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The Foolish Insured and Double Indemnity

have a working knowledge of the Labor Management Relations Act[29] whereas the state courts do not.

It is submitted that Congress should amend section 301(a) so that the task of formulating federal common law in the field of labor management relations is entrusted exclusively to the federal courts. Participation by the state courts can only lead to a disharmony incompatible with the *Lincoln Mills* concept of an all-embracing body of federal law.

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THE FOOLISH INSURED AND DOUBLE INDEMNITY

Judicial interpretation of the words "accidental"[1] and "accident"[2] in insurance policies has been the subject of extensive litigation.[3] However, there is a limited aspect of the subject which is of some importance in its own right: the situation where double indemnity is sought under an accidental death insurance policy when the insured's death resulted from his own foolishness.

This particular problem was presented in the recent federal case from California of *New York Life Ins. Co. v. Harrington*[4] where a beneficiary under a life policy sought to recover double indemnity for the death of her husband, who shot himself, by contending that the deceased relied upon the gun's safety mechanism and that the firing of the gun was unintended. Prior to the shooting, the insured, knowing

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[29]The Circuit Courts frequently review the National Labor Relations Board's conclusions of the law. The Board's orders carry no sanctions and if an order is not complied with, the Board must secure enforcement by filing a petition in the appropriate federal court of appeals. Similarly, the respondent may file a petition with the federal court of appeals if it desires to have the Board's order set aside. Upon such a petition the court is authorized to make a decree setting aside, enforcing, or modifying and enforcing the order as so modified. See, in addition to the provisions of the Act, National Labor Relations Board—Procedures, issued and effective August 23, 1947; National Labor Relations Board—Rules and Regulations, Series 5, effective August 23, 1947.

[1]Fletcher v. Security Life & Trust Co., 220 N.C. 148, 16 S.E.2d 687 (1941); United States Fid. &Guar. Co. v. Briscoe, 205 Okla. 618, 239 P.2d 754 (1951).

[2]Phelps Dodge Corp. v. De Witt, 63 Ariz, 379, 162 P.2d 605 (1945); Radcliff v. Southern Aviation School, 209 S.C. 411, 40 S.E.2d 626 (1946).

[3]Metropolitan Life Ins. Co. v. Roma, 97 Colo. 493, 50 P.2d 1142 (1935); Donohue v. Washington Nat'l Ins. Co., 259 Ky. 611, 82 S.W.2d 780 (1935); McGinley v. John Hancock Mut. Life Ins. Co., 88 N.H. 108, 184 Atl. 593 (1936); Raven Halls v. United States Fid. & Guar. Co., 254 N.Y.S. 589, 142 Misc. 454 (Sup. Ct. 1932).

[4]299 F.2d 803 (9th Cir. 1962).

the gun to be loaded, pulled the trigger several times producing clicking sounds, but the safety prevented discharge. When asked to stop, the insured ventured to prove the value of the safety by placing the gun to his head and pulling the trigger. Inadvertently, the safety was released and the insured was mortally wounded. The sole question was whether death "resulted directly and independently of all other causes, from accidental bodily injury."[5] The United States Court of Appeals for the Ninth Circuit, applying California law,[6] affirmed the judgment of the lower court in favor of the plaintiff and held that death was accidental because under the circumstances death was an unforeseeable and unexpected result.[7]

There is a concurrence of opinion that the term "accident" does not have an exact and technical legal meaning,[8] but rather is defined in broad statements according to the understanding of the reasonable man.[9] A generally approved definition, followed by many jurisdictions,[10] was set forth by the Supreme Court in the early case of *United States Mut. Acc. Ass'n v. Barry*[11] where an accident was defined as an occurrence happening by chance; unexpectedly taking place; not according to the usual course of things; or not expected; and that if a result follows from ordinary means, voluntarily employed in a not unusual or unexpected way, it is not accidental. A modern California case[12] adopts a similar definition, characterizing an accident as "a casualty—something out of the usual course of events, and which happened suddenly and unexpectedly and without any design of the person injured."[13]

Because of the scope of such definitions, there are conflicting decisions concerning accidental death in insurance policies.[14] In the

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[5]Id. at 805.

[6]Erie R.R. v. Tompkins, 307 U.S. 64 (1938).

[7]299 F.2d at 806.

[8]Lickleider v. Iowa State Traveling Men's Ass'n, 184 Iowa 423, 166 N.W. 363 (1918); Goethe v. New York Life Ins. Co., 183 S.C. 199, 190 S.E. 451 (1937).

[9]Arthur A. Johnson Corp. v. Indemnity Ins. Co. of N. America, 7 N.Y.2d 222, 196 N.Y.S.2d 678, (1959).

