

FORESEEABILITY — THE SCENE OF THE ACCIDENT REVISITED

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In dealing with accidental death claims, it may be of interest at the outset to know how it all began. Originally, in the 16th Century, we find that shipowners paid compensation on a voluntary basis to the families of sailors who were lost at sea. In the 17th Century, in England, the government paid certain benefits to soldiers who had sustained injuries while fighting in the European wars. Of course, these were not really insurance payments but voluntary compensation for death or injuries.

Accident insurance, as we know it now, had its origin in England with the Railway Passengers Assurance Company which was organized in 1849 to offer protection to persons travelling on the new railway monsters recently invented by Stephenson. The first policies covered only passengers injured in a moving train, but later coverage was extended to cover all violent bodily injuries. Later we find insurance to cover ocean accidents as exemplified by the Old Ocean Accident Insurance Company. In the United States, in the 1800's, an American, James Batterson of Hartford, after visiting England became interested in this kind of insurance. Thus, the Travelers Insurance Company was incorporated and commenced business in 1864 as one of the first North American incorporated companies to offer accident insurance on the lives of travelers.

Later policies covered other risks beyond the mere risk of travel, but it is still customary in accident policies to pay higher benefits for accidents occurring in certain kinds of public vehicles. From the beginning, it was also customary to exclude certain risks, some of which continue to the present time: sunstroke, freezing, self-inflicted injuries, violation of the law, voluntary exposure to danger, and expeditions into wild and uncivilized countries.

At the present time, a typical accidental death benefit rider attached to a life insurance policy provides for an additional amount "if death results directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means." This type of rider is generally added to a life policy to provide double indemnity coverage.

The Meaning of Accident

What do we mean by an "accident"?¹ Literally, the term comes from the Latin word "*accedere*" meaning "to happen." It has been defined as an unforeseen event or misfortune which is not the result of negligence or misconduct. In other words, it is an unexpected event which happens by chance and which does not take place according to the usual course of events. To put this in perspective, recent statistics show that in one year (1975) over 12,000 persons died from accidents in Canada as a whole. To put this in another way, in the past 3 years more Canadians have been killed on our streets and highways than the total number of Canadian servicemen killed in World War II.

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1. See J. Rendall, "Drink, Drive and Die! Then Ask Us to Define 'Accident' " (1979), 9 Man. L.J. 101.

One area of confusion in this area results from the use of the so-called "accidental means clause" and the "accidental results clause." Very briefly, under an accidental means clause not only the results but the means or the instrument causing the accident must be accidental. Accordingly, an unexpected death from an intentional act is not a covered risk. However, an accidental results clause only requires that the result be unexpected even though the means producing the unexpected result be an intentional act. For example, under an accidental means clause, the benefits might not be payable where an insured dies from a rupture while trying to lift a heavy object from his car, or where an insured dies following the intentional breaking of a bone in his neck during massage treatment by a physician, or where an insured died from a hernia incurred while lifting heavy tubs from the ground. However, some of the United States, for example, Pennsylvania,² have abandoned the distinction between these two clauses.

An excellent statement on this whole subject is found in *Metropolitan Life Insurance Co. v. Neikirk*, a decision of a Maryland court which noted that:

Obviously the purpose of accident insurance is to protect the insured against accidents that occur while he is pursuing his business or pleasure, in the usual way, without any thought of being injured or killed, and where there is no probability, in the ordinary course of events that he will suffer injury or death.³

Drawing on this statement, one can say that if a claim, looked at in the light of this statement appears to fit, then the insurer should probably pay. If, on the other hand, the means was intentional but there was a good question as to whether the insured was unduly exposing himself to the risk of death by his action, then an insurer may not have to pay.

Foreseeability

Candler v. London & Lancashire Guarantee & Accident Co.

A very useful starting point in any discussion of accident and foreseeability is the case of *Candler v. London & Lancashire Guarantee & Accident Co.*⁴ Here, an insured, in order to show his nerve to a friend, walked out on the patio of his 13th floor hotel suite in New York, which was surrounded by a three foot brick railing, one foot wide. He then sat on the railing drawing both feet up and clasping his knees with his hands. His friend then cautioned him, but the insured said "You haven't seen anything yet" and proceeded to swing around with his stomach on the railing and his feet extended into space with his arms and legs inside the railing. Unfortunately, he lost his balance and fell to his death. The policy contained an accidental means provision.

