

1952

Lorraine J. White v. National Postal Transport Association : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

LORAIN J. WHITE,

Plaintiff and Appellee,

— vs. —

NATIONAL POSTAL TRANSPORT
ASSOCIATION, formerly RAIL-
WAY MAIL ASSOCIATION,

Defendant and Appellant.

MAY 13 1952

Clk, Supreme Court, Utah

Case No.
7829

BRIEF OF APPELLANT

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Case No.
7829

BRIEF OF APPELLANT

STATEMENT OF FACTS

This appeal is taken from a jury verdict in an action brought on a provision for the payment of death benefits for accidental death contained in the Certificate, Constitution, and By-Laws of the Defendant association, of which Plaintiff's husband was a member at the time of his death.

In accordance with its Constitution and By-Laws, (Ex. 6) Defendant association issued to Milton H. White, husband of Plaintiff, a certificate (Ex. A) providing for the payment of Four Thousand Dollars (\$4,000.00)

if death resulted from accidental injuries alone. The certificate provides:

“Provided, however, no benefit or sum whatsoever shall be payable in any case whatsoever unless the accident alone results in producing visible, external marks of injury or violence suffered by the body of the member, nor unless the death or disability results wholly from the injury and within one year from the date thereof. Nor shall any benefit be paid for death or disability which results from voluntary inflicted injuries, be a member sane or insane, nor from poison or other injurious matter taken or administered accidentally or otherwise; nor as the result of any surgical operation.”

“Accidental death shall be construed to be either sudden, violent death from external violent and accidental means resulting *directly, independently and exclusively* of any other causes; and not the direct or indirect result of the member's own vicious or unlawful conduct; or death within one year as the *sole result of accidental means alone. There shall be no liability whatever when disease, defect, or bodily infirmity is a contributing cause of death.* The Railway Mail Association shall not be liable for any claims arising from appendicitis caused by trauma or otherwise.” (Italics supplied)

The Constitution and By-Laws of the Association which are incorporated by reference, as of the date of death, by the provisions of the certificate (Ex. A), provide at page 38 of Ex. 6 as follows:

“Accidental death and external injuries are defined to be either sudden, violent death or accidental injuries from violent and accidental means

alone resulting directly, independently and exclusively of all other causes and not the result of member's own vicious, intemperate, or unlawful conduct, and producing visible marks or other evidence of injury or violence on or within the body of the member. *There shall be no liability whatever, unless death or disability results wholly from the injury, nor when any disease, defect, or bodily infirmity is a contributing cause of death, disability, or injury, nor shall any benefit be paid when death or disability results from voluntary inflicted injuries by the member, be he sane or insane, nor from any anesthetic, poison, or drug taken or administered accidentally or otherwise, nor as the result of any surgical operation, nor by reason of the administration of an anesthetic prior to surgical operation, nor during any other preparation for surgical operation (except where the surgical treatment or preparation thereof is made necessary by an accident), nor as a result of any surgical, electrical, sani-practice, osteopathic or chiropractic treatment, or treatment of any sort intended to cure or alleviate mental or bodily ills, whether self-administered by the member or by any other person whomsoever, nor shall benefits cover nor extend to any of the following conditions, to-wit: appendicitis, fits, epilepsy, mental infirmity, ptomaine poisoning, bacterial infection (except a pyogenic infection occurring with and through an accidental cut or wound), arthritis, varicocele, cerebral hemorrhage, menigeal hemorrhage, spinal hemorrhage, heat prostration, sunstroke or sunburn, nor epididymitis or orchitis (unless caused by direct trauma).*" (Italics supplied)

The facts as to the life, illness, injury, and death

of Milton H. White are not in dispute. Plaintiff testified as to the accident in August, 1949, and the incidents surrounding his last moments. Plaintiff also produced two physicians, one a heart specialist, who attended Mr. White during his lifetime. Defendant also produced a heart specialist. All of the medical testimony was in substantial agreement. The only dispute is the application of the contractual provisions contained in the certificate and in the Constitution and By-Laws to the facts developed at the trial.

The evidence shows that Mr. White was at the time of his death on February 14, 1950, aged 63. (Ex. 2) He was suffering from rheumatic heart disease resulting from rheumatic fever in childhood. He had been under medical treatment by Dr. Edward P. Goddard for this heart condition for about one year prior to injury claimed by Plaintiff to have been the sole cause of death. (TR. 66) As a part of his treatment, he had been given mercurhydrin and thiomerin (TR 55), medicines characterized by his attending physician (TR 70-73) as typical of advanced heart disease and congestive heart failure. A typical symptom of his heart condition, auricular fibrillation, was the throwing out of emboli or fragments of blood clots (TR 54) which are pumped out into the body and may block the circulation in an extremity or a vital organ of the body. (TR 79) While under treatment and observation by Dr. Goddard, he had at least two of these typical embolic episodes (TR 71), one in the spleen and the other in the leg. Subsequently, while under treatment by Dr. Olson, a heart specialist, he had

a third in the kidney or abdominal area. (TR 55) A fourth embolus struck his brain on February 14, 1950, and caused his death (TR 56 and Exs. 2 and 3), in the opinion of Dr. Olson, the attending physician who testified for Plaintiff.

