2d 961 (Wash. 1946) (heart attack from effort of pushing car up slight grade on hill).

80. *Wiecking v. Phoenix Mut. Life Ins. Co.*, 116 F.2d 90 (7th Cir. 1940) (applying Indiana law) (sunstroke while playing golf; court said sunstroke could be accidental means in Indiana, but did not say what unusual or unexpected thing produced the injury); *Ashley v. Agricultural Life Ins. Co. of America*, 217 N.W. 27 (Mich. 1928) (insured got lost on hunting trip and froze to death; means of death was unintended exposure to storm and frost); *Wills v. Midland Nat'l Life Ins. Co.*, 91 P.2d 695 (Mont. 1939) (insured got off street car at wrong stop in minus-40-degree weather; court said exposure and freezing were unintentional); *Dalbey v. Equitable Life Assur. Soc'y*, 74 P.2d 432 (Mont. 1937) (fireman inhaled smoke while marring hose outside burning barn; court said smoke inhalation to such an extreme extent was not expected); *Hammer v. Mutual Beneficial Health & Acc. Ass'n*, 109 N.E.2d 649 (Ohio 1952) (insured, a roofer, died from sunstroke and heat exhaustion; court said means was not the act of working in the sun, but rather the action of the heat and rays of the sun). Compare *King v. Travelers Ins. Co.*, 192 A. 311 (Conn. 1937) (injury from dentist's overexposure to x-ray; court said he intended exposure to x-ray, but did not intend overexposure) with *Murphy v. Travelers Ins. Co.*, 2 N.W.2d 576 (Neb. 1942) (dentist got cancer after using finger to hold x-ray film for many years; court held that cumulative effect of x-ray exposure was unexpected, and no distinction should be made between accidental means and accidental results; the dissent questioned if even the result was accidental, because it "was all but sure to follow," *id.* at 582 (Tewell, J., dissenting)).

81. *Burr v. Commercial Travelers Mut. Acc. Ass'n of America*, 67 N.E.2d 248 (N.Y. 1946) (insured caught in snow storm; fell and hit head); *Wall v. Pennsylvania Life Ins. Co.*, 274 N.W.2d 208 (N.D. 1979) (hurt back while loading bags of seed on farm; no specific lift caused the injury); *Provident Life & Acc. Ins. Co. v. Green*, 46 P.2d 372 (Okla. 1935) (sunstroke while working on railroad); *Goethe v. New York Life Ins. Co.*, 190 S.E. 451 (S.C. 1937) (heat stroke from intense heat while fighting unexpected grass fire on farm).

82. *Hargreaves v. Metropolitan Life Ins. Co.*, 163 Cal. Rptr. 857 (Ct. App. 1980) (heroin overdose by six-year drug user); *Prudential Ins. Co. of America v. Gutowski*, 113 A.2d 579 (Del. 1955) (overdose of barbiturates; insured had taken more than prescribed number of capsules previously); *Gordon v. Metropolitan Life Ins. Co.*, 260 A.2d 338 (Md. 1970) (death caused by hypersensitivity to heroin, or impurities in the heroin, or synergism); *McGinley v.*

inction allow recovery so long as the "result" was unexpected and unforeseen.⁸³ Here also, recovery is frequently allowed by courts still purporting to distinguish between "means" and "results," by using a liberal test for "accidental means,"⁸⁴ on facts which are very similar to those where other courts have found that only the "result" was "accidental."⁸⁵ Where recovery is allowed for "accidental results," it appears that injury or death must be *highly* foreseeable before recovery will be denied.⁸⁶

Much the same spectrum of results is found in cases involving the insured's participation in a reckless or foolhardy act;⁸⁷ his vol-

John Hancock Mut. Life Ins. Co., 184 A. 593 (N.H. 1936) (acute alcohol poisoning after consuming unknown quantity of alcohol); *Whiteside v. New York Life Ins. Co.*, 503 P.2d 1107 (Wash. Ct. App. 1972) (self-injected overdose of morphine and methedrine; long history of drug use).

83. *O'Toole v. New York Life Ins. Co.*, 671 F.2d 913 (5th Cir. 1982) (applying Louisiana law) (overdose of cocaine); *Equitable Life Assur. Soc'y of the United States v. Hemenover*, 67 P.2d 80 (Colo. 1937) (overdose of luminal, taken for sleeplessness); *Russell v. Metropolitan Life Ins. Co.*, 439 N.E.2d 89 (Ill. App. Ct. 1982) (overconsumption of vodka); *Marsh v. Metropolitan Life Ins. Co.*, 388 N.E.2d 1121 (Ill. App. Ct. 1979) (overdose by drug addict); *Catania v. State Farm Life Ins. Co.*, 598 P.2d 631 (Nev. 1979) (insured regurgitated and choked to death as a result of acute narcosis caused by self-administered heroin injection); *Beckham v. Travelers Ins. Co.*, 225 A.2d 532 (Pa. 1967) (drug overdose).

84. *Commercial Ins. Co. v. Orr*, 379 F.2d 865 (8th Cir. 1967) (applying Missouri law) (aspiration of vomitus by alcoholic after drinking; court said jury could find cause of death was failure of epiglottis to close air passage; this was unintended); *Pilcher v. New York Life Ins. Co.*, 102 Cal. Rptr. 82 (Ct. App. 1972) (drug overdose by regular user; court said unintended overdose is accidental means, because death was unintended and unexpected).

