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## Apoplexy in Law

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# APOPLEXY IN LAW\*

KURT GARVE

## ACCIDENTAL APOPLEXIES

Decisions are numerous in support of the claim that apoplexy may be initiated, superinduced, or caused by aggravation of preexisting infirmities, thru external violences.

Workmen's Compensation litigation offers probably the finest distinctions of factual sets. They give material for valuable evidentiary interpretations and comparisons to other causes of actions.

Compensation has been awarded where apoplexy resulted from blows,<sup>177</sup> falls,<sup>178</sup> strains and other overexertion,<sup>179</sup> collision,<sup>180</sup> noxious gases,<sup>181</sup> meteorological dangers and artificial heat,<sup>182</sup> excitement,<sup>183</sup> and so on.<sup>184</sup> In many cases there is a combination of vulnerating forces.

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\*Continued from the April, 1937 issue, p. 174.

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<sup>177</sup>*Yodis v. Philadelphia & Reading Coal & Iron Co.*, 269 Pa. 586, 113 Atl. 73 (1921); *Andrzejewski v. Northwestern Fuel Co.*, 158 Wis. 170, 148 N. W. 37 (1914); *Kingston-Pocahontas Coal Co. v. Maynard*, 209 Ky. 431, 273 S. W. 34 (1925), rehearing denied (1925); *Frey v. Kerens-Donnewald Coal Co.*, 271 Ill. 121, 110 N. E. 824 (1915); *Freeman Coal Mining Co. v. Industrial Commission et al.*, 312 Ill. 556, 144 N. E. 326 (1924); *M. P. Moller Motor Car Co., Inc. v. Unger*, 166 Md. 198, 170 Atl. 777 (1934); *Southern Cement Co. v. Walthall*, 217 Ala. 645, 117 So. 17 (1928), rehearing den. (1928). Contra: *Chicago, R. I. & M. Ry. Company v. Harton*, 40 Tex. Civ. App. 235, 88 S. W. 857 (1905)—M. & S.; *Broadbent's Case*, 240 Mass. 449, 134 N. E. 632 (1922); *Barton v. Pittsburgh Coal Co.*, 113 Pa. Superior Ct. 454, 173 Atl. 678 (1934); *Hercules Powder Co. v. Nieratko*, 113 N. J. L. 195, 173 Atl. 606 (1934); and see cases under other forms of injury.

<sup>178</sup>*Van Watermeullen v. Industrial Commission*, 343 Ill. 73, 174 N. E. 846 (1931); *Kelso v. Rice*, 146 Md. 267, 126 Atl. 93 (1924); *Maxon v. Swift & Company*, 158 Minn. 491, 198 N. W. 133 (1924); *Townsend Grace Co. Inc. v. Ackerman*, 158 Md. 34, 148 Atl. 122 (1930); *Blair v. Village of Coleraine*, 177 Minn. 376, 225 N. W. 284 (1929); *Roach v. Oswald Lever Co.*, 274 Pa. 139, 117 Atl. 785 (1922); *Carvey v. W. D. Young & Co.*, 218 Mich. 342, 188 N. W. 392 (1922); *Powers Storage Co. v. Industrial Commission*, 340 Ill. 498, 173 N. E. 70 (1930); *Cook County v. Industrial Commission*, 327 Ill. 79, 158 N. E. 405 (1927); *Benjamin v. Kurnick*, 5 N. J. Misc. 1095, 139 Atl. 440 (1927); *J. M. Guffey Petroleum Co. v. Dinwiddie*,—Tex. Civ. App.—, 168 S. W. 439 (1914), 182 S. W. 444 (1915); *Cusick's Case*, 260 Mass. 421, 157 N. E. 596 (1927); *Seymour Woolen Mills v. Ward*,—Ind. App.—, 192 N. E. 892 (1934); *State ex rel. Simmers v. District Court of Stearns County*, 137 Minn. 318, 163 N. W. 667 (1917); *Selaya v. Ruthven & Cerrano et al.*, 5 Cal. Ind. Acc. Com. Dec. 238 (1918); Contra: *Hansen v. Turner Const. Co.*, 224 N. Y. 331, 120 N. E. 693 (1918); *Kelly v. Nichols*, 199 App. Div. 870, 191 N. Y. S. 445 (1921); *Feldman's Case*, 240 Mass. 555, 134 N. E. 251 (1922); *California Notion & Toy Co. v. Industrial Acc. Com.*, 59 Cal. App. 225, 210 Pac. 524 (1922); *Chilton v. Louisiana Cent. Lumber Co.*, 12 La. App. 299, 125 So. 457 (1929); *Dowling v. Public Service Production Co.*, 6 N. J. Misc. 391 (1929); *In re Sanderson's Case*, 224 Mass. 558, 113 N. E. 355

Fall violences are particularly persuasive, since they exhibit the characteristics of blows, strains, and other traumata. There are multiple, contemporaneous, or quickly succeeding vulnerating forces. The blow upon the body is due to the impact upon the ground or some other object. Combined with the fall are mental

(1916); *Hamilton v. Congoleum Nairn, Inc.*, 6 N. J. Misc. 359, 145 Atl. 540 (1928); *Frank Martin, Laskin Co. v. Industrial Commission of Wisconsin*, 172 Wis. 548, 179 N. W. 740 (1920); *Bierck v. Spiegel Furniture Co.*, 99 Ind. App. 340, 192 N. E. 726 (1934); *Dailey v. McGivray Stone Company*, 3 Cal. Ind. Acc. Com. Rep. 144 (1916); *McAdoo v. Cudahy Packing Co. etc.*, 2 Cal. Ind. Acc. Com. Rep. 500 (1915); and see cases under other injuries.

