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Accidental Means in New York A Rational Approach

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ACCIDENTAL MEANS IN NEW YORK—A RATIONAL APPROACH*

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A Recent Pertinent Case in New York

Some years ago a young lawyer was arguing a case before Judge Crane when he was on the trial bench as to whether or not the township was obliged to support certain poor people. He started by reviewing the authorities at the time of Queen Elizabeth, the Tudors, down through the Stuarts and at last, after a good hour, he got down to the Colonies and then the State of New York.

Judge Crane interrupted him and said, "Counsellor, did you read the case on this point in 177 New York Reports?"

The lawyer replied, "Judge, I've been working on this case for the last six months and only got down to 60 New York last night."

Judge Crane replied, "You started at the wrong end."[1]

It thus seems desirable to treat this subject, Accident and Accidental Means, with special reference to the law of the State of New York, by considering the latest pronouncement of the New York Court of Appeals—*Burr* v. *Commercial Travelers Mutual Accident Association of America*.[2]

This was an action by Josephine M. Burr, widow of Raymond L. Burr, and beneficiary of an accident insurance policy, against the Commercial Travelers Mutual Accident Association of America which Raymond L. Burr had joined in 1931. At that time he purchased a policy which insured him in the maximum amount of $10,000 against loss by accidental means of life, limb, sight and time but only in the event that the death or injury "was the direct and proximate result of and which is caused solely and exclusively by external, violent and accidental means".

On March 6, 1943, the insured, Raymond L. Burr, started to drive from Cooperstown to Utica in order to take a train for Malone. He drove his own car. He was accompanied by his wife, Josephine M. Burr, and his 13-year-old son, Raymond L. Burr, Jr. They left Cooperstown at 11:30 A.M.

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[1]Address of Frederick E. Crane, former Chief Judge of the New York Court of Appeals, at Saranac Inn July 11, 1939, (1939) 62 REPORTS OF N. Y. STATE BAR ASS'N 647.

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

It was snowing but not so as to give any concern. The weather grew steadily worse. The snow increased until it was snowing heavily. The velocity of the wind was high. It was bitter cold and visibility was low. The wind was the worst part of the storm.

They proceeded through Richfield Springs. At South Columbia the weather was at its worst. There was but one-way traffic on the road from South Columbia to Mohawk. The snow plow could not go back from South Columbia to Mohawk to widen the traffic lane. The snow was piled high on both sides of the roadway. After leaving South Columbia on the portion of the roadway which was open the Burrs met another car coming in the opposite direction near the top of a knoll. It could not be seen until it was upon them. Mr. Burr drew out a little to avoid it in passing. The other automobile struck the left rear fender of the Burr car pushing it to the ditch where it became embedded in the snow. Unsuccessful attempts were made by Mr. Burr to extricate the car by rocking it backward and forward. The occupants then waited for someone to come by who might help. One car went by but did not stop.

Mr. Burr then left his wife and son in the car and walked through the storm to a farmhouse to get a shovel. At the farmhouse he rested, complained of a pain in his chest, was short of breath. He said that the wind had "kinda winded him". After resting for a few minutes he returned to his car with the shovel. Mrs. Burr saw him come walking against the wind which was so strong that he seemed to be staggering against it. In response to Mrs. Burr's question as to whether he was freezing, he said, "No, I am not, but the wind has knocked me out." So they sat in the car for fifteen or twenty minutes to see if someone would not come and help them.

By that time much snow had seeped into the car. Mr. Burr decided that he would have to get out and shovel out the car in spite of the extreme velocity of the wind. He shoveled for quite a few minutes when he was seen to stagger and hit the shovel and fall against the rear wheel or fender of the car. He clutched his throat. His wife and son helped him into the car where he immediately lost consciousness. Fifteen or twenty minutes later help came from a passing car which carried the stricken man to the Herkimer Hospital where he was pronounced dead. He had probably died at the time he was stricken.

The question of accident and accidental means, which is the subject of this address, was raised in the *Burr* case by the court's charge to the jury as to primary liability under the insuring clause of the contested policy. As to that aspect, the charge was as follows:

> "Accidental means are those which produce effects which are not their natural and probable consequences. Consequently, if you find from the evidence that Mr. Burr met his death as the result of some unexpected and unforeseen consequences of his efforts to extricate his car from the snow bank on the day in question, you may find that it was the result of external, violent and accidental means. To be more explicit, if you find that Mr. Burr died as a result of overexposure or overexertion, or by slipping and falling against the shovel and against the car or by a combination of all three and if you further find that he could not have been reasonably expected to anticipate such results from his action on the day in question, then you may find that the essential accidental means exist."

Thus the jury was instructed that it was possible to find the existence of accidental means as a causation of the death of Raymond L. Burr from either overexposure, overexertion or the fall through slipping. The jury found for the policyholder and both the Appellate Division and the Court of Appeals affirmed. In studying the significance of the holding in this case it becomes desirable to eliminate the fall through slipping from consideration as being practically non-controversial as a proper basis for finding accidental means. What appears to be the most significant part of the charge has to do with overexertion. Inasmuch as the overexertion in this case was tied in closely with overexposure it is perhaps well to treat them together and view them in respect to the circumstances under which they are held to constitute accidental means either singly or in combination.