85. *Spence v. Equitable Life Assur. Soc'y*, 69 P.2d 713 (Kan. 1937) (overdose of barbitol by drug addict; jury found that insured did not know that amount he took was likely to cause death); *Collins v. Nationwide Life Ins. Co.*, 294 N.W.2d 194 (Mich. 1980) (acute alcohol intoxication; jury question whether death was foreseen by insured).

86. *Jones v. Prudential Ins. Co. of America*, 24 D.L.R.3d 683 (County Ct. of Grey, Ontario 1971) (insured put head in plastic bag and inhaled Cutex fumes during autoerotic experience; court said he knew or should have known that death might ensue, so death was not an accident).

87. Court distinguished between "accidental means" and "accidental results": *American Cas. Co. v. Hyder*, 8 Life Cas. (CCH) 947 (Tenn. 1943) (insured poured gasoline on his privates to cleanse himself after leaving a house of prostitution; he then struck a match so he could see better, and was burned; recovery denied; only the result was accidental); *Nicholas v. Provident Life & Acc. Ins. Co.*, 457 S.W.2d 536 (Tenn. Ct. App. 1970) (insured allegedly playing Russian Roulette; recovery denied; court held that, as a reasonable man, insured foresaw or should have foreseen that death or injury might result). *But see Linder v. Prudential Ins. Co. of America*, 250 S.E.2d 662 (N.C. Ct. App.), *cert. denied*, 254 S.E.2d 918 (N.C. 1979) (insured playing Russian Roulette; reversed and remanded for new trial; jury could find that insured did not intend to pull trigger, and that gun discharged accidentally).

Court did not distinguish between "accidental means" and "accidental results": *Knight v. Metropolitan Life Ins. Co.*, 437 P.2d 416 (Ariz. 1968) (insured, an experienced diver, dove off a high dam from which he had dived before; recovery allowed; court found that both means and results were accidental); *Taylor v. John Hancock Mut. Life Ins. Co.*, 142 N.E.2d 5 (Ill. 1957) (insured and others spread gasoline in house they intended to burn; pilot light in

untary submission to a medical or dental procedure;⁸⁸ infection or disease entering the body through a cut or ingestion of food or drink;⁸⁹ participation in an autoerotic experience;⁹⁰ and a variety of

stove ignited gasoline, and insured was trapped in house; recovery allowed; injury was not foreseeable). Compare two Russian Roulette cases: *Koger v. Mutual of Omaha Ins. Co.*, 163 S.E.2d 672 (W. Va. 1968) (recovery denied; exposure to a known and obvious danger is not accidental) with *Gulf Life Ins. Co. v. Nash*, 97 So. 2d 4 (Fla. 1957) (recovery allowed; it having been found that insured did not intend to commit suicide, "it inevitably follows that his death was accidental," *id.* at 8 (Drew, J., dissenting in part)).

Many courts allowing recovery have pointed out that the insurer may avoid coverage in these cases by including in the policy a provision which excludes from coverage injury or death caused by exposure to obvious risk of injury or obvious danger. See, e.g., *Rodgers v. Reserve Life Ins. Co.*, 132 N.E.2d 692, 696-97 (Ill. App. Ct. 1956).

88. Court distinguished between "accidental means" and "accidental results": *New York Life Ins. Co. v. Bruner*, 153 N.E.2d 616 (Ind. Ct. App. 1958) (unusual reaction to spinal anesthetic; recovery denied); *Wheeler v. Title Guar. & Cas. Co.*, 251 N.W. 408 (Mich. 1933) (reaction to injection of nupercaine, a common anesthetic; recovery allowed; effect was not the natural and probable consequence of the means); *Caldwell v. Travelers' Ins. Co.*, 267 S.W. 907 (Mo. 1924) (bowel obstruction following hernia operation which had been skillfully performed; recovery denied); *International Travelers' Ass'n v. Francis*, 23 S.W.2d 282 (Tex. 1930) (infection followed extraction of tooth; recovery allowed). In neither *Wheeler* nor *Francis* did the court indicate what made the means accidental.

Court did not distinguish between "accidental means" and "accidental results": *INA Life Ins. Co. v. Brundin*, 533 P.2d 236 (Alaska 1975) (heart stopped during hemorrhoid surgery; recovery allowed if jury finds that death was caused by the surgery); *Gaskins v. New York Life Ins. Co.*, 104 So. 2d 171 (La. 1958) (death from shock produced by a very rare reaction to a blood transfusion; recovery allowed); *Cooper v. New York Ins. Co.*, 180 P.2d 654 (Okla. 1947) (unusual reaction to morphine which had been given to relieve pain; recovery allowed); *Zinn v. Equitable Life Ins. Co.*, 107 P.2d 921 (Wash. 1940) (infection developed after doctor lanced insured's arm to relieve high blood pressure; recovery allowed).

89. Court distinguished between "accidental means" and "accidental results": *Northam v. Metropolitan Life Ins. Co.*, 163 So. 635 (Ala. 1935) (insured pulled a hair out of his face with tweezers; infection developed because tweezers were not sterile; recovery denied); *Christ v. Pacific Mut. Life Ins. Co.*, 144 N.E. 161 (Ill. 1924) (insured got typhoid after drinking polluted water; recovery allowed; court said insured intended to drink pure water, not polluted water); *Kimball v. Massachusetts Acc. Co.*, 117 A. 228 (R.I. 1922) (insured physician contracted erysipelas from patient; bacteria entered his body through open boil on his neck; recovery denied).

Court did not distinguish between "accidental means" and "accidental results": *Griswold v. Metropolitan Life Ins. Co.*, 180 A. 649 (Vt. 1935) (while insured was chopping wood, a stick flew up and cut his lip, which became infected; recovery allowed; court noted that the stick hitting his face was an accidental means anyway).

