

1973

Inga-Lill Elton v. Bankers Life & Casualty Company : Respondent's Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

INGA-LILL ELTON,

Respondent,

vs.

BANKERS LIFE & CASUALTY
COMPANY,

Appellant.

Case No.

12993

RESPONDENT'S BRIEF

NATURE OF THE CASE

This was an action on a Policy of Insurance designated as a Special Risk Group Policy wherein the Respondent was the named beneficiary.

DISPOSITION IN THE LOWER COURT

This case was tried before a Jury which returned its verdict for the Plaintiff on April 12, 1972. Defendant's Motion for a New Trial was denied by the Trial Judge on June 28, 1972. The Trial Judge issued the following Memorandum Decision (R. 146):

"The Court assumed the responsibility imposed by *Dienes vs. Safeco* and interpreted the policy. The instructions given by the Court isolated the factual issues and required a finding of bodily injury (which could have been internal) caused by accident (unusual stress and strain as permitted under Utah cases) and required the jury to negative death due to natural progression of arteriosclerosis. The fact issue, to-wit: the cause of death was properly submitted to the jury and the issue was resolved in Plaintiff's favor.

The Defendant's Motion for Judgment Notwithstanding the Verdict or New Trial is therefore denied."

STATEMENT OF FACTS

Respondent cannot accept the Statement of Facts set forth in the Brief of Appellant for two very important reasons. First, the testimony and reasonable inferences derived therefrom is not set forth in the light most favorable to respondent. Second, Appellant has considered as non-existent certain testimony of major importance. As an example we call attention to the testimony of Dr. Clyde Null with regard to cause of death. We cite as a case in support of our position *Holland v. Moreton*. 10 Utah 2d 390, 353 Pac.2d 989, where the court stated:

" . . . once the Jury has found for the plaintiffs, they are entitled to have the Supreme Court review the evidence and every reasonable inference fairly to be drawn therefrom in light most favorable to them and their contentions."

As her Statement of Facts, the Respondent submits the following:

(a) *The decedent, during the last six weeks of his life, was under unusual mental and physical stress and strain.*

At the trial of this matter, the Respondent called as her witnesses those who knew the decedent best to testify concerning the last six weeks of his life.

D. Frank Wilkins, a colleague of the decedent, Judge Elton, who had adjacent chambers, testified as to his observations during the period in question. (R. 172). He explained that Judge Elton had assumed cases involving sensitive matters and that during this period of time he (the decedent) was withdrawn, less communicative and appeared to be more concerned about these cases than usual, (R. 177) and that he commenced taking home an unusual amount of work and was extremely busy. (R. 178). He testified further, that the decedent was the Presiding Judge during the period in question and in addition to his normal assignments, he had this administrative function. (R. 179). It was Judge Wilkins observation that he was taking more work home than any other District Judge (R. 182) and assigned the sensitive cases during this period to himself. Although he could have assigned said cases to others, he did not. (R. 185). Judge Wilkins concluded his testimony by stating that during this period Judge Elton was working harder than he usually did and was working harder as a Presiding Judge than other Presiding Judges had done in the past. (R. 195).

The District Attorney for the Third Judicial District, Jay E. Banks, testified concerning one of these publicized cases that Judge Elton had in April of 1970 known as the Ronnow case. (R. 197). He testified as to the pressure of public officials and the type of telephone calls that the Judge received at home which were critical of his action on this matter. (R. 204). That in his years as District Attorney he had observed that the custom and practice in such cases as the Ronnow case was to assign them to a Judge outside of the District, and that it was highly unusual for a Judge to hold onto this type of "sensitive" case. (R. 218). During this period of time he observed the pressures put on the Judge (R. 222) occasioned by the phone calls and the unusual publicity that was given to the case both before and after the sentencing of Ronnow (R. 204, 206). Mr. Banks further testified that the decedent experienced a dramatic personality change (R. 206) and that he became withdrawn and that a recognizable physical change occurred in his appearance when he was subjected to the pressure of this case. (R. 207).

Mr. Harold Waldo, Jr., an attorney in Salt Lake City, testified about another case that Judge Elton handled during the period in question. This was the Sunday Closing Law case. Mr. Waldo testified as to the great controversy involved in this case as the result of a request for injunctive relief by his clients. Because of the nature of the case and the need Judge Elton felt for haste, Mr. Waldo stated that he fixed "strenuous time tables for both the attorneys and himself to meet". (R. 234). During this period "there was many editorials written by the newspapers and there was extensive television coverage, and many stories written about the coverage of the law and the aspects of how it would affect the community and so forth. So

it was very widely and extensively debated" (R. 233, 234). Because of the time limitation all of the parties represented by "at least twenty attorneys" (R. 235) commenced preparation which even required work on holidays. (R. 235). Mr. Waldo testified in some detail as to the appearance of the Judge on May 6, 1970 during the legal arguments made to him which lasted for one complete day. (R. 238, 239). He stated that he had never been involved in as extensive a hearing as the one in question. (R. 238). That during the morning in question, the Judge seemed quite alert and asked numerous and various questions. He states that

"You could see that he had a real concern about the point that he was asking the question on".