In attempting to evaluate the words and interpret the scope of this decision of the Court of Appeals as illuminated by the opinion, it seems desirable to refer in general terms to the background of the controversy involving accidental means in contra-distinction to accidental result, as well as to the trend of the decisions in New York through what was quite clearly an evolutionary period. Then, in that setting, consideration may be given to the words and implications of the opinion in the *Burr* case which was delivered and concurred in by a unanimous court. This seems to be particularly necessary because abstract statements in judicial opinions as to the law, as well as abstract statements generally without reference to context and the facts and circumstances under which they are made, are often misunderstood. Such misinterpretation and misunderstanding have been a prolific source of litigation down through the years and also a source of embarrassment to the bar in advising clients as to the status of the law.

The Background

The first personal accident policies were issued in the United States in 1864. Mr. Martin P. Cornelius in his treatise, *Accidental Means,* points out that the draftsmen of the first policies did not fully appreciate the infinite variety of the hazard they proposed to insure against and did not realize what an exceedingly comprehensive liability they had assumed in agreeing to pay death and accident claims in cases of death and injuries resulting from accident. Says Mr. Cornelius:

> "The companies, therefore, to protect themselves against unexpected and accidental results, from voluntary acts done as intended, inserted a further qualification in the insuring clause; to wit, that the means must not only be external and violent but also accidental; that is to say that the means producing the result, as well as that result, must be accidental."[3]

Probably the best known and most authoritative judicial expression of that differentiation was by Chief Justice Stone in the widely quoted *Landress* case where the Chief Justice, speaking for the majority of a divided court, said:

> "Petitioner argues that the death, resulting from voluntary exposure to the sun's rays under normal conditions, was accidental in the common or popular sense of the term and should therefore be held to be within the liability clauses of the policies. But it is not enough, to establish liability under these clauses, that the death or injury was accidental in the understanding of the average man—that the result of the exposure 'was something unforeseen, unsuspected, extraordinary, an unlooked for mishap, and so an accident', see *Lewis v. Ocean Acc. & G. Corp.,* 224 N. Y. 18, 21; 120 N. E. 56, see also *Aetna Life Ins. Co. v. Portland Gas & Coke Co.,* 229 Fed. 552—for here the carefully chosen words defining liability distinguish between the result and the external means which produces it. The insurance is not against an accidental result. The stipulated payments are to be made only if the bodily injury, though unforeseen, is effected by means which are external and accidental. The external means is stated to be the rays of the sun, to which the insured voluntarily exposed himself. Petitioner's pleadings do not suggest that there was anything in the sun's rays, the weather or other circumstances, external to the insured's own body and operating to produce the unanticipated injury, which was unknown or unforeseen by the insured."[4]

Approval of this differentiation between accidental means and accidental

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[3]CORNELIUS, ACCIDENTAL MEANS (1932) 3.
[4]Landress v. Phoenix Mut. Life, 291 U. S. 491, 495, 54 Sup. Ct. 461, 462 (1934).

result was not accepted complacently either by dissenting justices, lawyers or policyholders. Mr. Justice Cardozo's dissent in the *Landress* case gave utterance to one of his characteristically classical references when he said: "The attempted distinction between accidental result and accidental means will plunge this branch of the law into a Serbonian Bog."[5] The argument was made by counsel for the plaintiff in various cases that in the face of accidental injury or death such distinction was too subtle for the comprehension of the ordinary policyholder. From this it was argued that the language used by the insurance companies in their policies ought to be interpreted or construed along the lines of the understanding and comprehension of ordinary men and women.

Those who advocated the differentiation between means and result retorted that to make no distinction between accidental result and accidental means was to violate the plain terms of a contract of insurance and that the courts had no authority to make a contract for the parties other than as they had actually made.

In New York the cases on this primary point fall into two parallel groups which cannot be reconciled in reasoning or language. These two groups are supplemented by a third parallel group involving more particularly pre-existing disease. This latter group is closely related to the first two. For the purpose of easy reference the first may be called the traditional view group, the second the new theory group and the third the pre-existing disease group. Cases from each of these groups play a part in the *Burr* decision so it is well to see their proper place and value.

A number of the early accidental means cases are silent on the interpretation of accidental means.[6] However, in 1888 the General Term in the Fourth Department did say with reference to drowning: "Means is that which produces a result, and, in the sense used in the contract, is synonymous with cause."[7]

In 1896 the Appellate Division in the Third Department held by a three to two decision that an injury caused by voluntary insertion of a hypodermic needle might be found by a jury to be by accidental means. Three years

[5] *Id.* at 499, 54 Sup. Ct. at 463. From Lake Serbonis anciently existing in northern Egypt, surrounded and covered by shifting sands in which entire armies are said to have been swallowed up. NEW CENTURY DICTIONARY. The phrase Serbonian Bog is used figuratively to describe anything causing inextricable difficulty and embarrassment. See MILTON, PARADISE LOST, ii.592.

[6] The earliest reported New York case discussing the question of what is an accident seems to be Mallory v. Trav. Ins. Co., 47 N. Y. 52 (1871). However, the policy in this case did not contain the phrase "accidental means."

