3-1-1975

Insurance Consequences of Adverse Drug Reactions

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Recommended Citation
Bruce A. Olster, Insurance Consequences of Adverse Drug Reactions, 79 Dick. L. Rev. 401 (1975). Available at: https://ideas.dickinsonlaw.psu.edu/dlra/vol79/iss3/4

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I. INTRODUCTION

The problem of interpreting the accident provision in both double indemnity clauses of life insurance policies and health and accident insurance policies has beleagured the courts for many decades. Justice Musmanno speaking for the Pennsylvania Supreme Court in Brenneman v. St. Paul Fire and Marine Ins. Co. stated:

What is an accident? Everyone knows until the word comes up in court. Then it becomes a mysterious phenomenon, and, in order to resolve the enigma, witnesses are summoned, experts testify, lawyers argue, treatises are consulted and even when a conclave of twelve world-knowledgeable individuals agree as to whether a certain set of facts made out an accident, the question may not yet be settled and it must be reheard in an appellate court.

In recent years, the use of therapeutic drugs in the treatment of disease has increased many fold and, due to the extensive medical research which is required by law before a drug may be used by the public, the possibility of a patient suffering an adverse reaction is minimized. Unfortunately, however, patients do not always react as expected because of an unknown hypersensitivity to a particular drug and, as a result, death may ensue. Such a reaction is medically referred to as anaphylactic shock.
Typically, the insured suffers from a minor ailment which in the course of a routine medical procedure requires the administration of a drug into his system. However, due to a particular hypersensitivity or idiosyncrasy to the specific drug the insured suffers a fatal result.\(^5\) Sometimes the effects occur immediately while in other instances the insured has a delayed reaction, but in any event neither the physician nor the patient knew or even suspected the hypersensitivity of the insured to the drug.\(^6\) In fact it is generally impossible to predict which patients will suffer the adverse reaction to a particular drug.\(^7\) The only common element among the various drugs which originate the anaphylactic shock cases is the infrequency with which the drugs induce the unexpected results.\(^8\)

This Comment examines the effect of the "accident" provision and other related clauses in insurance contracts on the ability of the beneficiary to recover where the insured has suffered the unfortunate consequences of an unexpected and unforeseen allergic reaction to a drug. A detailed analysis on a jurisdictional basis is made delineating those cases where recovery was or was not permitted under accident insurance policies or double indemnity clauses of life insurance policies. It is the purpose of this Comment to analyze and classify the theories upon which these cases have permitted recovery, and in addition to trace the history and development of these theories with a noted interest in presently developing trends.

Consideration is not given to those cases where an incident such as an automobile collision or a fall down the stairs, which are uniformly held to be accidents, precedes the administration of the drug to the insured. In such instances the beneficiary is compensated based on the original accident.\(^9\) The only accident in the anaphylactic shock cases is the unexpected reaction to a drug which causes anaphylactic shock.

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6. While the cases considered herein involve fatal results, it should be noted that anaphylactic shock is not always fatal. See generally Nosasuq, Reactions to Contrast Media, 91 RADIOLOGY 92 (1966).
8. Id.
9. See Gyulai v. Prudential Insurance Company of America, 135 Pa. Super. 73, 4 A.2d 824 (1938). In this case a board struck the insured on the head which subsequently required the administration of a drug to effect medical treatment. The insured had a hypersensitivity to the drug which resulted in his death. The court reasoned that the accident, namely the hit on the head, started a chain of events which led to his death and therefore, even if death would not have resulted solely from the original injury recovery would still be permitted. Id. at 78, 82, 4 A.2d at 825.

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lactic shock cases examined in this article is the mistaken application of the drug to the unknowingly hypersensitive insured who is not being treated by reason of any accident of the type just described. In addition it is assumed for purposes of this Comment that the drug was properly prescribed and properly administered to the insured.

II. INSURANCE CONTRACTS

A. The Relevant Clauses

The courts in anaphylactic shock cases have been concerned with the construction of the two types of insurance contracts: the life insurance policy and the health and accident policy. There are four clauses within these types of policies that courts have in varying degrees considered essential to the proper disposition of an anaphylactic shock case.

The first and most important is a clause which requires the injury or death of the insured to be the result of an accident.\(^{10}\) In anaphylactic shock cases the clause most frequently encountered protects the insured from "bodily injuries effected through accidental means."\(^{11}\) The issue then confronting the court is whether anaphylactic shock is death by accidental means. This specific language is employed by the insurance companies to limit their liability to only those instances where the cause or the means of the injury were accidental.\(^{12}\) It is their intent by the use of this language not to be held liable where only an unexpected result occurred from the use of voluntary and intentionally employed means.\(^{13}\) Because anaphylactic shock is merely an unexpected result from the proper use of an intended drug a strict interpretation of this definition would require a court to deny recovery to the beneficiary. However, the various jurisdictions are divided on whether such an interpretation as propounded by insurance counsel should be given to the term "accidental means."\(^{14}\)

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10. It is assumed that there is a connection between the injection of the drug and the adverse reaction. Generally, insurance contracts also require the injury to be caused by external and violent means, but this has not been an issue in anaphylactic shock cases. See 10 COUCH §§ 41.39-41.41.

11. Other clauses such as caused by accident or accidental death have been employed, but except in one instance have not been the concern of cases on anaphylactic shock. See Whatcott v. Continental Casualty Co., 39 P.2d 733 (Utah 1935); note infra.

12. E.g., Landress v. Phoenix Mutual Life Insurance Co., 291 U.S. 491, 496 (1933); KEETON § 5.4(e).

13. Id.

which has arisen in defining this term is the essence of the split of authority which presently exists in cases on anaphylactic shock.

The second clause conditioning the liability of the insurance company requires the accident to be the sole and independent cause of the insured's death. The issue which is often raised under this clause is whether the insured's hypersensitivity to the drug was a concurring or contributing cause of his death. Insurance company counsel argue that even if there was an accident in giving the drug to the insured his death would not have occurred without the hypersensitivity and therefore the accident itself was not the "sole and independent" cause of the insured's death. In considering this issue courts have treated synonymously the issue presented by the third clause, namely, whether the hypersensitivity of the insured constitutes a bodily disease or infirmity which contributed to his death. While some older decisions are to the contrary, a mere hypersensitivity to a particular drug is generally not held to be a bodily infirmity or a contributing cause of death.

The fourth clause germane to recovery in these cases is an exclusionary clause which refers to injuries effected through medi-

N.J. 511, 193 A.2d 217 (1963); 44 Am. Jur. 2d Insurance § 1221 (1969); 10 Couch §§ 41.23-41.30; Keeton § 5.4(e); Meyers § 14.2.

15. See, e.g., 10 Couch § 41.32; Keeton § 5.4(e). It should also be noted that often the phrases direct result or direct and independent cause are used, but they have been treated similarly.

It is often important to distinguish between those insurance contracts which protect the insured from, “bodily injury, solely through external, violent, and accidental means . . .” and those which in addition have the phrase, “resulting directly and independently of all other causes . . .” Under the former the accident must merely start a chain of events leading to the insured's death, while in the later the accident must be the only cause of death. However, this issue has never arisen in the context of anaphylactic shock. See Dickerson v. Prudential Ins. Co. of America, 158 Pa. Super. 596, 599, 46 A.2d 33, 34 (1946); Mawn v. Prudential Ins. Co. of America, 144 Pa. Super. 200, 205, 206, 19 A.2d 300, 302 (1941); Clime v. Prudential Ins. Co. of America, 50 Pa. D. & C. 433 (C.P. Bucks County, 1944).


17. While most jurisdictions interpret the contract the same whether or not the exclusionary clause for bodily infirmities is present, Pennsylvania decisions make a distinction where only the sole and independent cause provision is present. Real Estate Trust Co. of Philadelphia, Trustee v. Metropolitan Life Insurance Co., 340 Pa. 533, 17 A.2d 416 (1941). See note 242 and accompanying text infra.


The leading case on defining what constitutes a bodily infirmity is Silverstein v. Metropolitan Life Ins. Co., 254 N.Y. 81, 171 N.E. 914 (1930). Silverstein which is adopted by many jurisdictions on this definition cites with approval the Dodge and Taylor cases.
It is very rarely an issue in anaphylactic shock cases but nevertheless it has been held to defeat recovery in the few instances it has been considered.

B. Common Principles Used in the Interpretation of Insurance Policies

In the construction of specific clauses such as those noted in the previous section the courts have adhered to various principles that are common to the interpretation of all insurance policies. First and most important is the principle that an insurance policy is a contract. The various interpretive tools commonly used by the courts in construing contracts are thereby called into play. The courts' objective, as with any contract, is to determine the intent of the parties at the time the contract was made. Another common contract principle used in interpreting insurance policies is that the court is confined to interpreting only the express terms of the contract. As it is often stated in insurance cases, "courts cannot make contracts for parties. They can only enforce the contract which the parties themselves have made."

Similarly, in determining the parties' intent it is the general rule that the language of the policy must be read as a whole. Therefore, the construction of a specific clause which would defeat the overall intent of the parties must be rejected. Where the terms of the insurance contract are unambiguous by definition they


20. E.g., Order of United Commercial Travelers v. Shane, 64 F.2d 55 (8th Cir. 1932); International Travelers Ass'n v. Yates, 29 S.W.2d 980 (Texas Ct. App. 1930). See note 218 infra.

21. It is of course the inherent nature of insurance contracts once construed that recovery will be denied if only one provision is not fulfilled or one exception to the contract realized. Therefore, if a court finds anaphylactic shock is not accidental means it need not proceed any further to deny recovery. If the court holds to the contrary, recovery will only be permitted when the other provisions of the contract are also fulfilled and none of the exceptions are realized.

22. 1 Couch § 15.

23. Id. §§ 15.9, 15.10. The fact most insurance contracts are standard forms does not alter the status of the policy as a voluntary contract between the parties. Id. § 15.6.

24. 1 Couch §§ 15.9, 15.10, 15.37.


26. 1 Couch § 15.29.

27. Id. § 15.9.
indicate the intent of the parties, and the court cannot, under the
guise of judicial construction, expand or diminish the risks ex-
pressly covered by the policy.  

The second principle of construction is that ambiguous lan-
guage in the insurance contract will be construed against the in-
surer.  This principle is most often justified on the basis that an
insurance company prepares the contract with a background of far
more legal expertise than the average policyholder, who in fact has
no voice in the preparation of the contract.  However, even where
ambiguous language exists, if the clear intent of the parties with
regard to the specific language can be ascertained this rule may
be avoided by construing the contract in light of the parties actual
intent.  But if no clear intent can be ascertained, with respect to
the ambiguous language it is still the rule that the construction
of the policy against the insurer must be done fairly and reasonably,
and in a manner consistent with the overall intent of the parties.  
In other words, this principle may not be applied without restraint.