Plaintiff testified that on August 25, 1949, while she and her husband were on a trip visiting relatives in Dodge City, Kansas, Mr. White received a bump on the rear calf of the right leg. The injury occurred when a bench being moved stuck, and when jerked loose, its corner struck Mr. White in the rear of his leg. The blow made no mark at the time (TR 8) but commenced to discolor on the way home to Ogden. When the Whites returned to Ogden on September 3, 1949, Dr. Goddard was called and Mr. White was placed in St. Benedict's Hospital with congestive heart failure (TR 67) at which time Dr. Olson was called in as a heart specialist. On September 8, an embolectomy was performed (Ex. 4 and TR 38) to remove a clot in the artery of the leg. Some clot was removed (TR 38), but the circulation of the leg did not improve, gangrene set in (TR 39), and on October 29, 1949 (Ex. 4), the leg was amputated above the knee. A pathological examination (Ex. 5) of the amputated portion of the leg developed that Mr. White had also been suffering from obliterating thromboangiitis of the vessels of the right leg, which condition is also known as Buerger's Disease (TR 45 and 73).

Mr. White's recovery from the amputation operation was normal. The wound healed properly, and discussion was being had with respect to fitting him with an arti-

ficial leg. (TR 72-73) But on the evening of February 13-14, 1950, White, after an attack of nausea, had what amounted to a convulsion, slipped off the bed and died. Dr. Olson was called, pronounced Mr. White dead on his arrival, and fixed the immediate cause of death as cerebral artery embolism. (Ex. 2) That was still his opinion on the day of the trial. (TR 56, 57) That was also the opinion of Dr. Peltzer, the heart specialist called by the Defendant association. (TR 81) Dr. Goddard, the only other medical expert called by Plaintiff, stated in the application for benefits filed with the Defendant association (Ex. 1), "This man has since expired, at which time I was not in attendance, but apparently due to his heart disease." Dr. Goddard further testified at the trial that he was in no position to venture an opinion as to the cause of death due to the fact that he was not present at Mr. White's death (TR 70).

Application for benefits was filed by Plaintiff with the Defendant association on May 5, 1950. The claim was denied on the ground that the accidental bump on the leg in August 1949 was not directly, independently and exclusively the cause of the death, but that the heart disease and Buerger's Disease were, at least, contributing causes. Thereafter, this suit was instituted in February 1951.

STATEMENT OF POINTS

POINT I.

THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A DIRECTED VERDICT.

(a) THIS CASE AT LEAST BELONGS IN CATEGORY THREE OF *Browning v. Equitable Life*.

(b) PLAINTIFF FAILED TO MEET HER BURDEN OF PROOF.

POINT II.

THE COURT WAS IN ERROR IN GIVING INSTRUCTION NO. 9.

POINT III.

THE COURT WAS IN ERROR IN GIVING THE JURY ITS INSTRUCTION NO. 8.

ARGUMENT

POINT I.

THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A DIRECTED VERDICT.

Contractual provisions similar to the ones in this case have been before this court some half dozen times since 1937. The first of this series,

Browning vs. Equitable Life Assurance Society, 94 Utah 532, 72 Pac. 2nd 1060

established the law of this state in interpreting the "accidental means alone" clause. The *Browning* case concerned a claim for disability payments by a dentist who had sprained his finger in an accident. The policy covered loss "resulting directly and independently of all

other causes, from bodily injuries effected during the term of this policy, solely through external, violent, and accidental means." The court, speaking through Mr. Justice Larsen, outlined three categories in which cases arising under similar policies or similar clauses have been classified. These are:

"(1) When an accident causes a diseased condition which, together with the accident, results in the injury or death complained of, the accident alone is to be considered the cause of the injury or death.

"(2) When, at the time of the accident, the insured was suffering from some disease, but the disease had no causal connection with the injury or death resulting from the accident, the accident is to be considered the sole cause.

"(3) When, at the time of the accident, there was an existing disease which cooperating with the accident resulted in the injury or death, the accident cannot be considered as the sole cause or as the cause independent of all other causes." (72 Pac. 2nd 1073).

Mr. Justice Wolfe, in his dissenting opinion on rehearing of

Browning vs. Equitable Life, 80 Pac. 2nd 348 at 353

further breaks down category (3) as follows:

"These words must, by their plain and inevitable meaning, exclude liability for any disability where either (1) the sole cause was other than the injury, or (2) the preponderating cause of disability was any *other* cause than the injury

effected solely through external, violent and accidental means, or (3) where there was an *efficient* concurring cause besides the injury, and such concurring cause was not produced or set in motion by the accident or injury.”

The point which divided the court in the *Browning* case and which was the issue in the five cases subsequently considered by this court was the choice of category and the method of making that choice.