[7] Tucker v. Mut. Ben. L. C. of Hartford, 50 Hun. 50, 53, 4 N. Y. Supp. 505, 506 (4th Dep't 1888), *aff'd without opinion,* 121 N. Y. 718, 24 N. E. 1102 (1890).

later the Court of Appeals affirmed this decision without opinion, Chief Judge Parker and Judge Gray dissenting.[8] The intermediate court did quote from Webster with regard to the definition of accident but no point was made of the distinction between cause and result. The case might have remained obscure but for Judge Cardozo's resurrection of it almost a quarter of a century later.

So far as my investigation shows, it was not until 1903 that the New York courts expressly adopted what I have termed the traditional view. The Appellate Division, Fourth Department, in that year held in the *Appel* case that a fatal injury to the walls of insured's appendix caused by the movement of certain muscles while the insured was riding a bicycle was not within accidental means coverage. Mr. Justice McLennan writing for the court observed, "The most that can be said in such cases and in the case at bar is that the result was accidental but the means which produced it were not accidental." The Court of Appeals affirmed without opinion.[9] This case has never been specifically overruled. Indeed, Judge Conway in the *Burr* case cites the *Appel* case as authority although not, of course, on the proposition quoted. It has been repeatedly followed in cases making the distinction between accidental cause and accidental result: in 1904 lifting a heavy weight;[10] in 1921 lifting heavy mail sacks;[11] in 1923 undergoing an anesthetic;[12] in 1928 moving ashcans;[13] in 1934 raising heavy planks;[14] in 1935 taking exercises and treatments;[15] in 1935 again undergoing anesthetic;[16] in 1938 lifting garage doors;[17] in 1944 inhaling tarter while teeth were being

[8]Bailey v. Interstate Cas. Co., 8 App. Div. 127, 40 N. Y. Supp. 513 (3d Dep't 1896), *aff'd*, 158 N. Y. 723, 53 N. E. 1123 (1899).

[9]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).

[10]Niskern v United Bro. of C. & J. of Amer., 93 App. Div. 364, 87 N. Y. Supp. 640 (2d Dep't 1904).

[11]Fane v. Nat. Ass'n of Railway Mail Clerks, 197 App. Div. 145, 188 N. Y. Supp. 222 (4th Dep't 1921).

[12]Barnstead v. Comm. Trav. Mut. Acc. Ass'n of Am., 204 App. Div. 473, 198 N. Y. Supp. 416 (1st Dep't 1923).

[13]Allendorf v. Fid. & Cas. Co. of N. Y., 223 App. Div. 809, 227 N. Y. Supp. 765 (memo 4th Dep't 1928), *aff'd without opinion*, 250 N. Y. 529, 166 N. E. 331 (1928), on ground that accident, if any, was not exclusive cause of injury.

[14]Wilcox v. Mut. Life Ins. Co. of N. Y., 241 App. Div. 790, 270 N. Y. Supp. 1019 (4th Dep't 1934), *aff'd without opinion*, 265 N. Y. 665, 193 N. E. 436 (1934). The order of the Appellate Div., 4th Dep't, reversing the direction of verdict in favor of plaintiff at trial term by Mr. Justice Hinkley, stated that the reversal was based on the *Allendorf* and *Fane* cases, *supra* notes 11, 13.

[15]Gould v. Travelers Ins. Co., 244 App. Div. 274, 279 N. Y. Supp. 892 (2d Dep't 1935), *aff'd without opinion*, 270 N. Y. 584, 1 N. E. (2d) 341 (1936).

[16]Mulholland v. Prudential Ins. Co. of Am., 155 Misc. 718, 280 N. Y. Supp. 322 (N. Y. City Ct. 1935).

[17]Nellenbeck v. Met. Life Ins. Co., 3 N. Y. S. (2d) 657 (N. Y. Mun. Ct. 1938).

cleaned.[18] Many of these cases never reached the Court of Appeals but some did. They constitute a distinct line of cases in accord with the general proposition set forth by Chief Justice Stone in the *Landress* case.

The distinction between accidental means and accidental result as applied in these cases precluded recovery in overexertion or overexposure cases, for the action of the decedent or injured party in most cases was his voluntary act even though he did not fully appreciate the danger. Such cases were classed as accidental result rather than accidental means cases.

After the commencement of this line of cases the first significant development following the *Appel* case was in 1914. In a decision holding that sunstroke was an accident rather than a disease as previously held, Mr. Justice Burr, speaking for the Appellate Division in the Second Department in the *Gallagher* case, quoted from Cooley's *Briefs on the Law of Insurance* as follows: "Accidental means are those which produce effects which are not their natural and probable consequence."[19]

Within a year after the Court of Appeals had affirmed the *Gallagher* case, Judge Cardozo handed down his celebrated opinion in the *Lewis* case. The insured died as the result of an infection incurred when he pricked a pimple with a pin which was unsterile. Judge Cardozo, writing for a divided court (Judge Crane dissenting) held this was accidental means citing the *Bailey* case:

> "There is little doubt that the germ came from the infected pimple. If the infection was the result of accident, the defendant is liable.
>
> "We think there is testimony from which a jury might find that the pimple had been punctured by some instrument, and that the result of the puncture was an infection of the tissues. If that is what happened, there was an accident. We have held that infection resulting from the use of a hypodermic needle is caused by 'accidental means' (*Bailey v. Interstate Cas. Co.* 8 App. Div. 127; 158 N. Y. 723; *Marchi v. Aetna Life Ins. Co.* 140 App. Div. 901; 205 N. Y. 606). The same thing must be true of infection caused by the puncture of a pimple. Unexpected consequences have resulted from an act which seemed trivial and innocent in the doing. Of itself, the scratch or the puncture was harmless. Unexpectedly it drove destructive germs beneath the skin and thereby became lethal."[20]

The *Lewis* case and the *Gallagher* case were the beginning of the second

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[18]Tucker v. Com. Trav. Mut. Acc. Ass'n of Am., 51 N. Y. S. (2d) 413 (N. Y. City Ct. 1944).