The Ontario Supreme Court held that it was clear that the insured knew the risk involved and actually courted the fall which could not be regarded as an unforeseen or unexpected incident as contrasted, for example, with the situation where he might have fallen if the railing had given away. In holding for the insurance company, the Court stated that

2. *Mohn v. American Casualty Co.* (1974), 326 A. 2d 346 (Pa. S.C.) See 49 A.L.R. 3d 673, at 679-87.

3. (1938), 200 A. 2d 370, at 374 (Md. C.A.).

4. [1963] 2 O.R. 547; 40 D.L.R. (2d) 408; [1963] 1 L.L.R. 537 (H.C.).

Once the deceased engaged in the dangerous exercises. . .from which one of the natural and probable consequences might well be a fall to the ground below, even though he felt he could accomplish the fact without falling, it must be taken that the mishap was not accidental or caused by accidental means unless there was some other unusual or unexpected occurrence in addition to the voluntary act of the deceased and which could not be reasonably foreseen and which produced the fall, before it can be classed as accidental.⁵

It should also be noted that there was considerable evidence that the insured had been drinking and that the Court would have been prepared to hold alternatively that the insured's death was caused directly or indirectly by intoxicants for which there was an exclusion in the policy.⁶

Mutual of Omaha Insurance Co. v. Stats

It is interesting that a careful reading of the judgment reveals a statement which seems to foretell the decision of *Mutual of Omaha Insurance Co. v. Stats*.⁷ This statement was that "Even though Candler's acts were grossly negligent such fact would not have itself excluded recovery under the policy in the absence of such an exception."⁸ While the *Candler* case is probably good law for that particular fact situation, the general principles of foreseeability as they involve gross negligence received a stunning blow in *Stats*. This is the most significant case involving drinking and driving in years and illustrates the trend in the courts of sometimes not finding the drunken driver at fault.

In the *Stats* case, the insured died almost instantly from injuries sustained one Sunday afternoon, when the automobile which she was driving ran into a building on the east side of Yonge Street where that street forms a "T" intersection at Craighurst Avenue and Yonge Street in Toronto. The insured with a lady friend, who was also killed, drove that afternoon to visit a friend on Craighurst Avenue at about 2 p.m., and after a short visit and a few drinks she backed her car out of the driveway and backed into a car on the south side of the street. Little damage was done to either car, except that the insured then couldn't get her own car started and the owner of the other car came out of his house and helped her to start it. Her car then proceeded easterly in an erratic manner and went right across Duplex Avenue without stopping at the stop sign. The car then speeded up swerving from side to side, barely missing lamp posts, a hydrant and parked cars. On arriving at Yonge Street, where there was also a stop sign, the car crossed right through across Yonge Street and drove into the side of a store on the east side of Yonge Street. The insured and the other lady passenger were both killed. A blood sample analysis showed .19 blood alcohol content, equal to approximately five beers or 7½ oz. of rye or scotch.

The insured was covered under the Canadian Automobile Group Policy which provided coverage where death resulted from "accidental bodily injuries." The policy contained no specific exclusions for this event. The Ontario trial Judge, Mr. Justice Lerner, had no difficulty in finding that the insured was grossly intoxicated at the time of her death and to such an extent as to be incapable of driving.⁹ He was then left with the basic question

5. *Id.*, at 561; 40 D.L.R. (2d), at 422; [1963] I.L.R., at 545-46.

6. *Id.*, at 569; 40 D.L.R. (2d), at 430; [1963] I.L.R., at 550.

7. [1978] 2 S.C.R. 1153; 87 D.L.R. (3d) 169; [1978] I.L.R. 1188.