<sup>179</sup>*Manning v. Pomerene*, 101 Neb. 127, 162 N. W. 492 (1917); *Smallegan v. John Smallegan & Sons*, 268 Mich. 245, 256 N. W. 435 (1934); *Samoskie v. Philadelphia & Reading Coal & Iron Co.*, 280 Pa. 203, 124 Atl. 471 (1924); *Fowler v. Risedorph Bottling Co.*, 175 App. Div. 224, 124 Atl. 471 (1924); *McCoy v. Spriggs*, 102 Pa. Superior Ct. 500, 157 Atl. 523 (1931); *Beck Mining Co. v. State Industrial Commission*, 88 Okla. 34, 211 Pac. 69 (1922); *Honis v. Coxie Bros. & Co., Inc.*, 95 Pa. Superior Ct. 209 (1928); *In the Matter of Pickereil v. Schumacher*, 242 N. Y. 577, 152 N. E. 434 (1926); *Doehler Die Castings Co. v. McNeely*, 21 Ohio App. 148, 152 N. E. 792 (1925), motion overruled (1926); *Kallgren v. C. W. Lundquist Co.*, 172 Minn. 489, 216 N. W. 241 (1927); *Contra: Diriscavage v. Pennsylvania Coal Co.*, 96 Pa. Superior Ct. 189 (1929); *Singlaub v. Industrial Acc. Com. of Calif.*, 87 Cal. App. 324, 262 Pac. 411 (1927); *Rocco v. Ellworth Collieries Co.*, 111 Pa. Superior Ct. 508, 170 Atl. 316 (1934); *Weissman v. Philadelphia Electric Co.*, 111 Pa. Superior Ct. 353, 170 Atl. 318 (1934); *Whitecavage v. Philadelphia & Reading Coal & Iron Co.*, 116 Pa. Superior Ct. 540, 176 Atl. 757 (1935); *Kitka v. Standard Underground Cable Co.*, 3 N. J. Misc. 951; *Lesko v. Lehigh Valley Coal Co.*, 270 Pa. 15, 112 Atl. 768 (1921); *Orchard & Wilhelm Co. v. Petersen*, 127 Neb. 476, 256 N. W. 37 (1934); *Stover v. Davis*, 110 Kan. 808, 205 Pac. 605 (1922); *Horvath v. Town of Highland*, 99 Ind. App. 472, 192 N. E. 897 (1934); *Texas Employers' Ins. Ass'n. v. McGrady*,—Tex. Civ. App.—, 296 S. W. 920 (1927), rehearing den. (1927); *Lybolt v. W. H. Hinman Inc.*, 85 N. H. 262, 157 Atl. 579 (1931); *Young v. Wells Fargo Bank & Trust Company etc.*, 12 Cal. Ind. Acc. Com. Rep. 139 (1925); *Crews v. Moseley Bros.*, 148 Va. 125, 138 S. E. 494 (1927); *McFadden v. Lehigh Navy Coal Co.*, 111 Pa. Superior Ct. 501, 170 Atl. 314 (1934); and see other injuries.

<sup>180</sup>*In Emmitt v. Key System Transit Co.*, 12 Cal. Ind. Acc. Com. Rep. 194 (1925) there was prior good health; autopsy disclosed no pathology accounting for the hemorrhage. There was excessive, abrupt, sudden high blood pressure.

<sup>181</sup>*Powers Storage Co. v. Industrial Commission*, 340 Ill. 498, 173 N. E. 70 (1930); noxious gases at first cause dizziness, whereafter the fall or blow on the head leads to apoplexy. *Contra: Howel v. St. Clair Coal Company*, 95 Pa. Superior Ct. 310 (1928), caisson-disease.