[19]Gallagher v. Fid. & Cas. Co. of N. Y., 163 App. Div. 556, 558, 148 N. Y. Supp. 1016, 1018 (2d Dep't 1914), *aff'd without opinion*, 221 N. Y. 664, 117 N. E. 1067 (1917).

[20]Lewis v. Ocean Acc. & Guar. Corp., 224 N. Y. 18, 20, 120 N. E. 56, 57 (1918).

line of decisions in New York which are termed the new theory cases.[21] A second infection case caused by an unsterile needle followed shortly after the *Lewis* case.[22] Next came a hemorrhage caused by picking a scar tissue from the nose.[23] A few years later an overdose of sodium ortal taken to induce sleep was held to be "accidental cause"[24] as was an enema self-administered resulting in a traumatic rupture of the intestine.[25]

Judge Cardozo in the *Lewis* case had not expressly denied a difference between accidental means and accidental result. This step was taken by Chief Judge Crane in the *Mansbacher* case in 1937. The insured had taken veronol for an earache with fatal consequences. The court said:

> "Her husband intended to take veronol but he never intended to take a lethal dose. . . ; he desired to get relief from pain, not relief from life. He took too much veronol; it was a mistake, a misstep. . . . It was an accident, ... In other words, if the insured did not intend to kill himself he intended to take enough veronol, as he had done before, to relieve the pain of earache. By mischance he took too much."[26]

This case if not the preceding ones repudiated the reasoning on which the *Appel* case and the succeeding similar cases of that traditional view group were based.

Between the *Mansbacher* case and the *Burr* case there were a number of other decisions of similar nature in the new theory line, not always achieved without dissent. Two deaths caused by rare hypersensitivity to a drug were held accidental by divided courts.[27] An insured who suffered a strangulated

[21]At about the same time Mr. Justice Cropsey ruled on the authority of cases from other jurisdictions that death from morphine comes within the classification of "accidental means" whether (1) insured unintentionally took an overdose or (2) did not know that the intended dose would be fatal, in Hodgson v. Pref. Acc. Ins. Co., 100 Misc. 155, 165 N. Y. Supp. 293 (Sup. Ct. 1917), *aff'd on other grounds,* 182 App. Div. 381, 169 N. Y. Supp. 28 (2d Dep't 1918).

[22]Townsend v. Com. Trav. Mut. Ass'n of Am., 231 N. Y. 148, 131 N. E. 871, 17 A. L. R. 1001, 1005 (1921).

[23]Schwartz v. Com. Trav. Mut. Acc. Ass'n of Am., 132 Misc. 200, 229 N. Y. Supp. 669 (Sup. Ct. 1928), *aff'd,* 227 App. Div. 711, 236 N. Y. Supp. 896 (1st Dep't 1929), *aff'd without opinion,* 254 N. Y. 523, 173 N. E. 849 (1930).

[24]Meyer v. N. Y. Life Ins. Co., 249 App. Div. 243, 291 N. Y. Supp. 912 (2d Dep't 1936), *App. discont.,* 276 N. Y. 557, 12 N. E. (2d) 573 (1937).

[25]Hoenig v. N. Y. Life Ins. Co., 156 Misc. 697, 282 N. Y. Supp. 443 (N. Y. Mun. Ct. 1935), *aff'd,* 249 App. Div. 618, 292 N. Y. Supp. 182 (1st Dep't 1936).

[26]Mansbacher v. Prudential Ins. Co. of Am., 273 N. Y. 140, 144, 7 N. E. (2d) 18, 20 (1937).

[27]Berkowitz v. N. Y. Life Ins. Co., 256 App. Div. 324, 10 N. Y. S. (2d) 106 (1st Dep't 1939); Adlerblum v. Met. Life Ins. Co., 259 App. Div. 859, 19 N. Y. S. (2d) 600 (1st Dep't 1940), *aff'd without opinion,* 284 N. Y. 695, 30 N. E. (2d) 728 (1940) (both App. Div. & Ct. of Appeals divided; *but cf.* Bennett v. Equit. Life Assur. Soc. of U. S., 13 N. Y. S. (2d) 540 (Sup. Ct. 1939), *aff'd without opinion,* 216 App. Div. 819, 25 N. Y. S. (2d) 799 (1st Dep't 1941) (insured died of post-operative pulmonary

hernia from opening a desk drawer was held the victim of accidental means.[28] An allergy to sulfa pyridine was similarly viewed.[29]

In addition to the recognized relationship between accidental result and accidental means in this new theory line of cases, this line of cases also clearly holds that an intended act may be the basis for finding accidental means if the intended act, because of a slip or misadventure, was done in a manner not intended or was done in ignorance of the existence of unusual conditions which caused unexpected, injurious consequences to ensue.