8. *Supra* n. 4, at 560; 40 D.L.R. (2d), at 421; [1963] I.L.R., at 545.

of whether the death was the result of an accident. The Court found that when the deceased drove her vehicle while grossly impaired, she was acting in a grossly dangerous and negligent manner.¹⁰

She voluntarily undertook to drive while in her impaired condition and when she had to know or foresee that harm would result and as a consequence her death was not accidental.¹¹ You will note that the decision rests on the basic question of reasonable foreseeability. In short, judgment was given in favour of the insurance company in finding that the death was not accidental. One might say that the type of activity was very similar to that in the *Candler* case, involving as it did, gross negligence.

The second part of this drama took place in the Ontario Court of Appeal.¹² The Court of Appeal reversed the trial court and found in favour of the plaintiff beneficiary in holding that the death was in fact accidental. There were two basic issues raised in the Court of Appeal: first, was the insured's death accidental, and second, was the claim barred on the grounds of public policy? The Court reviewed the various definitions and interpretations of the word accident and concluded that indeed the death was an accident. Admitting that there was negligence, the Court noted that negligence and accident are not mutually exclusive terms and they may, in fact, both co-exist. The Court distinguished between what they called the quality of the causes as contrasted to the quality of the results. While the insured was greatly at fault because her conduct was grossly negligent and dangerous, in terms of foreseeability this was not sufficient to find that she had in effect looked for or courted the risk as in the *Candler* case. In short, negligence, even if gross negligence, does not make a mishap non-accidental and bar recovery under an accident policy. Mr. Justice Blair, however, did note the absence of any exclusionary clause and observed

[I] cannot fail to note again the specificity with which insurers in other policies have endeavoured to exclude or limit accident claims. Bearing in mind the widespread distribution of this policy to all members of the Ontario Motor League and the well-known hazards of automobile driving, including, unfortunately, exposure to the risk of alcoholic over-indulgence, it is difficult to believe that the policy as worded was intended to exclude the type of claim made in this case.¹³

The second argument in the Court of Appeal was that the claim was barred on the grounds of public policy, in short that a person should not benefit from her own criminal wrongdoing — in this case driving while impaired and driving with a blood alcohol content exceeding .08, both offences under *The Criminal Code*. The Court found, however, that public policy did not bar the beneficiary's claim since she was claiming independently of the insured or the insured's estate and, in any event, there was no benefit accruing in any way to the insured or her estate.

This decision, appealed by Mutual of Omaha to the Supreme Court of Canada, was affirmed. The Supreme Court agreed with the Ontario Court of Appeal that the death was in fact accidental. Mr. Justice Spence, speaking for the majority, noted that the word "accident" must be interpreted in

9. (1975), 6 O.R. (2d) 734 at 737; 54 D.L.R. (3d) 29 at 32; [1975] I.L.R. 1104, at 1105 (H.C.).

10. *Id.*, at 740; 54 D.L.R. (3d), at 35; [1975] I.L.R., at 1107.

11. *Id.*, at 741; 54 D.L.R. (3d), at 36; [1975] I.L.R., at 1107.

12. (1976), 14 O.R. (2d) 233; 73 D.L.R. (3d) 324; [1976] I.L.R. 367 (C.A.).

13. *Id.*, at 239; 73 D.L.R. (3d), at 331; [1976] I.L.R., at 370.

its popular and ordinary sense¹⁴ and asked the rhetorical question "what word would any one of the witnesses of this occurrence use in describing the occurrence. Inevitably, they would have used the word 'accident'."¹⁵ Even though the insured's actions may be considered to be negligent or even grossly negligent that would not be sufficient to exclude coverage since to do so "would be to exclude the very largest proportions of risks insured against."¹⁶ A person may be negligent or grossly negligent, but at the time he might not have thought himself to be negligent — but if the person deliberately courts the risk, as in the *Candler* case, then it would not be accidental.

Mr. Justice Martland, however, in a dissenting judgment observed that

In my opinion it was not necessary for the insurer to prove that she deliberately drove her car into the building in order to establish that the occurrence was not an accident. If a person voluntarily embarks upon a foolhardy venture from which personal injury could be foreseen as an almost inevitable consequence it cannot properly be said that when the mishap occurs, it is an accident.¹⁷

It is submitted that this is a preferable statement of the law as it applies to accident insurance policies, but the majority of the Supreme Court found otherwise and we must, therefore, be governed accordingly.