The third principle to find application is the rule concerning
the construction of exclusionary clauses in insurance contracts.
These exclusionary clauses, like ambiguous language, are strictly
construed against the insurance company.  This rule is justified
on the basis that any clause which tends to defeat recovery must
be clearly and unambiguously expressed in the contract.  Even
though it is the general rule, strict construction may be defeated
by showing a clear intent on the part of the contracting parties
to the contrary. 

It must be noted that absent statutory prohibition or a public
policy defense an insurance company, like any other contracting
party, has the right to limit the coverage of a contract to certain
circumstances.  However, there is a noted tendency of the courts
not to allow a clause in the contract to defeat recovery, if the ob-
jectively reasonable expectations of the insured regarding the terms
of the contract would clearly be to the contrary.  This doctrine
is applied even though a literal reading of the clause would defeat

Super. 181, 184, 185, 216 A.2d 611, 615 (Law Div. 1966); 1 COUCH §§ 15.11,
15.14, 15.37.
29. 1 COUCH §§ 15.15, 15.73.
30. Id. § 15.80.
31. Id. § 15.82.
32. Id. §§ 15.85, 15.86.
33. Id. § 15.92.
34. Id.
35. Id. § 15.93.
36. Id. § 15.47. Insurance company's limit their liability on the poli-
cies by the use of requirements provisions which specify when benefits may
be paid and the various exceptions to the policies.
37. Id. § 15.41; KEETON § 6.3; Keeton, Insurance Law Rights at Var-
recovery and the insured had manifested an informed consent to the clause when he signed the policy. This result is often justified on the dual grounds of the unequal bargaining power between the parties and applying the theory of unconscionable advantage, a procedure frequently followed in dealing with contracts of adhesion.

Some courts have construed the term "accident" in light of its ordinary and popular meaning. The theory of unconscionable advantage is implicit in these decisions. As such an interpretation of "accident" entails sympathy for the party with little bargaining leverage, and construction of the contract in his behalf. Stated another way the rationale of this interpretation is that it was the presumed intent of the parties, unless otherwise manifested, to interpret the terms of the policy in their non-technical, non-legal sense. Other courts, however, have interpreted the term "accident" in light of its legal definition. As it is presumed under this latter view that the legal definition was the construction intended by the parties at the time the contract was made, the burden of any variance between the legal technicalities and the ordinary and popular definition falls on the insured.

Finally, it is important to note that the construction of insurance contracts is often statutorily regulated. While none of the cases concerning anaphylactic shock have had occasion to consider a specific statute, statutory power is generally given to the state insurance commissioner to prevent insurance companies from using unfair, inequitable or misleading language. This power is clearly

44. 1 COUCH § 15.2.
relevant to the problems created by the use of ambiguous language in insurance contracts and should be considered as a possible solution in this area of insurance law.

C. The Development of the Definition of Accidental Means

A direct correlation exists between a jurisdiction’s definition of the term “accidental means” and the compensability of anaphylactic shock. For this reason it is essential to understand the basic theories upon which the term “accidental means” has been developed.

There currently exists conflicting definitions of the term “accidental means” as adopted by numerous jurisdictions. If viewed along a continuum it would be found most jurisdictions are at either extreme: the strict or the liberal interpretation, while the few remaining jurisdictions are interspersed between the two poles.

In the case of United States Mutual Accident Association v. Barry the United States Supreme Court is recognized as having originated the strict interpretation of “accidental means.” Here the insured jumped from a platform four feet high and did not land in the proper manner. He landed heavily on the heels which caused a stricture of the duodenum, the resulting cause of his death. The life insurance policy afforded recovery only if death was caused by “accidental means.” In upholding a jury verdict for the plaintiff-beneficiary the Supreme Court held that the trial judge correctly instructed the jury that in order to recover under a policy with a clause predating the insurance company’s liability upon “accidental means,” the claimant must prove that something unexpected occurred in the act preceding the injury. Here the

46. As will be developed in detail in Sections III, IV, and V where a jurisdiction finds that anaphylactic shock is accidental means recovery will be permitted. The single exception is Texas where the medical treatment exclusionary clause precluded recovery when the insured died from an allergic reaction to nitrous oxide administered prior to a tonsillectomy. International Travelers Ass’n v. Yates, 29 S.W.2d 980 (Tex. Ct. App. 1930).


48. See, e.g., United States Mutual Accident Association v. Barry, 131 U.S. 100 (1889).

49. Id. at 103, 104.

50. The policy stated, “Principle sum . . . shall be paid . . . [when in- sured] shall have sustained bodily injuries effected through, external, vio- lent and accidental means . . . .” Id. at 101.

51. United States Mutual Accident Association v. Barry, 131 U.S. 100, 121 (1889).
unexpected manner in which the insured alighted from the platform sufficed.\textsuperscript{52}

The court employed a literal interpretation of the term “accidental means” which in fact limited the insurance company’s liability to only those instances where an accident occurred in the means or event which brought about the loss.\textsuperscript{53} Under this strict interpretation recovery would be denied where the injury was merely the unexpected result of an intentional, voluntarily employed act of the insured.\textsuperscript{54}

This strict interpretation of the distinction between accidental means and accidental results was reaffirmed by the United States Supreme Court almost a half century later in \textit{Landress v. Phoenix Mutual Life Insurance Co.}\textsuperscript{55} There the Court stated:

It is not enough, to establish liability under these clauses, that the death or injury was accidental in the understanding of the average man. . . . For here the carefully chosen words defining liability distinguish between the result and the external means which produces it. The insurance is not against an accidental result.\textsuperscript{56}

Adherence to this strict distinction has uniformly resulted in denying recovery where voluntary, intentional acts of the insured, properly executed, produced unexpected injuries or even death.\textsuperscript{57}

The liberal interpretation of “accidental means” was originated by the celebrated dissent of Justice Cardozo in the \textit{Landress} case.\textsuperscript{60} This dissenting opinion is best recognized for Justice Cardozo’s statement that, “The attempted distinction between accidental results and accidental means would plunge this branch of the law into a Serbonian Bog.”\textsuperscript{59} It was implied in the dissent that this distinction was used by the insurance companies to unconscionably limit their liability.\textsuperscript{60} In lieu of the definition of accidental means

\begin{itemize}
  \item \textsuperscript{52} \textit{Id. at 120. See Pope v. Prudential Ins. Co. of America}, 29 F.2d 185, 186 (6th Cir. 1928).
  \item \textsuperscript{53} \textit{See, e.g.}, Beckham v. Travelers Insurance Company, 424 Pa. 107, 225 A.2d 532 (1967); Linden Motor Freight Co., Inc. v. Travelers Ins. Co., 40 N.J. 511, 193 A.2d 217 (1963); \textit{Keeton} \S 5.4(e); \textit{Meyers} \S 14.2.
  \item \textsuperscript{54} \textit{Meyers} \S 14.2.
  \item \textsuperscript{55} \textit{Id. at 495, 496}.
  \item \textsuperscript{56} \textit{See, e.g.}, Order of United Commercial Travelers v. Shane, 64 F.2d 55 (8th Cir. 1932); Acacia Mutual Life Ins. Co. v. Galleher, 144 A.2d 550 (D.C. Mun. Ct. App. 1958); \textit{Keeton} \S 5.4(e); \textit{Meyers} \S 14.2.
  \item \textsuperscript{57} \textit{Id. at 491, 498} (1933).
  \item \textsuperscript{58} \textit{See, e.g.}, Order of United Commercial Travelers v. Shane, 64 F.2d 55 (8th Cir. 1932); Acacia Mutual Life Ins. Co. v. Galleher, 144 A.2d 550 (D.C. Mun. Ct. App. 1958); \textit{Keeton} \S 5.4(e); \textit{Meyers} \S 14.2.
  \item \textsuperscript{59} \textit{Id. at 499}.
  \item \textsuperscript{60} \textit{See Real Estate Trust Co. of Philadelphia v. Metropolitan Life Ins. Co.}, 340 Pa. 533, 17 A.2d 416 (1941); \textit{Keeton} \S 5.4(e); \textit{Meyers} \S 14.2.
\end{itemize}
which the majority adopted, Justice Cardozo reasoned that the term should be interpreted in light of the meaning which the average policyholder would attach to this language.61

Unlike the strict Barry-Landress62 interpretation of accidental means which gave effect to the literal meaning of the term, Justice Cardozo adopted the broader definition afforded by Justice Sanborn in Western Commercial Travelers Association v. Smith.63 In Western the insured died from blood poisoning caused by an abrasion of the foot which resulted from the rubbing of new shoes against the insured's skin.64 The insurance policy contained the standard "accidental means" clause and the court held the insured died within the meaning of that clause.65 The court in defining "accidental means" stated,

An effect which is not the natural and probable consequence of the means which produced it, 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 . . . is produced by accidental means.66 (emphasis added)

Where a jurisdiction has followed the lead of Justice Cardozo and abandoned the distinction between accidental results and accidental means the limitation that the accident occur in the act preceding the injury is no longer enforced.67 In fact, under this broader definition of accidental means if the effect or result was accidental or would be regarded by the ordinary policy-holder as an accident then the injury is compensable.68 Therefore, even where the means were voluntary, intentional, and properly performed the mere unexpected result makes the injury compensable.

The distinguishing element between the strict Barry-Landress69 definition and the Cardozo approach is the manner in which they treat voluntary and intentional conduct of the insured which produces unexpected injuries or even death.70 Those jurisdictions ad-

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62. See notes 48-56 and accompanying text supra.
63. 85 F. 401 (8th Cir. 1898). This definition of accidental means is commonly termed the "natural and probably consequences" theory.
64. Western Commercial Travelers Ass'n. v. Smith, 85 F. 401, 403 (8th Cir. 1898).
65. Id. at 405, 406.
66. Id. at 405.
68. MEYERS § 14.2.
69. See notes 48-56 and accompanying text supra.
70. Under both theories "involuntary means" as in automobile accidents and falls on stairs, are clearly accidental means. See MEYERS § 14.2.
hering to the strict rule deny recovery in such instances\textsuperscript{71} while those states adhering to the liberal rule would allow recovery.\textsuperscript{72} However, not all jurisdictions adopt one or the other of these definitions, but instead vary their application of the rule with the different factual situations presented. In this regard it was stated by the New Jersey Supreme Court,

[R]arely has either approach been uniformly applied to all factual categories in a single jurisdiction . . . ; the outcome of cases which one might think factually analogous, as well as the legal reasoning used to support the conclusion, varies not only from state to state but within a state.\textsuperscript{73}

While anaphylactic shock is uniformly viewed as the unexpected results of voluntary, intentional means, the application of the term "accidental means" has been less precise.\textsuperscript{74} Some courts adhere to the two extreme definitions in deciding these cases, but others are less consistent in their reasoning. Therefore, it is within this context of the various definitions of "accidental means" that cases on anaphylactic shock are decided.

