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"ACCIDENT" IN THE INSURANCE CONTEXT: SOME DEFINITIONAL PROBLEMS

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I. INTRODUCTION

The word "accident" appears to be quite easily comprehended by laymen—yet it becomes an elusive concept, and a significant source of confusion when utilized by attorneys, insurers, medical experts and the courts. By universal[1] and persistent repetition the courts have declared that the meaning of the term "accident" has no legal definition which is separate or distinct from that in common usage.[2] Life insurance policies often provide that double indemnity shall be paid in the event that death is accidental or caused by accidental means.[3]

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1. *E.g.*, Pilcher v. New York Life Ins. Co., 25 Cal. App. 3d 717, 102 Cal. Rptr. 82 (1972); Lickleider v. Iowa State Traveling Men's Ass'n, 184 Iowa 423, 166 N.W. 363 (1918); Regan v. National Postal Transp. Ass'n, 53 Misc. 2d 901, 280 N.Y.S.2d 319 (Civ. Ct. City of N.Y. 1967).

2. Hanley v. Fidelity & Cas. Co., 180 Iowa 805, 825, 161 N.W. 114, 120 (1917). The supreme court quoted 1 C.J. *Accident* section 3 with approval:

> Accident denotes an event that takes place without one's foresight or expectation; an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected; chance, casualty, contingency, an event happening without any human agency, or, if happening through human agency, an event which under the circumstances is unusual and unexpected by the person to whom it happens; something unexpectedly taking place, not according to the usual course of things; an unusual or unexpected result attending the operation or performance of a usual or necessary act or event; something happening by chance; a "mishap."

3. D. BICKELHAUPT & J. MAGEE, GENERAL INSURANCE (8th ed. 1970). The authors have suggested the typical form of such a double indemnity clause:

> The clause in a common policy, for example, provides that if death occurs before the anniversary date of the policy following the insured's 65th birthday and if such

Disability policies may limit recovery to instances where the disabling injury is the proximate consequence of an accident.[4] Clearly there is a need for a relatively concrete definition of the word "accident." As with much legal terminology, the difficulty lies in defining the term in the abstract, so that it may be subsequently utilized to distinguish those factual situations which in common understanding constitute accidents, from those which do not.[5] This particular exercise in judicial lexicology often ends in a dexterously constructed, convoluted definition of "accident," supplemented by the caveat that an accident is merely that which the common man thinks it is.[6] The definitional puzzle encompasses a number of related pieces, the separate discussions of which comprise the scope of this article: (1) Is there a logically cognizable difference between accidents caused by accidental means and those in which only the result is accidental? (2) Does voluntary exposure to danger preclude recovery under the accident terms of an insurance policy? (3) When do pre-existing physical or mental infirmities prevent recovery?

II. Accidental Means Versus Accidential Result

An insurance policy with accident provisions may limit coverage to death or injury inflicted through accidental means, thus excluding an accident which is merely accidental as a result. In Iowa,[7] as in most other jurisdictions,[8] total

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death "results directly and independently of all other causes from bodily injuries effected solely through external, violent, and accidental means and occurs within ninety days from the date of such accident, and if such injuries are evidenced by a visible contusion or wound on the exterior of the body (except in case of drowning and internal injuries revealed by an autopsy), and if such death does not result from suicide while sane or insane, from military or naval service in time of war, from submarine descent, from the taking of poison or the inhaling of gas whether voluntary or otherwise, nor directly or indirectly from disease in any form," the double indemnity is payable.

Id. at 719-20 n.22.

4. *Id.* at 757.

5. Judge Younger speaking for the Civil Court of the City of New York has offered a unique, and perhaps enlightening, explanation of how "accident" is to be defined:

> In many, if not most, civil cases, the jury does what Adam did on naming-day in Eden. One imagines him confronted by the fact—a creature like a mountain top with a voice like a typhoon—and by an assortment of possible words for that fact—"rabbit," perhaps, or "grasshopper" or "elephant." Adam chose one that fit, and "that was the name thereof." (Genesis 2:19) So a jury confronts the fact—a plaintiff did this, a defendant did that—and chooses from the vocabulary of the law the word that fits—negligence, contributory negligence, or whatever. Thus it arrives at a verdict.

Davis v. John Hancock Mut. Life Ins. Co., 64 Misc. 2d 791, 791-92, 316 N.Y.S.2d 722, 723 (Civ. Ct. of City of N.Y. 1970).

6. Hanley v. Fidelity & Cas. Co., 180 Iowa 805, 161 N.W. 114 (1917). The court observed, "it is now well settled that 'accident,' as used in insurance contracts, is to be given its meaning and effect as employed in general usage. Nevertheless, while conceding this to be correct, courts still persist in the effort to critically define the word . . . ." *Id.* at 824, 161 N.W. at 120.

7. Comfort v. Continental Cas. Co., 239 Iowa 1206, 1210, 34 N.W.2d 588, 590 (1948); Dawson v. Bankers Life Co., 216 Iowa 586, 591, 247 N.W. 279, 282 (1933); Lickleider v. Iowa State Traveling Men's Ass'n, 184 Iowa 423, 433, 166 N.W. 363, 367, *modified*, 168 N.W. 884 (1918).

8. Following are the most recent, leading or significant cases from jurisdictions in which the accidental means versus accident result distinction has been discussed.

Alabama, National Life & Accident Ins. Co. v. Allen, 285 Ala. 551, 234 So. 2d 567

severability of accidental means (or accidental cause) from accidental result is no longer recognized. In the years preceding 1918, the Iowa supreme court attempted to fully implement the intent of the insurers to limit accident coverage to losses sustained only by accidental means. Recovery under a policy so limited could be had only where the claimant showed that the means by which the accident proximately resulted were themselves accidental.

Although not always a bar to recovery in Iowa, the distinction between accidental means and accidental result has been determinative in numerous cases: where death resulted from a ruptured blood vessel suffered while reaching to close window shutters,[9] where the insured suffocated in an attempt to

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(1970); *Arizona*, Knight v. Metropolitan Life Ins. Co., 103 Ariz. 100, 437 P.2d 416 (1968); *Arkansas*, Travelers Ins. Co. v. Johnston, 204 Ark. 307, 162 S.W.2d 480 (1942); *California*, Ritchie v. Anchor Cas. Co., 135 Cal. App. 2d 245, 286 P.2d 1000 (Ct. App. 1955); *Colorado*, Equitable Life Assurance Soc'y v. Hemenover, 100 Colo. 231, 67 P.2d 80 (1937); *Connecticut*, Johnson v. Metropolitan Life Ins. Co., 26 Conn. Supp. 398, 225 A.2d 498 (C.P. Fairfield Co. 1966); *Delaware*, Maneval v. Lutheran Bhd., 281 A.2d 502 (Super. Ct. 1971); *Florida*, Wentz v. Independent Life & Accident Ins. Co., 254 So. 2d 368 (Fla. Dist. Ct. App. 1971); *Georgia*, Life Ins. Co. of Ga. v. Williams, 109 Ga. App. 264, 135 S.E.2d 925 (1964); *Idaho*, O'Neil v. New York Life Ins. Co., 65 Idaho 722, 152 P.2d 707 (1944); *Illinois*, Taylor v. John Hancock Mut. Life Ins. Co., 11 Ill. 2d 227, 142 N.E.2d 5 (1957); *Indiana*, Freeman v. Commonwealth Life Ins. Co., 271 N.E.2d 177 (Ind. Ct. App. 1971; *Kansas*, Akins v. Illinois Bankers Life Assurance Co., 166 Kan. 648, 203 P.2d 180 (1949); *Kentucky*, National Life & Accident Ins. Co. v. Jones, 260 Ky. 404, 86 S.W.2d 139 (1935); *Louisiana*, Boasso v. State Farm Mut. Auto Ins. Co., 246 So. 2d 696 (La. Ct. App. 1971); *Maine*, Hinds v. John Hancock Mut. Life Ins. Co., 155 Me. 349, 155 A.2d 721 (1959); *Maryland*, Gordon v. Metropolitan Life Ins. Co., 256 Md. 320, 260 A.2d 338 (1970); *Massachusetts*, Smith v. Travelers' Ins. Co., 219 Mass. 147, 106 N.E. 607 (1914); *Michigan*, Wells v. Prudential Ins. Co. of America, 3 Mich. App. 220, 142 N.W.2d 57 (1966); *Minnesota*, Kluge v. Benefit Ass'n of Ry. Employees, 276 Minn. 263, 149 N.W.2d 681 (1967); *Mississippi*, North American Accident Ins. Co. v. Henderson, 180 Miss. 395, 177 So. 528 (1937); *Missouri*, Murphy v. Western & Southern Life Ins. Co., 262 S.W.2d 340 (Mo. App. 1953); *Montana*, Terry v. National Farmers Union Life Ins. Co., 138 Mont. 333, 356 P.2d 975 (1960); *Nebraska*, Cutrell v. John Hancock Mut. Life Ins. Co., 145 Neb. 550, 17 N.W.2d 465 (1945); *New Hampshire*, McGinley v. John Hancock Mut. Life Ins. Co., 88 N.H. 108, 184 A. 593 (1936); *New Jersey*, Korfin v. Continental Cas. Co., 5 N.J. 154, 74 A.2d 312 (1950); *New Mexico*, Scott v. New Empire Ins. Co., 75 N.M. 81, 400 P.2d 953 (1965); *New York*, Regan v. National Postal Transp. Ass'n, 53 Misc. 2d 901, 280 N.Y.S.2d 319 (Civ. Ct. City of N.Y. 1967); *North Carolina*, Kinney v. Home Security Life Ins. Co., 2 N.C. App. 597, 163 S.E.2d 520 (1968); *North Dakota*, Grabau v. Hartford Accident & Indemn. Co., 149 N.W.2d 361 (N.D. 1967); *Ohio*, Hirschfelt v. Kentucky Cent. Life & Accident Ins. Co., 90 Ohio App. 144, 103 N.E.2d 839 (1951); *Oklahoma*, Republic Nat'l Life Ins. Co. v. Johnson, 317 P.2d 258 (Okla. 1957); *Oregon*, Pope v. Benefit Trust Life Ins. Co., 261 Ore. 397, 494 P.2d 420 (1972); *Pennsylvania*, Beckham v. Travelers Ins. Co., 424 Pa. 107, 225 A.2d 532 (1967); *Rhode Island*, Kimball v. Massachusetts Accident Co., 44 R.I. 264, 117 A. 228 (1922); *South Carolina*, Goethe v. New York Life Ins. Co., 183 S.C. 199, 190 S.E. 451 (1937); *South Dakota*, Wolfe v. Order of United Commercial Travelers of America, 70 S.D. 452, 18 N.W.2d 755 (1945), *rev'd on other grounds*, 331 U.S. 586 (1946); *Tennessee*, Smith v. Aetna Life Ins. Co., 24 Tenn. App. 570, 147 S.W.2d 1058 (1941); *Texas*, Praetorian Mut. Life Ins. Co. v. Humphrys, 484 S.W.2d 413 (Tex. Civ. App. 1972); *Utah*, Thompson v. American Cas. Co., 20 Utah 2d 418, 439 P.2d 276 (1968); *Vermont*, Griswold v. Metropolitan Life Ins. Co., 107 Vt. 367, 180 A. 649 (1935); *Virginia*, Aetna Life Ins. Co. v. Hale, 206 Va. 840, 147 S.E.2d 126 (1966); *Washington*, McMahan v. Mutual Benefit Health & Accident Ass'n, 33 Wash. 2d 415, 206 P.2d 292 (1949); *West Virginia*, Koger v. Mutual of Omaha Ins. Co., 152 W. Va. 274, 163 S.E.2d 672 (1968); *Wisconsin*, Stoffel v. American Family Life Ins. Co., 41 Wis. 2d 565, 164 N.W.2d 484 (1969); *District of Columbia*, Acacia Mut. Life Ins. Co. v. Galleher, 144 A.2d 550 (D.C. Mun. App. 1958).