The *Lee* case,

Lee vs. New York Life Insurance Co., 95 Utah 445, 82 Pac. 2nd 178,

added a new corollary to category two, as stated by the court,

“The rule, as we believe it to be on the facts which this jury was justified in finding, is that where an accidental injury sets in motion or starts activity of a latent or dormant disease, and such disease contributes to the death after having been so precipitated by the accident, the disease is not a direct or indirect cause of death nor a contributing cause in the meaning of the terms of the policy, but the accident which started the mischief and precipitated the condition resulting in death is the sole cause of death.”

In,

Clayton vs. New York Life Insurance Co., 96 Utah 331, 85 Pac. 2nd 819,

the trial court found sufficient conflict in the evidence to submit to the jury a determination of whether the accident caused the disabling illness. The jury having so found, this court affirmed and placed it in category one saying,

“In the case at bar, it was permissible for the jury to find that the respondent’s appendix was not diseased or infected prior to the blow, and that the blow to the abdomen was the sole cause of the appendicitis and disability, without any question of pre-existent condition or concurrent, contributing cause.” (85 Pac. 2nd 819 at 822).

In

Hanley vs. Mutual Life Insurance Co. of New York, 106 Utah 184, 147 Pac. 2nd 319

the assured suffered a blow in the groin from the fall of a heavy steel bar, causing a hernia. He was later operated on for the hernia and died very suddenly from pulmonary embolism. The case would clearly have come within category one and the company held liable but for the fact that over 90 days had intervened between the injury and the death, an excluding condition of the policy. The court did, however, allow recovery on a theory, not pertinent to the case at bar, that the surgical operation was a violent external and accidental means within the policy if the resulting death from the surgery was unexpected. The effect of this theory on surgical operation cases was clarified in

Kellogg vs. California Western States Life Insurance Co., Utah, 201 Pac. 2nd 949,

where recovery on the policy was denied when, because of the poor physical condition of the assured, post-operative shock was expected, and the death, therefore, not accidental.

Tucker vs. New York Life Insurance Co., 107 Utah 478, 155 Pac. 2nd 173

fell in category three. In that case, the decedent slipped on the ice and fractured his arm on November 19, 1941. He died on December 7, 1941, from a dissecting aneurism of the aorta. The evidence showed that he had high blood pressure caused by atherosclerosis, which had been a chronic condition, for which he had been treated for about a year. The undisputed medical testimony was that the aorta gave way as a result of a diseased condition which had so weakened the artery that it could not stand the increased blood pressure caused by the fall or strain after the injury. This court reversed the lower court and held that it should have given a directed verdict in favor of the defendants, stating,

“Mr. Nichols’ condition at the time of the accident was one in which he had an existing disease which cooperated with the accident in causing his death. This compels us to conclude that the accident cannot be considered the sole cause of insured’s death, and from this actual picture, we must conclude that this case is one which falls in the third class of cases set forth in Mr. Justice Larsen’s opinion in *Browning vs. Equitable Life Assurance Society*, *Supra*, and the cases there cited.”

(a) *This Case at Least Belongs in Category Three of Browning vs. Equitable Life.*

It is submitted that the case at bar belongs with the *Tucker* case in category three. The court there said,

“The record contains no testimony contrary to these facts and opinions given by Dr. Richards who was called by Plaintiffs and upon whose testimony their case must stand. The picture of the insured’s physical condition could be enlarged

and made even plainer by including other testimony given by both Dr. Richards and Dr. Viko. The record shows conclusively that there is no conflict in the evidence as to the material issues of this case.

“That Mr. Nichols had been suffering from high blood pressure for at least a year prior to his fall must be accepted as true. There is not any evidence to the contrary. He had been suffering from a known disease for a period of a year or longer. This condition or disease was, in the opinion of the doctors, not only active but progressive. Both doctors expressed a belief that the intima of the aorta gave way and caused death, and this was the result of the diseased condition which had so weakened this main artery *that it could not stand the increased blood pressure occasioned by the fall, or the strain imposed upon the aorta after the injury.*” (155 Pac. 173-176). (Emphasis supplied).

These same things may be said in the case at bar. There is no conflict in the evidence as to the cause of death. The death certificate (Ex. 2) and the medical proof of cause of death (Ex. 3) submitted by Dr. Olson on behalf of Plaintiff, both recite “cerebral artery embolism” and “rheumatic heart disease” as the causes of death. The death certificate itself was prima facia evidence of the facts therein stated, including the attending physician’s opinion as to the cause of death. (Sec. 35-2-20, Utah Code Ann. 1943).

Bozicevich vs. Kenilworth Merc., 58 Utah 458, 199 Pac. 406;

Griffin vs. Prudential Insurance Co., 102 Utah 363, 133 Pac. 2nd 333.