III. JURISDICTIONS PERMITTING RECOVERY

Broadly speaking two theories of recovery have been developed by jurisdictions permitting recovery. The first is a logical application of Judge Cardozo's dissent in \textit{Landress v. Phoenix Mutual Life Insurance Co.}\textsuperscript{75} As indicated above,\textsuperscript{76} this theory requires only that the effect or the result must be accidental, therefore, voluntary and intentional means would not preclude recovery.\textsuperscript{77} Jurisdictions adopting this definition of "accidental means" have permitted recovery under this theory because anaphylactic shock is by definition the unexpected result of intended means.\textsuperscript{78}

The second general theory of recovery is found in various jurisdictions that have adopted or at least purported to follow the lan-

\textsuperscript{71} See note 212 infra.
\textsuperscript{72} See note 106 infra.
\textsuperscript{74} It should be noted that some older cases imply that \textit{mistaken application} is in itself accidental means and not merely the unexpected result of intended means. See Mutual Life Ins. Co. of New York v. Dodge, 11 F.2d 488 (4th Cir. 1926), cert. denied, 277 U.S. 677 (1925); Taylor v. New York Life Ins. Co., 176 Minn. 171, 222 N.W. 912 (1929).
\textsuperscript{75} 291 U.S. 491, 498 (1933) (Cardozo, J. dissenting).
\textsuperscript{76} See notes 58-61 and accompanying text supra.
\textsuperscript{77} See \textit{Keeton} § 5.4(3); \textit{Meyers} § 14.2; notes 67-69 and accompanying text supra.
\textsuperscript{78} See note 106 infra.
guage of United States Mutual Accident Association v. Barry\textsuperscript{79} which, as discussed previously,\textsuperscript{80} is the origin of the distinction between accidental means and accidental results.\textsuperscript{81} However, these jurisdictions while drawing this distinction avoid strict application of the distinction. In so doing they uniformly refuse to adhere to the strict rule that all voluntarily employed conduct is outside the coverage of insurance contracts using the term "accidental means." But when confronted with the issue of defining "accidental means" in the context of voluntary, intentional conduct which produces unexpected results these jurisdictions define the term with varying degree of liberality and consistency.

Mutual Life Ins. Co. of New York v. Dodge\textsuperscript{82} was the first significant case to examine the question of anaphylactic shock and its coverage by insurance contracts. The death of the insured in this case resulted from paralysis of the respiratory center caused by the administration of a local anaesthesia (novocaine) prior to an operation for the removal of the deceased's tonsils.\textsuperscript{83} The evidence indicated that the insured had an "idiosyncrasy or hypersensitivity" to the drug of which both the doctor and patient were unaware and which caused the fatal effects.\textsuperscript{84} The policy being sued upon provided recovery for death by "accidental means" only if it was the "sole and independent" cause of death and was not within the exclusionary clause for death caused by bodily disease or infirmity.\textsuperscript{85}

The court discussed the three primary issues which are currently considered essential to the proper disposition of anaphylactic shock cases.\textsuperscript{86} The initial and most important issue was the resolution of whether anaphylactic shock deaths are within the coverage of an insurance policy which contracts to pay double the face amount for death by "accidental means." In the disposition of the

\textsuperscript{79} 131 U.S. 100 (1889).
\textsuperscript{80} See note 48 and accompanying text supra.
\textsuperscript{82} 11 F.2d 486 (4th Cir. 1926), cert. denied, 271 U.S. 677 (1925). The Dodge case is frequently cited under both theories of recovery.
\textsuperscript{83} Id. at 487.
\textsuperscript{84} Id.
\textsuperscript{85} The pertinent provisions of the policy as stated in the opinion were, ... for the payment of double of the face of the policy if death results, directly from bodily injury, ... independently and exclusively of all other causes and if such bodily injury be effected solely through external violent and accidental means; ... provided, however, that this double indemnity shall not be payable ... if death results ... directly or indirectly from bodily or mental infirmity or disease of any kind.
\textsuperscript{86} Id. at 487.

There is a fourth issue infrequently raised in anaphylactic shock cases, namely whether the administration of a drug is "medical treatment" within an exclusionary clause to that effect. See note 232 and accompanying text infra.
first issue, the court held that a mistaken application of a drug to a person with an unknown hypersensitivity or idiosyncracy to the particular drug was death by "accidental means." The decision was rendered in 1926, subsequent to the Barry and Western cases but prior to the Landress case where the United States Supreme Court reiterated the strict distinction between accidental results and accidental means. The Dodge court cited with approval both the Barry and Western decisions which contain conflicting definitions of the term "accidental means.

The attempt to fit the anaphylactic shock case into the strict definition of "accidental means" enunciated in Barry while permitting recovery was clearly problematic. The conflict engendered by such a procedure was illustrated in Landress where the United States Supreme Court cited with approval the case of Order of United Commercial Travelers v. Shane which specifically held that mistaken application as used in the Dodge case was not "accidental means." The Dodge case was cited in Landress as contrary authority to the strict rule enunciated therein.

Jurisdictions which thereafter adopted the strict rule of Landress had no difficulty finding anaphylactic shock was not accidental means. However, those jurisdictions which refused to adhere to the strict rule had problems reconciling the Dodge case because it cited with approval authority from both of the divergent views. The jurisdictions were faced with the conflict of not wishing

88. 131 U.S. 100 (1889).
89. 85 F. 401 (6th Cir. 1896).
90. 291 U.S. 491 (1933).
91. For a discussion of these theories see section TIC supra.
93. 291 U.S. 491 (1933).
94. 64 F.2d 55 (8th Cir. 1932). The majority in Landress stated, "The distinction between accidental external means and accidental result has been generally recognized and applied where the stipulated liability is for injury resulting from an accidental external means." 291 U.S. 491, 497 (1933). Following this quote the Shane case was cited with approval. Id.
95. Order of United Commercial Travelers v. Shane, 64 F.2d 55, 59 (8th Cir. 1932).
96. Landress v. Phoenix Mutual Life Insurance Co., 291 U.S. 491, 497 (1933). It should be noted that when Landress was decided the federal common law prevailed. Because of the subsequent decision in Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), which abolished the federal common law the Landress decision is no longer controlling precedent. However, the reasoning has been influential in many state court decisions.
97. See note 212 and accompanying text infra.
to avoid the import of specific contractual language (accidental means) but desirous of giving effect to what in the average policy-holder's opinion must be termed an accident. This conflict set the arena for the development of the two theories of recovery in anaphylactic shock.

The second issue considered by the Dodge court was whether a hypersensitivity to a drug was a bodily disease or infirmity within the exclusionary clause listed on the policy. The court held that hypersensitivity to a particular drug was not a bodily disease or infirmity but a mere peculiarity. The main thrust of their reasoning was the testimony of medical experts at trial, but the court also reasoned that the trial court could have held as a matter of law that hypersensitivity was not a bodily disease or infirmity. Today this position is well recognized and it is rarely an issue in cases of this nature.

The last issue the court considered was the question raised by counsel for the insurance company that death even if it was caused by "accidental means" was not the sole and independent cause of death because the hypersensitivity to the anaesthesia was a contributing or concurring cause. The court by drawing an analogy to a man with a thin skull who was struck on the head, decided that as the blow to the head would be the sole cause of death the mistaken application of the drug was equally the sole cause of death. The court stated, "The idiosyncrasy was but the 'condition'; the administration of the novocaine was the moving, sole, and proximate cause of the death."

### A. The Cardozo Theory of Recovery

The strict rule of Landress precluded recovery where unexpected and unforeseen results were the product of voluntary and intentional means. However, various jurisdictions refused to adhere to this strict rule and therefore were required to fashion their own guidelines with regard to what voluntary acts were within the definition of accidental means. As a result some jurisdictions found that leaving this question to a case by case determination produced inconsistency in their decisions. Because the judicial experience

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98. These two theories are discussed in detail in sections IIIA and IIIB.
100. Id.
101. See note 18 supra.
103. Id.
104. See KEETON § 5.4(e); MEYERS § 14.2; notes 48-57 and accompanying text supra.
105. These jurisdictions found Justice Cardozo's prediction that the distinction would plunge this area of the law into a "Serbonian Bog" was true. 291 U.S. 491, 499 (1933) (Cardozo, J., dissenting).
under this distinction proved unwieldy, these jurisdictions have followed the lead of Justice Cardozo and abolished the distinction altogether.\textsuperscript{106}

These jurisdictions present the first theory of recovery in anaphylactic shock decisions. In these states an injury which results from the unexpected effect of a voluntary and intentionally administered drug is within the coverage of an insurance policy which requires that death be the result of "accidental means." However, it should be noted that even though a jurisdiction has abolished the distinction between accidental means and accidental results its courts still must determine what is an accident that is compensable under the policy. Anaphylactic shock, as previously discussed, oc-

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It should be noted that in Whatcott the standard accidental means provision was not construed but instead the policy provided:

\textit{The insurance given by this policy is against loss of life . . . resulting from a personal bodily injury which is affected solely and independently of all other causes by happening of an external, violent, and accidental event.}\textsuperscript{39 P.2d at 734 (emphasis added).} The court treated the relationship between accidental means and event as synonymous to cause and effect. Therefore the policy only required an accidental result and not accidental means.
curs so infrequently that some courts find it to be an accident as a matter of law.\textsuperscript{107} However, other courts have held it is a factual question based on what the average policyholder would understand to be an accident.\textsuperscript{108}

Among jurisdictions adhering to the first theory of recovery New York has produced the most litigation on anaphylactic shock. New York courts have enunciated the following representative definition of "accidental means:" "Accidental means are those which produce effects which are not their natural and probable consequences,\textsuperscript{109} [and] . . . a voluntary submission to a means which produces an unusual effect is also within the definition of accidental means."\textsuperscript{110} As these jurisdictions adopt such a broad definition of accidental means the issue of whether anaphylactic shock is accidental means has not been the primary issue under this theory of recovery.\textsuperscript{111} Instead, the courts of New York and other similar jurisdictions have been more concerned with the issue of whether a hypersensitivity to a drug is a bodily disease or infirmity.\textsuperscript{112}

The leading case in New York delineating what constitutes a bodily disease or infirmity is \textit{Silverstein v. Metropolitan Life Ins. Co.}\textsuperscript{113} In this case the insured died from a perforation at the junction of the stomach and the duodenum which occurred when the insured fell onto a milk can.\textsuperscript{114} The insured was unaware that he had a duodenal ulcer which, even though dormant and noninjurious by itself, caused the wall to perforate because of the lower resistance it provided when there was a blow to the abdomen.\textsuperscript{115} Justice Cardozo speaking for the New York Court of Appeals held that a


\textsuperscript{109} In these jurisdictions the only requirement is that there be an unexpected result for the injury to be compensable. It is of no consequence that the means were voluntary and intentional. Because anaphylactic shock is clearly an unexpected, unforeseen, and unusual occurrence there is not any doubt that anaphylactic shock meets the jurisdictions definition of accidental means. See Berkowitz v. New York Life Insurance Co., 256 App. Div. 324, 327, 10 N.Y.S.2d 106, 110 (1939). In Berkowitz the court notes that insurance counsel did not stress the point whether anaphylactic shock was accidental means. The main issue was whether hypersensitivity to a drug was a bodily infirmity. \textit{Id.}


\textsuperscript{111} Id. at 83, 171 N.E. at 914.