<sup>182</sup>*Murray v. H. P. Cummings Const. Co.*, 197 App. Div. 903, 188 N. Y. S. 193 (1921); *Hull's Case*, 125 Me. 135, 131 Atl. 391 (1925); *Van Watermeullen v. Industrial Commission*, 343 Ill. 73, 174 N. E. 846 (1931); *Beck Mining Co. et al. v. Industrial Commission*, 88 Okla. 34, 211 Pac. 69 (1922); *Clemens v. Cornish*, 295 Pa. 73, 144 Atl. 821 (1929); *Doehler Die Castings Co. v. McNeely*, 21 Ohio App. 148, 152 N. E. 792 (1925); *W. A. Jones Foundry & Machine Co. v. Industrial Commission*, 303 Ill. 410, 135 N. E. 754 (1922); *La Veck v. Parke, Davis and Company*, 190 Mich. 604, 157 N. W. 72 (1916); *Pace v. North Dakota Workmen's Compensation Bureau*, 51 N. D. 815, 201 N. W. 348 (1924); *Contra: Kallgren v. C. W. Lundquist Co.*, 172 Minn. 489, 216 N. W. 241 (1927); *Crews v. Moseley Bros.*, 148 Va. 125, 138 S. E. 494 (1927); *Gausman v. R. T. Pearson Co.*, 284 Pa. 348, 131 Atl. 247 (1925); *Feldman's Case*, 240 Mass. 555, 134 N. E. 251 (1922). See also *Roach v. Kelsey Wheel Co.*, 200 Mich. 299, 167 N. W. 33 (1918). And see "Weather Conditions as Vulnerating Forces in Workmen's Compensation Proceedings," n. 92.

<sup>188</sup>*Broadbent's Case*, 240 Mass. 449, 134 N. E. 632 (1922); *Crosby v. Thorp, Hawley & Co.*, 206 Mich. 250, 172 N. W. 535 (1919).

<sup>184</sup>Electric shock case: *Refugio Soto Gutierrez v. Southern Pac. Company*, 12 Cal. Ind. Acc. Com. Dec. 94 (1925), inflammation of the brain, no apoplexy, comp. den.

excitement and muscular exertions brought into play in order to prevent, or to break the force of, the fall. There are also judicial majority and minority views to be considered in regard to the employer's liability.<sup>185</sup>

Purely legal standards influence decisions in which there is an exposure to meteorological conditions. In the majority of jurisdictions there must be some special exposure.<sup>186</sup>

Decisions involving apoplexies due to noxious gases show much similarity with the weather cases. Here, also, a special exposure must be shown. It is doubtful whether or not apoplexy would be classed as an occupational disease, except in cases of lead poisoning.<sup>187</sup>

After-effect cases are concerned with blood poisoning, inflammations, burns, fractures, amputations and close confinement.<sup>188</sup> Here the "time element" must be closely scrutinized.

In other personal injury cases recovery has been had for automobile<sup>189</sup> and street car<sup>190</sup> collisions, falls from railroad passenger cars, or while the plaintiff was on railroad premises,<sup>191</sup> etc.<sup>192</sup>

In *King v. Connecticut Co.*<sup>193</sup> judgment was rendered against a street car company when the victim was run over by a car by reason of stagnation apoplexy. In a landlord-tenant fall case<sup>194</sup> judgment in favor of the plaintiff was, however, reversed on technical grounds.

## DIAGNOSIS AND TREATMENT

One class of personal injury deserves special treatment because of the comparative frequency with which they occur: intoxication decisions.

<sup>185</sup>31 Yale Law Review 768, 35 Id. 220; 3 Detroit Law Review 170; Peoria Ry. Terminal Co. v. Industrial Board, 279 Ill. 352, 116 N. E. 651 (1917); Cusick's Case, 260 Mass. 421, 157 N. E. 596 (1927); McCarthy v. General Electric Co., 293 Pa. 448, 143 Atl. 116 (1928).

<sup>186</sup>See n. 92.

<sup>187</sup>6 A. L. R. pp. 1463 et seq.; 23 A. L. R. pp. 335 et seq.; 71 Corp. Jur. 593, § 344.

<sup>188</sup>Orchard & Wilhelm Co. v. Petersen, 127 Neb. 476, 256 N. W. 37 (1934), comp. den.; Cook County v. Industrial Commission, 327 Ill. 79, 158 N. E. 405 (1927); Leffler v. Morton Salt Co., 253 Mich. 276, 235 N. W. 239 (1931); United States Casualty Co. v. Matthews, 35 Ga. App. 526, 133 S. E. 875 (1926); Hercules Powder Co. v. Nieratko, 113 N. J. L. 193, 173 Atl. 606 (1934); State ex rel. George Taylor & Sons v. District Court of Ramsey County, 147 Minn. 10, 179 N. W. 217 (1920); United States Fidelity & Guaranty Co. v. Green, 38 Ga. App. 50, 142 S. E. 464 (1928).

<sup>189</sup>Douglas v. Berlin Dye Works & Laundry Co., 169 Cal. 28, 145 Pac. 535 (1914); Hehlo v. Marathon Bus Line, 7 N. J. Misc. 629, 146 Atl. 676 (1929); Malon v. Adley Express Co. Inc., 118 Conn. 565, 173 Atl. 159 (1934).

<sup>190</sup>MacNichols v. Public Service Ry Co., 8 N. J. Misc. 207, 149 Atl. 342 (1930).

<sup>191</sup>Galveston, H. & S. A. Ry. Co. v. Watts,—Tex. Civ. App.—, 182 S. W. 412 (1916), rehearing den. (1916).

<sup>192</sup>Assault & battery, judgment for defendant: Nofsinger v. Paup, 96 Neb. 805, 148 N. W. 967 (1914).