9. Feder v. Iowa State Traveling Men's Ass'n, 107 Iowa 538, 78 N.W. 252 (1899) (recovery not allowed).

quickly remove his night shirt under orders from his wife,[10] where a muscle strain suffered while bowling caused an eventual appendicitis,[11] where death followed from a fall on a screw driver[12] and where the insured died after ingesting unwholesome oranges.[13]

The initial case in which the Supreme Court of Iowa suggested that there was logic in treating injury or death from accidental means as completely and uniformly separable from injury or death which was merely accidental in result, was the case of *Carnes v. Iowa State Traveling Men's Association*.[14] The insured was suffering substantial pain from a condition described as "neuralgia in the face."[15] In an effort to secure a temporary respite from his discomfort he took an undetermined amount of morphine.[16] The consumption was excessive and the insured died. The court stated that "if he took the amount of morphine intended, and a result not anticipated occurred, then the cause of his death was not accidental, for he intended to do the very thing he did."[17] However, "[i]f he took more than he intended,—that is, intended to take one or two quarter grains, and, by mistake or inadvertance, took much more, — this was accidental, and, if death was so caused, the beneficiary is entitled to recover."[18] The impetus for this treatment by the Iowa court and the origin of the case law which continues to recognize the distinction in its strictest form, was the United States Supreme Court decision of *United States Mutual Accident Association v. Barry*.[19] An attentive and deliberate reading of *Barry* reveals that it may not have stood for the proposition for which it was cited in the *Carnes* decision[20] and certainly not for the rule of law for which it was cited

10. Smouse v. Iowa State Traveling Men's Ass'n, 118 Iowa 436, 92 N.W. 53 (1902) (reversed and remanded for erroneous instruction).

11. Lehman v. Great W. Accident Ass'n, 155 Iowa 737, 133 N.W. 752 (1911) (recovery not allowed).

12. Hatfield v. Iowa State Traveling Men's Ass'n, 180 Iowa 39, 161 N.W. 123 (1917) (recovery allowed). *See also* Hanley v. Fidelity & Cas. Co., 180 Iowa 805, 161 N.W. 114 (1917) (arising from the same incident as *Hatfield, supra*).

13. Martin v. Interstate Business Men's Accident Ass'n, 187 Iowa 869, 174 N.W. 577 (1919) (recovery not allowed).

14. 106 Iowa 281, 76 N.W. 683 (1898).

15. *Id.* at 283, 76 N.W. at 684.

16. Although it appeared that decedent Oliver B. Carnes had not obtained the morphine from his attending physician, the possibility of voluntary exposure to danger was not raised. *Id.* at 283, 76 N.W. at 684. See the discussion of this topic at division III *infra*.

17. Carnes v. Iowa State Traveling Men's Ass'n, 106 Iowa 281, 285, 76 N.W. 683, 685 (1898).

18. *Id.* at 284, 76 N.W. at 684.

19. 131 U.S. 100 (1889).

20. Difficulty of interpretation of the accidental means—result distinction formulated in *Barry* was compounded by the manner in which the definition of accidental means was propounded in that opinion. The Supreme Court quoted with approval the charge to the jury by the trial court judge. The instructions, or some fraction of the instructions, have been frequently cited as the definitive explanation of the accidental means versus accident result dichotomy:

> And I instruct you that if Dr. Barry jumped from the platform and alighted on the ground in the way he intended to do, and nothing unforeseen, unexpected, or involuntary occurred, changing or affecting the downward movement of his body as he expected or would naturally expect such a movement to be made, or causing him to strike the ground in any different way or position from that which he anticipated or would naturally anticipate, then any resulting injury was not effected

in subsequent Iowa decisions.[21] Dr. Barry, the insured, had jumped from a platform to the ground four or five feet below. The Court held that if he landed as he had intended, the injury was not by accidental means, but if he alighted in some manner which he had not intended, the means were accidental and recovery would be allowed.[22] The *Barry* approach, which was adhered to

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through any accidental means. [But if, in jumping or alighting on the ground, there occurred, from any cause, any unforeseen or involuntary movement, turn, or strain of the body, which brought about the alleged injury, or if there occurred any unforeseen circumstance which interfered with or changed such a downward movement as he expected to make, or as it would be natural to expect under such circumstances, and as caused him to alight on the ground in a different position or way from that which he intended or expected, and injury thereby resulted, then the injury would be attributable to accidental means.]

United States Mut. Accident Ass'n v. Barry, 131 U.S. 100, 110 (1889). The charge employed three adjectives (unforeseen, unexpected, involuntary) to describe the nature of a precipitating event which was held to be accidental means. The first part of the instructions qualified what was not to be considered accidental means, the second part (enclosed by brackets *supra*) described those means which were accidental. The first part of the charge enumerated the adjectives, prefaced them in the negative (with the word "nothing") and listed them in the disjunctive. In the second part of the charge, the negative was deleted, but the disjunctive was retained. Assuming that a precipitating event must be either accidental or not accidental, the instruction failed in that it did not include within these two categories, all possible alternate situations describable by the adjectives. This can be demonstrated by reducing the two parts of the instructions to simple statements in traditional form, where *A* and *B* are adjectives and *C* represents "finding of accidental means." The first part of the instruction can be stated: "If not *A* or *B* then not *C*." The second part can be stated, "If *A* or *B*, then *C*." To be logically consistent, and to conform to the requirement that an event either is an example of accidental means or it is not, the first statement would need to be, "If not *A and B*, then not *C*." Remaining undefined by the instruction was the precipitating event which was "not involuntary" but was "unforseen." Under the first part of the charge, there would be no accidental means found because "nothing . . . involuntary occurred . . . ." Under the second part of the charge there would be a finding of accidental means because "there occurred . . . [an] unforseen . . . movement . . . ." Thus the instruction would require the jury to find both the presence and the absence of accidental means from the same set of facts. In one of the hypothetical findings of fact suggested by the court in *Carnes v. Iowa State Traveling Men's Association*, 106 Iowa 281, 76 N.W. 683 (1898), reproduced in the text accompanying note 17 *supra*, such a situation is presented. Applying the first part of the instruction, a finding of accidental means is precluded; applying the second part of the instruction, a finding of accidental means is dictated. (This assumes that an act which is "intentional" is by definition also "voluntary" and that an event which is "not anticipated" is likewise "unforseen.") The instruction thus binds the jury to a finding that one fact situation is an instance of accidental means and it is not an instance of accidental means.

The preceding slither through the Serbonian Bog rests on the presumption, supported by case law where it has been directly considered, that "unforeseen" is not a synonym for "involuntary," and likewise, there is no synonymy between "involuntary" and "unintentional." Smouse v. Iowa State Traveling Men's Ass'n, 118 Iowa 436, 439, 92 N.W. 53, 54 (1902). "Involuntary" has been interpreted in at least three different ways in the insurance context:

(1) " 'Lacking will or power to choose; not under the control of the will or volition; taking place independently of the will or volition; not willed.' " Riley v. Inter-State Business Men's Accident Ass'n, 184 Iowa 1124, 1130-31, 169 N.W. 448, 450 (1918);

(2) "An involuntary movement is one which is made against the will as under compulsion, or [(3)] independent of the will, as in the process of breathing or in the circulation of the blood, or as seen in a body in convulsions." Smouse v. Iowa State Traveling Men's Ass'n, 118 Iowa 437, 439, 92 N.W. 53, 54 (1902). The third definition was used, by implication, in *Calkins v. National Travelers Benefit Association*, 200 Iowa 60, 204 N.W. 406 (1925). However, in *Carnes v. Iowa State Traveling Men's Association*, 106 Iowa 281, 76 N.W. 683 (1898), whether a precipitating event was accidental was posed in terms of "unintentional," although *Barry* was relied upon, and *Barry* stated the applicable definitions in terms of lack of volition, and unforeseeability.

21. *See* note 24 and accompanying text, *infra*.

22. United States Mut. Accident Ass'n v. Barry, 131 U.S. 100, 109-10 (1889).

in *Carnes*,[23] limited examination for the fortuitous element of the accident to the precipitating events directly from which the death or injury resulted. Accidental means were found where the precipitating event, or an element of the precipitating event, was itself unforeseen or unanticipated. The analysis did not go to the foreseeability or imputed expectation of the precipitated death or injury.