[10]Allied Mills v. Miller, 9 Ill. App. 2d 87, 132 N.E.2d 425 (1956); Gaydette v. Miller, 1 N.J. Super. 145, 62 A.2d 749 (App. Div. 1948); Warner v. Nationwide Mut. Ins. Co., 16 Misc. 2d 604, 189 N.Y.S.2d 617 (Sup. Ct. 1959); Campbell v. Jones 73 Wash. 688, 132 Pac. 635 (1913).

[11]131 U.S. 100 (1889).

[12]Zukerman v. Underwriters at Lloyds, 42 Cal. 2d 460, 267 P.2d 777 (1954).

[13]Id. at 784.

[14]Compare John Handcock Mut. Life Ins. Co. v. Plummer, 181 Md. 140, 28 A.2d 856 (1942); and Dorsey v. Prudential Ins. Co., 124 W. Va. 100, 19 S.E.2d 152 (1942), with Travelers Ins. Co. v. Johnston, 204 Ark. 307, 162 S.W.2d 480 (1942); and Newsoms v. Commercial Cas. Inc. Co., 147 Va. 471, 137 S.E. 456 (1927).

decision of the principal case, the court has set forth a most liberal view in accidental death cases by alllowing double recovery to the insured where death resulted from his foolhardy conduct.[15] Other jurisdictions, notably Pennsylvania,[16] North Carolina,[17] Tennessee,[18] and Georgia,[19] take a contrary position and refuse recovery under similar circumstances.

There are three slightly different yet interrelated rationales used by the courts denying recovery to the insured who is a victim of his own foolishness. These are assumption of the risk, forseeability of the risk and presumed intent.

In some cases the courts seem to employ a rationale analogous to that used in the "assumption of the risk"[20] doctine. In the Pennsylvania case of *Kinavey v. Prudential Ins. Co. of America,*[21] the beneficiary was denied double indemnity where the insured had voluntarily and in jest climbed on a bridge railing and fell to his death. The court held that deceased realized the risk and was warned, yet he voluntarily placed himself in a position of great danger and by his conduct was guilty of such recklessness that falling from the bridge was a reasonably expected result, thereby negating any theory of accident. Similarly, double indemnity was denied by North Carolina in *Allred v. Prudential Ins. Co. of America,*[22] in which the insured had voluntarily lain down in the middle of the road to display his bravery, and death ensued as a result of his being run over by an automobile. Here the court held that the risk was so obviously dangerous as naturally to result in loss of life.

Other courts employ the theory of "foreseeability of the risk."[23] In *Baker v. National Life & Acc. Co.*[24] double indemnity recovery

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[15]Supra note 7.

[16]O'Neill v. Metropolitan Life Ins. Co., 345 Pa. 232, 26 A.2d 898 (1942): Zuliskey v. Prudential Ins. Co., 159 Pa. Super. 363, 48 A.2d 141 (1946).

[17]Allred v. Prudential Ins. Co. of America, 247 N.C. 105, 100 S.E.2d 226 (1957); Scarborough v. World Ins. Co., 244 N.C. 502, 94 S.E.2d 558 (1956).

[18]Mutual Life Ins. Co. v. Distretti, 159 Tenn. 138, 17 S.W.2d 11 (1929).

[19]Thompson v. Prudential Ins. Co. of America, 84 Ga. App. 214, 66 S.E.2d 119 (1951); Green v. Metropolitan Life Ins. Co. 67 Ga. App. 520, 21 S.E.2d 465 (1942); Metropolitan Life Ins. Co. v. Anglin, 66 Ga. App. 660, 19 S.E.2d 171 (1942).

[20]Loynes v. Loring B. Hall Co., 194 Mass. 221, 80 N.E. 472 (1907); McGeary v. Reed, 105 Ohio App. 111, 151 N.E.2d 789 (1957).

[21]149 Pa. Super. 568, 27 A.2d 286 (1942).

[22]247 N.C. 105, 100 S.E.2d 226 (1957).

[23]Rowe v. United Commercial Travelers Ass'n, 186 Iowa 454, 172 N.W. 454 (1919); Shaw v. Barnard, 229 N.C. 713, 51 S.E.2d 295 (1949); Sargent v. Central Acc. Ins. Co., 112 Wisc. 29, 87 N.W. 796 (1901).

[24]201 Tenn. 247, 298 S.W.2d 715 (1956).

was refused by Tennessee where insured was shot after he had placed a can on his head to be used as a target by his companion. The court stated that death is not caused by accident if it is a natural and foreseeable result of a voluntary, though unusual and unnecessary act or course of conduct of the insured. The doctrine of presumed intent was used by Georgia in denying recovery in *Thompson v. Prudential Ins. Co. of America*[25] where the insured fatally shot himself while playing "Russian Roulette." The court said that one engaging in such a bizarre pastime with a lethal weapon, if he is compos mentis, knowing he is courting death, will be held to have intended the obvious result. That is, an effect which is the natural consequence of an act or course of action is not an accident; it is either the result of actual design or it falls under the maxim that every man must be held to have intended the natural and probable consequence of his deeds.