90. In these cases, the insured has often used a noose and pulley (or some other device) to reduce or temporarily cut off the supply of oxygen to the brain, with the expectation that this would heighten the erotic experience of masturbation. When something went wrong and the fail-safe mechanism did not work, the insured ended up strangling himself.

All of the cases which the authors have discovered involved coverage for "accidental bodily injury," which is usually equated with accidental results. In only one case, *Connecticut Gen. Life Ins. Co. v. Tommie*, 619 S.W.2d 199 (Tex. Civ. App. 1981), was recovery allowed. The court affirmed a judgment on a jury verdict for the beneficiary, saying that death was accidental unless the insured acted in such a way that he should have reasonably known that his actions would probably result in his death. Courts which have denied recovery in

other activities.⁹¹

VI. CASES WHERE INJURY OR DEATH IS CAUSED BY THE ACT OF ANOTHER

It seems to make much less difference whether a court distinguishes between "accidental means" and "accidental results" when the death or injury was caused by the act of another person. In these cases the courts usually apply a foreseeability test, where the issue is whether the insured's death or injury was a natural and probable consequence of his actions.⁹² Courts which do not distinguish between "means" and "results" seem to be just as willing to find that injury or death was foreseeable⁹³ as are those courts

these cases have applied the same test, but have found that the insured knew or should have known that death could result from his actions. *International Underwriters, Inc. v. Home Ins. Co.*, 662 F.2d 1084 (4th Cir. 1981); *Sigler v. Mutual Benefit Life Ins. Co.*, 506 F. Supp. 542 (S.D. Iowa), *aff'd*, 663 F.2d 49 (8th Cir. 1981).

91. Court distinguished between "accidental means" and "accidental results": *Chelly v. Home Ins. Co.*, 285 A.2d 810 (Del. Super. Ct. 1971), *aff'd*, 293 A.2d 295 (Del. 1972) (insured suffered slipped disc while bowling; recovery denied); *Smith v. Travelers' Ins. Co.*, 106 N.E. 607 (Mass. 1914) (insured sniffed too hard while using nasal douche; this carried germs into the middle ear, and eventually to the brain, causing spinal meningitis; recovery denied); *New Amsterdam Cas. Co. v. Johnson*, 110 N.E. 475 (Ohio 1914) (heart attack followed shock from taking cold bath after horseback riding; recovery denied); *Newsoms v. Commercial Cas. Ins. Co.*, 137 S.E. 456 (Va. 1927) (ptomaine poisoning or acute indigestion after eating canned beans; recovery allowed; court said he intended to eat nourishing food, but instead ate tainted food).

Court did not distinguish between "accidental means" and "accidental results": *Miser v. Iowa State Traveling Men's Ass'n*, 273 N.W. 155 (Iowa 1937) (insured bled to death after cutting his wrist when he struck a window; it was not clear whether he struck the window on purpose or not; recovery allowed); *Ray v. Federated Guar. Life Ins. Co.*, 381 So. 2d 847 (La. Ct. App. 1980) (insured was in mental hospital, and thought he had supernatural powers; he drowned after placing himself facedown in a partially filled bathtub; recovery allowed); *Wiger v. Mutual Life Ins. Co.*, 236 N.W. 534 (Wis. 1931) (carbon monoxide poisoning while insured was in an enclosed garage with car motor running; recovery allowed, because jury found death was not suicide).

92. *Freed v. Protective Life Ins. Co.*, 405 F. Supp. 175 (S.D. Miss. 1975), *aff'd*, 551 F.2d 861 (5th Cir. 1977) (insured was aggressor; recovery denied). Some courts use a more subjective standard: whether the insured *actually* expected what occurred, and persisted in his aggressions regardless. *Freeman v. Commonwealth Life Ins. Co.*, 286 N.E.2d 396 (Ind. 1972).

93. *McCrary v. New York Life Ins. Co.*, 84 F.2d 790 (8th Cir. 1936) (insured in bed with married woman; woman's husband entered and shot insured; death was reasonably foreseeable, even if not the inevitable consequence). The same is true where the coverage is for "accidental bodily injury," which is usually treated as the equivalent of "accidental result." *Byrd v. Nationwide Mut. Ins. Co.*, 415 A.2d 807 (D.C. 1980) (insured was wounded by police gunfire after he shot first at police; recovery denied); *Carlyle v. Equity Benefit Life Ins. Co.*, 551 P.2d 663 (Okla. Ct. App. 1976) (armed robbery of small store at night; insured left store; attendant followed and yelled at him to stop; insured turned with gun in hand, and was shot; recovery denied). Recovery is also sometimes barred by a "violation of law" exclusion in the policy, *McCrary*, 84 F.2d at 790; or because the court feels that recovery should be

which still recognize the distinction.⁹⁴ On the other hand, recovery has been allowed by courts which distinguish between “means” and “results” upon a finding that injury was not foreseeable,⁹⁵ just as it would be by courts which have abolished the distinction,⁹⁶ or by courts which do not even discuss the “means/results” distinction.⁹⁷

While the same foreseeability test is usually applied when the insured is injured or killed by his wife after abusing or beating her, it appears that the courts will make every effort to allow recovery, because in most cases the result of finding that injury was foreseeable is to make the wife a two-time loser—the victim of her husband’s abuse, and a nonbeneficiary of the insurance proceeds. In fact, in only one of the many cases which the authors have read has recovery been denied to the widow-beneficiary, and this was probably due to a strict application of the distinction between “means” and “results.”⁹⁸ Usually the court will find that death was

denied on grounds of public policy because the insured’s injury was a direct result of his own criminal conduct. *Piotrowski v. Prudential Ins. Co. of America*, 252 N.Y.S. 313, 318 (App. Div. 1931).