Transformation of the rule requiring recognition of this precise distinction can be found in the case of *Lickleider v. Iowa State Traveling Men's Association*.[24] The deceased had become such when a tire he was attempting to separate from a wheel rim suddenly came loose, jarring him with considerable force. The jolt caused the insured to stumble backwards and to suffer a blood clot in his right coronary artery. Death ensued shortly thereafter. It was indisputable that the insured intended to free the tire from the wheel rim and that he anticipated that the tire would in fact be removed from the rim. The court stated that a jury could find that it was the unexpected force with which the tire gave way that was the accidental cause of death of the insured,[25] and thus under the stricter rule of *Carnes* and *Barry* accidental means could have been found by looking to only the precipitating event.[26] Although not required to justify the judgment in *Lickleider*,[27] the court expanded the meaning of "injury or death by

23. Carnes v. Iowa State Traveling Men's Ass'n, 106 Iowa 281, 285, 76 N.W. 683, 685 (1898). The Iowa court approved of the distinction recognized by Judge Dyer in his charge to the jury quoted in note 20, *supra*.

24. 184 Iowa 423, 166 N.W. 363 (1918). In *Dawson v. Bankers Life Co.*, 216 Iowa 586, 247 N.W. 279 (1933) the court stated that the old rule was modified in *Lickleider*. However, the opinion in *Lickleider* appears to rely on two prior Iowa cases which stood for essentially the same interpretation of the rule. In *Jenkins v. Hawkeye Commercial Men's Association*, 147 Iowa 113, 124 N.W. 199 (1910) the insured intentionally ate a meal including fish, an unexpected consequence of which was a fish bone lodged in his rectum, followed by a fatal infection. In allowing recovery, the court said, "the wound was so out of the ordinary course of things as to constitute an accident. The effect was one which does not ordinarily follow, could not reasonably have been anticipated, and cannot be charged to have resulted from design." *Id.* at 118, 124 N.W. at 200. In *Clark v. Iowa State Traveling Men's Association*, 156 Iowa 201, 135 N.W. 1114 (1912) the court flatly rejected an assertion by the insurer that there could be no accidental means found where the deceased performed a wholly voluntary act, the result of which was death or injury. The court concluded that "[t]he position is unsound. Followed to its final result, it would mean that no man can recover on an accident policy containing a similar provision, if he received an injury while voluntarily engaged in any physical movement." *Id.* at 209, 135 N.W. at 1117.

In addition to espousal of the "new" rule in these prior cases, the court in *Lickleider* seemed unaware that it was altering the rule, for it distinguished inconsistent prior cases. However, part of the original opinion was subsequently withdrawn. Lickleider v. Iowa State Traveling Men's Ass'n, 168 N.W. 884 *modifying* 184 Iowa 423, 166 N.W. 363 (1918).

25. Lickleider v. Iowa State Traveling Men's Ass'n, 184 Iowa 423, 430-31, 166 N.W. 363, 366 (1918).

26. It appears that the original rule, requiring that the means be found accidental without reference to the nature of the result, could have been applied in *Lickleider* without altering the outcome. In discussing the means by which the accident was produced, the court said, "and in our judgment it was open to the jury to find, from all these circumstances, that, in this involuntary and undesigned movement so unexpectedly produced, he sustained a strain or injury to some of his vital organs which proved fatal." *Id.* at 430-31, 166 N.W. at 366. Here the means were accidental in themselves, independent of the unusual or unexpected nature of the result.

27. The trial court had sustained the insurer's motion for a directed verdict and entered judgment thereon. The Supreme Court of Iowa reversed, allowing that the jury could

accidental means" to include an unanticipated and unintended result following from an intentional act.[28] The *Lickleider* decision, which has been frequently cited[29] by both the Iowa supreme court[30] and the federal courts[31] as the pivotal Iowa case on "accidental means," suffers from internal inconsistency. Initially the court examined and approved the *Barry* opinion, which was clearly applicable to the facts in *Lickleider*. An edited rendition[32] of what was stated in the *Barry* decision served to diminish the emphasis given by the Supreme Court to the proper scope of the examination directed towards the detection of accidental means, to wit, examination only of the precipitating event itself. The absence of due emphasis made possible the unnoted[33] transition to a new rule

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have found accidental means under the old rule, while additionally approving authority for the newer rule. Lickleider v. Iowa State Traveling Men's Ass'n, 184 Iowa 423, 166 N.W. 363 (1918).

28. The court stated:

> The rule, clearly deducible from the overwhelming weight of authority, is that, when injury or death follows or results from a voluntary act of the insured, and the act is one which is not manifestly dangerous, but which is ordinarily done or performed without serious consequences to the doer, such result is caused by accidental means. This is nowhere better stated than by Sanborn, J., in *Western C.T. Ass'n v. Smith*, 85 Fed. 401, where he says: "An effect which does not ordinarily follow and cannot be reasonably anticipated from the use of those means, an effect which the actor did not intend to produce and which he cannot be charged with the design of producing, * * * is produced by accidental means."

Lickleider v. Iowa State Traveling Men's Ass'n, 184 Iowa 423, 433, 166 N.W. 363, 367 (1918).

29. *Jenkins v. Hawkeye Commercial Men's Association*, 147 Iowa 113, 124 N.W. 199 (1910), was actually the first case to suggest the changed rule, see note 24 *supra*, and the first case to cite what appeared to be conflicting precedents as consistent authorities. *See, e.g.*, Carnes v. Iowa State Traveling Men's Ass'n, 106 Iowa 281, 76 N.W. 683 (1898); Maryland Cas. Co. v. Hudgins, 72 S.W. 1047 (Tex. Civ. App. 1903).

30. Dawson v. Bankers Life Co., 216 Iowa 586, 247 N.W. 279 (1933). *See* Rowe v. United Commercial Travelers Ass'n, 186 Iowa 454, 172 N.W. 454 (1919); Budde v. National Travelers Benefit Ass'n, 184 Iowa 1219, 169 N.W. 766 (1918).

31. Continental Cas. Co. v. Jackson, 400 F.2d 285 (8th Cir. 1968).

32. Following is a quotation from *United States Mutual Accident Association v. Barry*, 131 U.S. 100 (1889). Enclosed by brackets are the clauses excised when the language was quoted in *Lickleider v. Iowa State Traveling Men's Association*, 184 Iowa 423, 166 N.W. 363 (1918):

> But if, [in jumping or alighting on the ground,] there occurred from any cause, any unforeseen or involuntary movement, turn, or strain of the body, which brought about the alleged injury, or if there occurred any unforeseen circumstance which interfered with or changed such a downward movement as he intended [expected] to make, or as it would be natural to expect under such circumstances, [and as caused him to alight on the ground in a different position or way from that which he intended or expected,] and injury thereby resulted, then the injury would be attributable to accidental means.

Id. at 431, 166 N.W. at 366-67. The clauses served to emphasize that the examination for accidental means was to be limited to the precipitating event.

33. Nowhere in the opinion was it suggested that the court was modifying the rule for determining the existence of accidental means. Lickleider v. Iowa State Traveling Men's Ass'n, 184 Iowa 423, 166 N.W. 363 (1918). In fact eight years later the court had not yet recognized that there had been a change: "All of our cases hold that it is not sufficient that there was an accidental or unanticipated result only, but that the means must have been accidental,—that is, involuntary and unintentional." Clarkson v. Union Mut. Cas. Co., 201 Iowa 1249, 1250-51, 207 N.W. 132, 133 (1926). The review of Iowa authority in *Clarkson* concluded with a quotation from *Lickleider* stating this familiar language, " 'when injury or death follows or results from a voluntary act of the insured, and the act is one which is not manifestly dangerous, but which is ordinarily done or performed without serious consequences to the doer, such result is caused by accidental means.' " *Id.* at 1252, 207 N.W. at 133. This is but one species of confusion lurking beneath the Serbonian Bog. *See* note 37 *infra*.

of law, inconsistent with *Barry* and *Carnes*. After the review of authority,[34] the Iowa court concluded:

> The rule, clearly deducible from the overwhelming weight of authority, is that, when injury or death follows or results from a voluntary act of the insured, and the act is one which is not manifestly dangerous, but which is ordinarily done or performed without serious consequences to the doer, such result is caused by accidental means. This is nowhere better stated than by Sanborn, J., in *Western C. T. Assn. v. Smith*, 85 Fed. 401, where he says:
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> "An effect which does not ordinarily follow and cannot be reasonably anticipated from the use of those means, an effect which the actor did not intend to produce and which he cannot be charged with the design of producing, * * * is produced by accidental means."[35]

Clearly this rule allows the determination of the presence of accidental means to focus on the precipitated event, and, as it were, to work backwards. This is a distinction from the rule espoused in *Barry* and relied upon in *Carnes*. There had been a metamorphosis of the rule.

The new rule made it possible to infer from the nature of the result whether the means were accidental. If the means were not those from which injury normally followed, but injury did in fact occur, then the means were imputed to be accidental, although totally intentional.

This alteration of the rule may have, in practice, obliterated the distinction. As discussed, *infra*,[36] where the insured voluntarily and intentionally exposes himself to danger, there can be no accident in the result or the means. From every accidental result one of two mutually exclusive findings could be made: (1) the result did not normally and foreseeably follow the precipitating event, hence the means were accidental under *Lickleider*, or (2) the result was to be expected from such means and therefore there was a voluntary exposure to danger and thus no accidental result or accidental means under any definition.[37]

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34. Lickleider v. Iowa State Traveling Men's Ass'n, 184 Iowa 423, 431, 166 N.W. 363, 366 (1918). Most of the authority was consistent with the rule in its newly modified form, hence inconsistent with the rule as it stood in *United States Mutual Accident Association v. Barry*, 131 U.S. 100 (1889).

35. Lickleider v. Iowa State Traveling Men's Ass'n, 184 Iowa 423, 433, 166 N.W. 363, 367 (1918).

36. *See* discussion of voluntary exposure to danger at division III *infra*.

37. The concept of voluntary exposure to danger has been described in this manner:

> It may be, and it is, true that, if the insured does a voluntary act, the natural, usual, and to be expected result of which is to bring injury upon himself, then a death so occurring is not an accident, in any sense of the word, legal or colloquial; and it is only when thus limited that the rule so stated has any proper application. To illustrate: A may be foolhardy enough to believe that he can leap from a fourth-story window with safety, and, trying it, is killed. B, desiring to descend from the same floor, climbs out upon a fire escape, which collapses, and he falls to his death. In no proper sense of the word is A's death accidental or caused by accidental means, nor can any reasonable person deny that B's death is accidental and produced by accidental means,—yet neither would have happened but for the voluntary act of the deceased.

Lickleider v. Iowa State Traveling Men's Ass'n, 184 Iowa 423, 429, 166 N.W. 363, 366 (1918). *See* Rowe v. United Commercial Travelers Ass'n, 186 Iowa 454, 172 N.W. 454 (1919).