\textsuperscript{112} Id. at 83, 171 N.E. at 914.
dormant duodenal ulcer was not a bodily disease or infirmity.\textsuperscript{116} The court reasoned that in order to constitute a bodily disease or infirmity a pre-existing condition must be active and able to cause harm apart from any other injury inflicted to the insured.\textsuperscript{117}

Following the reasoning of Silverstein the New York courts have found that a mere hypersensitivity to a drug which results in the insured's death is not a bodily disease or infirmity.\textsuperscript{118} This ruling coupled with the broad definition of accidental means adopted by New York has encouraged suit whenever unexpected results of surgical procedures produce injury or even death to the insured. This has in turn forced the courts to define with more clarity the scope of the exclusionary clause.

Plaintiff's counsel, seeking to avoid the bodily disease and infirmity exclusion, treat all unexpected results of surgical procedures as mere hypersensitivities of the insured. Conversely, insurance company counsel seek to expand the scope of the clause by labeling all pre-existing abnormalities of the insured as bodily infirmities. Nonetheless, a close examination of the cases readily shows the clear distinction drawn in New York between the true anaphylactic shock cases and litigation which demonstrates the aggressiveness of the plaintiff's bar.

New York has in fact adopted a very narrow definition of what constitutes a mere hypersensitivity of the insured. In the cases which allow recovery the insured were all given drugs to effect medical treatment for the relief of a pre-existing condition.\textsuperscript{119} Death would not have resulted when it did in any of these cases except for the fact the insured had an allergy to the specific drug introduced into his system. The condition that existed in the deceased's body was such that no outside force other than the specific drug injected into the deceased's body could have caused death.\textsuperscript{120}

\textsuperscript{116} Id. at 84, 171 N.E. at 915.
\textsuperscript{117} Id.
In order to better direct the energies of counsel in suits of this nature the court in *Escoe v. Metropolitan Life Ins. Co.* stated, “it is seen that the seriousness of the disease is not an important factor. The controlling element is the seriousness of the risk involved in the therapy.” Even where the insured was terminally ill, if he actually died as a result of a rare reaction to a drug and not his serious illness, recovery would be permitted.

A comparison of the reasoning in this case with cases that did not allow recovery further points out the distinction. In *Wilson v. Travelers Ins. Co.* the court held there was not death by accidental means when the administration of an anesthetic caused pressure to be exerted on an unknown tumor which resulted in cardiac arrest. This case is distinguishable from those cases allowing recovery because here the drug was required to work through an infirmity of the insured to effect the unexpected result. Thus while the infirmity was unknown to both the doctor and the patient and produced an unexpected result, death did not result from a hypersensitivity to the anesthetic.

Much the same reasoning was employed in *Barnstead v. Commercial Travelers Mutual Accident Association of America* where nitrous oxide administered prior to an operation acted on a condition of the insured known as *status lymphactus* to cause death. There was no specific allergy to the nitrous oxide itself but the drug acted through a disease of the insured to unexpectedly cause his death.

Therefore, while New York has in fact allowed recovery in anaphylactic shock cases, it has narrowly defined the line of cases which do not constitute bodily diseases or infirmities. The fact a patient and doctor are unaware the drug may cause an adverse reaction does not suffice. The fact the drug acts on an unknown disease to cause the insured’s death does not entitle the beneficiary to recover. It is clear the unexpected result must be due solely to a specific allergy to the drug and will not be actionable if it acts through another unknown condition of the insured.

Where recovery is allowed in anaphylactic shock cases under this theory of defining “accidental means” there will be of necessity litigation on what constitutes a mere hypersensitivity to a drug.

122. Id. at 699, 35 N.Y.S.2d at 834.
124. Id. at 315, 287 N.Y.S.2d at 783.
126. Id. at 474, 198 N.Y. S. at 417.
129. See notes 119 and 120 and accompanying text supra.
Judging from the New York experience, where the most litigation has occurred, recovery will be limited to cases that meet these three tests:

(1) The possibility of adverse reactions to the treatment when properly administered must be almost negligible;¹³⁰ and,

(2) The adverse reaction must be the result of a specific allergy to the drug itself and not be the result of the drug acting through any intermediary condition of the insured; regardless of how remote the possibility may be; and regardless of the fact that neither the doctor nor the patient knew of the intermediary condition;¹³¹ and,

(3) The illness which required the insured to be given the drug must not have contributed to the death of the insured other than placing him in the position to require the administration of the drug.¹³²

B. The Second Theory of Recovery

The second theory of recovery in anaphylactic shock cases is found in those jurisdictions which have not abolished the distinction between accidental means and accidental results. However, they have nonetheless refused to adhere to the strict interpretation of Landress that "accidental means" does not include any voluntary acts of the insured. These jurisdictions each confront the issue by weighing the import of specific contractual language, namely, "accidental means," against the unfairness of refusing recovery to a claimant on the basis of a technicality of which he was obviously unaware. Rather than abolish the distinction, as the jurisdictions following the Cardozo theory¹³³ have done, these jurisdictions perceive that some voluntary acts were meant to be excluded by the term "accidental means" while others were not. Death induced by anaphylactic shock has uniformly been recognized by these jurisdictions as death by "accidental means."¹³⁴ Three of these jurisdic-

¹³⁰. See notes 121-129 and accompanying text supra.
¹³¹. Id.
¹³². Id.
¹³³. See note 106 supra.
¹³⁴. The jurisdictions following this theory that have had cases on anaphylactic shock are Illinois, Minnesota, New Jersey, Michigan and Texas. The first three are discussed within the text as illustrative of the varied approaches under this theory but the cases from the latter two are cited herein.

Texas: International Travelers Ass'n v. Yates, 29 S.W.2d 980 (Texas 1930) (anaphylactic shock was held to be produced by accidental means but a medical treatment exclusion precluded recovery). See, e.g., Interna-
tions, New Jersey, Minnesota, and Illinois are discussed herein because of the varied approaches they employ in reaching this result.

1. New Jersey

The case of Korfin v. Continental Casualty Co. decided by the New Jersey Supreme Court is the controlling precedent on the issue of whether anaphylactic shock is "accidental means" in New Jersey. In this case the insured voluntarily took a small pox vaccination and death ensued eleven days later from post vaccinal encephalitis, a reaction that sometimes follows the administration of the vaccine. The court held that anaphylactic shock was death by accidental means. The court reasoned that not all voluntary acts such as taking small pox vaccine are excluded by the term "accidental means" in insurance contracts and cited Barry for support of this proposition. However, unlike the Dodge case which was decided in 1926, the Korfin court in citing Barry had the benefit of the 1934 United States Supreme Court decision in...
Landress.\textsuperscript{141} Landress, as described previously,\textsuperscript{142} reaffirmed the Barry case on the strict interpretation of "accidental means," namely that voluntary, intentional means which produce unexpected results are not compensable.\textsuperscript{143} In fact, as was also previously discussed,\textsuperscript{144} Landress cited with approval Order of Commercial Travelers v. Shane\textsuperscript{145} which specifically held that anaphylactic shock was not accidental means.\textsuperscript{146}

The courts error in citing Barry for the proposition that in some instances voluntary conduct which produces unexpected results is compensable has been impliedly recognized and distinguished by the New Jersey Supreme Court in two later decisions where the New Jersey definition of "accidental means" was further developed. In the cases of Perrine v. Prudential Ins. Co. of America,\textsuperscript{147} and Linden Motor Freight v. Travelers Ins. Co.\textsuperscript{148} the court recognized contrary to the Korfin court that the Barry decision was in fact the origin of the strict rule later enunciated in Landress. Thus while these cases did not overturn the Korfin holding they did reject the authority cited to support the holding. Nevertheless New Jersey does not accept the proposition of Justice Cardozo that the distinction should be abolished altogether. Instead, New Jersey does in fact today occupy a middle ground, recognizing the distinction between accidental results and accidental means but interpreting the term "accidental means" in light of the average policyholder and thereby permitting some voluntary means to be compensable.\textsuperscript{149} The rationale for this was stated by Justice Hall in Perrine v. Prudential Ins. Co. of America, "it [the definition of accidental means] will produce results both fairer to all concerned and more uniform than either the loose Cardozo or the strict Barry thesis."\textsuperscript{150} Therefore, even though in 1950 the Korfin court purported to follow the wrong interpretation of Barry as it is now recognized in New Jersey, it did inferentially adopt the proper

\begin{itemize}
  \item \textsuperscript{141} 291 U.S. 491 (1933).
  \item \textsuperscript{142} See notes 55-57 and accompanying text supra.
  \item \textsuperscript{144} See note 94 and accompanying text supra.
  \item \textsuperscript{145} 64 F.2d 55 (8th Cir. 1932). See note 94 supra.
  \item \textsuperscript{146} Order of Commercial Travelers v. Shane, 64 F.2d 55, 59 (8th Cir. 1932).
  \item \textsuperscript{147} 56 N.J. 120, 265 A.2d 521 (1970).
  \item \textsuperscript{148} 40 N.J. 511, 193 A.2d 217 (1963).
  \item \textsuperscript{149} Perrine v. Prudential Ins. Co. of America, 56 N.J. 120, 126, 265 A.2d 521, 524 (1970).
  \item \textsuperscript{150} Id. at 128, 265 A.2d at 525.
\end{itemize}
standard, namely, that of the average policyholder. As was stated in the Linden case, "the court [in Korfin] seems to have tacitly recognized and quite properly so, that an average policyholder would think such an occurrence [anaphylactic shock] within the reasonable expectation of coverage." From this analysis it is therefore clear that anaphylactic shock is produced by "accidental means" in New Jersey.

The Korfin case only dealt with the issue of anaphylactic shock and accidental means. However, a clause in the insurance policy involved also required that the accidental means must be the "sole and independent" cause of death. The failure of counsel for the insurance company to raise this clause as a defense was questioned in Mahon v. American Casualty Co. of Reading, Pa. In this case the superior court questioned whether hypersensitivity to a drug was a contributing cause of death which would preclude recovery under the sole and independent cause provision in the insurance contract. The Mahon court went further to state that a different result might be achieved where there were both a sole and independent cause provision and an exclusionary clause.