As the afternoon went on the Judge became "very noticeably tired" and when he would speak "his words were slower and drawn out and somewhat labored" (R. 239).

As was shown by subsequent testimony, Judge Elton became ill prior to the time he was to make his decision, however, made the same on May 12, the day before his death. On the date in question, the Courtroom was crowded with attorneys, newsmen, television people and other interested parties. When the Judge ascended the bench:

"It was apparent that he was quite tired, because he took a considerable period of time to get up to the Bench and to seat himself in his chair. He then announced the decision and, again, in a rather unusual way, I thought. He normally spoke in quite a booming voice, but on this occasion he spoke very low and he was really a little difficult to hear." (R. 240).

Mr. Waldo re-emphasized in cross-examination that Leonard Elton looked markedly tired on May 12, 1972.

Both Judge Elton's Clerk and Bailiff testified at the trial in this matter. His Clerk testified that he seemed to be under a lot of pressure with the Sunday Closing Law, Kennecott Copper Case and the Ronnow case. (R. 259). He testified that on some occasions the work load that the Judge assumed would require him to work through his lunch and he would go home at 5:30 or 6:00 p.m. with a "briefcase full of files". He noted that Judge Elton became very tired and irritable (R. 260). He further testified that he had worked for other District Judges and that the pressure and work load that Leonard was experiencing was difficult and unusual. (R. 262). His Bailiff, David J. Shewell, testified to the heavy load that Judge Elton was working on and his heavy work habits during the last days of his life. (R. 274).

Felshaw King, an attorney from Davis County and an acquaintance of the Judge, testified that the day before his death, he had an ex-parte matter before the Judge (R. 289) and he described his condition as being haggard (R. 290) and that Judge Elton indicated that he had been working quite hard on pending matters and complained about the strain because of what he felt was the unusual nature of the cases and being in receipt of "disruptive and abusive calls". (R. 291).

The person closest, however, to the Judge during this period of time was, of course, his wife, the Respondent in this matter. She testified as to the unusual work patterns of Judge Elton during the period in question. (R. 292). She testified that he was dragging (R. 305) and that he was extremely bothered by the abusive phone calls received in regards to the Ronnow case (R. 296) (R. 301) and that he spent weekends, evenings and waking hours reading and preparing for the

pending cases. (R. 297). In addition to this, he commenced skipping lunches (R. 298) and commenced working both at home and at the office on Saturdays and Sundays. (R. 298). The night prior to the legal arguments on the Sunday Closing Law case, May 5, 1970, the decedent because of the stress and pressure suffered from a bizarre loss of memory. Mrs. Elton testified:

"Q. All right. Would you please tell the jury what happened on the evening of May 5, that is, the day before the arguments on May 6, 1970.

A. Well, he had been to work. He came home and he went to bed early. And later on in the evening, like I always did, I always go in and check on him and say good night and so forth. And as I did, he was just lying there and staring right straight out.

Q. Mrs. Elton, what time was this in the evening?

A. This was about 11:00 o'clock at night.

Q. All right. Please continue, I am sorry.

A. And so I talked to him. And at first he didn't respond. And as I kept talking to him, I could see he was far distant away. He had lost his memory completely. He didn't know who he was. He didn't know at first who I was. And he didn't know where he was. He didn't — absolutely didn't know anything. He completely lost his memory. And I tried to talk to him, to bring him back. And then he went out of the bed and went into the front room, the living room. So I called my children, and we were sitting there to 3:00 or 3:30 in the morning. And he kept asking all these questions. He had all these law books and things he had been studying the night before, and he said what are these. And what are they for. And we tried to revive his memory, but it was just gone. So — and he was taking notes all the time, everything I told him he took

notes that he was working on this particular thing, and his name was so and so, and he was a Judge, you know, and so forth. He wrote all these things down.

Anyway, I called the doctor, and the doctor told me that he was — had worked too hard mentally, and that I had to relax his mind. The only way I can do it is to give him a sleeping tablet and put him back to bed."

In addition to working his regular shift and working nights and weekends and holidays there was pending matters in the morning, prior to the normal work day, in the determination of Grand Jury matters (R. 303).