94. *Walker v. Metropolitan Life Ins. Co.*, 272 F. Supp. 217 (S.D. W. Va. 1967) (insured prowled around ex-wife’s house at night, and attempted forcible entry; she warned him that she would get a gun, then shot him); *National Life & Acc. Ins. Co. v. Jones*, 86 S.W.2d 139 (Ky. 1935) (insured was aggressor and other person shot in self-defense); *Kentucky Cent. Life Ins. Co. v. Willett*, 557 S.W.2d 222 (Ky. Ct. App. 1977) (insured and girlfriend had argument in car; he slapped her and waved a gun at her; she picked up the gun, they struggled, and gun went off, killing insured); *Home Beneficial Life Ins. Co. v. Partain*, 106 A.2d 79 (Md. 1954) (insured was aggressor; reversed and remanded on other grounds); *Smith v. Combined Ins. Co. of America*, 120 S.E.2d 267 (Va. 1961) (insured was a fugitive; he hid in a barn and shot at the police; tear gas shot into barn set it on fire, and he burned to death).

95. *California State Life Ins. Co. v. Fuqua*, 10 P.2d 958 (Ariz. 1932) (insured was shot by police during gun battle); *Freeman v. Commonwealth Life Ins. Co.*, 286 N.E.2d 396 (Ind. 1972) (alleged aggressor killed by victim; summary judgment for insurer reversed and remanded for trial).

96. *Crumpton v. Confederation Life Ins. Co.*, 672 F.2d 1248 (5th Cir. 1982) (applying Texas law) (insured allegedly raped a neighbor, and threatened to kill her children if she told anyone; she reported this to police five days later; on the following evening, she saw insured on street; he came toward her, she pulled out a gun, and shot him; jury could find woman’s actions to be unanticipated); *Travelers’ Protective Ass’n v. Stephens*, 49 S.W.2d 364 (Ark. 1932) (insured came to aid of friend who was in a fight; insured was cut with a knife); *Gulledge v. Atlantic Coast Life Ins. Co.*, 179 S.E.2d 605 (S.C. 1971) (insured dated a married man; she called his wife several times to tell her about it; insured drove by the wife’s house with another man; wife followed them in her car; when they stopped, wife shot both twice, then ran over insured).

97. *Smith v. Equitable Life Assur. Soc’y*, 614 F.2d 720 (10th Cir. 1980) (applying Wyoming law) (insured was shot during a property line dispute); *Terry v. National Farmers Union Life Ins. Co.*, 356 P.2d 975 (Mont. 1960) (death resulted from fist fight during card game).

98. *Butcher v. Nationwide Life Ins. Co.*, 290 S.E.2d 373 (N.C. Ct. App. 1982) (insured

not sufficiently foreseeable to bar recovery,⁹⁹ especially if a jury has given its verdict for the beneficiary.¹⁰⁰

VII. CONCLUSION

There seems to be little question that there is a strong trend in favor of liberal construction of the term "accidental means," thereby enhancing the chances of recovery by the beneficiary. Whether by creatively searching for something unusual or unforeseen in the act itself, or by simply equating "means" and "results," most courts have attempted to arrive at decisions which reflect the reasonable understanding and expectations of laypersons in the purchase of accident policies. While there will probably continue to be some resistance to this trend, it seems likely to remain the dominant view in the years ahead.

started fight with wife and got a butcher knife; he was wounded in a struggle over the knife; court held that the insured was the aggressor and provoked his wife's act; while the "result" may have been accidental, the "means" was not).

99. *Cockrell v. Life Ins. Co.*, 692 F.2d 1164 (8th Cir. 1982) (applying Arkansas law) (insured hit his wife, threatened her and her children, and left the house; when he returned, she shot him); *Stogsdill v. General American Life Ins. Co.*, 541 S.W.2d 696 (Mo. Ct. App. 1976) (insured shot by wife; evidence was unclear as to whether he was the aggressor); *Floyd v. Equitable Life Assur. Soc'y*, 264 S.E.2d 648 (W. Va. 1980) (insured, a large man, regularly got drunk and beat up his wife, a small woman; she had previously always been passive, but this time she stabbed him).

100. *Aetna Life Ins. Co. v. Beasley*, 130 So. 2d 178 (Ala. 1961) (insured often beat up his wife in presence of son; while drunk, he beat her up and threatened to kill them both; son, who had never physically resisted before, shot him; court said it could not say as a matter of law that the natural and probable consequence of insured's actions was that son would kill him).

APPENDIX

The authors have attempted to determine each American jurisdiction's definition of "accidental means," and whether it distinguishes between "accidental means" and "accidental results." In many instances, the state's position is definite and clear. In others, it is not at all certain, for a variety of reasons. The court's answers to the question may only be implied or dictum; the latest case may be quite old; the court may purport to follow one rule but actually apply another; or there may be no decision on point in the state at all.

In light of this, we have not attempted to list in two columns the states which follow each of the rules. Such specificity is neither possible nor prudent. Rather we have simply given our analysis of the case or cases in each state and indicated our view as to how that state should be categorized.

For the sake of brevity, in this Appendix we will refer to the distinction between "accidental means" and "accidental results" as "the distinction."