Exclusion Clauses

Now where does all this leave us? We have come a long way from the usual test of reasonable foreseeability. Gross negligence may now not be a sufficient reason to deny a claim on the basis of reasonable foreseeability. In my opinion, if an insurer may not rely on the doctrine of reasonable foreseeability and must show that the insured voluntarily looked for or courted the risk, then we are faced with a much heavier burden of proof. The problem of obtaining the evidence to show the insured's intention may be very difficult indeed. I think this means that insurance companies must take a close look at their policies and decide whether some type of exclusion should be introduced to cover gross negligence cases or more specifically, drinking and driving situations.

In 1976, the Group Insurance Accident Committee of the Life Office Management Association conducted a survey among 22 Canadian companies and found that 12 companies did not consider intoxication as a valid basis to decline an accidental death claim. Ten companies declined such claims but the basis of declining varied from company to company and from jurisdiction to jurisdiction. Some companies rely on a criminal offence exclusion, and some companies use the doctrine of foreseeability, and a minority rely on an alcohol or drug exclusion. The trend among the larger carriers of accident insurance seems to be towards declining this type of claim.

One type of exclusion used sometimes is that which excludes death or injury while under the influence of alcohol. The courts have sometimes denied recovery using this exclusion provided the evidence is clear that there was a definite causative effect between the drinking and the death.

14. *Supra* n. 6, at 1162; 87 D.L.R. (3d), at 181; [1978] I.L.R., at 1191.

15. *Id.*, at 1164; 87 D.L.R. (3d), at 182; [1978] I.L.R., at 1192.

16. *Ibid.*

17. *Id.*, at 1173; 87 D.L.R. (3d), at 175; [1978] I.L.R., at 1196.

Another exclusion is that relating to a criminal offence and this has been used effectively in some Canadian cases. Under Section 236 of *The Criminal Code*, it is an offence to drive a motor vehicle with a blood alcohol content exceeding .08%. A number of recent reported and unreported cases demonstrate that this type of wording may be a good basis for declining a drunk driving death claim. However, one Court did criticize the fact that a clause referring to the commission of any offence under *The Criminal Code*, in effect, incorporates into the policy all the over 720 sections of *The Criminal Code*, and this might be very incomprehensible to an ordinary policyholder.¹⁸

Some Canadian companies now use a clear exclusion which specifically refers to the blood alcohol content. A typical wording along these lines would be to exclude death "from injury sustained by the life insured as a result of driving a vehicle, if the life insured at the time of sustaining the injury has alcohol in his blood in excess of 80 milligrams of alcohol per 100 milliliters of blood." A definition of the word "vehicle" is generally included to extend the exclusion to cover not only automobiles but boats, snowmobiles, motorcycles, etc. This has proven to be effective in several cases and may represent the coming trend. Of course, one would need clear evidence as to the blood alcohol content.

Courting the Risk

Even though the test of reasonable foreseeability may have taken a hard blow in the *Stats* case, and it may now be necessary to show that an insured actually looked for or courted the risk, there is still a limit beyond which a court may decline to find an incident to be accidental. This is illustrated in a recent case from British Columbia, *Oakes v. Sun Life Assurance Co.*¹⁹

In this case, the insured Oakes was covered under a double indemnity rider which covered death resulting from external, violent and accidental means. There was an exclusion for committing, or attempting to commit, a criminal offence. The circumstances were that Oakes, one warm July evening, was travelling north on the Island Highway in British Columbia on his motorcycle at a very high rate of speed. When he encountered a police car, which immediately gave chase, put on its siren and flashing lights and took off after the insured, the insured looked back over his shoulder but did not slow down or pull over. The chase lasted for approximately 11 miles and during this time the insured drove at speeds ranging from 70 to 110 miles per hour. The policeman was unable to overtake the insured, particularly as traffic was heavy in both directions and the insured on numerous occasions passed other vehicles by crossing the double centre line, forced several oncoming cars off the road, and went around the blind curves on the wrong side of the road. Further down the highway, about a mile and a half away, another policeman, having been warned that Oakes had evaded pursuit, parked his police car across the side of the highway at right angles to the centre line of the highway. The motorcyclist did not stop when he saw this policeman's car but continued around it in a northerly direction at a high rate of speed. This policeman then pulled out on to the highway and also took off after the motorcycle, managing to get within eight or ten car

18. *Murphy v. Excelsior Life Insurance Co.* (1977), 18 N.B.R. (2d) 350, at 357; [1977] 1 L.R. 826, at 829 (Q.B.).