The court in the principal case seems to disregard the recklessness of the original act and emphasizes the firing of the gun. Because the insured relied on past instances in which the gun did not fire, the court finds it easier to say that the inadvertent release of the safety was unforeseeable.[26] When the insured's death is the result of a voluntary act, in the performance of which there is some misadventure or slip,[27] the death is caused by an accident. This is analogous to the situation where the insured acted voluntarily but in ignorance of a material fact.[28] This approach is different from that taken by other courts, who have said that a person who does a needless and dangerous act is chargeable with knowledge of the obvious and that which is usual or could be expected.[29] And, notwithstanding that the insured was ignorant of a material fact, if he "might have known it"[30] by the exercise of ordinary care, by this better view, death cannot be considered the result of an accident.

The federal court in the principal case made a curious distinction in interpreting California law applicable to accidental death cases, for it had previously been held that where the insured had foolishly provoked an encounter and was killed by the hand of another, double indemnity recovery would be denied.[31] Generally, death resulting

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[25]84 Ga. App. 214, 66 S.E.2d 119 (1951).

[26]Supra note 7.

[27]Pacific Mut. Life Ins. Co. v. Schlakzug, 143 Tex. 264, 183 S.W.2d 709 (1944); Jennings v. National Life & Acc. Ins. Co., 226 Mo. App. 777, 46 S.W.2d 226 (1932).

[28]Horton v. Travelers' Ins. Co., 45 Cal. App. 462, 187 Pac. 1070 (1920).

[29]Aetna Life Ins. Co. v. Kent, 73 F.2d 685 (6th Cir. 1934).

[30]Thompson v. Prudential Ins. Co. of America, 84 Ga. App. 214, 66 S.E.2d 119, 122 (1951).

[31]Eraldi v. North Am. Acc. Ins. Co., 20 F. Supp. 735 (N.D. Cal. 1937).

from bodily injuries effected through accidental means, within the double indemnity provision of a life insurance policy, does not include the insured's death resulting from wounds received in an encounter provoked by him or in which he was the aggressor.[32] In a leading California case[33] a similar outcome was reached. The court set forth the doctrine that, where a person thus invites another to a deadly encounter, and does so voluntarily, his death cannot be regarded as accidental. Quoting from a prior federal circuit court opinion, the court said, "It might as well be claimed that death is accidental when a man intentionally throws himself across a railroad track in front of an approaching train, or leaps from a high precipice, or swallows a deadly poison."[34] Although these cases are not identical to the principal case, they seem indistinguishable in legal principle. In both cases the participants placed themselves in great danger and foolishly assumed hazardous risks. Indeed, it may be said that toying with a loaded gun by directing it to one's head and pulling the trigger, under the objective test of the reasonable man, makes death equally as foreseeable, if not more so, then entering into a ordinary fight.

In conclusion, it is submitted, that although the line of demarcation as to when foreseeability ends and the unexpected begins is not a definite one, courts should be hesitant to embark on the line of reasoning employed by the court in the principal case. Such cases must be carefully scrutinized by the court; for it is in accordance with human nature that where double indemnity is provided for in the case of accidental death, reasons are often sought to justify an accident. Therefore, under circumstances similar to those in the principal case, the better rule denies recovery to the double indemnity claimant.[35] Foolishness, especially of such a nature as to result in the loss of human life, should not be the basis for reward.

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[32]Prudential Life Ins. Co. v. Overby's Adm'x, 251 Ky. 750, 65 S.W.2d 1006 (1933); Harrison v. Prudential Ins. Co. of America, 54 Ohio App. 279, 6 N.E.2d 991 (1936); General Acc., Fire & Life Assur. Corp. v. Hymes, 77 Okla. 20, 185 Pac. 1085 (1919); Hope v. New York Life Ins. Co., 186 S.C. 85, 195 S.E. 110 (1938); Mutual Benefit Health & Acc. Ass'n v. Ryder, 166 Va. 446 185 S.E. 894 (1936).

[33]Price v. Occidental Life Ins. Co., 169 Cal. 800, 147 Pac. 1175 (1915).

[34]Id. at 1176.

[35]Trivette v. New York Life Ins. Co., 283 F.2d 441 (6th Cir. 1960); Baker v. National Life & Acc. Ins. Co., supra note 24, at 716, 717.