Fifteen years after *Lickleider*, in *Dawson v. Banker's Life Co.*,[38] the court stated:

> In many jurisdictions the courts distinguish between *accidental results* and *accidental means*, and requires [*sic*] that both be approved in order to meet the provisions of a policy. Such was the earlier rule in Iowa. In the case of Lickleider v. Iowa State Traveling Men's Association, [citation omitted] the earlier rule was modified, and it was there held that an *accidental result* and the *accidental means* by which it is caused are somewhat identical, and that proof of the former may be considered as proof of the latter.[39]

This reference to *Lickleider* could be misleading upon a cursory reading. "[S]omewhat identical" is perhaps too strong without qualification. Although the rule is more adequately described later in the opinion,[40] the "somewhat identical" language has been incorporated into subsequent opinions.[41]

Following the *Lickleider* decision, the Supreme Court of Iowa would occasionally revert to the older, more narrow distinction between accidental means and accidental result from the *Barry* opinion.[42] The court seems to have oscillated from one approach to the other, depending on the factual situation presented.

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38. 216 Iowa 586, 247 N.W. 279 (1933). In *Dawson v. Bankers Life Co.*, the deceased sustained an injury during a seventh inning slide to third base. Fifteen to twenty minutes later he became ill and died within an hour. The Supreme Court of Iowa affirmed the judgment for the plaintiff, and stated:

> If there was, therefore, any testimony from which it could be reasonably inferred that the decedent was injured in his slide to third base, and that such act of sliding is ordinarily done without serious consequences, the resultant injury would be considered as caused by accidental means, and the question of accidental death was properly one for the jury.

Id. at 592, 247 N.W. at 282.

39. *Id.* at 591, 247 N.W. at 282.

40. *Id.* at 591-92, 247 N.W. at 282.

41. Continental Cas. Co. v. Jackson, 400 F.2d 285, 288 n.2 (8th Cir. 1968); Comfort v. Continental Cas. Co., 239 Iowa 1206, 1210, 34 N.W.2d 588, 590 (1948); Miser v. Iowa State Traveling Men's Ass'n, 223 Iowa 662, 671, 273 N.W. 155, 160 (1937).

42. Martin v. Interstate Business Men's Accident Ass'n, 187 Iowa 869, 174 N.W. 577 (1919). In the *Martin* opinion, cases prior to, and inconsistent with, *Lickleider v. Iowa State Traveling Men's Association*, 184 Iowa 423, 166 N.W. 363 (1918) were cited for what purportedly was the then current definition of accidental means. The court stated that:

> If he chose the good oranges and ate them, and they failed to digest, and gastritis resulted, it cannot be said that the means which caused acute gastritis were accidental. If he voluntarily chose to eat affected oranges, and they failed to digest, it cannot be said that the means that caused the gastritis were accidental. The consequences that followed the eating might not have been anticipated or intentional, but the thing done was intentionally done. If the jury could have found from this record that the deceased voluntarily selected, from the oranges before him, affected oranges, and ate them, knowing that they were affected, and they produced the ill consequences that followed the eating, it must find that he ate, then, what he intended to eat, but misjudged the effect. If we say that he ate affected oranges, we must also say that they were selected for consumption voluntarily and intentionally; for this is the only inference to be drawn from the record. It cannot be said that either the selection or the consumption was accidental. The consequences that followed may not have been foreseen, and probably were not foreseen. So, if we should say that the jury might assume that he selected affected oranges and ate them, and they failed to digest, and gastritis set in, the jury could simply say that the result was accidental, but not the means.

187 Iowa 869, 877-78, 174 N.W. 577, 580 (1919). *See* note 33 *supra*.

In *Calkins v. National Travelers Benefit Association*[43] the stricter rule was invoked. The deceased had imbibed in a quantity of bad whiskey. Since there was no allegation that the insured intended suicide, it could be fairly said that the fatal acute gastritis resulting from the whiskey was not anticipated or expected by the deceased. Because it was not shown that the lethal consumption was taken involuntarily,[44] the supreme court held that there were no accidental means as a matter of law. The court did not follow the broader reasoning ascribed to the *Lickleider* decision.[45]

After the *Dawson* affirmation of the *Lickleider* decision, and the restatement of the *Lickleider* rule, the question of what constituted accidental means was taken to be settled law.[46] The present status of the Iowa law was recently reviewed by the United States Court of Appeals for the Eighth Circuit in *Continental Casualty Co. v. Jackson.*[47] In determining the Iowa rule, the federal court relied on *Lickleider* for the appropriate definition of accidental means.[48] Approval was given to the trial court instructions which succinctly stated the current form of the rule: "if the insured does a voluntary act, without knowledge or reasonable expectation that the result thereof will be to bring injury upon himself from which death may follow, then a bodily injury resulting in death is caused by accident."[49]

In those jurisdictions where the logomachy has been resolved, and the sharp distinction between accidental means and accidental result laid to rest, several related rationales have been relied upon. Authority for most of these can be found in Justice Cardozo's dissent in *Landress v. Phoenix Mutual Life Insurance Co.*,[50] The opinion is most commonly cited for the caveat therein, that "the attempted distinction between accidental results and accidental means will plunge this branch of the law into a Serbonian Bog,"[51] to be cautiously

43. 200 Iowa 60, 204 N.W. 406 (1925).

44. There was some evidence presented that the jug from which the insured was drinking had slipped, causing involuntary consumption. The court rejected the proof offered as irrelevant, in that it was not probative of that which the plaintiff alleged. In addition, the court stated that in order to secure a recovery, the plaintiff would be required to prove that the amount of liquor involuntarily ingested was the sole and exclusive cause of death. *Id.* at 63-64, 204 N.W. at 407.

45. Had the court followed the broader reasoning, the jury would have been permitted to infer the presence of accidental means from the unexpected and unusual nature of the result. The court stated: "The physician evidently did not believe he was in a critical condition, or likely to die from the poisonous effect of fuel oil. In fact, he testified that he did not think the condition of the patient was dangerous." *Id.* at 65, 204 N.W. at 408. If the jury were to find that the deceased had been cognizant of the poisonous, and potentially fatal character of the liquor, yet had voluntarily indulged nonetheless he would have voluntarily exposed himself to danger. *See* note 37 *supra.* The court found that since proof offered to show involuntary quaffing was irrelevant, and that no attempt was made to show sole and exclusive cause, no jury question was presented. *Id.* at 64, 204 N.W. at 407.

46. *See* note 38 *supra* and accompanying text.

47. 400 F.2d at 285 (8th Cir. 1968).

48. *Id.* at 288-89.

49. *Id.* at 288.

50. 291 U.S. 491, 498 (1934).

51. *Id.* at 499. Although Justice Cardozo may not have intended that his words be read as a summary repudiation of any distinction, some courts have attributed such meaning to his opinion and then criticized him for slovenliness: "So we felt unable to follow the

applied and for the most part ignored.[52] This view may be administratively the easiest to apply, due to mechanical simplicity, but it extends the policy liability to an injury or death to an extent not contemplated by the insurer.[53] However, what coverage the insurer believes has been purchased may very well not be the appropriate test.[54] Basic to insurance law are the rules of construction also discussed in Justice Cardozo's dissent, that genuine "ambiguities and uncertainties are to be resolved against the [insurance] company,"[55] and that "contracts of insurance should not be construed through the magnifying eye of a technical lawyer, but rather from the standpoint of what an ordinary man would believe the contract to mean."[56] From these principles a number of courts have formulated a factual[57] test of "the reasonable expectation of the policy-holder,"[58] or simply resolved the ambiguity created by the use of the phrase "accidental means" in favor of the insured.[59] Other courts[60] have merely allowed the accidental means to be inferred by the unexpected and

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approach of the Cardozo dissent [citation omitted] that an accidental result almost automatically imports that the means were accidental. In our view, that would amount to a complete disregard of specific language in the policy importing an obviously intended lesser coverage." Perrine v. Prudential Ins. Co. of America, 56 N.J. 120, 124-25, 265 A.2d 521, 523 (1970). In a footnote to the same opinion the court added: "It may be noted in passing that the Cardozo thesis of equating accidental means with accidental results is not a panacea automatically solving all cases. [citing examples]." *Id.* at 125 n.1, 265 A.2d at 523 n.1. A reading of Justice Cardozo's dissent in its entirety is not supportive of the conclusion that he advocated a total inosculation of two terms under his consideration.

52. A number of courts have held that there is no distinction. *E.g.*, Beckham v. Travelers Ins. Co., 424 Pa. 107, 225 A.2d 532 (1967). The court stated, "[w]e prefer to confront the issue directly and to expressly abandon the artificial distinction between accidental means and accidental results." *Id.* at 115, 225 A.2d at 535. Knight v. Metropolitan Life Ins. Co., 103 Ariz. 100, 437 P.2d 416 (1968); Gulf Life Ins. Co. v. Nash, 97 So. 2d 4 (Fla. 1957); Scott v. New Empire Ins. Co., 75 N.M. 81, 400 P.2d 953 (1965); Gurr v. Commercial Travelers Mut. Accident Ass'n of America, 295 N.Y. 294, 67 N.E.2d 248 (1946); Carter v. Standard Accident Ins. Co., 65 Utah 465, 238 P.2d 259 (1925).

53. Linden Motor Freight Co. v. Travelers Ins. Co., 40 N.J. 511, 524-25, 193 A.2d 217, 225 (1963).

54. *E.g.*, Iowa-Des Moines Nat'l Bank v. Insurance Co. of N. America, 459 F.2d 650 (8th Cir. 1972); General Cas. Co. v. Hines, 261 Iowa 738, 156 N.W.2d 118 (1968); Hiatt v. Travelers' Ins. Co., 197 Iowa 153, 197 N.W. 3 (1924).

55. Landress v. Phoenix Mut. Life Ins. Co., 291 U.S. 491, 499 (1934).

56. Murphy v. New York Life Ins. Co., 219 Iowa 609, 613, 258 N.W. 749, 751 (1935); American Ins. Co. v. Tutt, 314 A.2d 481 (D.C. Ct. App. 1974); Toevs v. Western Farm Bureau Life Ins. Co., 94 Idaho 151, 483 P.2d 682 (1971); Langlas v. Iowa Life Ins. Co., 245 Iowa 713, 63 N.W.2d 885 (1954).