19. [1979] 1 L.R. 3887 (B.C.S.C.).

lengths of the motorcycle. At this point, both vehicles were travelling at a speed of about 60 to 70 miles an hour. A short time after catching up to the insured, the policeman discovered that he was right on top of the motorcycle and struck the motorcycle, throwing the insured to the pavement. As a result of this collision Oakes suffered injuries which caused death. The policeman was unable to give any explanation for the collision. It was surmised that the insured slowed down very quickly at the time the police car was accelerating and that Oakes did not react quickly enough to the situation which confronted him.

The Supreme Court of British Columbia found that there was no doubt the insured acted in a reckless, dangerous and unlawful manner and would have been aware that he was engaged in a race with the police cars. It was also found that the insured must have known that there was a very real risk that his conduct would cause serious injury either to himself or to other persons using the highway.²⁰ Mr. Justice Anderson had no doubt that the insured was "actually and voluntarily looking for and courting the risk of the collision that killed him."²¹ He noted that it did not matter that the risk of being struck from behind was not as great as the risk of running into another vehicle or colliding with a police vehicle upon being forced to the side of the highway. Oakes may have expected to outrun his pursuers, but the collision which caused his death, was not an unusual or unexpected incident associated with his activities.²² While it might be said that the collision resulted from an error in judgment on the part of the policeman, this must have been one of the very risks that must have been foreseen by Oakes. In racing competitions of this kind where normal safeguards and restraints are dispensed with, errors in judgment are commonplace and therefore Oakes' death was not accidental.

The plaintiff relied on the Supreme Court ruling in the *Stats* case, but Mr. Justice Anderson distinguished *Stats* in noting that in *Stats* there was a specific finding that the deceased was not courting or looking for the risk of the collision which caused her death and the facts in the *Oakes* case were completely the opposite.²³

Exclusionary Clauses

A recent English case illustrates very vividly the care that is necessary in drafting an exclusionary clause for accident insurance with particular reference to motor racing. In *Scragg v. United Kingdom Temperance & General Provident Institution*,²⁴ a wealthy businessman, Philip Scragg, was killed when his sports car crashed in flames at the Silverstone Racing Circuit in England during a motor sprint event. When the insured was killed in his V-12 E-type Jaguar at the age of 53, his life was insured under an accident policy which contained an exclusion if the insured died as a direct or indirect result of "motor racing, motor hill climbs, motor trials or rallies." The insurance company claimed that this wording would cover so-called motor sprint events, even though that exact term was not specifically used in the

20. *Id.*, at 3889.

21. *Ibid.*

22. *Ibid.*

23. *Ibid.*

24. [1976] 2 Lloyd's Rep. 227 (Q.B.).

exclusion. Evidently, motor sprint events are those in which drivers race individually against the clock, as compared to a motor race. Mr. Justice Mocatta said that as used in its ordinary sense the phrase "motor racing" would cover sprint events,²⁵ but he was really concerned here with the specialized and particular wording as used in the exclusion. Four motor sport experts, including the managing director of McLaren racing were called as expert witnesses. Mr. McLaren advised that he felt motor racing would cover motor sprint events, but the three other expert witnesses disagreed with him and indicated that motor racing was restricted to events in which the competitors started at the same time and that motor sprint events were less dangerous.

What possibly turned the Judge in favour of the claimant however was a letter written by the insurance company for the insured to sign which stated that the insured did not participate in motor racing but only in timed hill climbs in which the competitor set off at timed intervals. The Judge stated that in his view this showed the company had considerable appreciation of the words used in the clause and that they were used in a specialized way as related to motor sports.²⁶ He accordingly gave judgment against the insurance company.