Mrs. Elton, on cross-examination, in a sense, summed up her observations of the last six weeks of her husband's life:

"A. Well, he did, but I mean the way I was able to observe my husband, it was because I know he had his regular duties in Court, he had — he was — he had this Ronnow, this Sunday Closing was sort of overlapping in preparing, and he spent every single minute studying. Like I said, even Sundays, Saturdays and Sundays. And this involved the whole family. It was just plain miserable. And I could see he was building up this pressure. And I told — there was nothing I could do about it. But this is what I feel was it just came to a climax.

Q. Was he also — did his pallor in his face — did he become gray and ashen?

A. Yes, I could see that he was looking tired.

Q. And he became withdrawn?

A. Yes.

Q. And moody?

A. He was terrible moody. He withdrew from my children. He wouldn't even help them with homework or he withdrew from us all. He was just like he was in a different world by himself.

Q. And you said that there towards the end, if I understand it, he was really ragged, is that right?

A. Yes. He was

MR. HANSON: That's all." (R. 313).

(b) The medical evidence tendered by the Respondent showed that the unusual strain that the decedent was under precipitated his death.

Much ado is made by Appellant in its Brief on the opinions and the conclusions of its two expert witnesses. It is stipulated by the Respondent that the Appellant did not call two witnesses which corroborated the plaintiff's theory in this case. It is respectfully submitted that the copious quoting and summarizing of the testimony of opinions of experts, which opinions contradicted the plaintiff's experts, is of no help to an Appellate Court in determining whether or not error was committed.

However, what is more critical is the fact that the Appellant's Brief does not disclose the true impact of the medical testimony of the witnesses called by the Respondent. Perhaps this medical testimony is summed up most succinctly in the last paragraph of Plaintiff's Exhibit No. 6. (On Cross-examination the Appellant brought out the fact that Dr. Null had originally reviewed this case when he was appointed as Chairman of a medical panel for the Industrial Commission of Utah. Counsel

for Appellant attempted to refer to this prior opinion and, as such, he, of course, opened the matter up and the Exhibit was properly before the Court. {R. 386, 395 and 396}). The last paragraph of Plaintiff's Exhibit No. 6 states as follows:

"Assuming but not deciding that the Deceased was involved in the events as alleged, the Panel find that the record is clearly indicative of marked emotional and physical stress superimposed upon an individual with severe vascular disease as manifested by the previously outlined central nervous system manifestation of vascular insufficiency. *It is the opinion of the Panel that the job activities, characterized by marked physical and emotional stress in this circumstance, most probably markedly aggravated the underlying condition and did indeed precipitate the Decedent's death.*"

Counsel for Appellant, on cross-examination, confirmed the fact that the opinions of the medical panel report were the opinions of Dr. Null. The testimony at (R. 398) shows:

"Q. Dr., this is not your opinion, is it?

A. I beg your pardon.

Q. This is not your opinion is it?

A. Yes. It is.

Q. This is the opinion of three doctors, is it not?

A. That is correct, but it is also my opinion."

Dr. Robert M. Dalrymple, the decedent's treating physician and a Board Certified Internist, testified as to the medical history of the decedent. On January 9, 1969, Dr. Dalrymple testified that Judge Elton suffered a stroke. (R. 317). Prior to that time, he appeared in good health, was symptom free from any cardiovascular difficulty and there was no indica-

tion of any physical impairment. He had not, for many years, been under medical care. (R. 315, 316). He was hospitalized subsequent to his stroke for a time and then returned to part-time employment. By the fall of 1969 he resumed his judicial duties and was working full time. (R. 323, 324).

In January of 1970 he assumed the responsibility of Presiding Judge of the Third District. These responsibilities, as shown by Judge Wilkins' testimony, heretofore referred to, substantially increased the Judge's work load.

From the time he resumed his full judicial duties until April 20, 1970 Judge Elton saw his doctor monthly without complaints or medical findings relating to vascular difficulty. (R. 324, 325). On April 21, 1970 after seeing Dr. Dalrymple the day before on an uneventful visit, he came to his office claiming of dizziness. The doctor testified that:

"A. His wife brought him into my office because he had a sudden onset of dizziness. His wife was holding him up. He was cold and clammy, and he had what is known as an astigmatism. In other words, if you look at something it is blurred. And it implies something wrong at the base of the brain. And he was quite sick to his stomach, but did not vomit.