It is stated in the *Griffin* case that evidence of the type contained on the death certificate may be explained or contradicted by competent evidence. What the court there meant by that can best be determined by examining its summary of the evidence which it said was sufficient to explain or contradict the death certificate and to sustain the verdict of the jury. The doctor in that case arrived after the man was unconscious, and jail inmates told him the insured had suffered an epileptic fit. An autopsy did show insured suffered from chronic alcoholism and incident disorders, but did not confirm epilepsy. There was also no evidence that insured had ever been known to have suffered from epileptic convulsions. This court there said,

“The fact is that the doctor who filled out the death certificate admitted that in making such declaration he relied on statements of other persons at the city jail who had not seen the insured suffer any epileptic attack and had no knowledge on which to base their statements. Their statements to the doctor on which he relied were perfectly conjectural. The declaration in the death certificate was almost if not entirely destroyed by the admissions of the ones who were instrumental in causing such statement to be inserted. It is true the doctor found a condition, which under certain circumstances might produce convulsions similar to epilepsy, but he gave no professional opinion under oath that the fall was caused by an attack of epilepsy and indeed in view of his admitted uncertainty as to causal factors the jury would have been justified in disbelieving his opinion even if he had expressed an opinion under the circumstances.”

Contrary to the *Griffin* case, Dr. Olson, who signed the death certificate and the medical proof of cause of death, stated in his testimony at the trial that it was still his opinion that the cause of death was a cerebral embolism (Tr. 51-57). Dr. Peltzer was of the same opinion (Tr. 81). Dr. Goddard, the only other physician testifying at the trial, said, "I would say that I am in no position to venture an opinion due to the fact I was not present at the man's death," and wrote on Exhibit 1, "This man has since expired, at which time I was not in attendance, but apparently due to his heart disease." (Tr. 70). Counsel for Plaintiff tried to elicit testimony that an autopsy might have shown something different as the immediate cause of death (Tr. 41), but while Dr. Olson admitted that there were other possibilities, the best the Counsel could get from him was,

Q. In view of that then, Doctor, I take it that your statement as to the cause of death came upon the death certificate as cerebral artery embolism is subject to change?

A. Yes, if I saw proof by autopsy I was in error, I certainly would change it. *It still is my best judgment that it is the cause of death,* but I have no proof except judgment based on symptoms the last moments of his life." (Tr. 51). (Emphasis supplied).

Upon cross examination, Dr. Olson said,

Q. You state in the death certificate you signed and in this medical proof of cause of death, Exhibit 3, "cerebral artery embolism" as the cause of death, Doctor?

A. Yes, that is my judgment.

Q. That is your signature?

A. Yes.

Q. That is still your best judgment?

A. It is my best judgment. It may be in error, but that is what I thought at the time.

Q. You have heard nothing since to make you change your mind?

A. There is a difference between the way patients die when they have pulmonary embolism and when they have cerebral embolism.

Q. And from what Mrs. White told you, you were and are of the opinion it was cerebral artery embolism?

A. Yes (Tr. 56-57).

Dr. Peltzer's testimony was substantially similar:

Q. I asked you if you had an opinion as to the cause of death, the immediate cause of death based on the history of the disease and Mrs. White's description of his last hour.

A. Well, I have several. I will have to conceive of several things that could have caused it, one of which is the most likely possibility, it is cerebral embolism.

Q. You think that is the most likely?

A. Statistically, yes (Tr. 81).

And at Tr. 83, under cross examination by Plaintiff's counsel, he said,

Q. One could be pulmonary embolism?

A. As I heard the testimony, the reason I put cerebral before pulmonary, the history is not

pulmonary embolism but more likely cerebral embolism.

Q. You wouldn't say pulmonary embolism is not possible?

A. It isn't completely impossible. It is possible.

Q. As to the other causes, they are possible?

A. You might understand they are cardiac causes.

Q. I am talking about this death certificate.

A. They are related diseases of his heart.

Q. The death certificate is not conclusive as far as we are concerned?

A. In the absence of autopsies, no.

Other than these doctors quite honest admissions that it was "possible" they could be in error if an autopsy showed otherwise, but that they did not think so, there is no evidence explaining or contradicting the death certificate, and no issue for the jury on the question of cause of death save speculation on whether an autopsy would have shown these two heart specialists to have been in error.

The Tenth Circuit Court in applying Utah Law to a similar policy in

Mutual Life Ins. Co. of New York vs. Has-sing, 134 Fed. 2nd 714

said,

"It is incumbent upon one asserting liability under a contract of this type, to show by a fair preponderance of the evidence that death resulted directly from bodily injuries independently and exclusively of all other causes; effected solely

through external, violent, and accidental means, which necessarily implies that death did not result indirectly from disease or bodily infirmity. [Citing cases]. The jury was so instructed, and its verdict was in the affirmative. If there are any facts or reasonable inferences to be drawn from the fact tending to support the jury verdict, it must stand, although the jury may have been justified in reaching a contra conclusion. But the verdict must find some substantially affirmative support in the facts and circumstances. “* * * the law contents itself with probabilities, and declines to wait for certainty before drawing its conclusions.” *Lewis v. Ocean Accident & Guarantee Corporation*, 224 N.Y. 18, 120 N.E. 56, 57, 7 A.L.R. 1129. *But the law is not content with mere possibilities, conjectures, or surmises. The jury is not permitted to guess or speculate on the cause of death.* (Emphasis supplied).

See also

Troutman vs. Mutual Life Ins. Co. of N. Y.,
125 Fed. 2nd 769.