<sup>193</sup>110 Conn. 615, 149 Atl. 219 (1930).

<sup>194</sup>Causa v. Keeny, 156 App. Div. 134, 141 N. Y. S. 104 (1913).

Apoplexy may be confounded with acute alcoholic intoxication. There are, however, some differences which aid in excluding the one or the other of the two, intoxication or apoplexy.

The unconsciousness of alcoholism is ordinarily not so deep as that of apoplexy. A drunken man can usually be aroused from his stupor easily enough. He also shows signs peculiar to intoxicated people. His appearance may be dirty. He shows maudlin resistance. He is restless and boisterous. His arm or leg is not paralyzed. His face does not show the distortion of features so significant in apoplexy. The most prominent sign of intoxication is the alcoholic breath, missing in the uncomplicated case of apoplexy.

In the diagnosis of apoplexy a higher degree of medical knowledge and power of observation is to be imputed to a doctor than to an untrained lay person. Yet, it cannot be denied that the differential diagnosis between apoplexy and intoxication may be quite difficult. Only a tentative diagnosis may at first be possible.<sup>195</sup> This is true particularly where an alcoholic also suffers a stroke while intoxicated, or where a fall, a blow, a brawl, or some other event precedes, or follows, the apoplectic stroke. There may be no actionable negligence by the medical man in regard to the diagnosis, where the diagnosis is incorrect.

The ordinary rules of actionable negligence in diagnosis could hardly be applied to a layman under the legal duty to protect, and to care for, an apoplectic erroneously assumed to be drunk. If there be any fault, it rather lies in the unauthorized assumption by the layman that he is competent to make a diagnosis at all. He may well be charged with the knowledge that nausea and vomiting, or certain other symptoms of apoplexy, may be due to causes other than intoxication. The general appearance of the apoplectic should warn him that something serious is present. The lack of an alcoholic breath is detected readily by persons untrained in medicine. If in spite of such popular knowledge of the features of intoxication the layman deems himself capable of making a correct diagnosis, but is in error, it is proper that he be held to have acted at his own risk. He ought to be held liable for mistakes proximately aggravating the apoplectic stroke. Such a line of reasoning has been followed by a court in a carrier case in New York.<sup>196</sup>

Where an erroneous diagnosis is followed by correct treatment, or where such diagnosis and incorrect treatment do not contribute proximately to the aggravation of the apoplectic stroke no cause of action exists.

The issue is one of vulnerative capacity versus vulnerating effect. It is argued that proper treatment of an apoplectic stroke demands first of all rest in bed. Morphine should be given to keep the patient quiet if this be indicated and necessary. Permitting a patient, for the purposes of a medical examination, to lie

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<sup>195</sup>Middleton v. Whitridge, 156 App. Div. 154, 141 N. Y. S. 104 (1913), testimony of Dr. Touart.

<sup>196</sup>Ibidem, 156 App. Div. 154, 141 N. Y. S. 104 (1913), reversed by 213 N. Y. 499, 108 N. E. 192 (1915).

on the cement floor of a police station, with no medical treatment thereafter without even the giving of a direction to undress the patient and to put him on a cot, is a vulnerating effect rather than a vulnerative capacity of negligence. The medical man knew that the patient had been in an automobile accident. He had been hurled a distance of about 35 feet.<sup>197</sup> To allow an apoplectic to be carried around for hours in a street car with all its jolting would make a case of actual rather than of potential aggravation. The street car employees had noticed that the passenger was sick. It was their duty to take care of him.<sup>198</sup>

The defense denies that there is even a vulnerative capacity in the omission of the defendant. The hardened arteries, the bad condition of the kidneys, the analysis of the urine and of the blood, have made the prognosis bad from the very beginning. Even in so-called slight paralytic strokes one can never tell whether or not recuperation would have taken place but for defendant's negligence. The opinion of medical experts is no more than mere guesswork and speculation. This cannot form a foundation upon which a judicial tribunal may found liability of the defendant.

The truth would seem to lie midway between these two contentions. Where the stroke is only slight, the chances are that the patient would have recovered under proper treatment.<sup>199</sup> Where, however, there is a fatal injury, which brought about the apoplectic stroke, the vulnerating effect of defendant's omission is practically none.<sup>200</sup> It is highly problematic what the outcome of the apoplexy in such a case would have been. It is clear that such fine distinctions as vulnerative capacity and vulnerating effect do not justify the trial court in directing a verdict for either party, unless as in an Iowa case,<sup>201</sup> a very grave condition is present.

#### ORIGINATION AND SUPERINDUCEMENT VERSUS AGGRAVATION — INSURANCE

Accident, health, and life insurance have relation to violence apoplexy. The issue is generally exclusive accidental origination or superinducement of the paralysis versus contribution thereto by some preexisting infirmity.<sup>202</sup>

No hard and fast rules can be laid down as to when liability of the insurer exists. The chain of events must show by its effects or after effects that the vulnerating force did not enter the territory of the preexisting ailment.