Q. Did you form an opinion at that time what caused the condition from which he was suffering?

A. Yes, sir, I assumed he had had another stroke?"

(It should be pointed out at this juncture, that the flare-up described above occurred during the period of time when Judge Elton was receiving the abusive calls as a result of the sentencing in the Ronnow Case and was in the middle of the preparation of the Sunday Closing Law Case).

Dr. Dalrymple testified that he, again, saw Judge Elton on the 2nd day of May, 1970 and noted that he was "extremely emotionally upset at that time".

The doctor also testified that just immediately prior to the decedent's death, he was under undue stress. (R. 332). Dr. Dalrymple also refuted the Appellant's claim that the stroke of May 13, 1970 was pre-destined in that he, as his treating physician, did not anticipate the same and was surprised because "I did not think he was going to die that fast". (R. 332, 359). He also refuted the fact that the stress that Judge Elton was under was due to fear that he might die. (R. 357).

As stated earlier, the Respondent called in addition to the treating physician as her expert, Dr. Clyde Null. (R. 362). Dr. Null is a Board Certified Internist with a subspecialty in cardiovascular diseases (R. 363) and is also a fellow in the American College of Physicians (R. 367). The doctor based his opinion and conclusions at the trial in this matter upon the autopsy report, the medical records and the hypothetical questions tendered to him (the hypothetical questions that were tendered to him were not objected to by the Appellant).

Th doctor testified to the fact that on May 13, 1970 Judge Elton suffered a cerebral occlusion. However, the autopsy report failed to disclose whether or not the occlusion was brought about by a new clot or whether there was an alteration in one of the vessel walls. The doctor stated, however, that as far as the physiological changes that occurred, it did not matter which internal failure happened. (R. 369).

The type of stroke that Judge Elton had in January of 1969 and May of 1970 are referred to medically as a "cerebral vascular accident". (R. 370).

After explaining the mechanism of a cerebral vascular accident, the doctor was asked a hypothetical question based upon the testimony tendered by the lay witnesses. The doctor was asked if he could testify with reasonable medical certainty as to his opinion as to the effect the activities of the last six weeks of his life had in regard to Judge Elton's death. The doctor responded (R. 377) as follows:

"A. I certainly think it aggravated the underlying situation and undoubtedly markedly aggravated his cerebral vascular disease."

He went on to state that this aggravation of the underlying condition brought about his death. (R. 378). In this connection he testified that there is a wealth of clinical information that shows when persons are placed under chronic stress that such stress aggravates arteriosclerosis. In this connection he stated that strokes are a consequence of many factors involving the tissues and alterations of the tissues in regard to their requirement for oxygen and that these factors are altered by stress. He states as follows :

"And there is little question that individuals subjected to harrassment, stress, who are ill because of pre-existing strokes, heart attacks, what have you, or just arteriosclerosis anywhere will be made worse by this type of activity.

Q. In your opinion is this what happened in this case?

A. I think so." (R. 379).

On cross-examination counsel for Appellant attempted to reinforce his position that one that has arteriosclerosis is suffering from progressive disease and as such is destined to die from this progression. The doctor responded to this approach by stating:

"Q. And when you — and when the condition gets so bad — I mean eventually this person, as the condition progresses, is going to die from the progression of this condition?

A. That's not really necessarily true, sir. It is a common clinical observation that we cannot always — we simply can't answer all of these in that fashion. People will have a stroke, they will have symptoms of vascular insufficiency and this will go on for years, and others do not. And there are a whole host of factors which influence that. (R. 383).

Again on cross-examination the doctor reasserted his position that in this particular case Judge Elton's death was brought about by being "markedly aggravated by the underlying stress which he was subject to" (R. 384, 389). He stated further on cross examination as follows:

"A. And I do not think that the majority of the people are subject to this particular degree of stress in the same situation, no, sir." (R. 384).

Throughout the Appellant's Brief and throughout the record on appeal on cross-examination, great emphasis is made by the Appellant in stating that Judge Elton's strokes occurred during periods of rest and as such the stress activities could not be related to his death. Dr. Dalrymple, the treating physician, negated this contention. (R. 331). In order to clarify the Respondent's position in regards to the assertion of the defend-

ant, Dr. Null was asked directly whether or not the fact that he was at home at the time of the stroke affected the doctor's opinion as to the fact that the stress triggered Judge Elton's death. The doctor answered clearly and unequivocally that what seems to be a paradox of individuals under chronic stress is an extremely common occurrence. The doctor stated:

" . . . And what effect does this relief have in regards to your opinion on stress?