Sunstroke in the early days was considered a disease but is not so considered in New York. It is usually said that the *Gallagher* case signified the change. That is probably not entirely accurate. The *Gallagher* case considdered sunstroke as an accident rather than as a disease because the policy sued upon so listed it. The importance of the *Gallagher* case which is a landmark lies in its reasoning whereby sunstroke suffered by one in the necessary conduct of his business for an unusual number of hours might be held to have been incurred through accidental means. Its reasoning was based largely upon the so-called *Barry* case.[30] That was a case where the insured jumped 4 or 5 feet to the ground from a plank upon which he was walking. He did not intend to alight so as to cause his death. Two others had jumped safely before he jumped. The jar to insured caused internal complications from which he died. It was held to be the unusual effect of a known cause not within the expectation of the person injured and liability was established.

The reasoning upon which sunstroke is considered an accident in New York may be seen from the majority and dissenting opinions in the *Landress* case for the dissenting opinion quite clearly sets forth the New York rule. The same reasoning applicable to sunstroke would seem to be applicable to freezing. Cornelius on *Accidental Means* gives several illustrative cases but none from New York.[31]

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embolism. Mansbacher & Berkowitz cases not followed because cause not trivial and result not foreseeable.)

[28]Simson v. Com. Trav. Mut. Acc. Ass'n of Am., 263 App. Div. 297, 32 N. Y. Supp. 615 (1st Dep't 1942), *aff'd*, 289 N. Y. 700, 45 N. E. (2d) 457 (1943).

[29]Escoe v. Met. Life Ins. Co., 178 Misc. 698, 35 N. Y. S. (2d) 833 (Sup. Ct. 1942).

[30]Mutual Acc. Ass'n v. Barry, 131 U. S. 100, 9 Sup. Ct. 775 (1889).

[31]Mr. Cornelius lays down as a basic proposition that there is no liability for loss resulting from sunstroke under the usual insuring clause of an accident policy any more than there would be liability for loss resulting from pneumonia or tuberculosis occasioned by exposure to inclement weather. Under the heading of freezing, however, he cites the case of N. W. Com. Trav. Ass'n v. London Guar. Co. (Canada 1895) 10 Manitoba Law Rep. 537, where the insured took a long ride on a cold night, the wagon broke down and he was frozen to death before help arrived and recovery was had. He cites Herdic v. Maryland Cas. Co., 146 Fed. 396 (1906), *aff'd*, 149 Fed. 198 (C. C. A. 3d, 1906); Schmid v. Ind. Trav. Acc. Ass'n, 42 Ind. App. 483, 85 N. E. 1032 (1908);

The foregoing, however, does not represent all of the important cases necessary to an understanding of the background of the *Burr* case. Apart from suicide which affords little theoretic difficulty, the alternative to accident is disease. The question of disease may come up in several ways.[32] However, since insurance policies almost universally confine their protection to instances where the accident is the sole cause of the loss for which recovery is sought, it is essential to determine whether a victim of an accident was suffering from a disease at the time of the accident which was a contributing cause. The third group of cases referred to are those which have turned on this issue.

It seems clear to me that the *Silverstein* case[33] is the most important of this line of cases which have come before the Court of Appeals. The insured, while lifting a can of milk, slipped and fell. The can struck him on the abdomen. He happened to have a small ulcer which was, in Chief Judge Cardozo's opinion in the case, "as trivial and benign as an uninfected pimple." The combination of ulcer and blow, however, started a chain of events resulting in death. The court held the ulcer was not a disease but was at most a mere predisposing tendency.

In the *McMartin* case there was an automobile collision and the insured received a severe blow in the chest. He died twenty days later without having left his hospital bed. He had suffered from nephritis for at least three years and had other serious ailments. He died from nephritis. Judge Crouch in the opinion said: "Nephritis, existent for at least three years, chronic and progressive, may not with any fitness of language or with any sense of reality be described as a mere predisposing tendency."[34]

Feder v. Ia. State Trav. Men's Ass'n, 107 Iowa 538, 78 N. W. 252 (1899) as cases in which the courts concluded that death from voluntary exposure to excessive heat or cold or the vicissitudes of climate in the absence of any accidental means bringing about the exposure cannot be considered as due to injuries effected through accidental means. He then gives as an example of a case where a death from exposure to cold was brought about by injuries effected through accidental means, that of Pref. Acc. Ins. Co. v. Barker, 93 Fed. 158 (C. C. A. 5th, 1899), where the insured accidentally became immersed in a bog and being unable to extricate himself died from the effects of the exposure.

The theory of the author of ACCIDENTAL MEANS is that there is a distinction between sunstroke and freezing in that one is pathological and the other traumatic in character based on reasoning which is difficult to follow. However, in view of the new theory in New York cases cited elsewhere this distinction seems purely academic and not controlling. CORNELIUS, ACCIDENTAL MEANS (2d ed. 1916) 62 *et seq.*

[32]Of course if the disease is caused by the accident it will not normally interfere with recovery. Mulvihill v. Com. Cas. Ins. Co., 221 App. Div. 494, 224 N. Y. Supp. 644 (4th Dep't 1927), *aff'd without opinion*, 248 N. Y. 524, 162 N. E. 510 (1928).

[33]Silverstein v. Met. Life Ins. Co., 254 N. Y. 81, 171 N. E. 914 (1930).

[34]McMartin v. F. & C. Cas. Co., 264 N. Y. 220, 223, 190 N. E. 414, 416 (1934).