<sup>197</sup>Bamberg v. Morgan,—Iowa—,218 N. W. 492 (1928), judgment for plaintiff was reversed.

<sup>198</sup>See n. 196.

<sup>199</sup>Ibidem.

<sup>200</sup>See n. 197.

<sup>201</sup>Ibidem.

<sup>202</sup>See clauses in: Fenton v. American Liability Co., 123 Ohio St. 97, 174 N. E. 254 (1930); North American Acc. Ins. Co. v. Baldwin,—Tex. Civ. App.—, 271 S. W. 181 (1925); Greenlee v. Kansas City Casualty Co.,—Mo. App.—, 182 S. W. 138 (1916); Federal Life Ins. Co. v. Firestone, 159 Okla. 228, 15 Pac. (2) 141 (1932); Travelers' Ins. Co. v. Selden, 78 Fed 285 (1897). As to other clauses see: Fiedler v. Iowa State Traveling Men's Ass'n., 191 Iowa 287, 179 N. W. 317 (1920).

Deviations from the simple picture of accidental injury must be due solely to complications within the domain of the primary injury, thus causing apoplectic paralysis.<sup>203</sup>

Whether apoplexy is accidental or the result, in whole or in part, of a preexisting weakness or disease, thus contributing to the paralysis, is usually a question of fact to be decided by the jury with the aid of medical expert testimony.<sup>204</sup>

Ordinarily a weak vulnerating force is not likely to cause substantial disability. The conclusion is justified that the paralysis came into existence independently of the calamity. On the other hand, a comparatively strong violence excludes practically independent culmination. The probability of either aggravation or origination exists. A preference is to be given to the former over the latter where there is a history of some pre-accidental infirmity which could have led to apoplexy, and vice versa. Where, therefore, experts called for the plaintiff testified that there was nothing in the circumstances of the calamity which could have caused death, if there had been no predisposition to an apoplectic stroke, the trial court should not have refused a directed verdict for defendant company.<sup>205</sup>

The mere fact that a victim had suffered from paralysis prior to the accident does not mean that he may not have contracted an exclusively accidental pneumonia, for instance. This is particularly true when the apoplexy had yielded to medical treatment, or to a remission by nature's way, so that the patient could attend his office and look after his business as president of a corporation.<sup>206</sup> Here, the true issue is a lowered vitality leading to lung trouble, and the apoplectic stroke is only indirectly material to the issue.

A very strong vulnerating force makes independent accidental apoplexy highly probable. The jury may be entitled to apply its own every day's knowledge without the aid of medical expert testimony. A marble slate was whole prior to a fall. It was found thereafter to have been broken in two by the force with which deceased's head had struck the slab.<sup>207</sup> A wound on the head, one inch and a half long, with the night clothes around the shoulders saturated with blood are facts likely to cause judgment for the plaintiff, who prior to his calamity had been in his usual good health.<sup>208</sup> It makes a close question of fact where the body of

<sup>203</sup>See under *Aggravation versus Superinducement*, supra p. 160 and as to alcohol as contributing cause: *Federal Life Ins. Co. v. Firestone*, 159 Okla. 228, 15 Pac. (2) 141 (1932).

<sup>204</sup>*Fenton v. American Liability Co.*, 123 Ohio St. 97, 174 N. E. 254 (1930); *Shugart v. Metropolitan Life Ins. Co.*,—Pa.—, 176 Atl. 546 (1935).

<sup>205</sup>*Travelers' Ins. Co. v. Selden*, 78 Fed. 285 (1897).

<sup>206</sup>*North American Acc. Ins. Co. v. Baldwin*,—Tex. Civ. App.—, 271 S. W. 181 (1925), rehearing den. (1925); *Contra: Order of the United Commercial Travelers of America v. Nicholson*, 9 Fed (2) 7 (1925).

<sup>207</sup>*Johnson v. Continental Casualty Co.*, 122 Mo. App. 369, 99 S. W. 473 (1907).

<sup>208</sup>*Greenlee v. Kansas City Casualty Co.*,—Mo. App.—, 182 S. W. 138 (1916).

the insured is found in his car in a ditch, the automobile standing upright on its wheels, and where it is doubtful whether the body was seen either "just slumped forward" or "plunged forward."<sup>209</sup>

In this type of litigation due regard must be paid to the term "accidental means." In most jurisdictions the intention to do the vulnerating act is controlling, whether or not the result of the act is usual. Other courts, however, have laid stress upon the extraordinary effect regardless of intention.<sup>210</sup>

Falls and blows are obviously not intended in almost all cases, except in assault injuries. Strains are ordinarily ambiguous, since they may be intended or not. The result of strain may generally be considered unusual when leading to apoplexy. Other traumata must depend upon their own individual set of facts in each situation.