(b) *Plaintiff Failed to Meet Her Burden of Proof.*

As succinctly stated by Mr. Justice Wolfe in his concurring opinion in the *Griffin* case (133 Pac. 2nd 333 at 343),

“The burden of proof that (a) The insured suffered injuries (b) The injuries directly caused the death (c) Such cause was independent of all other efficient cooperating causes (d) The injuries occurred solely through violent means, external means and accidental means, is on the Plaintiff.”

Another similar analysis of what a contractual provision similar to this one in the case at bar requires of

a Plaintiff was the following statement by the Pennsylvania court in

Lucas vs. Metropolitan Life Ins. Co., 339 Pa. 277, 14 At. (2d) 85, 131 A.L.R. 235.

“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 or 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.” (131 A.L.R. 235, 239).

To attempt to meet this burden in the case at bar, Plaintiff did show that the insured did suffer an injury, the bump on the leg in the accident described by Mrs. White. To show that the bump on the leg directly caused the death independently of all other cooperating causes, Plaintiff must establish the following syllogism: (1) The bump caused the gangrene, independently of any other cause; (2) the gangrene caused the amputation; (3) the amputation created a blood clot which lodged in the brain, (4) therefore, the bump independently, directly, and exclusively of all other causes, resulted in the death of Milton H. White.

Plaintiff tried to establish this syllogism in one easy step in her counsel's hypothetical question to Dr. Olson, the first question appearing at pages 41-44 of the transcript, and the second on pages 44 and 45. To these questions, Dr. Olson had no opinion (Tr. 44, 45). Plain-

tiff likewise failed to establish any evidence to support points (1) and (3) of the syllogism.

As to the argument that the bump on the leg was the sole cause of the gangrene, Dr. Goddard, the man who performed the operation and had Mr. White under his care, testified on behalf of Plaintiff just the opposite. A pathological examination of the diseased leg showed that Mr. White had also been suffering from obliterating thrombo-angiitis of the vessels of the right leg, which condition is also known as Buerger's Disease (Exhibit 5 and Tr. 45 and 73). With respect to this situation, Dr. Goddard on cross examination said:

"Q. Now, with a man who is suffering from heart disease of the type Mr. White was, and Buerger's Disease, would it be more likely that a blow of the type described, that is, with the sharp edge of the bench on the back of the calf, would cause some injury to the vein or artery than not?

A. With respect to the Buerger's Disease, it would be more likely than with a person not so afflicted.

Q. Would it have any effect on the circulatory system?

A. I don't think, on a blow on the leg.

Q. With Buerger's Disease it would?

A. Yes, they apparently were.

Q. And they would be damaged and more susceptible to injury?

A. Yes." (Tr. 74).

Dr. Peltzer came to the same conclusion:

“Q. Now, Doctor, if a man of about Mr. White’s physical characteristics, which you heard described, were not suffering from Buerger’s disease and from rheumatic heart condition, would a blow of the type you heard described in court today be likely to cause an injury to the arteries which would result in gangrene?”

A. I would have to say that a similar blow on a normal artery would be unlikely to cause gangrene in extremities and in an otherwise normal body.” (Tr. 80).

There was no evidence to go to the jury to the effect that a blow similar to that described in Mrs. White’s testimony would be likely to cause an injury to the circulatory system, resulting in the gangrene, of a person not suffering from a rheumatic heart or Buerger’s Disease.

Similarly, Plaintiff failed to show the third step of her required syllogism. Dr. Olson, in his discussion of the circulatory system, stated that for a clot originating in the leg, as a result of the operation, to reach the brain causing death by cerebral embolism would be, by the nature of the circulatory system, an impossibility, except for the very unusual situation of a paradoxical embolism (Tr. 60-61). Even its name indicates its rarity. Dr. Olson said he would not expect it (Tr. 61) and that it was so improbable and infrequent as to cause a report in the medical journal (Tr. 63), and that it did not occur in this case (Tr. 64). Dr. Goddard said it would be very rare (Tr. 72) and Dr. Peltzer testified with respect to paradoxical embolism, “I believe Dr. Olson quoted well

when he said it is such a rarity that it is still a reason to publish an article in medical literature. I couldn't tell you statistically, but it is an extremely rare incident. It is so rare that there are no statistics—only isolated cases reported.” (Tr. 80).

Again, no evidence of any affirmative nature, that the death dealing clot could have resulted from the operation, was produced by Plaintiff. Can a jury be permitted to speculate on the occasion of a paradox so rare that it is cause for reports in medical journals? Is an honest admission by a doctor that he could be wrong, as there is no certainty short of an autopsy, evidence to be considered and speculated upon by a jury as bearing upon a possibility of a cause of death other than that testified to by the doctor and unsupported by any other evidence?

Mutual Life vs. Hassing, Supra, and Troutman vs. Metropolitan Life, Supra.

Contrast the overwhelming evidence that the clot came from the diseased heart. White had a rheumatic heart. Typical of a rheumatic heart is an off-beat known as auricular fibrillation (Tr. 53). A concomitant of auricular fibrillation is the throwing off into the bloodstream of clots called emboli (Tr. 54, 79). White had an embolic episode in the spleen in November, 1948. He had another in his leg in September, 1949. He had a third in his kidneys in January, 1950 (Tr. 55). Dr. Olson, without contradiction, said he had a fourth in the brain causing the death (Tr. 56, Exs. 2 and 3). All of these were without dispute in the evidence.