57. Of course it is often the case that the court will hold that a particular construction does or does not conform to the average policyholder's expectations as a matter of law. *E.g.*, Harris v. John Hancock Mut. Life Ins. Co., 41 N.J. 565, 197 A.2d 863 (1964).

58. In describing the reasonable expectations test the Supreme Court of New Jersey said: "Whether the preceding events—the means or cause of the bodily injury resulting—are accidental will be determined by the reasonable appreciation, understanding and expectation of the average policy purchaser in the light of and having in mind the limiting language of the insuring clause." *Id.* at 568, 197 A.2d at 864. Equitable Life Assurance Soc'y v. Hemenover, 100 Colo. 231, 67 P.2d 80 (1937); Burr v. Commercial Travelers Mut. Accidental Ass'n, 295 N.Y. 294, 67 N.E.2d 248 (1946); Stoffel v. American Family Life Ins. Co., 41 Wis. 2d 565, 164 N.W.2d 484 (1969).

59. Rauert v. Loyal Protective Ins. Co., 61 Idaho 677, 106 P.2d 1015 (1940); Barnes v. North American Accident Ins. Co., 176 Pa. Super. 294, 107 A.2d 196 (1954); Richards v. Standard Accident Ins. Co., 58 Utah 622, 200 P. 1017 (1921); Newsome v. Commercial Cas. Ins. Co., 147 Va. 471, 137 S.E. 456 (1927).

60. One example is the Iowa supreme court. *See* note 47 *supra.*

The Supreme Court of Iowa has pronounced that voluntary exposure to danger means

> something more than contributory negligence or want of ordinary care on the part of the assured. The policy [provision] was no doubt intended to cover accidents although the assured may have been guilty of negligence which proximately contributed to his injury. To render one guilty of a voluntary exposure to danger, he must have intentionally done some act which reasonable and ordinary prudence would pronounce dangerous.[84]

The majority rule is that the insured must have knowledge of the impending danger, although such knowledge may be constructive.[85] It does appear that some early Iowa cases employed a subjective test to determine the presence or absence of the knowledge element.[86] This element is inextricably joined to the volition element, for if the insured has no knowledge of the hazard, actual or constructive, his exposure to the danger would be involuntary and unintentional.[87] This is true notwithstanding the fact that the exposing act itself was

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In *Rommel* the insured was drowned while attempting to break up an ice jam in the Des Moines river. The court restated the question of "obvious risk" in this manner:

> Was the hazard or risk assumed by deceased obvious or so apparent to a reasonably prudent and cautious person that it can be said, as a matter of law, that reasonable minds would not differ in respect thereto? If the risk was so plain, apparent, and obvious that it would have been readily perceived or observed by an ordinarily prudent and cautious person, then a verdict, if returned in favor of plaintiff for the full amount in the policy, could not be permitted to stand.

Id. at 781-82, 166 N.W. at 457.

82. Ellefson v. Hawkeye Commercial Men's Ass'n, 198 Iowa 430, 198 N.W. 774 (1924).

83. Payne v. Fraternal Accident Ass'n of America, 119 Iowa 342, 93 N.W. 361 (1903). The insured was struck and killed by a freight train. There was no evidence of suicide, but recovery under the accidental death provisions of the policy would be precluded if the jury were to have found a voluntary exposure to unnecessary danger. The judgment for the spouse of the deceased insured was affirmed because there was evidence from which "reasonable minds might reach different conclusions as to whether [the insured] had 'intentionally done some act which reasonable and ordinary prudence would pronounce dangerous.'" *Id.* at 348, 93 N.W. at 363.

In *Bakalars v. Continental Casualty Co.*, 141 Wis. 43, 44, 122 N.W. 721, 722 (1909) the Wisconsin court stated that the following three elements must be shown when the clause read "voluntary exposure to unnecessary danger or obvious risk of injury . . . (a) [c]onscious knowledge of the danger; (b) intentional or willful exposure to it; and (c) that the danger shall be unnecessary."

84. Follis v. United States Mut. Accident Ass'n, 94 Iowa 435, 439, 62 N.W. 807, 809 (1895).

85. Correll v. National Accident Soc'y, 139 Iowa 36, 116 N.W. 1046 (1908); Matthes v. Imperial Accident Ass'n, 110 Iowa 222, 81 N.W. 484 (1900); Bakalars v. Continental Cas. Co., 141 Wis. 43, 122 N.W. 721 (1909).

86. Matthes v. Imperial Accident Ass'n, 110 Iowa 222, 81 N.W. 484 (1900); Collins v. Bankers' Accident Ins. Co., 96 Iowa 216, 64 N.W. 778 (1895). In *Collins*, the court stated, "[b]efore he could voluntarily expose himself to danger, he must know of the danger, and it does not appear that he had such knowledge." *Id.* at 218, 64 N.W. at 779. The objective standard was applied later. *E.g.*, Correll v. National Accident Soc'y, 139 Iowa 36, 116 N.W. 1046 (1908). The court stated in *Correll* that "to constitute a voluntary or unnecessary exposure, the danger must either have been known to the insured in fact, or one which in the exercise of his faculties as an ordinarily prudent person should in reason have been known to him." *Id.* at 43, 116 N.W. at 1048. *But see* Follis v. United States Mut. Accident Ass'n, 94 Iowa 435, 439, 62 N.W. 807, 809 (1895).

87. In the case of *Rowe v. United Commercial Travelers' Association*, 186 Iowa 454, 172 N.W. 454 (1919), the deceased insured was driving an automobile when it was overturned, either by excessive speed or the collapse of a wheel. To clarify the required ele-

voluntary and intentional.[88]

> To illustrate, an extreme example may be usefully considered.
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> The insured, a young man, in company with another man, spent the evening and until shortly after midnight at a house of ill repute in Sparta, Tennessee. Upon leaving this house the two men went to a nearby filling station, procured a quart of gasoline, went into the rest room and began washing their privates with the gasoline as a sanitary measure. While engaged in this chore, the insured asked his companion to strike a match so that he could better see what he was doing. When the match was struck, the entire rest room burst into flames and the insured received burns, from which he died.[89]

Irrespective of whether these facts are applied under a test for accidental means,[90] for an accident in result only,[91] or for voluntary exposure to danger the outcome will be the same. In the above facts the Tennessee supreme court sought accidental means but found none.[92] Under the Iowa rule[93] there would be no accidental result, because the consequence, using an objective standard,[94] was the expected and natural result of the behavior of the insured. Undeniably there was a voluntary exposure to danger upon the facts as presented.[95]

As progressively less extreme factual circumstances are considered, the probability that the injurious result would follow from the behavior of the insured decreases. At the point at which a jury would not find sufficient reason to expect that the result would follow the particular behavior, the same hypothetically consistent trier of fact might well find insufficient reason to anticipate the hazard, under an objective test,[96] and therefore an insufficient basis to return a finding of voluntary exposure to danger.

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ment of volition, the court urged consideration of hypothetical alternate factual circumstances.

> The act which brings him into danger may be voluntary, yet the exposure be involuntary. [citation omitted]. If, for illustration, we may suppose that the wheel of Rowe's car had become out of repair and seriously weakened, and he was not aware of the defect, and that in attempting to speed up the car after slowing down for the turn around the corner the wheel gave way and brought about the driver's injury and death, the act which increased the speed and brought the breaking strain upon the wheel may have been voluntary, but the exposure to the resulting danger was unintentional and involuntary.

Id. at 464-65, 172 N.W. at 458.

88. *Id.*

89. Baker v. National Life & Accident Ins. Co., 201 Tenn. 247, 251, 298 S.W.2d 715, 717 (1957), *discussing* American Cas. Co. v. Hyder, 8 CCH LIFE 947 (1943).

90. *See* division II wherein accidental means are discussed.

91. *See* division II wherein accidental result is discussed.

92. American Cas. Co. v. Hyder, 8 CCH LIFE 947, 948 (1943).

93. *See* Continental Cas. Co. v. Jackson, 400 F.2d 285, 288-89 (8th Cir. 1968).

94. In determining the probability that a result would follow an act, in this context, consideration is not directed toward what the insured subjectively anticipated.

95. It cannot be doubted that a reasonable and prudent man would see imminent danger in striking a match in closed quarters when gasoline fumes were present. *See* text accompanying note 84 *supra.*

96. An objective standard is used in many jurisdictions, including Iowa. Correll v. National Accident Soc'y, 139 Iowa 36, 116 N.W. 1046 (1908); Diddle v. Continental Cas. Co., 65 W. Va. 170, 63 S.E. 962 (1909). *See also* Combs v. Colonial Cas. Co., 73 W. Va. 473, 80 S.E. 779 (1914).

IV. Proximate Cause: Disease or Accident

The typical accident policy will contain a clause limiting coverage by excluding injury or death resulting directly or indirectly, wholly or in part, from any illness or disease of any kind.[97] Rules of causation are often irksome and their application in the accident-disease context is not an exception. As factual circumstances vary, the pre-existing disease may be found to proximately cause the harm;[98] the accident to proximately cause the disease;[99] the accident and the pre-existing disease to be concurrent proximate causes of the injury;[100] or the disease or accident may be found to be the sole proximate cause of the harm.[101]

The problems of pre-existing disease and accident causation can best be illustrated by a consideration of cardiovascular disease. In the adult community in the United States heart disease is the number one killer.[102] Therefore, many problems of forensic medicine, common to both insurance companies and the administrators of civil and criminal justice, are eventually analyzed with illumination from experts in cardiovascular specialties. The positive finding of an acute myocardial infarction in an accident victim or the finding that such was the proximate cause of an accident, may mean the difference between the denial and allowance of a recovery.

The clinical cardiologist and pathologist frequently are asked to determine whether causal relationships exist between an environmental episode and a myocardial infarction and sudden death. In 1959 the Morland Commission[103] asked approximately four hundred internists and cardiologists seven questions concerning myocardial infarction. Question two asked:

> Suppose the case of a 60 year old working man employed for 20 years on a job that regularly requires lifting 100 pound weights. During the course of the work as customarily performed, he develops a coronary occlusion with myocardial infarction while lifting a 100 pound weight. From a medical viewpoint, would you consider the attack to be causally related to the lifting of the weight?[104]

Approximately fifty per cent replied "yes" and approximately fifty per cent replied "no." Question four asked:

If a workman during the course of his regular work and where no un-

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97. *See, e.g.*, Binder v. National Masonic Accident Ass'n, 127 Iowa 25, 102 N.W. 190 (1905). The policy under examination stated that "[n]o benefits shall accrue . . . for any death or disability happening directly or indirectly, wholly or in part, accidentally or otherwise because of or resulting in or from any disease or bodily or mental infirmity. . . ." *Id.* at 34, 102 N.W. at 193. *See also* note 3 *supra.*

98. *Id.* at 35, 102 N.W. at 193-94.