Alabama:

Has consistently made the distinction. *Aetna Life Insurance Co. v. Beasley*, 130 So. 2d 178 (Ala. 1961); *Emergency Aid Insurance Co. v. Dobbs*, 83 So. 2d 335 (Ala. 1955); *Northam v. Metropolitan Life Insurance Co.*, 163 So. 635 (Ala. 1935); *National Security Insurance Co. v. Ingalls*, 323 So. 2d 384 (Ala. Civ. App. 1975).

Alaska:

Does not recognize the distinction. *INA Life Insurance Co. v. Brundin*, 533 P.2d 236 (Alaska 1975).

Arizona:

Expressly abolished the distinction, although the court's statement was dictum because the court found that the means was accidental. *Knight v. Metropolitan Life Insurance Co.*, 437 P.2d 416 (Ariz. 1968).

Arkansas:

Stated that "accident" and "accidental means" are synonymous, though this was probably dictum, because the insured came to the aid of a friend in a fight, and his being cut may have been accidental or, if done on purpose, was not foreseeable to the insured. *Travelers' Protective Association of America v. Stephens*, 49 S.W.2d 364 (Ark. 1932). See also *Cockrell v. Life Insurance Co.*, 692 F.2d 1164 (8th Cir. 1982) (applying Arkansas law) (dictum).

California:

Has consistently made the distinction. *Ells v. Order of United Commercial Travelers of America*, 125 P.2d 457 (Cal. 1942); *Rock v. Travelers' Insurance Co.*, 156 P. 1029 (Cal. 1916); *Hargreaves v. Metropolitan Life Insurance Co.*, 163 Cal. Rptr. 857 (Ct. App. 1980); *Dark v. Prudential Insurance Co. of America*, 40 P.2d 906 (Cal. Dist. Ct. App. 1935).

Colorado:

Has eliminated the distinction. *Reed v. United States Fidelity & Guarantee Co.*, 491 P.2d 1377 (Colo. 1971); *Equitable Life Assurance Society of the United States v. Hemenover*, 67 P.2d 80 (Colo. 1937).

Connecticut:

Still recognizes the distinction, but is liberal in its construction of "accidental means." *King v. Travelers Insurance Co.*, 192 A. 311 (Conn. 1937) (recovery allowed for dentist's injury from overexposure to x-ray; saying he intended exposure, but not overexposure); *Johnson v. Metropolitan Life Insurance Co.*, 225 A.2d 498 (Conn. C.P. 1966) (death resulting from high speed auto chase).

Delaware:

Recognizes the distinction. *Chelly v. Home Insurance Co.*, 293 A.2d 295 (Del. 1972), *aff'g* 285 A.2d 810 (Del. Super. Ct. 1971); *Prudential Insurance Co. of America v. Gutowski*, 113 A.2d 579 (Del. 1955).

District of Columbia:

Made the distinction in *Smith v. Continental Casualty Co.*, 203 A.2d 168 (D.C. 1964). *But see* discussion in the Kansas cases *infra*.

Florida:

Abolished the distinction in *Gulf Life Insurance Co. v. Nash*, 97 So. 2d 4 (Fla. 1957). *But see Benante v. Allstate Insurance Co.*, 477 F.2d 553 (5th Cir. 1973) (applying Florida law), where the court denied recovery for death following a heart attack after the exertion of running to catch a plane. In *Benante*, the court followed *Goldstein v. Paul Revere Life Insurance Co.*, 164 So. 2d 576 (Fla. 3d DCA) *cert. denied*, 170 So. 2d 587 (Fla. 1964), involving the same issue, *i.e.*, a voluntary act with an unexpected result.

Georgia:

Stated that it made the distinction, but did so in a case in which the beneficiary might have lost anyway because of failure to carry the burden of proof. *Continental Assurance Co. v. Rothell*, 181 S.E.2d 283 (Ga. 1971) (insured, who was drunk, picked up by police; insured found to have suffered a broken neck; there was no other evidence).

Hawaii:

There do not appear to be any cases on point.

Idaho:

Does not recognize the distinction. *O'Neil v. New York Life Insurance Co.*, 152 P.2d 707 (Idaho 1944); *Rauert v. Loyal Protective Insurance Co.*, 106 P.2d 1015 (Idaho 1940).

Illinois:

Expressly abolished the distinction in *Taylor v. John Hancock Mutual Life Insurance Co.*, 142 N.E.2d 5 (Ill. 1957), after impliedly eliminating it in previous cases. Though the *Taylor* court divided four-three on the decision, the disagreement was as to whether the "result" of the insured's actions was "accidental." All members of the court treated "accidental means" as synonymous with "accidental results."

Indiana:

Has recognized the distinction since *Husbands v. Indiana Travelers' Accident Association*, 133 N.E. 130 (Ind. 1921) and impliedly reaffirmed this position in *Freeman v. Commonwealth Life Insurance Co.*, 286 N.E.2d 396 (Ind. 1972). However, in *Freeman* the insured was allegedly the aggressor in the encounter in which he was killed. The court stated that death was by accidental means unless the insured actually expected such a result and persisted in his aggression anyway. Such a subjective test would be considered liberal even for a court which has abolished the distinction.

Iowa:

Has eliminated the distinction. *Comfort v. Continental Casualty Co.*, 34 N.W.2d 588 (Iowa 1948); *Miser v. Iowa State Traveling Men's Association*, 273 N.W. 155 (Iowa 1937).