Plaintiff has also suggested one other syllogism to tie the bump on the leg to the death. That line of reasoning is: (1) Bump caused the gangrene (2) Gangrene caused the operation (3) The operation put Milton H. White in a state of decline of health from which he eventually died. It has already been shown that point one is fallacious and that the gangrene could not have come from the bump in the absence of the Buerger's Disease condition or the diseased heart condition. Likewise, Plaintiff failed to establish any evidence to support this point three. Dr. Olson, in answer to Plaintiff's long, hypothetical question which stressed the supposed decline in health after the operation and concluded:

“Q. Doctor, would you say it is possible, having in mind the hypothetical question, the long one I asked you a short time ago, is it possible this blow on the leg would have a causal connection on the man's death?

A. I have no opinion on it.

Q. You have no opinion?

A. No, I don't know.

Q. Would you say it is impossible?

A. I don't know, there is no way to tell.” (Tr. 45).

Another hypothetical question was put to Dr. Goddard, another of Plaintiff's witnesses (Tr. 68):

“Q. Now, doctor, in view of that information, and in view of what you saw of the patient in September, October, November and December of 1949, and in view of the embolectomy, the amputation of the leg, and the resultant con-

finement to his bed, and his house, I will ask you if you have an opinion as to whether or not the injury described as a bump, or a knock on the rear of the calf of his leg, on the rear of the calf of the right leg causing pain then and thereafter, would have causal connection to the man's death on February 14th, 1950?

- A. I did feel it would necessarily have to have a causal effect.

MR. SNOW: That is all."

CROSS EXAMINATION

BY MR. BILLINGS:

- "Q. You say "necessarily," Doctor, on what basis do you reach that conclusion?

- A. I would reach that conclusion on the basis that anything that would damage one's health *with an already existing condition, such as Mr. White had*, would hasten his demise. (Emphasis supplied).

- Q. That is the only meaning of the word "necessarily," is that correct then?

- A. In my opinion, it would."

Dr. Goddard also said the operation was over with (Tr. 72), and the recovery was normal, thus breaking the chain of causation of this theory of Plaintiff's. Dr. Olson described a new heart attack coming in January 1950 (Tr. 55) which is a new cause, independent of the blow on the leg. Counsel for Plaintiff also attempted to get some solace for this desperate theory from Dr. Peltzer (Tr. 84):

- "Q. You heard Dr. Goddard, I suppose, when he said that the injury which has been described

here today necessarily had a causal connection to death, I suppose you disagree with that?

A. Not completely.

Q. You do not completely disagree with it?

A. No.

BY MR. BILLINGS:

Q. What do you mean by that, Doctor?

A. I mean if a man is suffering from a serious cardiac disease which requires such measures done to him.

Q. Drugs?

A. Digitalis and mercurhydrin, that is a usual indication of advanced heart disease and the method in which they were employed. Anything that would happen to that man, let's say, in his diseased cardiac state, for instance, he might have fallen out of bed, what to other individuals was common trauma, he might have in a way aggravated this condition, any incident in his life, let's say, that interfered with his normal cardiac condition would assist.

Q. Would you say that that type of trauma you have described, could have caused his death independently of the cardiac disease from which he was suffering?

After some objection, the answer at page 85:

"A. Not in a normal healthy individual, I am trying to put emphasis on the fact that in the presence of cardiac disease, instances of traumatic injury, not important to the human body, and in the presence of cardiac disease they do aggravate the condition.

Q. You mean this blow from the bench, you have described, might have had some connection with his death, is that right?

A. And also I am trying to describe the fact, if a man has disease of the arteries—

Q. Buerger's Disease?

A. Buerger's Disease, that a blow in those circumstances would cause a more significant injury than if he didn't have Buerger's Disease so the blow plus the fact he did have that disease would aggravate the heart disease more."

It is submitted, as was said by this court in the *Tucker* case, supra,

"Where the record discloses no dispute concerning insured's physical condition over the year prior to his injury, and there being no dispute as to the cause of death, we must find the court erred in submitting the facts to the jury and erred in giving its instructions. In view of the record, the court should have given Defendant's requested instruction No. 1 directing the jury to return a verdict of no cause of action in favor of Defendant and against the Plaintiff."

POINT II.

THE COURT WAS IN ERROR IN GIVING INSTRUCTION No. 9.

Instruction No. 9 (R. 22) provides,

"You are instructed that where an accidental injury sets in motion or starts renewed activity of a previously existing but quiescent disease or condition, and such disease or condition contributes to the death, after having been so precipi-

tated by the accident, the disease is not a direct or indirect cause of death, nor is it a contributing cause as in the meaning of the language of insurance certificates. In such case, the accident is a sole cause of death.