The possible effect of these questions about the decision in the Korfin case was extinguished by the decision of Kevit v. Loyal Protective Life Ins. Co. In this case the court examined the New Jersey position on the other two issues which commonly arise in anaphylactic shock cases, namely concurring or contributing cause and hypersensitivity as a bodily infirmity under an exclusionary clause. The New Jersey Supreme Court treated the sole and independent cause provision and the exclusionary clause for bodily

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153. The policy stated, "[i]njury as used in this policy means bodily injury which is the sole cause of the loss ..." Korfin v. Continental Casualty Co., 5 N.J. 154, 156, 74 A.2d 312, 313 (1950). It should be noted there was no exclusionary clause in the policy.
155. Id. at 160, 167 A.2d at 206. The court stated:
[a]lthough the litigated question [in Korfin] was whether encephalitis from vaccination was an "accidental means" of death, it is of interest that no one raised the question whether the decedent's apparent hypersensitivity of allergy to the vaccine used prevented the vaccination from being considered the sole cause of death.

Id.
156. Mahon v. American Casualty Co. of Reading, Pa., 65 N.J. Super. 148, 158, 167 A.2d 191, 204, 205 (App. Div. 1961). As previously discussed the "sole and independent cause" provision in an insurance contract is a requirement clause that limits the insurance company's liability. See notes 15 and 16 and accompanying text supra. The exclusionary clause referred to is the provision in insurance contracts which excludes from coverage deaths caused by "bodily disease or infirmity." See notes 17 and 18 and accompanying text supra.
158. See note 156 supra.
infirmities synonymously.\textsuperscript{159} In overruling \textit{Mahon} on this point the court stated:

We attach little significance to the presence of the exclusionary clause in view of the primary provision limiting coverage to loss from accidental bodily injuries directly and independently of all other causes. As the appellate decision itself recognized in \textit{Mahon}, the courts' goal in construing an accident insurance policy is to effectuate the reasonable expectations of the average member of the public who buys it; he may hardly be expected to draw any subtle or legalistic distinctions based on the presence or absence of the exclusionary clause.\textsuperscript{160}

The \textit{Kevit} case adopted the reasoning of Justice Cardozo in his opinion in \textit{Silverstein v. Metropolitan Life Ins. Co.}\textsuperscript{161} in defining what constitutes a bodily infirmity which will amount to a contributing cause within the meaning of an insurance contract. The \textit{Silverstein} approach, as previously discussed, has been uniformly interpreted to exclude allergic reactions to drugs as bodily infirmities.\textsuperscript{162} Even though this specific interpretation has not been made by the New Jersey courts there is no indication after an examination of the case law that a contrary decision would result.

Thus, in New Jersey the issues which are pertinent to the disposition of anaphylactic shock cases have been decided in favor of the insured for the following reasons. First, anaphylactic shock

\begin{footnotes}
\item[159.] Id. at 486, 170 A.2d at 30.
\item[160.] Id.
\item[161.] 254 N.Y. 81, 171 N.E. 914 (1930). In \textit{Kevit} the insured was struck over the head by a "two by four" and developed tremors which led to his total disability. The defendants claimed the insured had a pre-existing disease but could not specify it. The court stated:

\[\text{[w]e are here concerned with a latent, inactive condition or disease which was not accompanied by any symptoms and which was precipitated or activated by the accident into a resulting disability; in comparable situations many courts have sustained recovery on one justly realistic approach or other, notwithstanding policy provisions to the effect that the indemnity shall be against loss resulting from accident, independently of all other causes and not from any disease or ailment.}\]


It should be noted that in deriving its definition of bodily infirmity Judge Cardozo, speaking for the Court of Appeals of New York in \textit{Silverstein}, cited with approval both the \textit{Dodge} case and \textit{Taylor v. New York Life Ins. Co.}, 176 Minn. 171, 222 N.W. 912 (1929) (both anaphylactic shock cases permitting recovery). \textit{Silverstein v. Metropolitan Life Ins. Co.}, 254 N.Y. 81, 83, 171 N.E. 914, 915 (1930).
\end{footnotes}
has been construed to be "accidental means" within the meaning of the insurance policy. Second, an exclusionary clause and a "sole and independent cause" provision will be read synonymously and interpreted in light of the *Silverstein* ruling in defining what is a bodily infirmity and what constitutes a contributing cause. As *Silverstein* has uniformly been interpreted to exclude hypersensitivity to drugs from either of these clauses in other jurisdictions, it is unlikely New Jersey would prohibit recovery based on these two provisions of an insurance policy.

2. *Minnesota*

In Minnesota the definition of accidental means" has been developed inversely to the development in New Jersey. In the pre-*Landress* case of *Taylor v. New York Life Ins. Co.* the beneficiary of a life insurance policy claimed that the insured died by "accidental means" when a local anaesthesia (pure novocaine), properly administered prior to a tonsillectomy, caused anaphylactic shock in the insured. In finding for the beneficiary, the Minnesota Supreme Court, like the New Jersey Supreme Court in *Korfin*, expressly rejected the claim of insurance counsel that all voluntary acts are excluded from coverage by the term "accidental means." But, rather than attempt to fit the anaphylactic shock case into the *Barry* definition Minnesota adopted the definition of "accidental means" similar to the one enunciated in the *Western* case, namely, the "natural and probable consequences" theory. It, therefore, appeared that when *Landress* was decided in 1934 Minnesota would follow Justice Cardozo's dissent and allow recovery in line with the jurisdictions classified under the first theory of recovery. In fact, in the 1932 decision of the Minnesota Supreme Court in the case of *Kornschat v. Equitable Life Insurance Society of the U.S.* it was stated, "this court is committed to the more liberal doctrine that where the death is the unusual, unexpected or unforeseen result of an intentional act, it occurs by accidental means."

However, unlike New Jersey which has completely rejected *Barry* and moved to a center position on this issue, Minnesota has

163. 176 Minn. 171, 222 N.W. 912 (1929).
164. Id. at 173, 222 N.W. at 913.
165. 5 N.J. 154, 74 A.2d 312 (1950).
167. 100 U.S. 131 (1889). See notes 48-56 and accompanying text supra.
168. 85 F. 401 (6th Cir. 1898). See note 66 and accompanying text supra.
170. See note 106 supra.
171. 186 Minn. 423, 243 N.W. 691 (1932).
172. Id. at 429, 243 N.W. at 691.
left the Cardozo approach and adopted the Barry distinction. In the case of *Gidlund v. Benefit Ass'n of Ry. Employees*\(^1\) decided in 1941 (post-Landress) by the Minnesota Supreme Court, Judge Loring, the same judge who wrote the *Kornschak* opinion nine years earlier, adopted what was clearly the Barry-Landress distinction.\(^2\) Judge Loring impliedly rejected the reasoning in *Korns schak* and *Taylor*, by stating:

> There are cases holding that where death or injury is unforeseen, unexpected, and without design and is not such as naturally or ordinarily results from the voluntary act of the insured, the unusual result may be said to constitute accidental means. . . . In our opinion these cases stretch legitimate construction of the contractual language beyond sound reason.\(^3\)

Thus the question arises whether *Taylor* is still a viable decision in Minnesota. Several factors suggest that this is so. First, the cases of *Gidlund v. Benefit Ass'n of Ry. Employees*\(^4\) and *Kluge v. Benefit of Railway Employees*\(^5\) which have altered the definition of accidental means from the Cardozo approach to the Barry-Landress rule were both cases involving death by heart attack. It is recognized that deaths due to heart attacks resulting from the insured doing an intentional act such as lifting a heavy object are treated separately because the average policyholder does not regard heart attacks as accidental.\(^6\) Secondly, the doctrine of interpreting the insurance contract in light of the average policyholder as enunciated in *Korns chak* still prevails in Minnesota.\(^7\) As previ-

\(1\) 210 Minn. 176, 297 N.W. 710 (1941).
\(3\) Gidlund v. Benefit Ass'n of Ry. Employees, 210 Minn. 176, 177, 178, 297 N.W. 710, 711, 712 (1941). See, e.g., Kluge v. Benefit of Railway Employees, 276 Minn. 263, 149 N.W.2d 681 (1967).
\(4\) 210 Minn. 176, 297 N.W. 710 (1941).
\(5\) 276 Minn. 263, 149 N.W.2d 681 (1967).
\(6\) See, e.g., Kluge v. Benefit of Railway Employees, 276 Minn. 263, 149 N.W.2d 681 (1967); Linden Motor Freight Co., Inc. v. Travelers Ins. Co., 40 N.J. 511, 520, 521, 193 A.2d 217, 225, 226, 227 (1963). The *Linden* court which did a thorough survey of heart attack cases and accident provisions of insurance contracts stated:

> If we look particularly at the decisions in other jurisdictions which have dealt with the precise problem before us—the performance of voluntary, intentional physical acts, without anything unexpected or unforeseen occurring during the course thereof which result in heart injury by reason of strain or overexertion—we find that the vast majority deny coverage as a matter of law, no accidental means being found.

\(7\) *Korns chak v. Equitable Life Assurance Society of the U.S.*, 186 Minn. 423, 243 N.W. 691 (1932).
ously discussed the uniform result under this doctrine is that anaphylactic shock is accidental means. Finally, the Taylor case is one of the leading cases on anaphylactic shock and based on the doctrine of stare decisis Minnesota would be unlikely to overthrow such a long standing precedent.

On the other hand it is important to note that Taylor was decided prior to Landress while Gidlund was decided subsequent to Landress. This might indicate that Minnesota had altered its definition of accidental means following that ruling by the United States Supreme Court. However, if this were the intention of the court it would have expressly overruled the contrary reasoning in both Taylor and Kornschak. Therefore, it appears that Gidlund and Kluge are to be confined to their facts, as merely defining the "accidental means" of death in heart attack cases. Thus it follows that anaphylactic shock is an "accidental means" of death in Minnesota and therefore covered by insurance policies.

3. Illinois

In Illinois the courts have always purported to follow the Barry case as controlling precedent in defining accidental means. But, ever since the first Illinois Supreme Court case on the subject, Christ v. Pacific Mutual Life Ins. Co., they have refused to adopt the rule that all voluntary acts which result in unforeseen


181. In considering the conflicting definitions of "accidental means" in Minnesota the New Jersey Supreme Court in Linden Motor Freight v. Travelers Ins. Co., 40 N.J. 511, 193 A.2d 217 (1963), did not attempt to reconcile them because the court reasoned that Minnesota followed a case by case interpretation of "accidental means" for each different factual context. This is consistent with the perpetration of the Taylor rule in Minnesota because it does not require the courts in that state to reconcile the definition of "accidental means" used in heart attack cases with the definition used in anaphylactic shock cases.