99. *E.g.*, Delany v. Modern Accident Club, 121 Iowa 528, 97 N.W. 91 (1903).

100. *See* cases collected in Annot., 84 A.L.R.2d 176, 199-202 (1962).

101. *Id.* at 198-99.

102. "The chief cause of death in the United States, myocardial infarction, accounts for a mortality of over 650,000 per year, and about half of these are sudden and unexpected." Corday & Swan, *New Research Perspectives in Myocardial Ischemia and Infarction*, in Myocardial Infarction 3 (1973).

103. Sigler, *Workman's Compensation for the Cardiac: Results of Questionnaire on Relation of Exertion to Myocardial Infarction*, 2 Am. J. Cardiology 781 (1958).

104. *Id.* at 781.

> usual physical exertion is present, suffers a heart attack following an incidence of emotional disturbance occasioned by a verbal argument with a fellow employee or the reprimand of a superior in connection with his work, from a medical viewpoint would you consider the attack to be causally related to the emotional disturbance?[105]

Sixty-eight per cent said "yes" and twenty-seven per cent said "no," five per cent did not answer the question. Question seven asked:

> Assume that a man of about 25 years of age begins employment at moderately heavy work and continues in this job for 20 years. At the end of this time, while on the job without engaging in any unusual exertion or strain, he suffers a coronary occlusion with myocardial infarction. In your opinion, is the heart attack causally related to the employment?[106]

Seven per cent said "yes," eighty-eight percent said "no," and five per cent did not answer. Thus it is apparent that there is a wide diversity of opinion among cardiologists to the relationship of stress in general and to effort and emotion, in particular, in the production of sudden cardiac deaths. Under a policy limitation which specifically excludes recovery when any pre-existing disease contributes to the resulting harm,[107] in theory at least, a heart attack could rarely be an accident entitling the insured to a recovery. Atherosclerosis begins in childhood and it is quite common to find evidence of coronary vascular disease even in the coronary arteries by the age of five.[108] There are many chemical mechanisms postulated in the etiology of atherosclerosis and associated with stresses secondary to pressure curves and bifurcation of vessels. Thus, dietary factors influencing the chemical constituency of plasma and hereditary influences related to anatomic variations represent only two of the many known risk factors associated with the development of clinical atherosclerosis.

Prior to an actue manifestation of heart disease it is often true that there will be no outward indicia of an impending heart attack. There are several expressions of clinical cardiovascular disease, although much of pathologic atherosclerosis remains dormant and asymptomatic during a lifetime. Angina Pectoris is a clinical syndrome present when there is an inequity between the oxygen demands of the heart muscles and the oxygen availability, due to any cause. Most frequently the cause is diminished blood flow secondary to a diminished vascular supply, but other causes are well substantiated. Angina may be precipitated by effort, emotion, eating, or environmental factors, but it may also occur at rest in highly compromised states.

If occlusion occurs in a coronary vessel, death of the muscular tissue can result and occasion in a classic myocardial infarction or "coronary." In an acutely susceptible individual, stress, either emotional or effort, can induce an infarction. Such stress can be induced by the excitement of a prize fight or

105. *Id.*
106. *Id.* at 782.
107. *See* note 3 *infra.*
108. M. FRIEDMAN, PATHOGENESIS OF CORONARY ARTERY DISEASE (1969).

a football game, or the physical exertion of shoveling snow or sexual intercourse. In a recent study only 2.2 per cent of those people dying of sudden cardiac deaths were engaged in anything except normal activity and the overwhelming majority of people dying of sudden cardiac deaths do so at home.[109] Furthermore, only twenty per cent of individuals having sudden cardiac deaths were found to have an acute coronary thrombosis.[110]

In transmural myocardial infarction there is a strong correlation with coronary thrombi which are generally found. Thus it becomes apparent that sudden cardiac death is heterogeneous in cause and that different pathophysiologic processes are involved. The common denominator is coronary atherosclerosis. The triggering mechanism might be a liberation of chemical factors that suddenly increased myocardial oxygen demands. Some investigators have pointed out the significant correlation between sudden cardiac death and cigarette smoking.[111] Premature beats have been studied by numerous investigators and it has been found that when a sudden disruption of cardiac rhythm occurs, secondary to the paroxsysmal salvo of ventricular ectopic beats, sudden death may ensue.[112] The exact mechanism cannot always be determined but it probably relates to insufficiency of the cardiac muscle as a pump in the profusion of the brain and of the cardiac muscle itself. In recent years the personnel of intensive care units and coronary care units at most hospitals have been trained to recognize these episodes and with the help of sophisticated electrocardiographic monitoring devices are well equipped to reverse this abrupt sequence of events with counter shock therapy.

Thus, it should be apparent that it is difficult to draw clinical conclusions that can be used as guide lines in medical-legal and insurance considerations.[113]

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109. Walters, *Medical-Legal Implications of Acute Myocardial Infarctions and Sudden Death*, in LEGAL MEDICINE ANNUAL 1971, at 213, 218 (1971).

110. *Id.*

111. Fredrickson, *Atherosclerosis and Other Forms of Arteriosclerosis*, in 2 HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 1239, 1249 (1970). In Dr. Fredrickson's article, it is stated that "[a]mple statistical evidence supports a mean increase of about 70 percent in the death rate from IHD [ischemic heart disease or arteriosclerotic heart disease] in men who smoke one pack of cigarettes per day compared with nonsmokers. The excess morbibity ratio in some instances may be as high as 200 percent. . . . The major influence of smoking is upon the incidence of sudden death, however; and the data now appear convincing that stopping smoking rather rapidly decreases this particular risk." *Id.*

112. Chiang, Pearlman, Ostrander & Epstein, *Relationship of Premature Systoles to Coronary Heart Disease and Sudden Death in the Tecumseh Epidemiologic Study*, 70 ANN. INTERN. MED. 1159 (1969). To add to the confusions of causation, it has been observed in regard to premature beats that only when this phenomenon occurs with ischemia are there serious ramifications. The incidence of ventricular premature beats in the general population is significant numerically. Walters, *Medical-Legal Implications of Acute Myocardial Infarctions and Sudden Death*, in LEGAL MEDICINE ANNUAL 1971, at 213, 225 (1971).

113. Council on Community Service and Education of the American Heart Association, *Report of the Committee on the Effect of Strain and Trauma on the Heart and Great Vessels*, 26 CIRCULATION 612, 612-13 (1962).

> In a sense, then, the physician speaks of *the* cause and the lawyer of *a* cause; however, the physician recognizes that arteriosclerosis is a disease in which a great many factors play a part. Indeed, it is now admitted that in any disease both genetic and environmental factors play a part.
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> . . . .
>
> [At the November 1961 symposium by the Committee on the Effect of Strain

An autopsy is vital. It is the single most important factor in retrospective view of the causation and mechanism of sudden death and myocardial infarction. Any conclusions drawn in the absence of an autopsy are frequently conjectural. Necessarily, there must be a time relationship between the supposed exciting event and the acute clinical sequelae. In our present state of knowledge, for environmental stress to be said to be casually related in any way, it should, at least, occur at or near the time of the clinical event. When one recalls that only 2.2 per cent of people are doing anything other than their usual and customary behavior at the time of their death, it would seem logical that hypertension, atherosclerosis, tobacco smoking, diet, weight and similar factors are substantially more important in the production of fatal cardiac disease than environment, effort or emotion.

The law seems to give substantial weight to "casual" factors in the production of myocardial disease and death which the medical community would be reluctant to substantiate. An adversary procedure is inherently amenable to allowing more than cold and logical weight to support the proponent's meager case, especially when buttressed by a distressed widow and a multitude of bills. But, to the cardiologist, "the slow evolution of coronary atherosclerosis throughout the individual's life, depending as it apparently does on heredity, cholesterol level, presence or absence of smoking, hypertension, obesity, and so on, seems more important that some minor environmental interplay near the end of this process."[114]

The most recent discussions of the Iowa law pertaining to pre-existing disease and accidental death were propounded by the United States District Court for the Southern District of Iowa, in *Jackson v. Continental Casualty Co.*,[115] and by the United States Court of Appeals for the Eighth Circuit in

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> and Trauma on the Heart and Great Vessels] . . . the following factors of causation were considered: racial, ethnic, genetic, and phylogenetic factors, the role of the intestinal flora, steroids, electrolytes, catecholamines and serotonin, physical effort and the emotions, uric acid metabolism, cardiovascular reflexes, the settling of blood cell masses to the lower side of the vessels during life, predisposing diseases, sexual discrepancy in the incidence of myocardial infarction, diet, meteorological and coagulation factors, inflammatory and metabolic factors in the vessel walls, intimal hemorrage, electrical activity within the blood vessels, anatomical factors, blood viscosity, fibrinolysis, platelets, chemical factors, and tobacco.
>
> . . . .
>
> The lawyer . . . would be satisfied with any one of these causes if it could be shown that it contributed to any appreciable degree to the heart disease or heart failure in the case under consideration. [emphasis in original]

Id. at 613. *See* Small, *Gaffing at a Thing Called Cause: Medico-Legal Conflicts in the Concept of Causation*, 31 TEXAS L. REV. 630 (1953) wherein it is said:

> Aggravation, acceleration, activation—to the doctor they are part and parcel of the natural and inevitable pathological process. . . . So understood, they leave little room for trauma in the causal spectrum. To aggravate aggravation, to accelerate acceleration, to make the inevitable more inevitable, are foreign to the doctor. True, fate may be hastened by a day or two, or slowed in the same degree, but fate remains; and its cause can scarce be laid to the fixing of the day.

Id. at 651.

114. Walters, *Medical-Legal Implications of Acute Myocardial Infarctions and Sudden Death*, in LEGAL MEDICINE ANNUAL 1971, at 213, 226 (1971).

115. 266 F. Supp. 782 (S.D. Iowa 1967), *aff'd*, 400 F.2d 285 (8th Cir. 1968).