“Therefore, if you find by a preponderance of the evidence that the deceased Milton H. White had previously been afflicted with a heart condition which condition was not active and which condition was not to be expected to cause his imminent death, and, if you further find by a preponderance in the evidence that the injuries suffered by the said Milton H. White set in motion or renewed the activity of said heart condition, and that therefore said heart condition contributed to the cause of death, I instruct you, in such event, you must return a verdict in favor of the Plaintiff and against the Defendant since under such a finding, the accident, under the law is considered to be the sole cause of death.”

This instruction is an obvious attempt to apply the rule of the *Lee* case,

Lee vs. New York Life Insurance Co., 95 Utah 445, 82 Pac. 2d 178

to the case at bar, but, as said by the court in the *Tucker* case, the facts in that case were materially different.

“Lee previously had been ill from gall bladder trouble, but at the time of the accident this condition was not active but dormant, and was completely walled off, and had not the injury directly disturbed this and caused it to become active, the condition which was dormant and walled off might never have contributed to the insured’s death.”

In the case at bar, the heart condition was anything but latent or dormant. White had an embolic episode in 1948 (Tr. 70). He had another in 1949 (Tr. 71). He was hospitalized in September 1949 for congestive heart failure. He was being actively treated with the drugs mercuhydrin and thiomerin, which are heart medicines used in advanced heart disease and congestive failure (Tr. 70). The condition of Mr. White's heart was not set in motion by the blow on his leg any more than Mr. Nichols' arteries were hardened or his blood pressure raised by the fracture in the *Tucker* case.

The distinction between the case at bar and one where the *Lee* doctrine can be applied is well exemplified by a recent decision of the Tenth Circuit applying Utah Law in a diversity case:

Kansas City Life Ins. Co. vs. Hayes, 184 Fed 2d 327.

In that case, a man in previously good health fell down the stairs in his home and died within a few hours. After an autopsy, the report gave the cause of death as first, multiple traumata to almost all portions of the body, and second, chronic, recurrent rheumatic heart disease with formation of ball thrombus in the left auricle appendage which became dislodged into the mitral orifice, occluding same. Another doctor, a heart specialist, who observed the autopsy, stated that in his opinion the ball thrombus was loosened by the fall of the deceased and that it eventually occluded the valve of the heart causing death. From his examination, he considered the insured's heart essentially normal for a man

his age and showed nothing which in his opinion would cause death in the absence of the fall. There was also other evidence to the effect that the ball thrombus was caused by a rheumatic heart. The Circuit Court said,

“In sum, it seems to be agreed that the immediate cause of death was a dislodged ball thrombus which occluded the mitral valve shutting off circulation. There was a *difference of opinion* on whether the fall caused the thrombus to dislodge and occlude the mitral valve, or whether the occlusion was caused directly or indirectly from a diseased heart. . . . We agree with the trial court that the facts in our case presented a jury question whether the accidental fall set in motion a latent or dormant disease condition resulting in death of the insured.” (Emphasis supplied).

In the case at bar, there was no difference of opinion as to the source of the embolus. Both Dr. Olson and Dr. Peltzer agreed it came from the heart. In the case at bar, the heart disease of White was not dormant or latent but active, and though partially under control by the medication prescribed by Dr. Goddard, and later by Dr. Olson, it still was throwing off emboli which blocked arteries in the spleen, leg, the kidneys, and finally the brain.

It is submitted that in giving the jury instruction No. 9 the court submitted to it an issue for which there was no evidence in support and opened the door to sheer speculation, bias, and prejudice.

Griffin vs. Prudential Ins. Co., Supra.

POINT III.

THE COURT WAS IN ERROR IN GIVING THE JURY ITS INSTRUCTION NO. 8.

Instruction No. 8 (R. 21) provides,

“If you find that the deceased Milton H. White had ailments or infirmities of the body at the time he suffered an injury, by reason of which ailments or infirmities he had a weakened condition without normal powers of resistance, I instruct you that he might nevertheless have met his death by reason of external, violent, and accidental injury within the meaning of the insurance certificate in this case.

“If you find, in the preponderance of the evidence that he suffered an injury because of external, violent, and accidental means, and if you find by a preponderance of the evidence that such injury was a real, direct, and efficient cause of his death, Plaintiff is entitled to your verdict even though you might believe that a normal or more robust person would have had a greater capacity to resist such an injury and might not have been killed by it.”

That instruction is another approach to the second causation theory of Plaintiff discussed above. It has already been shown that all the evidence was to the effect that in the absence of his heart condition and Buerger's Disease, the slight blow on White's leg would never have started a chain resulting in death. It has also been shown that this chain was broken by the recovery from the operation testified to by Dr. Goddard, and that another heart attack occurred in January, 1949 introducing a new and independent cause as testified to by Dr.

Olson. Dr. Olson also testified that the probable cause of the nausea which Plaintiff claims weakened White was the drugs he was taking for his heart condition (Tr. 47, 62), and that it was not typical of a recovery from amputation. Dr. Goddard testified the recovery was normal and that they were discussing a prosthetic device when Mr. White died (Tr. 72).

Or, if this instruction be applied to the first syllogism mentioned above, Plaintiff has likewise failed to produce any evidence to support that line of argument. But even if it be accepted, *arguendo*, that the blow caused the clot in the leg which caused the gangrene, independently of any other cause, still Plaintiff failed to produce any evidence that the clot originating in the leg went to the brain causing the death.

