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Commercial Law

INSURANCE

*J. Denson Smith**

It appears that Lake Serbonis, in which, according to Herodotus, whole armies were engulfed, is now dry. It also now appears that Louisiana's Serbonian bog,¹ in which at least one jack-screw operator disappeared without a trace, has been effectively drained. No longer must the policy holder fret over the difference between "accidental" death and death by "accidental means," assuming, clearly contrary to the fact, an awareness of its possible existence. What he, as an average man, would consider an accidental death is now also death by accidental means. Hence, if a patient undergoing a blood transfusion dies of anaphylactic shock, his death is accidental and results from accidental means. This is the holding in *Gaskins v. New York Life Insurance Company*.² Presumably, one whose fascination with the risk involved in Russian roulette results in his demise, timely or untimely, might not be considered as having died by accidental means, or therefore, accidentally, notwithstanding the fortuitous element in the positioning of the cylinder. But, after all, this is a risk to which the company should not be exposed, as the average man would probably agree.³ What the insured is reasonably led to believe he is buying is what he gets. His understanding is the important thing, not the hypertechnical distinction the insurer may be trying to establish; controlling is what the words should mean to him, not what they may mean to the company.

An opportunity to pass on a problem not heretofore resolved in Louisiana was presented to the court in *Thomas W. Hooley & Sons v. Zurich General Accident and Liability Insurance Company*.⁴ Following a denial of liability on the basis of lack of coverage under a liability policy with respect to damage done by the

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1. See the dissenting opinion of Mr. Justice Cardozo in *Landress v. Phoenix Mutual Life Ins. Co.*, 291 U.S. 491 (1934).

2. 104 So.2d 171 (La. 1958), noted elsewhere in this issue. The court declined to perpetuate the distinction taken in *Parker v. Provident Life & Accident Ins. Co.*, 178 La. 977, 152 So. 583 (1934), the jackscrew case.

3. *Thompson v. Prudential Ins. Co.*, 66 S.E.2d 119 (Ga. App. 1951).

4. 235 La. 289, 103 So.2d 449 (1958).

insured to the property of another, the insured amicably settled the claim and then brought suit against its insurer. In addition to pleading lack of coverage on the ground that the damaged property was excepted, the insurer also contended that in settling the damage claim, the insured had violated the "no action" provision of the policy. Both contentions were resolved against the defendant. The court found no Louisiana case in point as to either but relied on persuasive authority elsewhere. With reference to the defense based on the no action clause the court took the view that not only will the insurer disqualify itself to rely on the clause when it refuses to defend an action brought against the insured but the same result will follow when it denies liability under the policy. In such event the insured is privileged to effect a reasonable settlement in good faith without violating the clause. The court also held that the plaintiff was entitled to the statutory penalties. Inasmuch as the coverage issue had never been settled in Louisiana this defense, at first blush, would seem not to have been arbitrary. However, there were particular facts indicating that the insurer's action was lacking in good faith in addition to the fact that it relied on the insured's compromise settlement of the claim as constituting a violation of the no action clause when by denying coverage it was itself responsible for his action. In view of these factors there seems to be no reason to conclude that the case stands for the proposition that an insurer will incur the statutory penalties, notwithstanding that the issue raised is unsettled here if the cases elsewhere have generally rejected the contention on which the defense is based. Such a rule, applied without discrimination, would appear to be unjustifiably harsh.

In *Wellborn v. Bankers Life and Casualty Co.*⁵ the insurer was found to have cancelled arbitrarily policies covering hospitalization and indemnification for accidental bodily injuries. The cancellations were held to be ineffective and the statutory penalties were applied. The court reaffirmed the principle that total disability does not mean absolute helplessness but rather that the insured is unable to perform the substantial and material acts of his business or occupation in the usual and customary way. The facts gave ample support to the decision.

Authorization to a tutor to accept a settlement of a claim for damages made by a minor because of the accidental death of her

5. 234 La. 301, 99 So.2d 122 (1958).

parents was denied in *In re The Tutorship of O'Quinn v. O'Quinn*.⁶ The court, following prior jurisprudence, found that the minor might well be entitled under the facts to receive two-thirds of a maximum coverage of twenty thousand dollars provided by a liability policy.

In *Kendrick v. Mason*⁷ the court construed a poorly worded provision against the insurer and rejected its defense based on a claimed absence of coverage in a policy protecting a sewer contractor against acts of negligence.

6. 234 La. 491, 100 So.2d 482 (1958).

7. 234 La. 271, 99 So.2d 108 (1958).