The lesson to be learned from this case is that if the exclusionary wording is too precise, it may well be deemed to have omitted certain activities which were meant to be excluded. Therefore, in some instances, broad exclusionary language may be preferable. In the area of sporting events, there has been some recent legal activity relating to the now evergrowing sport of hang gliding. In the last year, there were at least two claims in Canada where death resulted from hang gliding activities and the claims were successfully resisted on the basis of an aviation exclusion in the accidental death benefit rider. These cases did not go to court but there have been three reported cases in the United States courts which may be of assistance. Two were in California and one in Georgia.

In *Fidler v. Farmers New World Life Insurance Co.*,²⁷ the United States District Court for the Central District of California found an insurer not liable for payment of benefits under a life policy which contained an exclusion for death resulting from travel or flight in or descent from any kind of aircraft. In granting summary judgment for the insurance company, the Court found that the insured's operation of the hang glider constituted travel or flight in an aircraft.

Again in *Wilson v. Insurance Company of North America*,²⁸ the United States District Court for the Northern District of California held that an insurer was not liable under a group accident policy which excluded travel or flight in any vehicle or device for aerial navigation. The plaintiff argued, that the particular hang glider or kite was not really an aircraft because it was patterned after a parachute and had no wings, and since it had been held in the past that a parachute is not an aircraft this coverage should be allowed. However, the California Court found that on a fair and reasonable

25. *Id.*, at 229.

26. *Id.*, at 231.

27. (1977), 435 F. Supp. 912 (Cal. Dt. Ct.).

28. (1978), 453 F. Supp. 732 (Cal. Dt. Ct.).

interpretation of the wording it would exclude the risk from policy coverage.

Most recently, the Georgia Court of Appeals in *Firemen's Fund American Life Insurance Co. v. Long*²⁹ also found that death from hang gliding was effectively excluded by a policy exclusion covering flight or travel in any vehicle or device for aerial navigation. The Court of Appeal reversed the trial court in holding that the exclusionary language was clear and unambiguous.

Conclusion

In conclusion, the following observations can be made concerning the present meaning of "accident":

1) Evidence of negligence, or even gross negligence, may not now be a strong enough defence to aid an insurer in successfully denying liability since negligence and accident are not mutually exclusive terms.

2) It will now be necessary to produce sufficient evidence to demonstrate that the insured, by his negligence, deliberately courted or looked for the risk which resulted in his death.

3) The rule of public policy which bars a person or his estate from benefiting from his own wrongdoing will not be sufficient to bar a third-party beneficiary from claiming independently of the insured or his estate, although this rule may be sufficient to bar an insured or his estate.

4) As noted by Mr. Justice Blair in the *Stats* case, insurers may be required to be more exact and specific with respect to the risks which they clearly wish to exclude. This will require very careful draftsmanship.

However, recent accidental death cases illustrate that insurers will not be required to pay the accidental death benefit where the death results from being run over while lying down on the white line in the middle of a super-highway³⁰, or from burns suffered as a result of lighting a cigarette while washing one's private parts with gasoline³¹, or from strangulation while hanging by the neck in order to induce an erotic stimulation³² or while playing Russian roulette with a loaded revolver³³ or even as a result of being shot by an irate neighbour while carrying on an adulterous affair with the neighbour's wife³⁴.

29. (1978), 148 Ga. App. 216, 251 S.E. 2d 133 (C.A.).

30. *Allred vs. Prudential Insurance Co.* (1957), 247 N.C. 105, 100 S.E. 2d 226 (S.C.).

31. *American Casualty Co. v. Hyder* (1943), 8 Life Cases 517 (Tenn. S.C.), rev'd. (1943), 8 Life Cases 947 (Tenn. C.A.).

32. *Runge v. Metropolitan Life Insurance Co.* (1976), 537 F. 2d 1157 (4th Cir.).

33. *Koger v. Mutual of Omaha Insurance Co.* (1968), 163 S.E. 2d 672 (W. Va. C.A.).

34. *Falster v. Travelers Insurance Co.*, (1963), 5 Life Cases 1509 (Tenn. C.A.).