Continental Casualty Co. v. Jackson.[116] The insured was Robert D. Jackson, a Judge of the Iowa District Court in Des Moines, Iowa. He was insured against death from " 'bodily injury caused by an accident . . . resulting directly and independently of all other causes in loss covered by this policy.' "[117] The Judge suffered a posterior myocardial infarction, following the voluntary lifting and carrying of his father-in-law, Herman Anderson, who had become unexpectedly incapacitated by illness. Judge Jackson, with the assistance of two other men, transported Anderson from one room in the Anderson home to another. Mr. Anderson, apparently in a semi-conscious state, grabbed onto various fixed objects as he was being carried. This made the task of moving him significantly more strenuous.[118]

The insured had no history of heart disease,[119] yet soon after Anderson had been moved, Judge Jackson experienced severe substernal pain and consequently was admitted into a hospital. In less than two weeks he had died.[120]

Expert witnesses for the beneficiaries testified that " 'The probable cause of the myocardial infarction . . . was the heavy lifting previous to the chest pain.' "[121] The myocardial infarction was the result of a coronary arterial occlusion, to some degree the result of the strain, and to some degree the result of arteriosclerosis.[122] Arteriosclerosis almost always is a condition pre-existing in patients experiencing heart attacks.[123] Experts for the beneficiaries testified

116. 400 F.2d 285 (8th Cir. 1968), *aff'g* Jackson v. Continental Cas. Co., 266 F. Supp. 782 (S.D. Iowa 1967).

117. Continental Cas. Co. v. Jackson, 400 F.2d 285, 286 (8th Cir. 1968).

118. Testimony showed that "as Mr. Anderson grabbed onto the various objects and walls, he disrupted the carriage and caused a jerking motion. . . . [T]here was an unusual strain placed upon various parties throughout their movements in carrying Mr. Anderson . . . . [T]he jerking motion tended to stop them 'just like box cars hitting together.' " *Id.* at 287.

119. It should be noted that no autopsy was performed. *Id.*

120. For a more detailed description of the facts of the "accident," see *Jackson v. Continental Casualty Co.*, 266 F. Supp. 782, 784-85 (S.D. Iowa 1967).

121. Continental Cas. Co. v. Jackson, 400 F.2d 285, 287 (8th Cir. 1968).

122. *Id.* This definition was given by Judge, now Chief Judge, Hanson in *Jackson v. Continental Casualty Co.*, 266 F. Supp. 782 (S.D. Iowa 1967):

> Arteriosclerosis is a common condition. It narrows and hardens arteries and vessels by the depositing of certain substances in the intima or lining of the artery or vessel. If sufficiently narrowed, the passage of blood may be blocked or a blood clot may occur because the intima is no longer smooth. Arteriosclerosis may affect the coronary arteries. The end result of narrowing or clotting in the coronary arteries is a myocardial infarction.

Id. at 793. The blockage of the arteries supplying blood to the heart muscle is, in medical terminology, the coronary occlusion. The deprivation of freshly oxygenated blood results in the death of a certain amount of coronary tissue, that is, an infarction of the myocardium. When an individual exerts himself physically, the heart rhythm increases and a proportionately greater supply of blood is required. If the demand is too great, the vessels being too constricted to allow sufficient blood to pass through them, an infarction of the muscle tissue will result. The probability of such a consequence is increased as the arteries become more narrow, and when the physical exertion is more severe.

123. One medical expert for the beneficiaries testified that he had never seen a patient who had suffered a myocardial infarction and not had arteriosclerosis. An expert for the defendant insurer testified that 98 per cent of persons having myocardial infarctions also have arteriosclerosis. Jackson v. Continental Cas. Co., 266 F. Supp. 782, 793 (S.D. Iowa 1967). The adage quoted by the court is suggestive of the medical attitude toward arteriosclerosis: " 'When the stage is set the play will go on.' " *Id.* at 794.

that "the proportionate relationship of strain to myocardial infarction is somewhere in the vicinity of 35%."[124]

While it could be said with assurance that a *medical* "but for" test would indicate both the pre-existing arteriosclerosis and the strenuous task were contributing proximate causes of the death of the insured, it is equally true that a disputable issue had been presented: Was the exertion in a legal sense the cause of death, "directly and independently of all other causes"?[125] The jury found that it was, and both the district[126] court and the court of appeals approved the decision.[127]

At the outset it should be stated that the courts have treated arteriosclerosis somewhat differently than other pre-existing diseases when considering problems of the concurrent causation of death.[128]

A branched analysis is required to fully comprehend the pattern followed by the court. A distinction, of cryptic significance, is made in categorizing policy provisions. The insurance contract may contain a "limiting clause" which extends coverage only to injuries resulting solely from accidental injuries, or the terms may additionally contain an "exclusionary clause" removing from coverage injuries resulting wholly or in part from any disease or bodily infirmity. As of the time of the *Jackson* decision, the Iowa supreme court had not construed the "directly and independently of all other causes" language.[129] Other phraseology, some quite similar, had been considered several times, but not without some apparent inconsistency.[130] In some decisions, the exclusionary form had been a basis for a more narrow approach to causation.[131]

In *Watters v. Iowa State Traveling Men's Association*[132] the court considered the propriety of submitting to the jury the question of whether the facts constituted a showing of accidental means, independent and exclusive of all

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124. *Id.* at 793.
125. *Id.* at 783.
126. *Id.* at 794.
127. Continental Cas. Co. v. Jackson, 400 F.2d 285, 292 (8th Cir. 1968).
128. A reasonable basis for the distinction is that in the instance of arteriosclerosis the disease necessarily is a contributing proximate cause of a heart attack. *See* Jackson v. Continental Cas. Co., 266 F. Supp. 782, 789 (S.D. Iowa 1967).

> [T]estimony of three experts in the instant case indicates the recovery would be impossible in all cases in which an insured was accidentally stricken by a heart attack if a sole cause rule were adopted. As this Court understands their testimony, there is never a heart attack or myocardial infarction without a prior arteriosclerotic condition.

Id. at 789-90.
129. See Annot., 84 A.L.R.2d 176 § 4 (1962) for a discussion of how limiting clauses and exclusionary clauses effect construction of insurance provisions.
130. A more comprehensive description of the development of the Iowa law can be found in *Jackson v. Continental Casualty Co.*, 266 F. Supp. 782, 786-90 (S.D. Iowa 1967).
131. Mahon v. American Cas. Co., 65 N.J. Super. 148, 167 A.2d 191 (App. Div. 1961). Although *Mahon* considered the distinction, it was held to be of little significance in a later case. Kievit v. Loyal Protective Life Ins. Co., 34 N.J. 475, 170 A.2d 22 (1961).

> "The Iowa supreme court has been impressed by the presence of exclusionary clauses. It has also attached great significance to strict wording in addition to or incorporated in the usual limiting clause." Jackson v. Continental Cas. Co., 266 F. Supp. 782, 792 (S.D. Iowa 1967).

132. 246 Iowa 770, 69 N.W.2d 1 (1955).

other causes. The insured, Dr. Phil Ganz Watters, had been diagnosed and treated as suffering from a serious condition of the heart known as congestive heart failure,[133] and from congestion of the kidneys.[134] After a stay in the hospital, the insured returned to his normal, and very active medical practice. Ten months later Dr. Watters slipped on some ice near his home. His death occurred two weeks following this episode. The trier of fact heard expert testimony that the physical shock of the fall caused the insured's death.[135] Defense experts testified that the cause of death was congestive heart failure.[136] The court held that it was proper for the jury to consider the question of proximate cause and that the evidence adequately supported the verdict for the insured.[137]

In *Watters* there was credible testimony that the pre-existing disease was in no way a precipitating cause in the death of the insured.[138] With reference to the death of Judge Jackson, surely the same claim could not have been made.[139] Thus *Watters* did not set a binding precedent to be followed by the United States district court in *Jackson*, because in the former, even under the strictest interpretation of the insurance policy, the jury could have found for the plaintiff beneficiaries.

The federal judiciary was therefore required in *Jackson* to predict what determination the Iowa court would make if presented the facts of that case.

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133. Congestion is defined as "[t]he presence of an abnormal amount of blood in the vessels of a part, due either to increased afflux or to an obstruction to the return flow." T. STEDMAN, STEDMAN'S MEDICAL DICTIONARY 278 (1972).

134. *See* 4A R. GRAY, ATTORNEYS' TEXTBOOK OF MEDICINE ¶ 286.22(2b) (1972).

135. The expert medical witnesses for the defendant insurer contended that the insured suffered "Stokes-Adams attack," which is a fainting caused by a weakened heart. If the pre-existing disease caused the "accident," there could be no recovery. This case presented a classic confrontation of experts. For the defendant Dr. Philip Keil stated: "'It is my opinion that Dr. Watters died of heart failure and not of myocardial infarction.'" Dr. Daniel Glomset agreed: "'I believe Dr. Watters died of congestive failure and additional etiologic and causative agents . . . .'" For the plaintiff, Dr. Harold Margulies testified, "'I believe his death was due to the fall which occurred, which injured the chest wall and the underlying structures.'" Dr. Walter Anderson was supportive: "'I don't think any other disease had anything to do with [the death of Dr. Watters].'" Watters v. Iowa State Traveling Men's Association, 246 Iowa 770, 782-86, 69 N.W.2d 1, 8-10 (1955). Congestive heart disease is significantly different from arteriosclerosis as a pre-existing disease, for it could not be said that a sclerotic condition would not contribute to the precipitation of an infarction in some degree.

136. *See* note 135 *supra*. Watters v. Iowa State Traveling Men's Ass'n, 246 Iowa 770, 69 N.W.2d 1 (1955). The head-on confrontation of the experts, including diametric interpretations of the same electrocardiogram results, yielded the following observation by the court:

> It has been said that "an ounce of fact is worth a pound of opinion". . . . The hard core of undisputed fact testimony of Dr. Watters' continuous service for almost two years prior to his accidental fall—substantial, tangible evidence which one can get a solid grip on, and which is wholly lacking on defendant's side—gives strong support to the opinions of plaintiff's medical witnesses as to the cause of death of Dr. Watters. The able trial court rightly denied defendant's motion for a directed verdict at the close of all of the evidence.

Id. at 787-88, 69 N.W.2d at 10-11.

137. *Id.* at 788, 69 N.W.2d at 11. In addition the court found that the instructions to the jury were sufficient. *Id.* at 789-90, 69 N.W.2d at 12.

138. *See* note 135 *supra*.