Kansas:

Refused to make the distinction in *Spence v. Equitable Life*

Assurance Society, 69 P.2d 713 (Kan. 1937) and *Bukata v. Metropolitan Life Insurance Co.*, 67 P.2d 607 (Kan. 1937), but did make the distinction in *Miller v. Prudential Insurance Co. of America*, 331 P.2d 310 (Kan. 1958). The insured in *Miller* suffered a heart attack while doing heavy work as an oil field roughneck. The court denied recovery, holding that this was an accidental result. It may be that Kansas, and perhaps other jurisdictions, make an exception in cases involving overexertion in an ordinary, regular activity. See, e.g., *Benante v. Allstate Insurance Co.*, 477 F.2d 553 (5th Cir. 1973) (applying Florida law) (heart attack after running to catch plane); *Smith v. Continental Casualty Co.*, 203 A.2d 168 (D.C. 1964) (heart attack after climbing embankment in performance of regular duties as engineer).

Kentucky:

Makes the distinction. *National Life & Accident Insurance Co. v. Jones*, 86 S.W.2d 139 (Ky. 1935); *Kentucky Central Life Insurance Co. v. Willett*, 557 S.W.2d 222 (Ky. Ct. App. 1977).

Louisiana:

Has repudiated the distinction. *Schonberg v. New York Life Insurance Co.*, 104 So. 2d 171 (La. 1958); *Ray v. Federated Guaranty Life Insurance Co.*, 381 So. 2d 847 (La. Ct. App. 1980).

Maine:

There do not appear to be any cases on point.

Maryland:

Makes the distinction. *Gordon v. Metropolitan Life Insurance Co.*, 260 A.2d 338 (Md. 1970); *Home Beneficial Life Insurance Co. v. Partain*, 106 A.2d 79 (Md. 1954).

Massachusetts:

Makes the distinction. *Reeves v. John Hancock Mutual Life Insurance Co.*, 130 N.E.2d 541 (Mass. 1955); *Smith v. Travelers' Insurance Co.*, 106 N.E. 607 (Mass. 1914).

Michigan:

Impliedly eliminated the distinction by allowing recovery in *Wheeler v. Title Guaranty & Casualty Co.*, 251 N.W. 408 (Mich. 1933) (death following injection of nupercaine, a common anesthetic) and *Hoff v. Mutual Life Insurance Co.*, 254 N.W. 137 (Mich. 1934) (abrasion, caused by being left on a bedpan too long, became infected). However, in *Turner v. Mutual Benefit Health & Accident Association*, 24 N.W.2d 534 (Mich. 1946), where the

insured jumped to get on a moving freight elevator, missed, and fell down the shaft, the court said that *United States Mutual Accident Association v. Barry*, 131 U.S. 100 (1889) was "squarely in point." *Barry*, of course, was the early landmark case which established the distinction. The *Turner* court could have found that the insured intended to jump on the elevator, and instead jumped down the shaft, and thus the "means" was "accidental." But the court also said that *Wheeler* and *Hoff* were "[o]f like import." It is hard to see how the court could find that *Barry*, *Wheeler* and *Hoff* stand for the same view. Quite recently, in *Collins v. Nationwide Life Insurance Co.*, 294 N.W.2d 194 (Mich. 1980), the court reversed a judgment for the insurer in a case that seemed to involve only an "accidental result," although the court stated that it need not decide if Michigan distinguishes between "accidental means" and "accidental results." In *Collins*, death resulted from acute alcoholic intoxication. The Michigan court held that the jury must decide whether death was in fact foreseen—whether the insured intended or expected his conduct to result in death. This is clearly a very liberal "accidental result" approach, even if the Michigan court is reluctant to say so.

Minnesota:

Makes the distinction. *Lincoln National Life Insurance Co. v. Erickson*, 42 F.2d 997 (8th Cir. 1930) (applying Minnesota law); *Kluge v. Benefit Association of Railway Employees*, 149 N.W.2d 681 (Minn. 1967) (policy covered "accidental bodily injury," but court treated this as being the same as "accidental means").

Mississippi:

The court stated that there is a distinction between "accidental means" and "accidental results" in *Lavender v. Volunteer State Life Insurance Co.*, 157 So. 101 (Miss. 1934), but this was dictum. The distinction was not at issue, because the insured's body had no visible contusion or wound as required by the policy, and also, the insured was violating the law (a policy exclusion) by attacking a constable.

Missouri:

Has consistently made the distinction, but sometimes applies the test rather liberally. *Commercial Insurance Co. v. Orr*, 379 F.2d 865 (8th Cir. 1967) (applying Missouri law) (aspiration of vomitus by alcoholic after drinking; recovery allowed; court said jury could find that cause of death was failure of epiglottis to close air passage, which was unexpected); *New Empire Life Insurance Co. v. Bowling*, 411 S.W.2d 863 (Ark. 1967) (applying

Missouri law) (insured lost control of car at high speed; recovery allowed; court said loss of control of car was accidental, not intentional); *Callahan v. Connecticut General Life Insurance Co.*, 207 S.W.2d 279 (Mo. 1947) (insured, while drunk, went off the road in his car; his feet got wet and froze; court held it was a jury question whether this was "accidental means"); *Caldwell v. Travelers' Insurance Co.*, 267 S.W. 907 (Mo. 1924) (insured died of bowel obstruction after a skillfully performed hernia operation; recovery denied).

Montana:

Recognized the distinction in dictum in *Tuttle v. Pacific Mutual Life Insurance Co.*, 190 P. 993 (Mont. 1920), and restated it while allowing recovery through a liberal application of the "accidental means" test in *Dalbey v. Equitable Life Assurance Society*, 74 P.2d 432 (Mont. 1937) (fireman suffered smoke inhalation while manning hose outside burning barn; court said smoke inhalation was not expected) and in *Wills v. Midland National Life Insurance Co.*, 91 P.2d 695 (Mont. 1939) (insured suffered exposure and freezing after he got off street car at wrong stop in minus-forty-degree weather; court said exposure was accidental). In its most recent look at the subject, the Montana court did not discuss the distinction but did say that "an accidental result may follow an intentional act and be regarded as caused by accidental means." *Terry v. National Farmers Union Life Insurance Co.*, 356 P.2d 975, 978 (Mont. 1960) (recovery allowed; death resulted from a fist fight during a card game).