In the *McGrail* case[35] the assured suffered a thrombosis after a fall on the ice. The question was presented as to whether this could have followed unless arterial sclerosis existed. The principal point involved was pre-existing disease or predisposing tendency.

The *Silverstein* case might be said to be an overexertion case. The *McMartin* and *McGrail* cases did not involve overexertion. Nevertheless, the primary point involved in each of these cases was precisely the same and had nothing to do with the character or existence of accidental means.

To show the contrast between these cases and a true overexertion case as respects accidental means, attention is called at this point to the *Simson* case, heretofore classed in the new theory line of cases. There the insured, in the course of his usual occupation, tried to open a drawer in his desk which stuck and the exertion caused a strangulated hernia. The court said:

> "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 falls clearly within the causes defining accidents from violent, external and accidental means."[36]

Such difficulty as may exist in these so-called overexertion cases primarily lies in the application of basic principles which in themselves seem well settled. The reason for including this group of cases will become apparent when the so-called "overexertion" doctrine referred to in the *Burr* case is reached.

Reference should be made to two other items of background which are pertinent.

The tendency of the courts to interpret language to mean what the average man would understand it to mean is shown in numerous cases. It is somewhat similar to the rule of law that where the language of a contract is vague and indefinite it must be construed more strongly against the one whose language it is.[37] The tendency to interpret language to mean what the average man would understand it to mean goes further and has to do with the meaning which is to be ascribed to certain words and phrases regardless of authorship.

In *Lewis* v. *Ocean Acc. & Guar. Corp.*, the infected pimple case, Judge Cardozo, in writing the opinion for the court, said:

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[35]McGrail v. Equitable Life Assur. Soc. of U. S., 292 N. Y. 419, 55 N. E. (2d) 483 (1944).

[36]Simson v. Com. Trav. Mut. Acc. Ass'n of Am., 263 App. Div. 297, 298, 32 N. Y. S. (2d) 615, 616 (1st Dep't 1942), *aff'd*, 289 N. Y. 700, 45 N. E. (2d) 457 (1942).

[37]Schumacher v. Great East. C. & I. Co., 197 N. Y. 58, 90 N. E. 353 (1909); Paul v. Trav. Ins. Co., 112 N. Y. 472, 20 N. E. 347 (1889).

"To the scientist who traces the origin of disease there may seem to be no accident in all this. 'Probably it is true to say that in the strictest sense and dealing with the region of physical nature, there is no such thing as an accident'. . . . Such a man would say that the dire result, so tragically out of proportion to its trivial cause, was something unforeseen, unexpected, extraordinary, an unlooked for mishap, and so an accident. This test—the one that is applied in the common speech of men—is also the test to be applied by courts." (Citing the *Barry, Bailey* and other cases.)[38]

Again in *McGrail* v. *Equitable Life Assur. Soc. of U. S.*:

"Such meaning must be given to the terms used as would he ascribed to them by the average man in applying for insurance and reading the language of the policy at the time it was written."[39]

On the subject of causation, a statement in *Leyland Shipping Co.* v. *Norwich Union Fire Ins. Soc.*,[40] cited with approval in *Bird* v. *St. Paul F. & M. Ins. Co.*,[41] and again cited with approval in the *Burr* case, pointed out that "causation is not a chain but a net. At each point influences, forces, events, precedent and simultaneous, meet and the radiation from each point extends infinitely."[42]

The Instant Case

The foregoing background is necessary to an intelligent understanding of the significance of the statements which are found in the most recent case on accidental means in the New York Court of Appeals.[43] These statements seem to involve three principal points. First, is the traditional distinction between accidental means and accidental result completely abandoned in New York? Second, if so, what principle or doctrine is taking its place? And finally, what are the scope and significance of the so-called "overexertion" cases and how do they fit into the general picture?

In view of Judge Conway's flat statement that "in this state there is no longer any distinction made between accidental death and death by accidental

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38224 N. Y. 18, 20, 120 N. E. 56, 58 (1918), cited *supra* note 20.
39292 N. Y. 419, 424, 55 N. E. (2d) 483, 486 (1942).
4087 L. J. K. B. 395 (H. L. 1918).
41224 N. Y. 47, 51, 120 N. E. 86, 87 (1918).
42This has a special significance in the *Burr* case where there is found a combination of nearly a dozen circumstances all working together toward the result: the trip, the cold, the snow, the narrowness of the roadway, the collision, the strangeness of the environment, the remoteness of the farmhouse, the lack of help, the velocity of the wind, the anxiety for wife and son and the emergency in general.
43Burr v. Com. Trav. Mut. Acc. Ass'n of Am., 295 N. Y. 294, 67 N. E. (2d) 248 (1946), cited *supra* note 2.

means, nor between accidental means and accidental result",[44] it might seem a bit presumptuous to raise the first question. It must be noted, however, that in other parts of the opinion he takes pains to point out the "means" in the case. Thus he says, "We have indicated the 'means' which a jury could have found caused the bodily injuries resulting in the death of plaintiff's husband, and have pointed out the incidents occurring on that morning which in our opinion would cause the average man to include such means in the term 'accidental' as used in the policy. Here it was not only the result of such incidents which were unexpected, but a jury could find that the catastrophe was brought about by the intervention of unexpected and unintended means such as the automobile collision, the blizzard and windstorm, a slip or a twist of the body, resulting in a fall and trauma, placing a strain upon the body which the body could not withstand."[45] Thus it could and no doubt will be argued that this is really a case of accidental means and that the first quoted statement is mere dictum or broader than intended.