182. See note 96 supra.

183. It should be noted that the Taylor case also examined the issue of whether hypersensitivity to a drug is a bodily disease or infirmity. The court reasoned that because the hypersensitivity does not affect the insured's normal life, will not cause him to die earlier except where the drug is introduced into his body, and does not otherwise interfere with the workings of his body it is therefore a peculiarity and not an infirmity. Taylor v. New York Life Ins. Co., 176 Minn. 171, 222 N.W. 912 (1929). This position remains good precedent in Minnesota today. See, e.g., Keller v. Orion Ins. Co., 422 F.2d 1152 (8th Cir. 1970); Wessel v. Prudential Life Ins. Co. of America, 361 F.2d 571 (8th Cir. 1966); Levin v. The Paul Revere Life Ins. Co., 280 Minn. 301, 151 N.W.2d 186 (1968); Kundinger v. Metropolitan Life Ins. Co., 218 Minn. 273, 15 N.W.2d 487 (1944).

184. 131 U.S. 100 (1889). See notes 48-56 and accompanying text supra.

185. 312 Ill. 525, 144 N.E. 161 (1924).
consequences are excluded from coverage. However, the Illinois cases decided under this definition are not in complete agreement on what types of voluntary acts exclude an insured from coverage.

The two cases which allow recovery, *Vollrath v. Central Life Insurance Co.* and *Schliecher v. General Fire and Life Insurance Corporation*, were both decided in the 1920's. In *Vollrath* the insured died from his hypersensitivity to the anesthesia (ether) while being prepared for a tonsillectomy. The appellate court specifically rejected language to the effect that all voluntarily employed means which are properly administered are not “accidental means.” The court followed this jurisdiction's earlier statement on the subject, *Christ v. Pacific Mutual Insurance Co.*, which held that not all voluntary acts are excluded from coverage under the term “accidental means.” In *Schliecher* the insured died from a rare reaction to nitrous oxide prior to having a tooth extracted. This court also realized that Illinois does not follow the strict rule and adopted language similar to that of *Western* stating:

An effect which is not the natural or probable consequence of the means which produce it...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.”

However, an opposite result was reached in another appellate
court case, *Ebbert v. Metropolitan Life Ins. Co.*\(^{197}\) decided in 1937. Here the appellate court found that voluntary submission to the administration of a drug which was properly administered and resulted in the insured's death because of a hypersensitivity to the drug was not death by accidental means.\(^{198}\) The court relied on strong dicta in the case of *Wayne v. Travelers Insurance Co.*\(^{199}\) which adopted the strict rule of defining "accidental means" of death.

It is important to note that the *Wayne* case was decided before the *Christ* case in which the Illinois Supreme Court adopted the liberal view of "accidental means" of death.\(^{200}\) Thus it would appear as if the *Ebbert* court's reliance on any language contained in the *Wayne* case was unfounded and clearly in conflict with the most recent position enunciated by the Illinois Supreme Court.\(^{201}\)

Two more recent Illinois cases, *Yates v. Bankers Life and Casualty Co.*\(^{202}\) and *Taylor v. John Hancock Mutual Life Ins. Co.*\(^{203}\) support the validity of this conclusion. In *Yates* the Illinois Supreme Court stated:

> If an act is performed with the intention of accomplishing a certain result and if, in the attempt to accomplish that result another result, unintended and unexpected and not the natural and probable consequences of the intended act in fact, occurs, such unintended result is deemed to be caused by accidental means.\(^{204}\)

Clearly this would include anaphylactic shock in the definition of "accidental means." In *Taylor* the court succinctly stated, "In effect accidental means has been held to be synonymous with acci-

\(^{197}\) 289 Ill. App. 342, 7 N.E.2d 336 (1937), aff'd on other grounds, 369 Ill. 306, 16 N.E.2d 749 (1938).

\(^{198}\) Id. at 350, 7 N.E.2d at 342.

\(^{199}\) 220 Ill. App. 493 (1923).

\(^{200}\) *Christ v. Pacific Mutual Ins. Co.*, 312 Ill. 525, 144 N.E. 161 (1924). The *Christ* court did not cite the lower court decision in *Wayne* but adopted reasoning clearly negating the strict interpretation of the distinction between accidental results and accidental means. See note 192 supra.

\(^{201}\) The conflict exists even though *Ebbert* was later affirmed by the Illinois Supreme Court. When *Ebbert* was considered the Supreme Court only affirmed that part of the decision which denied recovery on the basis that the insured had a pre-existing disease. The correctness of the statement by the appellate court that anaphylactic shock was not accidental means was not considered. *Ebbert v. Metropolitan Life Ins. Co.*, 369 Ill. 306, 309, 16 N.E.2d 749, 751 (1938).

The pre-existing condition of the insured in *Ebbert* was a liver ailment that in the opinion of the court contributed to his death. Therefore, recovery was precluded on the basis of a "sole and independent" cause provision, and an exclusionary clause for "bodily infirmities." Id. at 313, 16 N.E.2d at 756.

\(^{202}\) 415 Ill. 16, 111 N.E.2d 516 (1953).

\(^{203}\) 11 Ill. 2d 227, 142 N.E.2d 5 (1957).

This clearly shows Illinois is moving towards the view expressed by Mr. Justice Cardozo in *Landress v. Phoenix Mutual Life Ins. Co.*

In *Carlson v. New York Life Insurance Company,* the Illinois appellate court considered what pre-existing illness may, because of the presence of an exclusionary clause for "bodily disease or infirmity" or a "sole and independent cause" provision, preclude recovery. The court held that the injury must be the direct and proximate cause of death before a claim under the policy will be denied. In making this interpretation the court adopted the Silverstein rule which, as previously discussed, has uniformly been cited outside the jurisdiction for the premise that hypersensitivity to a drug is not a pre-existing illness or cause which would relieve the insured of liability. Therefore, the defense available to an insurance company under either of these clauses would not be effective in anaphylactic shock cases in Illinois today.

### IV. Jurisdictions Denying Recovery

The jurisdictions that have denied recovery to persons claiming under accident provisions of insurance policies for deaths arising from anaphylactic shock have uniformly adopted the strict distinction between accidental means and accidental results. Voluntary, intentional acts which produce unexpected or unforeseen results are not compensable in these jurisdictions. In an insurance contract only one provision need be unfulfilled or one exclusionary requirement be unrealized before recovery will be denied. Therefore, a jurisdiction which finds that anaphylactic shock is not "accidental means" need not proceed further in the disposition of the case. The other issues concerning the sole and independent cause provisions and the exclusionary clause for bodily infirmities and

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208. 76 Ill. App. 2d at 191, 222 N.E.2d at 367.

209. 254 N.Y. 81, 171 N.E. 914 (1930).

210. See note 162 supra.

211. See notes 48-56 and accompanying text supra.
diseases are not discussed. This is the basic reasoning of all jurisdictions that have denied recovery. Two other jurisdictions indicated similar reasoning would be adopted in anaphylactic shock cases.

A comparison of the leading case which denies recovery, Order of United Commercial Travelers v. Shane, with Mutual Life Ins. Co. of New York v. Dodge, the leading case for allowing recovery, illustrates the basic distinction between the two positions. Both cases were decided under the federal common law and prior to the United States Supreme Court decision in Landress v. Phoenix Mutual Life Insurance Co. Factually the cases are almost identical. In Shane the insured died immediately following the administration of the anaesthetic butyn, a drug having the same characteristics as the novocaine which was administered to the insured in Dodge. In addition, both cases examined most of the issues that are relevant to the proper disposition of anaphylactic shock cases today; accidental means, the sole and independent cause pro-

214. 64 F.2d 55 (8th Cir. 1932).
216. See note supra.
218. 64 F.2d 55, 57 (8th Cir. 1932).
vision, the exclusionary clause for bodily diseases and infirmities, and the medical treatment exclusion.

The primary issue the two courts differ upon is of course, whether anaphylactic shock is "accidental means." This disagreement is primarily centered on their different interpretation of the language contained in United States Mutual Accident Association v. Barry\textsuperscript{219} which states:

If in the act which precedes the injury something unforeseen, unexpected, unusual occurs, which produces the injury, then the injury has resulted through accidental means.\textsuperscript{220}

In Dodge the unintentional application of the drug to a person with an idiosyncrasy to the particular drug was the "accident preceding the injury."\textsuperscript{221} However in Shane the suggestion by plaintiff's counsel that the idiosyncrasy was part of the means was expressly rejected.\textsuperscript{222} This conflict is the essence of the disagreement on the issue of whether anaphylactic shock is accidental means. Dodge clearly states there was no intention to give the drug to a person with an idiosyncrasy hence accidental means. Shane as clearly states the idiosyncrasy was not part of the means and since the drug was administered properly there was no accident in the means, just an accidental result.\textsuperscript{223}

In addition to disagreeing on the proper interpretation of this language in Barry, the two courts differ on the importance of the Western\textsuperscript{224} case where the natural and probable consequence mode of defining accidental means was enunciated. Both Dodge and Shane cite it with approval as supporting their result, but in Shane the court confined it to its facts which the court stated were not opposed to denying recovery.\textsuperscript{225} In fact the Shane court did not use the Western case to define what was accidental means but rather employed the strict interpretation of the distinction between

\begin{itemize}
\item 219. 131 U.S. 100 (1889).
\item 220. \textit{Id.} at 121.
\item 222. Order of United Commercial Travelers v. Shane, 64 F.2d 55, 58 (8th Cir. 1932).
\item 223. Because some jurisdictions adhere to the \textit{Dodge} logic (see notes 106 and 134 accompanying text \textit{supra}) and others adhere to the logic of \textit{Shane} (see note 212 and accompanying text \textit{supra}) the outcome of cases that are actually identical may depend on the jurisdiction in which the insurance contract was formed.
\item 224. 85 F. 401 (8th Cir. 1898). \textit{See} notes 63-66 and accompanying text \textit{supra}.
\item 225. Order of United Commercial Travelers v. Shane, 64 F.2d 55, 59 (8th Cir. 1932).
\end{itemize}
accidental results and "accidental means." The Dodge court actually used the Western case to define accidental means thereby extending the principles of the case beyond its facts. Thus, the two positions are characterized by their conflicting interpretations of the language in Barry and the impact the Western case has on their definition of accidental means.

Even though later cases denying recovery merely rely on the fact anaphylactic shock is not an "accidental means," it should be noted that the Shane court held that where death results from an idiosyncrasy of the insured then the administration of the drug is not the sole cause of death. Therefore recovery could also be denied under the sole and independent cause provision of the insurance policy. This directly conflicts with the reasoning in Dodge where it was held the idiosyncrasy was but the condition of the insured and the administration of the drug was the sole and proximate cause. Due to the inherent nature of insurance contracts, the only jurisdictions where this issue has been considered are those which find anaphylactic shock is "accidental means." They have uniformly found through various arguments that hypersensitivity to a drug is not a contributing or concurring cause.