Prima facie there would be recovery in falls and blows cases. Strains due to a fall would also create causes of action. Strain due to lifting may lead to judgment for defendant. Raising a newspaper above one's head, while lying in bed from sickness, so that apoplexy ensues, is nevertheless an ordinary and natural movement executed as intended.<sup>211</sup> Straining from vomiting has been held to be the cause of a fatal paralysis thru accidental means.<sup>212</sup> Pulling weeds which gave way so that plaintiff fell backwards with all his force has warranted recovery by the injured person, at least under the minority view.<sup>213</sup>

In some assault cases judgment was given for the plaintiff. A fall on the pavement, due to a blow in the face, so that fracture of the skull is the outcome, is an accidental injury within the meaning of such an insurance policy, even though the blow itself is inflicted intentionally and maliciously. It was unintentional on the part of the insured. The fatal fall was not intended by the assailant.<sup>214</sup> The admission of the fact that insured was dead, that his body had been found in a river with a wound on the head and face, penetrating the brain and causing death makes a prima facie case for the plaintiff. It casts upon the insurer the burden of proof that death occurred from one of the causes exempted in the policy.<sup>215</sup> See also *Goldenberg v. Equitable Life Assur. Soc. of the United States*.<sup>216</sup>

Finally, there are left the "application" cases. The tendency of apoplectic diseases to remain non-manifest over a long period of time offers opportunity for litigation in connection with statements made by the applicant for insurance.

<sup>209</sup>*Fenton v. American Liability Co.*, 123 Ohio St. 97, 174 N. E. 254 (1930).

<sup>210</sup>14 R. C. L. 1239, Perm. Supp. Ed., *ibidem* 1249, sec. 427.

<sup>211</sup>*Stone v. Fidelity & Casualty Co. of New York*,—Tenn.—, 182 S. W. 252 (1916), by analogy, eye case, hemorrhage in interior of eye.

<sup>212</sup>*Ross v. International Travelers' Ass'n.*,—Tex. Civ. App.—, 283 S. W. 621 (1926).

<sup>213</sup>*International Travelers' Ass'n. v. Dixon*,—Tex. Civ. App.—, 283 S. W. 681 (1926).

<sup>214</sup>*Union Accident Co. v. Willis*, 44 Okla. 578, 145 Pac. 812 (1912), and see under Apoplexy in Crime, bare fist apoplexies, *infra*.

<sup>215</sup>*Business Men's Acc. Ass'n. of America v. Cowden*, 131 Ark. 419, 199 S. W. 108 (1917).

<sup>216</sup>113 Pa. Superior Ct. 414, 173 Atl. 445 (1934).

Under the strict warranty construction,<sup>217</sup> liability of the insurer is avoided when the statement is untrue although made in good faith. In other decisions various elements of construction enter the issue. The matter misrepresented must have materially increased the risk. The illness must have actually contributed to disability or death. There must be actual knowledge of the infirmity, legal fraud, actual or constructive, actual intent to deceive, or bad faith.<sup>218</sup> Such terms as "serious illness," "good" or "sound" health, and representations pertaining specifically to underlying causes of apoplexy may thus become matters of litigation. Yet, the state of health is ordinarily a matter of opinion of lay persons rather than findings of objective medical examinations. The insurer ought to know in many cases that the applicant cannot have a certain knowledge in this subject-matter.

The "doctor applicant" cases are different. Here more restrictions may be conceded. Thus, where the applicant was a medical practitioner and also a medical examiner for defendant insurance company, judgment went for the defense. The doctor had taken advantage of his acquaintance and friendship with other insurance doctors. He knew that he was suffering from a serious heart disease and also from high blood pressure. He had been rejected by one examiner, but had procured a clean record of health from some one else with the connivance of the insurance agent. Fraud was practiced upon the insurance company.<sup>219</sup> The mere fact that applicant is a medical man does not render misinformation a matter of bad faith per se. Questions may have been answered orally, the insurance agent making the misrepresentations. The doctor may have had good reason to trust in the integrity of the agent.<sup>220</sup>

A looser use of the "doctor-applicant" principle may be conceded in other situations, as whether the applicant is a dentist, or a nurse, or some other person connected with the art of healing. They either have less opportunity to observe diseases leading to apoplexy, or they may not have the fundamental knowledge when making the application for insurance. Negative X-ray pictures taken because of symptoms resembling kidney colics together with total and lasting disappearance of the ailment after a physic was taken does not inform a dentist of the presence of Bright's disease. It makes an apoplectic stroke accidental where there is an injury upon the crown of the head with a bruise upon the scalp, an effusion of blood into the back of the head, concussion of the brain, and so on.<sup>221</sup>

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<sup>217</sup>*Southern Surety Co. v. Farrell*, 79 Colo. 53, 244 Pac. 475 (1926), rehearing den. (1926).

<sup>218</sup>*Ibidem*, and *Schmitt v. Massachusetts Protective Ass'n., Inc.*, 170 Minn. 60, 212 N. W. 5 (1927); *O'Brion v. Columbia Nat. Life Ins. Co.*, 119 Me. 94, 109 Atl. 379 (1920); *Self v. New York Life Ins. Co.*, 56 Fed. (2) 364 (1932). As to estoppel of insurer see: *Maier v. Fidelity Mut. Life Ass'n.*, 58 Fed. 566 (1897).