139. Expert witness for the plaintiff beneficiaries admitted the relevance of the pre-existing sclerotic condition. Jackson v. Continental Cas. Co., 266 F. Supp. 782, 793 (S.D. Iowa 1967).

This probable future course of Iowa decisions suggested by the federal court was, however, projected from the *Watters* opinion. That the limiting clause does not mean what it literally states was historically supported by Iowa cases[140] and was well-supported by the majority of other jurisdictions.[141] The law is reflected with fidelity in the approved instructions to the jury. In regard to the insurance policy limiting clause which required that death be the result of an accident, directly and independently of all other causes, the court charged:

> Direct cause means the moving or precipitating cause. A disease or condition may contribute to death from a medical standpoint or as a remote cause; but if this factor would not apart from the accident, if any you find, have caused the death, then and in that event, the disease would not be the moving or precipitating cause of the death.
>
> Independently of all other causes means independent of any other cause which would have apart from any accident have caused the death.
>
> An accident may be a direct cause of death even though the accident aggravated a disease or condition which then contributed to the death if that disease or condition would not without the accident have produced the death at that time.[142]

This decision, while accomplishing a reasonable result, that is, rejection of the concept that a sclerotic condition would preclude recovery, does leave one question to be answered: Could an exclusionary clause be interpreted so as to reach the result avoided in *Jackson*?[143]

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140. Lickleider v. Iowa State Traveling Men's Ass'n, 184 Iowa 423, 166 N.W. 363 (1918). The insured had suffered a heart attack and had died following a physical trauma of sorts. Experts testified that he was afflicted with advanced arteriosclerosis. The Iowa supreme court reversed the trial court, holding that the question of cause of death was for the jury. The court stated:

> [There was] evidence that the sclerosis discovered in this case was such only as is ordinarily found in men of his size and age, and the weight and influence to be accorded to these conflicting opinions was for the jury. If the arteries of the deceased were sclerotic, but the sclerosis was such only as is the natural or usual accompaniment of increasing years, the fact, if it be a fact, that a bodily injury sustained by him would be more likely to be fatal than would be the case if such condition did not exist would not prevent a recovery on the policy should it otherwise appear that the injury was of the nature or kind described in the contract.

Id. at 427, 166 N.W. at 365. Also supporting the federal district court interpretation were: *Clark v. Iowa State Traveling Men's Association*, 156 Iowa 201, 135 N.W. 1114 (1912) and *Meyer v. Fidelity & Casualty Co.*, 96 Iowa 378, 65 N.W. 328 (1895). *But see* Michener v. Fidelity & Cas. Co., 200 Iowa 476, 203 N.W. 14 (1925); Keen v. Continental Cas. Co., 175 Iowa 513, 154 N.W. 409 (1915); Vernon v. Iowa State Traveling Men's Ass'n, 158 Iowa 597, 138 N.W. 696 (1912); Binder v. National Masonic Accident Ass'n, 127 Iowa 25, 102 N.W. 190 (1905); Delany v. Modern Accident Club, 121 Iowa 528, 97 N.W. 91 (1903).

141. See cases collected in Annot., 82 A.L.R.2d 611 (1962).

142. Continental Cas. Co. v. Jackson, 400 F.2d 285, 290-91 (8th Cir. 1968).

143. In *Binder v. National Masonic Accident Association*, 127 Iowa 25, 102 N.W. 190 (1905), an exclusionary clause was included in the policy of insurance. The court, while alluding to the exclusionary clause, held that where a pre-existing disease (in that case not arteriosclerosis) contributed to a result, the result was not within the policy provisions. The attitude of the court was recently affirmed in *Benzer v. Iowa Mutual Tornado Insurance Association*, 216 N.W.2d 385 (Iowa 1974) wherein it was stated: "An insurer, having affirmatively expressed coverage through broad promises, assumes a duty to define any limitations or exclusionary clauses in clear and explicit terms." *Id.* at 388.

V. CONCLUSION

The public, the insurance companies and the courts, the experts, the litigants and their attorneys will continue to be plagued by the definitional problems of "accident" in the insurance context. The present approach appears to be ad hoc, marshaling all facts and expert opinions and submitting the issues to a jury under this evanescent legal concept. There does not seem to be an adequate formula by which a logical criterion can be used to determine whether an accident has occurred. Consistency is thus difficult to obtain.

Perhaps a better approach might be to borrow a recent concept of tort law[144] and apply a comparative yardstick to the problems in this field. By employing such a method a jury could, for example, arrive at a decision that death occurred twenty per cent from causes accidental and eighty per cent from pre-existing disease. Jury computation could be adequately regulated by a statutory formula allowing the trier of fact to apply differing degrees of weight to various elements of causation.

Although this procedure would technically go beyond coverage contemplated expressly in the contract of insurance,[145] it would more accurately reflect two realities of litigation. In the interest of judicial economy, pre-trial settlements are encouraged, and they are in fact normally attempted by the parties. Essentially the jury would be placed in the position of dictating an equitable settlement. Secondly, juries are known to indulge in such comparative thinking in reaching a verdict, regardless of the charge of the court. The present system does not allow the trier of fact to properly weigh scientific opinion evidence against the factual situation. It is inherently polarizing in its effect; either the insured or the insurer is correct and there is no middle ground. Injustices frequently result and the case law becomes cluttered with inconsistencies. By permitting this latitude in *Jackson*,[146] the jury could have found that of the forces contributing to death thirty per cent were accidental and seventy per cent were pre-existing. This finding would have been scientifically generous, but more in line with medical knowledge and opinion than the verdict obtained. This

144. W. PROSSER, THE LAW OF TORTS § 67 (4th ed. 1971). The tort law concept of comparative negligence allows apportioning fault and hence damages. Using this model, the jury could be permitted to apportion cause of death or accidental injury.

145. Although the insurer may not have contemplated coverage for death or injury only partially caused by accident, the insurer most probably does not contemplate that its contract of insurance would be construed to mean other than what it literally says, which often happens. This type of construction, or misconstruction, is usually performed under the premise that the reasonable policyholder would not have contemplated the coverage literally provided or excluded in the policy. Linden Motor Freight Co. v. Travelers Ins. Co., 40 N.J. 511, 524-25, 193 A.2d 217, 225 (1963). Would it be unreasonable for the insured to expect that if he were to die or to be injured in a manner that was partially precipitated by an accident, that he would receive partial compensation? If the jury attitude toward insurance companies and the insurers' frequent desire to settle are considered, it would not be unreasonable to suggest that some insurers might welcome such a flexible new approach. *See* Siegal, *Silent Growth of Comparative Negligence in Common Law Courts*, 12 CLEV.-MAR. L. REV. 462 (1963). *See also* Wilson, *Contributory, Concurrent, or Comparative Negligence Under the New Iowa Statute?*, 15 DRAKE L. REV. 97, 100-02 (1966).

146. Jackson v. Continental Cas. Co., 266 F. Supp. 782 (S.D. Iowa 1967), *aff'd* 400 F.2d 285 (8th Cir. 1968).

approach would avoid the circumstance where the expert is required to make his opinion absolute if it is to have any impact at all.[147] Such is a contortion of opinion, as causation is not capable of unqualified medical categorization. The proposed approach is no panacea and problems will remain, but the present definitional condition of "accident" in the insurance context begs for improvement.

147. "The doctor has his cause and the lawyer his, and each is different from the other . . . ." Small, *Gaffing at a Thing Called Cause: Medico-Legal Conflicts in the Concept of Causation*, 31 TEXAS L. REV. 630, 658 (1953). See *Watters v. Iowa State Traveling Men's Association*, 246 Iowa 770, 791-92, 69 N.W.2d 1, 12-13 (1955), wherein a possible result of medical absolutism is recounted.

PYRAMIDING UNINSURED MOTORIST COVERAGE—HAS IOWA JOINED THE MAJORITY?

Charles G. Neighbor†

I. INTRODUCTION

Limited indemnification of the victim of a negligent uninsured motorist has at last come under the scrutiny of the Iowa supreme court. Until the case of *Benzer v. Iowa Mutual Tornado Insurance Association*[1] was decided by the Iowa court in March of 1974, the insurance industry believed that it had found a haven from the rising tide of judicial decisions which permit automobile policyholders to *stack* or *pyramid*[2] their policy's limits of coverage to more fully compensate them for their losses. The *Benzer* decision is a significant step forward by the court in recognizing that the public has the right to receive the protection from uninsured motorists that the Iowa Legislature intended when it enacted chapter 516A, of the *Iowa Code*, Protection Against Uninsured or Hit-and-Run Motorists.[3]

The insurance industry has consistently attempted to limit its liability to the victim of an uninsured motorist through various devices incorporated into its policies. The clear majority of courts now reject the earlier decisions which permitted insurers to charge premiums for uninsured motorist coverage, limit liability and reap windfall profits. These courts are holding that the ambiguity of the insurance contracts, coupled with the policy of the legislatures to protect the public from the negligent uninsured motorist, can only result in entitling an insured to coverage which he believed he purchased.

This article will examine the foundation upon which the Iowa court has established the beginning of a new era for the insurance consumer. Though the court has only taken its first step in this direction, one cannot resist the

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1. 216 N.W.2d 385 (Iowa 1974).

2. Stacking or pyramiding refers to an insured person, within the uninsured motorist endorsement of an automobile insurance policy, aggregating the limits of coverage available to compensate for the loss. This may occur where the insured combines limits of more than one automobile insured by a common policy. Dyer v. Nationwide Mut. Fire Ins. Co., 276 So. 2d 6 (Fla. 1973); Sturdy v. Allied Mut. Ins. Co., 203 Kan. 783, 457 P.2d 34 (1969). It also occurs where the limits of several policies are combined. *See* Tucker v. Government Employees Ins. Co., 288 So. 2d 238 (Fla. 1973); Clayton v. Alliance Mut. Cas. Co., 212 Kan. 640, 512 P.2d 507 (1973); Blakeslee v. Farm Bureau Mut. Ins. Co., 388 Mich. 464, 201 N.W.2d 786 (1972). The concept of stacking or pyramiding has also been held applicable to medical payment coverage under an automobile insurance policy in situations as set forth above. *See* Allstate Ins. Co. v. Zellars, 452 S.W.2d 539 (Tex. Civ. App. 1970). In any case where stacking or pyramiding is to be validly applied, the insured must have damages in excess of the policy's stated limits of recovery.

3. IOWA CODE ch. 516A (1973).