Another potential barrier in those jurisdictions denying recovery is the exclusionary clause prohibiting recovery for injuries arising from medical treatment. While it has very rarely been an issue it has almost uniformly resulted in denying recovery to anaphylactic shock victims. The justification for the results have been that the administration of a drug for the purpose of anesthetizing the insured, or prior to any other medical treatment is part of that treatment. Recovery was denied on this basis in Shane

226. Id.
228. Order of United Commercial Travelers v. Shane, 64 F.2d 55, 58 (8th Cir. 1932).
231. See note 19 supra.
233. In International Travelers Ass'n v. Yates, 29 S.W.2d 980, 981 (Tex. Ct. App. 1930), the court stated: "[t]he average layman would refer to a death under an anaesthetic
where the policy stated, "[Insurer] shall not be liable to any person for any benefit for any death . . . resulting from . . . medical, mechanical or surgical treatment. . . ."284 Recovery has also been denied on this basis where the court found anaphylactic shock was "accidental means."285

While it is not argued that the administration of a drug to the insured is not medical treatment, it appears that giving effect to these clauses to preclude recovery in anaphylactic shock cases defeats the inherent purposes of the insurance contract. The insured contracts with the insurance company to protect him and his family from unforeseen consequences which result in bodily injury or even the death of the insured. Medically, anaphylactic shock is clearly an accident, it occurs unpredictably and infrequently.286 In addition the insured's death occurs solely because of the unexpected allergic reaction and not due to any active disease which the insured might possess. This is clearly distinguishable from those cases where the insured unexpectedly dies during medical treatment, but the cause of death is the disease which induced the treatment. The latter situation, is more within the meaning of the medical treatment exclusion as intended by the insured. But to apply the exclusion to prohibit recovery in anaphylactic shock cases where the insured's death was caused solely by an unpreventable, unpredictable occurrence deprives the policyholder of the benefits for which he purposely acquired the policy.

While the literal interpretation of the medical treatment exclusionary clause may defeat recovery in anaphylactic shock cases, the objectively reasonable expectations of the insured would clearly be to the contrary. Recovery may therefore be justified on the basis of unequal bargaining power between the parties or unconscionable advantage on the part of the insurer to limit liability beyond the reasonable expectations of the average policyholder.287

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284. Order of United Commercial Travelers v. Shane, 64 F.2d 55, 56 (8th Cir. 1932). Of course, recovery was also denied because anaphylactic shock did not constitute accidental means. In addition, the court found the hypersensitivity was a contributing cause. Id.
286. See notes 5-8 and accompanying text supra.
V. THE PENNSYLVANIA EXPERIENCE

In Hesse v. Travelers Ins. Co.\textsuperscript{238} the Pennsylvania Supreme Court by a vote of four to three held that death which resulted from hypersensitivity to an anaesthetic was not within the limits of coverage afforded the insured under a policy which protected him against, “bodily injuries, effected, directly and independently of all other causes, through external violent and accidental means.”\textsuperscript{239} In this case the insured was administered an anaesthetic prior to an operation for the removal of one of his kidneys. No complaint was made that the operation was not skillfully performed or that the anaesthetic was not properly administered.\textsuperscript{240} The insured died before the surgery was completed from what the doctors termed \textit{anaesthetic death}, and which they defined as “hypersensitivity of the particular individual to the particular anaesthetic.”\textsuperscript{241} Neither the patient nor the doctors were aware of the patient’s hypersensitivity to the anaesthetic. The courts reasoning was twofold. First, it was held there was no “accidental means” as required by the insurance contract.\textsuperscript{242} It was the law of Pennsylvania at that particular time to recognize the strict distinction between accidental means and accidental results, and consistent with this strict rule the Pennsylvania courts found that a voluntary, intentional act which brings about an unintended result was not “accidental means” as it was employed in insurance contracts.\textsuperscript{243} Applying this interpretation of “accidental means” to anaesthetic death, the Hesse court stated, “there was no accidental means, all those employed were intentional.”\textsuperscript{244} Second, the court held that the insured’s hypersensitivity to the anaesthetic was the effective cause or at least a contributing cause of death, therefore, death was not effected solely and independently of all other causes as required by the insurance policy.\textsuperscript{245}

The Hesse result, that anaphylactic shock was not “accidental means”, was based on the strict distinction between accidental means and accidental results.\textsuperscript{246} However, in 1967 the Pennsyl-
vania Supreme Court in the case of *Beckham v. Travelers Insurance Company*247 reversed this long standing precedent in favor of the approach taken by Justice Cardozo in his celebrated dissent in the *Landress* case, namely, to abolish the distinction between accidental results and accidental means. The *Beckham* court stated:

Rather than continue upon our present course we prefer to confront the issue directly and abandon the artificial distinction between accidental means and accidental results. Continued adherence to this distinction would not only fail to serve a useful purpose but would condone ambiguity in a context in which we have traditionally insisted upon clarity and precision.248

The *Beckham* court cited *Hesse* as adding to this confusion by contrasting the result in *Hesse* to another Pennsylvania case, *Urian v. Equitable Life Insur. Soc'y*.249 In *Urian* the insured was killed by carbon monoxide gas while at work in his garage and the court permitted recovery.250 The *Beckham* court implied that similar results were warranted and under the new definition of accidental means such would be the outcome.251 Therefore, the court in effect questioned without overruling the *Hesse* decision in light of the ruling adopted in the *Beckham* case.

From the *Beckham* decision it is clear the current Pennsylvania law would allow recovery under the definition of accidental means when an intentional act properly performed produced an unexpected injury to the insured.252 However, to fill the void in defining what voluntary, intentional acts are "accidental means" the court adopted the average policyholder's opinion as the yardstick on this question.253 Judging by the uniformity in other jurisdictions, which employ a similar definition of "accidental means," and hold that anaphylactic shock is a compensable voluntary act, there

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248. Id. at 115, 225 A.2d at 535.
252. See discussion of jurisdictions abolishing the distinction between accidental results and accidental means, notes 58-68 and accompanying text *supra*.

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is little doubt Pennsylvania would reach an identical conclusion.\(^{254}\) Therefore, such part of the reasoning in the *Hesse* case which denied recovery because anaphylactic shock was not “accidental means” has been effectively overruled in Pennsylvania.

The second significant aspect of the *Hesse* court’s reasoning was the finding that the hypersensitivity to the anaesthesia is a contributing cause of the insured’s death, and hence, even if there had been an accident it could not have been the direct and independent cause of death.\(^{255}\) In light of the Pennsylvania cases decided subsequent to *Hesse*, which examine the effect of a pre-existing disease of the insured on recovery under accident provisions of insurance contracts, this premise of the *Hesse* case is no longer tenable. In fact *Hesse* was denied very early in the development of this area of the law in Pennsylvania which has since undergone substantial revision and refinement.

The insurance contract in *Hesse*, unlike most insurance contracts today with accident provisions, did not contain an exclusionary clause for death directly or indirectly caused by bodily disease or infirmity.\(^{256}\) These clauses have the obvious purpose of limiting the insurance company’s liability and this distinction between policies which have this exclusionary clause and those which do not is important in defining the scope of this liability. The Pennsylvania Supreme Court in *Real Estate Trust Company of Philadelphia v. Metropolitan Life Ins. Co.*\(^{257}\) recognized that where an insurance contract contains only the *direct and independent* cause provision the accident merely must be the *proximate or predominant* cause of the insured’s death or injury.\(^{258}\)

The *Hesse* court in denying recovery interpreted this rule to require the insurance company to be able to ascertain the disease or infirmity of the insured which contributed to his death, otherwise no liability would be imposed.\(^{259}\) However, no other court

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\(^{254}\) See discussion of jurisdictions adopting this definition of accidental means in section IIIA supra. See note 106 supra.


\(^{256}\) This was recognized in *Real Estate Trust Co. of Philadelphia v. Metropolitan Life Ins. Co.*, 340 Pa. 533, 541, 17 A.2d 416, 420 (1941).


\(^{258}\) *Hesse v. Travelers Ins. Co.*, 299 Pa. 125, 129, 130, 149 A. 96, 97 (1930). This reasoning was used to circumvent an earlier Pennsylvania Supreme Court decision, *Kelly v. Pittsburgh Casualty Co.*, 256 Pa. 1, 100 A. 494 (1917), which originated the “proximate and predominant rule” used to interpret the direct and independent cause provision found in insurance contracts. See Note, *The Effect of a Pre-Existing Disease on the Right to Recover Under an Accident Policy or the Double Indemnity Provision a Life Insurance Policy*, 88 U. Pa. L. Rev. 853 (1938).
which has interpreted this rule has subsequently made this distinction which appears artificial and contrary to the inherent purpose insurance policies serve, namely, protecting against unknown risks.

The Pennsylvania Supreme Court did in fact downgrade the importance of the Hesse decision on this specific point in the Real Estate Trust case. The court reviewed the entire history of the law in this area in Pennsylvania and while noting Hesse was only the second case to reach it for consideration on this issue, it emphasized that the real question in Hesse was not the contributing cause element but the accident element.\(^{260}\)

Before the Pennsylvania Supreme Court clarified its position on pre-existing diseases of the insured and accident clauses in insurance contracts in Real Estate Trust, the Pennsylvania Superior Court had occasion in the companion cases of Gyulai v. Prudential Ins. Co. of America\(^{261}\) and Gyulai v. Metropolitan Life Ins. Co.\(^{262}\) to rule on the question of whether a hypersensitivity to a drug was a defense where recovery was sought under insurance contracts both with and without exclusionary clauses. The court held in both instances that where an accident, in this case a board falling on the head of the insured, places the insured in a position to require the administration of a drug to which he was unknowingly hypersensitive, and the insured dies as a result of the hypersensitivity, the hypersensitivity is neither a contributing cause of the death, nor a bodily infirmity of the insured.\(^{263}\) Because there was an incident preceding the administration of the drug which was clearly an accident, the Gyulai cases are distinguishable from the Hesse case.\(^{264}\) But, nevertheless the principles applied in analyzing the effect of hypersensitivity to drugs in accident clauses of insurance


\(^{261}\) 135 Pa. Super. 73, 4 A.2d 824 (1938).

\(^{262}\) 135 Pa. Super. 82, 4 A.2d 828 (1938).