<sup>219</sup>*Self v. New York Life Ins. Co.*, 56 Fed. (2) 364 (1932).

<sup>220</sup>*Schmitt v. Massachusetts Protective Ass'n., Inc.*, 170 Minn. 60, 212 N. W. 5 (1927).

<sup>221</sup>*O'Brion v. Columbia Nat. Life Ins. Co.*, 119 Me. 94, 109 Atl. 379 (1920).

Even a layman cannot excuse his ignorance where prior to the issuance of the policy he had suffered a severe injury to his head which two weeks later led to apoplectic paralysis.<sup>222</sup>

In conclusion the following general criteria may be applied in a very broad sense:

1. A history of pre-accidental symptoms, or operative findings, or pathological-diagnostic, or autoptic discoveries after the accident may raise the suspicion that the insured had been suffering from a pre-existing infirmity at the time of the accident, that such an ailment suggests a culmination in an apoplectic stroke, independent of accident, or that the disease contributed to the fortuitous results;<sup>223</sup>
2. There must be an accident, as this term is understood in the law of insurance;
3. An excessive vulnerating force may make the issue of origination versus aggravation comparatively immaterial;
4. The greater the extent of a conceded pre-existing ailment, likely to cause apoplexy per se, the weaker the external force necessary to hasten the disorder to disability, or to contribute thereto, and vice versa;
5. The greater the strength of violence, the greater the probability of aggravation, even though the ailment had been of a minor extent only prior to the calamity;
6. Absence of history of a pre-existing ailment likely to cause apoplexy, together with considerable strength of the vulnerating force justifies the inference of exclusive accidental apoplexy, provided the time element in particular, and other criteria, do not contravene such a conclusion;
7. The time of development in regard to manifestations of a hidden pre-accidental ailment may stand in inverse proportion to the extent of the ailment already existing prior to the accident. The shorter the time interval within which the ailment manifests itself, the weaker the inference of origination, the stronger the suspicion of aggravation,<sup>224</sup> and vice versa. This criterion ought to be applied with great caution.

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<sup>222</sup>Weissman v. Continental Life Ins. Co.—Mo. App.—, 267 S. W. 21 (1924). And see: Northwestern Mut. Life Ins. Co. v. Murray, 54 R. I. 69, 170 Atl. 73 (1934).

<sup>223</sup>Brandeis v. Metropolitan Life Ins. Co., 116 Pa. Superior Ct. 558, 176 Atl. 789 (1933).

<sup>224</sup>Contra: International Travelers' Ass'n. v. Dixon,—Tex. Civ. App.—, 283 S. W. 681 (1926).

## APOPLEXY IN CRIME — BEYOND REASONABLE DOUBT

Violence apoplexy due to crime is not different from that brought about by accident so far as the principles of proximate causation are concerned. The evidence must be scanned for possible flaws as to the divers criteria discussed above.

## A. THE LOCATION CRITERION — BLOW VERSUS FALL

The location criterion in criminal cases, however, has a double aspect. It connects causally crime and apoplexy. It also helps to determine the mens rea, the intent to kill.

Where a number of bullets are found lodged in the brain substance, an intent to kill is easily assumed.<sup>225</sup> The degree of suspicion may decrease, with the decrease of number of projectiles, and also with the distance of their location from the victim's head itself. A single bullet may, therefore, be interpreted as an accident, unless there was commission of a felony,<sup>226</sup> or deliberation as proved by other evidence.<sup>227</sup>

When an apoplectic stroke is due to a blow on the head, on the other hand, it is always possible that the subsequent impact of the victim's head upon the hard floor, for instance, caused the paralysis rather than the blow itself. While defendant is criminally liable, nevertheless, his liability may rest more upon the theory of foreseeability of consequences of the blow itself than upon that of intent to bring about an apoplectic stroke by the blow. The question of mens rea, therefore, may justify instructions as to degrees of crime lower than charged by the prosecution.<sup>228</sup> The issue of "blow-intent-apoplexy" versus "fall-foreseeability-paralysis" is apt to arise.

The "hard substance-blow" apoplexies<sup>229</sup> generally permit inference of intent to kill. There is a deadly weapon used in a deadly and dangerous manner on the head of decedent. The preponderance is in favor of blow-intent rather than that of fall-foreseeability. The higher degrees of crime charged may rightly be assumed to exist. A skull broken clearly across the top with a triangular fracture on the right side, and with 12 fractured pieces on the left side, indicate some wilful external force of great vigor, the use of some blunt instrument, and an intent to kill rather than foreseeability-culpability of the consequences of a fall, a distance of about 35 feet over a bluff.<sup>230</sup>

<sup>225</sup>People v. Holloway, 28 Cal. App. 214, 151 Pac. 975 (1915), conviction of murder.

<sup>226</sup>Commonwealth v. Sterling, 314 Pa. 76, 170 Atl. 258 (1934).

<sup>227</sup>State v. Langford, 95 Mo. 97, 8 S. W. 237 (1888), murder.