Nebraska:

Eliminated the distinction in *Murphy v. Travelers Insurance Co.*, 2 N.W.2d 576 (Neb. 1942) (recovery allowed; dentist got cancer after using his finger to hold x-ray film for many years).

Nevada:

Eliminated the distinction in *Catania v. State Farm Life Insurance Co.*, 598 P.2d 631 (Nev. 1979) (insured regurgitated and choked to death as a result of acute narcotism caused by self-administered heroin injection; summary judgment for insurer reversed and remanded for trial; although this was a three-two decision, only one of the dissenters wanted to make the distinction; the other disagreed only as to the foreseeability of the resulting death).

New Hampshire:

Made the distinction in *McGinley v. John Hancock Mutual*

Life Insurance Co., 184 A. 593 (N.H. 1936) (insured died of acute alcoholism after consuming an unknown quantity of alcohol; court said act was done knowingly, without mistake).

New Jersey:

Recognizes the distinction, but uses a very liberal test based on the "reasonable expectations of the average policyholder." *Perrine v. Prudential Insurance Co. of America*, 265 A.2d 521, 524 (N.J. 1970). In *Perrine*, peritonitis developed following a break in the intestine caused by pressure on the abdomen while insured was moving heavy equipment. The court said there was a traumatic incident, and a jury could find that the result was caused by something accidental. As the dissent pointed out, it is difficult to see how a jury could reasonably conclude that the injury was caused by "accidental means." As a practical matter, there is no difference between New Jersey's "reasonable expectations" test and an elimination of the distinction.

New Mexico:

Does not recognize the distinction. *Vallejos v. Colonial Life & Accident Insurance Co.*, 571 P.2d 404 (N.M. 1977); *Scott v. New Empire Insurance Co.*, 400 P.2d 953 (N.M. 1965).

New York:

Does not recognize the distinction. *Miller v. Continental Insurance Co.*, 389 N.Y.S.2d 565 (1976); *Burr v. Commercial Travelers Mutual Accident Association of America*, 67 N.E.2d 248 (N.Y. 1946) (dictum).

North Carolina:

Appeared to eliminate the distinction in *King v. Commercial Casualty Insurance Co.*, 150 S.E. 19 (N.C. 1929) (infection was caused either by a sprain or by a surgical incision; recovery allowed; court said even if infection was caused by incision, it was not a natural and probable result of insured's act); but clearly applied the distinction in *Henderson v. Hartford Accident & Indemnity Co.*, 150 S.E.2d 17 (N.C. 1966) (fireman died of heart attack brought on by smoke inhalation after fighting fire; recovery denied; court said only the result was accidental). The distinction has been recognized recently in *Butcher v. Nationwide Life Insurance Co.*, 290 S.E.2d 373 (N.C. Ct. App. 1982), and *Linder v. Prudential Insurance Co. of America*, 250 S.E.2d 662 (N.C. Ct. App.), cert. denied, 254 S.E.2d 918 (N.C. 1979).

North Dakota:

Expressly abolished the distinction in *Wall v. Pennsylvania Life Insurance Co.*, 274 N.W.2d 208 (N.D. 1979), and restated this position in dictum in *Kasper v. Provident Life Insurance Co.*, 285 N.W.2d 548 (N.D. 1979).

Ohio:

Recognized the distinction in *New Amsterdam Casualty Co. v. Johnson*, 110 N.E. 475 (Ohio 1914) (insured suffered heart attack due to shock from taking cold bath after horseback riding; recovery denied). In *Hammer v. Mutual Benefit Health & Accident Association*, 109 N.E.2d 649 (Ohio 1952), recovery was allowed where the insured, a roofer, died from sunstroke and heat exhaustion. The court, without directly discussing the distinction, said that the means was not the act of working in the sun, but rather the action of the heat and rays of the sun. This liberal approach was followed by the Kansas Supreme Court in *Rankin v. United Commercial Travelers of America*, 392 P.2d 894 (Kan. 1964), where, applying Ohio law, judgment for the insurer was reversed and remanded. In *Rankin*, the previously healthy insured died from a heart attack caused by emotional strain, heat and exertion while fighting a pasture fire. The Kansas court acknowledged that Ohio law is unclear regarding the distinction, but felt that *Hammer* was sufficient precedent for its decision.

Oklahoma:

Does not recognize the distinction. *New York Life Insurance Co. v. Wise*, 251 P.2d 1058 (Okla. 1952); *Cooper v. New York Life Insurance Co.*, 180 P.2d 654 (Okla. 1947); *Provident Life & Accident Insurance Co. v. Green*, 46 P.2d 372 (Okla. 1935).

Oregon:

Expressly abolished the distinction in *Botts v. Hartford Accident & Indemnity Co.*, 585 P.2d 657 (Or. 1978), though it was dictum because the policy did not contain an "accidental means" requirement. Nevertheless, the court seemed to apply the "accidental means" test in denying recovery. The insured, an inexperienced operator of a grader on a highway repair crew, was working quickly and under great pressure. The exertion and mental strain caused a heart attack. The court said there was nothing abnormal or unusual about the activity which led up to the heart attack, and affirmed the judgment for the insurer. Yet, in *Harbeintner v. Crown Life Insurance Co.*, 612 P.2d 334 (Or. Ct. App. 1980), the court cited *Botts* in affirming a summary judgment for the beneficiary, whose insured had gone off the road while drunk. The court

said that, “[w]hile drunken driving is dangerous . . ., the public still regards such an accident [sic] as ‘accidental.’” 612 P.2d at 335 (quoting 1A J. APPLEMAN, *INSURANCE LAW AND PRACTICE* 83, § 467 (1979)).