\(^{264}\) In Gyulai the insured was accidentally hit over the head by a board. The issue in the case was not whether anaphylactic shock was accidental means but whether a hypersensitivity to a drug was a contributing cause of the insured’s death. However this case is distinguishable from Hesse because unlike Hesse where recovery was precluded because the hypersensitivity contributed to the insured’s death, this court states:

\[E\]ven if it be conceded that the insured’s death would not have resulted from the injury inflicted upon his head if he had not been hypersensitive to the effects of the injection, it does not follow that there can be no recovery.

135 Pa. Super. 73, 78, 4 A.2d 824, 825 (1938) (emphasis added).
contracts were subsequently cited with approval by the Pennsylvania Supreme Court in the Real Estate Trust case.\textsuperscript{265}

In deriving its holding the superior court recognized that Pennsylvania had adopted the definition of bodily infirmity enunciated by Judge Cardozo in Silverstein v. Metropolitan Life Ins. Co.\textsuperscript{266} This view recognized that:

A policy of insurance is not accepted with the thought that its coverage is to be restricted to an Apollo or a Hercules . . . [but] a distinction is to be drawn between a morbid or abnormal condition . . . and a condition . . . so remote in its potential mischief that common speech would call it not disease or infirmity. . . . \textsuperscript{267}

The superior court reasoned that a jury could find that hypersensitivity to a drug was not a bodily infirmity because of the infrequency with which it occurs and because it merely reflects a lowered resistance in the insured, not a morbid disease.\textsuperscript{268}

Apparently insurance companies became dissatisfied with the results in Pennsylvania under the proximate and predominant\textsuperscript{269} cause rule and, therefore, included the exclusionary clause for bodily diseases and infirmities in their insurance contracts with accident provisions. This was an obvious attempt to limit their liability and was given effect as such by the Pennsylvania Supreme Court on various occasions.\textsuperscript{270} A specific rule was developed to differentiate the insurance companies' liability on policies with and without this exclusionary clause in light of a provision that the accident be the direct and independent cause of death:

Where the liability of the insurance carrier is so restricted, it is not sufficient for the insured to establish a direct causal relation between the accident and the loss of disability. He must show that the resulting condition was caused solely by external and accidental means, and if the proof points to a pre-existing infirmity or abnormality which may have been a contributing factor, the burden is upon him to produce further evidence to exclude that possibility.\textsuperscript{271}


\textsuperscript{266} 254 N.Y. 81, 171 N.E. 914 (1930). This rule was by the Pennsylvania Supreme Court in the case of Arnstein v. Metropolitan Life Ins. Co., 345 Pa. 158, 26 A.2d 898 (1942). The Gyulai court had previously applied the Silverstein definition of what constitutes a bodily infirmity. Gyulai v. Prudential Ins. Co. of America, 135 Pa. Super. 73, 78, 80, 4 A.2d 824, 825, 826 (1938).


\textsuperscript{268} Gyulai v. Prudential Ins. Co. of America, 135 Pa. Super. 73, 79, 80, 4 A.2d 824, 825, 827 (1938).

\textsuperscript{269} See note 259 supra.

\textsuperscript{270} See KEETON § 5.4(e); MEYERS § 14.2.

But the right to recover was barred only if there was in fact such a contributing cause, not if it was merely speculated that the pre-existing condition contributed to the insured's death.272

A later decision, Brenneman v. St. Paul Fire and Marine Ins. Co.,273 altered the burden of proof with regard to the contributing cause element but did not change the limits on the insurer's liability provided by the clause.274 In Brenneman the Pennsylvania Supreme Court held that the claimant must first prove a bona fide accident and a causal connection between the accident and the death of the insured.275 But, unlike before, the burden then shifted to the insurance company to prove the effect, if any, of a pre-existing condition of the insured upon his subsequent death.276

In defining what pre-existing conditions of the insured will prevent recovery under this rule the Pennsylvania Supreme Court has clearly followed the principles previously stated in the Gyulai cases.277 The policy in adopting this approach was to limit the liability of the insurance company beyond what was provided by the proximate and predominant278 rule but not to defeat the entire purpose of the accidental death provision by providing that every condition of the insured which related to the injury would preclude recovery.279 While no subsequent cases have considered this rule with regard to an insured's hypersensitivity to a drug, it appears that the decision in Gyulai based on the principles similar to those finding application in this rule would require a result identical to

274. Id. at 415, 192 A.2d at 748.
275. Id.
276. Id.
278. See note 259 supra.
Gyulai, namely, that a hypersensitivity to a drug will not preclude recovery under an insurance contract with these two clauses.

The cases interpreting these clauses which have denied recovery all involve pre-existing diseases of the insured that were active before the accident. For example, where the accident produced gangrene of a diabetic character, the fact the insured was suffering from diabetes at the time of the accident prevented recovery. Arteriosclerosis not consistent with the age of the insured was held to be a pre-existing disease of the insured that prevented recovery. A nervous condition of the insured which had dissipated prior to the accident but recurred following the accident was held to be a pre-existing disease that precluded recovery. But conditions which are inherent in the age of the insured or mere weaknesses or lower resistances of the insured to outside forces will not prevent recovery.

The Pennsylvania Supreme Court in deciding these cases has always treated the two clauses synonymously. The pre-existing condition of the insured when examined under the exclusionary clause is also treated as that condition which allegedly contributed to the death of the insured, thereby preventing the accident from being the sole and independent cause of death as required by the policy. The exclusionary clause, as previously stated, is viewed as a specific limitation on the broader sole and independent cause provision. Therefore, the courts have implied that if a pre-existing condition does not fall within the exclusion it is a fortiori, not a contributing cause of the insured's death. Under this mode of interpreting the two clauses and the principles applied to define the insurers liability, it is apparent that the reasoning in the Hesse case, which held that hypersensitivity to a drug was a contributing cause of the insured's death, has been effectively overruled by subsequent decisions of the Pennsylvania Supreme Court.

VI. CONCLUSION

There is a conflict among the states on the issue of whether injuries or deaths which result from anaphylactic shock are compensable under an accident insurance policy or the double indemnity provision of a life insurance policy. The direct cause of the split of authority is the conflicting manner in which the various jurisdictions interpret the provision in these policies which requires the bodily injury or death to be effected through "accidental means."²⁸⁶

Basically three interpretations of the term, "accidental means," have developed. The first and most liberal was enunciated by Justice Cardozo in his dissent in Landress v. Phoenix Mutual Life Ins. Co.²⁸⁷ This theory defines accidental means in light of what the average policyholder would determine constitutes an accident in the ordinary and popular use of the term.²⁸⁸ Because anaphylactic shock is an event that may occur once in one hundred thousand administrations of the drug it is clearly viewed as an accident by the average policyholder.²⁸⁹ Jurisdictions adopting this definition have, therefore, uniformly held anaphylactic shock is "accidental means" and permitted recovery.²⁹⁰

A second and totally opposite definition of "accidental means" is the strict rule enunciated in United States Mutual Accident Ass'n. v. Barry²⁹¹ which was reaffirmed by the United States Supreme Court in Landress.²⁹² Under the strict rule the requirement in the insurance policy that bodily injury or death occur through "accidental means" is given legal meaning apart from the ordinary use of the term accident.²⁹³ States adopting this rule view the use of the specific language, "accidental means," as an attempt by the insurance company to limit its liability and give it effect accordingly.²⁹⁴

Adherence to the strict rule uniformly requires an unexpected, unusual or unforeseen event occur in the act preceding the injury. It is not sufficient that only the result was unexpected; there must

²⁸⁶. See note 46 and accompanying text supra.
²⁸⁷. 291 U.S. 491, 498 (1933) (Cardozo, J., dissenting).
²⁸⁸. See note 61 and accompanying text supra.
²⁹⁰. See note 104 and accompanying text supra.
²⁹¹. 131 U.S. 100 (1889).
²⁹³. See notes 42, 43 and accompanying text supra.
²⁹⁴. See note 12 and accompanying text supra.
be an accident in the means which caused the injury. Therefore, these jurisdictions do not consider death or injuries which result from voluntary, intentional acts, properly conducted, as constituting "accidental means." Because anaphylactic shock is clearly the unexpected result of voluntary, intentional acts on the part of the insured, jurisdictions adhering to the strict rule hold anaphylactic shock is not produced by "accidental means" and therefore deny recovery.

Faced with the conflict of desiring to give effect to the use of specific language ("accidental means") by the insurer yet understanding that the average policyholder would not comprehend the legal implications, numerous jurisdictions have adopted a middle ground. These jurisdictions, unlike those adopting the strict rule, have held that not all voluntary, intentional conduct which produces unexpected injuries or even death are automatically non-compensable due to the use of the term "accidental means" in insurance contracts. Conversely, however, not every unexpected result is within the definition of "accidental means" as it is more liberally defined under the first theory. While jurisdictions adhering to this less definable middle ground have often been criticized because of inconsistent results in analogous factual situations, they have nonetheless uniformly held that anaphylactic shock was produced by accidental means and permitted recovery.

Two other clauses have frequently been the basis of defenses by insurance companies in anaphylactic shock cases. The first is the provison which requires the accident to be the sole and independent cause of the insured's death, and the second is the exclusionary clause which prohibits recovery if the insured's death is contributed to by a bodily disease or infirmity. Where the two clauses are both present they are treated synonymously because they speak to the same argument in anaphylactic shock cases. It is the contention of the insurers that the insured's hypersensitivity to the drug was a bodily infirmity which contributed to his death and recovery should, therefore, be denied. However, except for a few older decisions, it has uniformly been held that hypersensitivity to a drug does not constitute a bodily infirmity which contributed to the insured's death.

In conclusion, of the three theories which have been developed

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295. See note 57 and accompanying text supra. Compare this requirement to the first interpretation of "accidental means" where only an accidental result must occur.
296. Id.
297. See note 212 and accompanying text supra.
298. See note 134 and accompanying text supra.
299. Id.
300. See notes 15-18 and accompanying text supra.
301. Id.
302. See note 18 and accompanying text supra.
in defining "accidental means" only the strict interpretation has precluded recovery in anaphylactic shock cases. However, fortunately for the policyholder the trend has been to repudiate the strict rule in favor of a broader definition of the term.\textsuperscript{303} Jurisdictions formerly adhering to the strict rule have found that giving a legal interpretation which substantially differs from the ordinary and popular meaning of the term "accidental means" has often produced inequitable results.\textsuperscript{304} A policyholder finds that his conception of what constitutes an accident at the time the contract was made suddenly differs, to his detriment, from the interpretation rendered by a court. Nowhere are the inequities of this rule more pointed than in the context of anaphylactic shock cases, and continued adherence would only serve to perpetuate this unfairness.

\textbf{Bruce A. Olster}

\textsuperscript{303} Keeton \textsuperscript{5} 5.4(e); Meyers \textsuperscript{14} 2.
\textsuperscript{304} See notes 106, 134 and accompanying text supra.