On the other hand, Judge Conway's statement is more than a pronouncement on this case. He is referring to the preceding cases and notably the *Mansbacher* case. The court has long been insistent, as Judge Conway points 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."[46]

Assuming for the moment that what we have called the traditional view does no longer govern in New York but not to the extent of holding that all accidental results must have been caused by accidental means, we then come to the second question—What principle or doctrine does govern?

Mr. Justice Deyo sitting at the trial in this case charged in part: "Accidental means are those which produce effects which are not their natural and probable consequences." Judge Conway, referring to the court's opinion in the *Mansbacher* case, says: "We cited with approval Richards on *The Law of Insurance* (3rd edition, section 385) to the effect that accidental means are those which produce effects which are not their natural and probable consequences."[47]

This is a misquotation as it was in the *Mansbacher* case. The Richards

[44] *Id.* at 302, 67 N. E. (2d) at 252.
[45] *Id.* at 301, 67 N. E. (2d) at 251.
[46] *Id.* at 302, 67 N. E. (2d) at 252.
[47] *Ibid.*

text recites the traditional distinction between means and results. The quotation in fact, and the basis for the judge's charge in the *Burr* case, comes from Cooley's *Briefs on the Law of Insurance.*[48]

Regardless of source, however, the statement has been widely quoted and has resulted in much discussion and debate.

It is argued by some that this establishes that accidental results and accidental means are one and the same and that proof of accidental result is all that is necessary to establish accidental means.

Consistency may be a jewel but it can be overdone. Judge Simeon E. Baldwin from a background of judicial experience once told his class at the Yale Law School, "Young men, as life goes on do not try to be too consistent."[49]

It is my personal judgment as a lawyer (and I want to emphasize that this entire address represents my personal views only and that I am not speaking for my Company or anyone else) that what the court seems to hold, considering the opinion as a whole, is that an accidental result may be examined to see if it does not itself characterize the means which brought it about; that all accidental means do not bring accidental results in the shape of death or injury; and conversely, all accidental results are not due to accidental means. The relationship is close and the result may often characterize the means. The late Chief Justice Stone hinted at this in his opinion in the *Landress* case where he said: "Nor do we say that in other circumstances an unforeseen and hence accidental result may not give rise to an inference that the external means was also accidental."[50]

The U. S. Circuit Court of Appeals in the 10th circuit fairly recently decided a case which was governed by the law of New York. Special consideration was given to the language in the *Mansbacher* and *Lewis* cases. Circuit Judge Phillips, writing for the court, said, "We think the test laid down by the New York decisions is whether the average man, under the existing facts and circumstances, would regard the loss so unforeseen, unexpected and extraordinary that he would say it was an accident."[51] This was said after the *Mansbacher* case and two years before the *Burr* case.

To use an expression of the late Professor Vance,[52] there is a certain

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[48]6 COOLEY, BRIEFS ON INSURANCE (2d ed.) 5237.

[49]Recollection of the author concerning an unreported classroom lecture.

[50]Landress v. Phoenix Mut. Life, 291 U. S. 491, 496, 54 Sup. Ct. 461, 462 (1934).

[51]Pref. Acc. Ins. Co. v. Clark, 144 F. (2d) 165 (C. C. A. 10th, 1944).

[52]WILLIAM R. VANCE, Prof. of Law, Yale Law School, and author of HANDBOOK OF THE LAW OF INSURANCE (2d ed. 1930). The expression quoted was used in another connection.

"rough utility" in this comment and suggestion made in 1944 which may be just what the New York courts have in mind. At any event, that seems to be just what happened here in a subsequent case in 1946.

There remains for discussion one final question—What about the scope and significance of the so-called overexertion cases? Judge Conway near the close of his opinion observes with reference to the use of the word "overexertion" in the charge, "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."[53]

The precise significance of this part of the opinion was not clear to me when I first read it and I think it may be misunderstood by others who happen to read the case without making a detailed study of it. Perhaps an analysis of this point would serve a useful purpose here.

The doctrine stated in the opinion stems from a statement by Judge Cardozo in the opinion in the *Silverstein* case to which reference has already been made. The *Silverstein* case involved overexertion but it was in relation to pre-existing disease on the question of sole and exclusive causation. The statement of Judge Cardozo was as follows:

> "There will be no recovery under a policy so written [presumably excluding recovery where disease is a partial cause] where an every day act, involving ordinary exertion, brings death to an insured because he is a sufferer from heart disease."[54]

As a statement of law this is not controversial in any degree. It is the presence of disease, not the nature of the act or the character of the exertion, which is significant. The court cites the *Allendorf* case as authority for this statement. While there was no opinion in that case in the Court of Appeals, the State Reporter notes in the official report: "Judgment affirmed with costs on the ground that the accident, if any, was not the exclusive cause of the injury."[55]

Had it been material, it would have been just as true for the Chief Judge in the *Silverstein* case to write, "There will be no recovery under a policy so written where an *accidental* act involving *extraordinary* exertion brings death to an insured because he is a sufferer from heart disease."