<sup>228</sup>State v. Shaver, 197 Iowa 1028, 198 N. W. 329 (1924), superseding 194 N. W. 353 (1923).

<sup>229</sup>People v. Conte, 17 Cal. App. 771, 122 Pac. 450 (1912), 122 Pac. 457 (1912), rehearing denied; Lewis v. Commonwealth, 19 Ky. L. 1139, 42 S. W. 1127 (1897), reversed; State v Leib, 198 Iowa 1315, 201 N. W. 29 (1924), syll. 13.

<sup>230</sup>State v. Price, 135 Minn. 159, 160 N. W. 677 (1916), murder.

The "bare fist" apoplexies require more discrimination.<sup>281</sup> There is, for example, a material variance where an indictment charges the defendant with having committed murder by striking and wounding the victim in and upon the body, limbs, etc., with a rock, piece of steel, or some hard substance, the exact kind and material of which is unknown to the grand jurors, while the undisputed evidence is that accused hit decedent over the head with his bare fist.<sup>282</sup> The contrast between "hard substance" and "bare fist" apoplexies becomes more pronounced when one considers the following facts. The victim had his skull trephined years prior to the assault. Death occurred because either the blow, or the sudden staggering movements, or the fall, had torn to pieces some brain substance in the very spot of the previous operation. The inelasticity of the scar tissue caused the tear.<sup>283</sup> The "bare fist" apoplexies, therefore, warrant instructions based upon foreseeability-culpability, and often exclude intent to kill.

#### B. THE TIME ELEMENT — RES GESTAE AND DYING DECLARATIONS

The time element, too, has a double phase of interpretation.<sup>284</sup> Physical recovery of the victim excludes homicide by the accused. There can be neither murder nor manslaughter.

The time element has also some connection with the evidentiary facts of *res gestae* and of dying declarations. Where there is total unconsciousness, utterances of the victim are mere inarticulate sounds of the diseased mind. On the other hand, total consciousness may be present.

In dying declarations there must be realization by the victim of the dangerous character of the injury inflicted, or a belief in the certainty of death, or imminence of death, to such a degree that there is entire abandonment that deceased will recover even partially.<sup>285</sup> Yet, an apoplexy is likely to exclude neither the objective fatal end nor the subjective belief in imminent death. The great mental shock, the previous or contemporaneous involuntary evacuation of the bladder and bowels, the weakness following convulsions are alarming signs. The difficulties in swallowing, the choking, the unsteady gait, the blindness of one half of field of vision, the double vision, the dizziness and giddiness, the extreme prostration, the temporary speechlessness, and other mental symptoms, together with the experiences

<sup>281</sup>Where there is proof of many hard blows, intent to kill is to be inferred: *Philbrook v. State*, 216 Wis. 206, 256 N. W. 779 (1934), manslaughter first degree.

<sup>282</sup>*Murphy v. Commonwealth*, 226 Ky. 169, 10 S. W. (2) 626 (1928).

<sup>283</sup>*Roohana v. State*, 167 Wis. 500, 167 N. W. 741 (1918).

<sup>284</sup>No conviction in *Commonwealth v. Randall*, 260 Mass. 303, 157 N. E. 354 (1927); *State v. Langford*, 95 Mo. 97, 8 S. W. 237 (1888); *Commonwealth v. Harris*, 177 Ky. 607, 197 S. W. 1071 (1917).

<sup>285</sup>*State v. Tubbs*, 101 Vt. 5, 139 Atl. 769 (1928); *Contra: Commonwealth v. Harris*, 177 Ky. 607, 197 S. W. 1071 (1917).

of the previously inflicted violence, would appear to be sufficient to make anybody realize impending death though he is conscious.

In respect to *res gestae* somewhat different rules apply. The mere chattering of the unconscious victim must be admitted as part of the *res gestae*.

This brings us back to our opening case.<sup>236</sup> The defence claimed that there was total consciousness, and that this fact threw sufficient suspicion upon probability of fabrication and falsification by decedent. Spontaneity was missing. Defendant objected to this statement made 40 minutes after the assault. The statement was calculated to identify the prisoner at the bar as a party to the criminal act. It was material error to admit the statement in evidence.

The prosecution, however, urged that this statement ought to have been admitted. Deceased had regained consciousness, it is true, but he nevertheless had been suffering not only from mental shock, but also from great physical pain which had continued uninterruptedly and with increasing intensity. The excitement of the assault and of its attendant circumstances still prevailed. Spontaneity was present. All this is fortified by the fact that the victim had soon lost consciousness thereafter.

The reviewing court adopted the view of the prosecution. The statement was properly received in evidence. There was no recovery. The statement was made during the interval of a sham-recession of the apoplexy as outlined in the time element discussion. Headache was still present. The victim was still under the influence, conscious and subconscious, of the criminal act itself. These two elements, sham-recovery and influence upon the mind by the crime itself, logically connected the statement and assault by the prisoner at the bar. There was no intervention of prevarication, nor opportunity thereof.

Los Angeles, Cal.

Kurt Garve.

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<sup>236</sup>See n. 1.