In addition to the fact that the evidence does not support a finding of the jury on this instruction, the instruction itself does not correctly state the law applicable to the contract between the Defendant association and Plaintiff's decedent. The certificate (Ex. A) provides in part, "there shall be no liability whatever when disease, defect, or bodily infirmity is a contributing cause of death." The By-Laws state in part, "there shall be no liability whatever, unless death or disability results wholly from the injury, nor when any disease, defect, or bodily infirmity is a contributing cause of death, disability, or injury."

In

Tucker vs. New York Life, supra

the court found from the undisputed evidence, that

because of the decedent's diseased and weakened condition, his artery "could not stand the increased blood pressure occasioned by the fall or the strain imposed upon the aorta after the injury." Such a finding fits neatly into instruction No. 8, but this court, with an insurance contract not nearly so restrictive as the one now before it, placed that case, without a dissent, in category three and reversed a judgment entered on a verdict for the Plaintiff.

It must be recognized that some courts have allowed recovery where there is no active disease, but merely a frail or infirm condition of the body which renders the individual more liable to serious effects from an injury than an average person. See 1 Appleman, *Insurance Law and Practice*, Sec. 403, Page 500, and cases therein cited. But that is not this case, any more than the *Tucker* case fell within that category. Compare, for example,

Frame vs. Prudential Ins. Co. of America,
358 Pa. 103, 56 Atl. 2d 76

which the Pennsylvania court held to be within the class of cases mentioned in Appleman, with

Lucas vs. Metropolitan Life Ins. Co., Supra.

In the latter case, Plaintiff had an automobile accident in 1926 which resulted in a bone deformity which could have caused arthritis. The suit was for arthritic disability claimed to have resulted from a fall in 1938. The court held the 1938 fall merely accelerated and aggravated the progress of the disease. In the *Frame* case, the decedent was 71 and was partially paralyzed

from an earlier cerebral hemorrhage. He died after suffering a broken leg and ribs and hip resulting from a fall downstairs. The court there sustained recovery on the ground there was no evidence the disability caused the fall.

Some respect must be given to the provisions of the contract. It is submitted that an existing disease or infirmity which aggravates the effect of the injury, *Tucker vs. New York Life Ins. Co.*, *supra*, or is aggravated by the injury, *Runyon vs. Commonwealth Casualty Co.*, 109 N.J.L. 238, 160 At. 402, is a contributing cause, *Railway Mail Ass'n vs. Stauffer*, 152 F. 2d 146, (C.C., D.C.) *Railway Mail Ass'n vs. Weir*, 156 N.E. 921 (Ohio). To come within the Appleman class of cases and meet the terms of the policy, the instruction must make clear that the ailments or infirmities are wholly inactive. *Browning vs. Equitable Life Assurance So.*, *supra*; *Kelly vs. Prudential Ins. Co.*, 334 Pa. 143, 6 At. 2d 55; *Leland vs. United Commercial Travelers*, 233 Mass. 58, 124 N.E. 517. This, instruction No. 8 fails to do. By thus leaving it open to the jury, the court authorized the jury to completely disregard all the evidence as to the active nature of White's heart condition and Buerger's Disease, other than the finding that they made him more susceptible to injury, of which fact there was no question.

Nor do instructions No. 5 and No. 6 correct the prejudicial errors in instructions No. 8 and No. 9. All the former do is present instructions conflicting with and contradictory to No. 8 and No. 9 as to the law pertaining to the insurance policy in issue and what Plaintiff must

show to recover. And, as was said by this court in *Konold vs. Rio Grande Western Railway Co.*, 21 Utah 379, 60 Pac. 1021,

“Instructions on a material point in the case which are inconsistent or contradictory shall not be given. The giving of such instructions is error and is sufficient grounds in a reversal because it is impossible after the verdict to ascertain which instruction the jury followed or what influence the erroneous instruction had in their deliberations. This has been so uniformly held that citations are unnecessary.”

See also

Sorensen vs. Bell, 51 Utah 262, 170 Pac. 72,
and

Jensen vs. Utah Railway Co., 72 Utah 366,
270 Pac. 349.

Instructions No. 8 and No. 9 introduced before the jury facts which were not presented by the evidence and were well calculated to induce them to suppose that such state of facts, in the opinion of the court, was possible under the evidence and might be considered by them as a basis for imposing liability on Defendant association. Giving such instructions constitutes reversible error.

Griffin vs. Prudential Ins. Co., supra;

Parker vs. Bamberger, 100 Utah 361, 116
Pac. 2d 425;

Mehr vs. Child, 102 Utah 151, 140 Pac. 2d
772.

CONCLUSION

In conclusion, it is submitted that the trial court was in error in not granting Defendant's motion for a directed verdict, that the error was compounded in submitting the case to the jury under erroneous instructions which raised issues not substantiated by the evidence and that the court perpetuated such error in failing to grant Defendant's motion for a new trial or for judgment notwithstanding the verdict on the same grounds.

Respectfully submitted,

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