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[53]Burr v. Com. Trav. Mut. Acc. Ass'n of Am., 295 N. Y. 294, 305, 67 N. E. (2d) 248, 253 (1946).

[54]Silverstein v. Met. Life Ins. Co., 254 N. Y. 81, 85, 171 N. E. 914, 915 (1930).

[55]Allendorf v. Fid. & Cas. Co. of N. Y., 250 N. Y. 529, 166 N. E. 331 (1928).

The excerpt from the opinion in the *Burr* case which is now under discussion runs the danger of throwing out the idea that it is announcing a test of what is or is not an accident. It doubly courts this danger because it cites in support of the statement not only the *Silverstein* and *Allendorf* cases (pre-existing disease cases where a different question was involved) but the *Appel, Niskern* and *Fane* cases, all of which are of the traditional theory line and on the basis of more recent decisions seemingly obsolete on the question of accidental means. It is true that the court also cites the *Wilcox* case in which no opinion was written either in the Appellate Division or Court of Appeals and which was, it is also true, an overexertion case where the lining of the aorta was exceedingly thin. The order of reversal in the Appellate Division says that it was on the authority of the *Allendorf* and *Fane* cases. If it turned on the question of pre-existing disease it is not in point. If it turned upon whether the overexertion was due to accidental means, it seems to be at variance with the more recent holding of the court in the case of *Simson* v. *Com. Trav. Mut. Acc. Ass'n of Am.,* to which reference has been made before, and with the whole line of new theory cases. The *Appel* case was not a pre-existing disease case nor was the *Fane* case, and the *Niskern* case, while it might be classified as a pre-existing disease case, was in fact decided on the basis of what is an accident.

A quick reading of the opinion under consideration might lead one to believe that the fundamental doctrine which has been established in this state as illustrated in the *Mansbacher* and *Burr* cases relative to accidental means has only limited application to accidents especially accidents from overexertion happening to a householder in his natural and customary activities or to a workman in the performance of his ordinary duties. From a reading of the opinion as a whole it is believed unlikely that the court intended to establish or confirm any such limitation or distinction; particularly in view of the citation with approval in another part of the opinion of the case of *Simson* v. *Com. Trav. Mut. Acc. Ass'n of Am.,* previously mentioned, which was a case of overexertion constituting primary liability and where recovery was affirmed regardless of the accident having happened in the ordinary course of the insured's occupation.

One is confirmed in this conclusion when it is recalled that overexertion as a basis of primary liability is one thing and overexertion in its relation to pre-existing disease is another. In the *Burr* case the question under consideration was the correctness of the charge as to overexertion on the question of primary liability and not otherwise.

Conclusion

Thus we have the latest pronouncement in a series of cases on accidental means which are overpowering in number. Does this one say the final word? Far from it. Does it throw light and give guidance to bench and bar alike? Without question, at least to a certain extent. But many questions remain.

Would the decision have been the same if the car in the storm had become stuck in the snow and had not been thrown to the ditch by the automobile collision? It will be noted that Judge Conway in his opinion emphasized the collision. Could accidental means be spelled out from the velocity of the wind alone? If so, would there be any logical difference as to whether the insured were engaged in his customary duties or otherwise? How about the situation of a man crossing a stream on a swing bridge when he encountered wind of such velocity that he was blown into the stream even though on his customary way home? If accidental means could be spelled out from the velocity of the wind alone, could it also be spelled out from the unexpected and unusual snow and cold? These and many other questions may subsequently arise. Some may prove fairly simple. Difference of conclusion will exist. Legal battles will still take place. They may never be entirely avoided. Nevertheless, each time a thought provoking decision such as this comes down, a certain amount of legal controversy is behind us and we have attained advance ground.

Judge Conway, the author of the opinion in the *Burr* case, when Superintendent of Insurance of the State of New York, stated in a public address that if insurance could be sold minus litigation the insurance world would profit generally.[56] That is a consummation greatly to be wished but probably impossible of attainment. As long as exaggerated and unreasonable and fraudulent claims are prevalent, insurance companies will have to resist payments which seem to responsible managements unfounded and unjust. As the Superintendent of Insurance of New York following Judge Conway, I felt and continue to feel the same as did he about the desirability of companies avoiding as much litigation as possible.[57] By and large, insurance companies of high standing desire to pay their policy obligations fully and promptly without quibble or technical evasion. Sometimes, however, ques-

[56]Address by Albert E. Conway, Superintendent of Insurance of the State of New York, at testimonial dinner to Charles S. Rosensweig, reported in (1929) 40 INSURANCE ADVOCATE 538.

[57]Address of the author before International Claim Ass'n at White Sulphur Springs Sept. 10, 1934, *The Insurance Adjuster and His Work.*

tions as to the meaning of the English language arise which are most baffling to the companies, to the policyholders and to the courts alike.

As these points of difference may be resolved from time to time and lesser ground for controversy in the courts shall exist, it will of course be in the public interest. At times progress seems very slow.

It behooves all of us to study the decisions. On analysis, they are often more significant than they seem at first glance. Conversely, at times they are not as revolutionary as they originally seem. Sometimes they raise up new problems and new distinctions to which the lawyers must turn their minds and attention in order that the judiciary be given that help and guidance that it has reason to expect from an enlightened bar. Thus the Insurance Section and the Young Lawyers' Section of the New York State Bar Association have an opportunity and a challenge which I believe they gladly accept.