Pennsylvania:

Expressly abandoned the distinction in *Beckham v. Travelers Insurance Co.*, 225 A.2d 532 (Pa. 1967).

Rhode Island:

Recognized the distinction in *Kimball v. Massachusetts Accident Co.*, 117 A. 228 (R.I. 1922). There do not appear to be any more recent cases on point in Rhode Island.

South Carolina:

Eliminated the distinction in *Goethe v. New York Life Insurance Co.*, 190 S.E. 451 (S.C. 1937), though the court’s statement that it was in accord with Justice Cardozo’s *Landress* dissent was probably dictum. *Id.* at 456. In *Goethe*, the insured suffered a heat stroke while fighting an unexpected grass fire on his farm. The court found that the heat stroke itself was an “accidental means,” but even if it were not the death was still an “accidental result.”

South Dakota:

There do not appear to be any cases on point.

Tennessee:

Makes the distinction. *Baker v. National Life & Accident Insurance Co.*, 298 S.W.2d 715 (Tenn. 1956); *American Casualty Co. v. Hyder*, 8 Life Cas. (CCH) 947 (Tenn. 1943); *Nicholas v. Provident Life & Accident Insurance Co.*, 457 S.W.2d 536 (Tenn. Ct. App. 1970).

Texas:

Expressly eliminated the distinction in *Republic National Life Insurance Co. v. Heyward*, 536 S.W.2d 549 (Tex. 1976). The court said that the Texas view on accidental death had become so liberal that any distinction between “means” and “results” had disappeared and should no longer be recognized. The test should be foreseeability from the viewpoint of the insured.

Utah:

Does not recognize the distinction. *Thompson v. American Casualty Co.*, 439 P.2d 276 (Utah 1968); *Carter v. Standard Acci-*

dent Insurance Co., 238 P. 259 (Utah 1925).

Vermont:

Eliminated the distinction in *Griswold v. Metropolitan Life Insurance Co.*, 180 A. 649 (Vt. 1935), though it was dictum in that case. While the insured was chopping wood, a stick flew up and cut his lip, which became infected. The court said that even if the distinction were made, having the stick hit his face was an "accidental means."

Virginia:

Recognizes the distinction. *Runge v. Metropolitan Life Insurance Co.*, 537 F.2d 1157 (4th Cir. 1976) (applying Virginia law); *Smith v. Combined Insurance Co.*, 120 S.E.2d 267 (Va. 1961) (dictum, because court held that insured's death was not an accident); *Newsoms v. Commercial Casualty Insurance Co.*, 137 S.E. 456 (Va. 1927) (dictum, because court found that means was accidental).

Washington:

Appeared to clearly abandon the distinction in *Zinn v. Equitable Life Insurance Co.*, 107 P.2d 921 (Wash. 1940) (doctor lanced insured's arm to relieve high blood pressure; an infection developed; recovery allowed). After citing many cases on both sides of the distinction conflict, the court said that the cases eliminating the distinction rested upon "sound legal principles." *Id.* at 923. But in *Evans v. Metropolitan Life Insurance Co.*, 174 P.2d 961 (Wash. 1946), the Washington court emphatically stated that "accidental means" requires that something unforeseen must happen which *produces* the injury. *Id.* at 976. The court expressly overruled two prior cases where recovery was allowed for an "accidental result," and said that in *Zinn* and several other cases the means was "accidental" if a liberal definition was used. (The "accidental means" in *Zinn* was not the incision, but rather the entry of the germs.) While the court's statement in *Evans* may have been dictum, because the decision of the case seemed to rest on a "contributed to by disease" exclusion in the policy, its position was reaffirmed in *Johnson v. Business Men's Assurance Co. of America*, 228 P.2d 760 (Wash. 1951), where recovery was denied to a beneficiary whose insured died after making six to eight trips into a burning house to salvage his household goods. The distinction was also applied in denying recovery in *Whiteside v. New York Life Insurance Co.*, 503 P.2d 1107 (Wash. Ct. App. 1972), where an insured with a long history of drug use died from a self-injected overdose of morphine and methedrine.

West Virginia:

Makes the distinction. *Floyd v. Equitable Life Assurance Society*, 264 S.E.2d 648 (W. Va. 1980); *Dorsey v. Prudential Insurance Co. of America*, 19 S.E.2d 152 (W. Va. 1942). See also *Walker v. Metropolitan Life Insurance Co.*, 272 F. Supp. 217 (S.D. W. Va. 1967).

Wisconsin:

Does not recognize the distinction. *Stoffel v. American Family Life Insurance Co.*, 164 N.W.2d 484 (Wis. 1969); *O'Connell v. New York Life Insurance Co.*, 264 N.W. 253 (Wis. 1936); *Wiger v. Mutual Life Insurance Co.*, 236 N.W. 534 (Wis. 1931).

Wyoming:

There do not appear to be any reported cases on point in the Wyoming courts, but in *Smith v. Equitable Life Assurance Society*, 614 F.2d 720 (10th Cir. 1980) the court, applying Wyoming law, said that death is "accidental" if it were neither reasonably foreseeable, nor the likely consequence of [the insured's] conduct." *Id.* at 723.