A. It doesn't really have any. This has always been a paradox, it has always been an interesting observation in medicine, that individuals under chronic stress will have heart attacks and so forth, strokes, not necessarily during the time that they have a tremendous amount of pressure on them emotionally and tensionwise, but will occur frequently at a later time when the stress period is over. There have been a number of investigative studies in an effort to answer why that should be so because people would naturally say well the stress obviously had nothing to do with it because he was over the stress, he was rested twenty-four hours later and then it happened. . . . But it has been observed in investigative studies that these reactions in the body reach their peak at times, well, twenty-four hours after the original stress, after the real pressure was there on people. So it is not surprising, it is a clinical observation, it has some backing in research material which has been demonstrated. So we do have appreciation, we do not have a full understanding of it, neither do we have a full understanding of arteriosclerosis. But we do have this observation, and it is quite valid." (R. 392, 393).

It would seem, therefore, that the defendant's contention that the stroke was not related to stress is clearly refuted by the

medical testimony; and, the defendant is merely re-arguing another factual matter that was determined against it by the jury.

At the close of the plaintiff's case in this matter the defendant made a motion for a directed verdict. It is respectfully suggested that the trial jury properly analyzed the status of the evidence at that time in his denial of such motion. The court stated what the legal issues were in accordance with the law in the State of Utah. He stated that he would leave for the jury the factual determination of whether or not the stress of his activities immediately prior to Judge Elton's death constituted an accident and caused the occlusion or stroke. (R. 416) We agree with the trial judge that there was credible evidence that the activities of Judge Elton were unusual, that the stress was extra-ordinary and that the medical evidence showed that this brought about the death of the decedent.

POINT I

THE EVIDENCE SUSTAINS THE VERDICT.

A. *The nature of the Policy.*

The Policy which is the subject of the claim of the Respondent in the case is truly unique. As stated earlier, the Policy in this case is designated by the Insurer-Appellant as a Special Risk Group Policy No. SR 82508. The Policy provides for coverage for loss of life, loss of two or more members, loss of one member and permanent total disability (as defined). There is also a weekly income benefit and a medical expense provision. Attached hereto and made a part of this Brief, in the Appendix, is a copy of said Policy which was attached to

the Complaint and admitted as being a true copy of the Policy in question, in Appellant's Answer.

The Policy in question insofar as it is relevant to the issues in this case provides for coverage when there is an "injury". The Policy states:

"Injury" whenever used in this certificate means bodily injury occurring while the group policy is in force as to the Insured Person or Insured Dependent whose injury is the basis of claim and causing the loss directly and independently of all other causes and effect solely through an accidental bodily injury to the Insured Person or Insured Dependent."

The Policy, therefore, provides coverage for *injury*. The phrase "causing the loss directly and independently of all other causes" modifies either the word claim or the word injury. When occurring in classical policies, this modification goes to the word accident or accidental means. The uniqueness of the Policy is further compounded by the fact that the Insurer fails to define, as most policies do, the words "injury" and "accidental bodily injury". The types of policies which have been most frequently construed by the Courts define with specificity what is meant by "accident", "accidental injury" or "accidental bodily injury". The following are some of the typical phrases that are used:

- (1) Bodily injury effected solely through external violent and accidental means.
- (2) Bodily injuries effected directly and independently of all other causes through external, violent, and accidental means.
- (3) There must be a "visible" wound or contusion.

(See 93 ALR 2d 578 at Page 579, Footnote (2).)
Handley vs. Mutual Life Insurance Company of New York, 106 Utah 184, 147 P.2d 319.

The obvious purpose of Insurers in defining "accident" in the manner set forth above is to limit their coverage to those types of instances where external and violent acts bring about the death. Not only, as stated above, is there no limiting definition of the words "injury" and "accidental bodily injury", the Policy in question uses these two phrases interchangeably within the Policy. See Part Six entitled "Exclusions" where in Paragraph 6 the word "accidents" is used and in Paragraph 7 the word "injury" is used.

Another uncommon aspect of the Policy is found in Part Six which is entitled "Exclusions". There is no exclusion for loss which is contributed or which results in whole or in part from bodily sickness or disease. Again, typical of the language found in most exclusionary provisions of "accidental policies" are:

(1) This policy does not cover any loss or disability resulting directly or indirectly, in whole or in part, from (a) any mental or bodily sickness or disease; See *Whitlock vs. Old American Insurance Company*, 21 Utah 2d 131, 442 P.2d 26, or

(2) Or death resulting directly or indirectly from bodily or mental infirmity. See *First National Bank of Birmingham vs. Equitable Life Assurance Society of The United States*, 144 Southern 451.

In summary, therefore, the Policy in this case covers "injury" and does not have the classical language requiring that there must be an "accident" which is "violent" or "external" and does not exclude as a contributing cause "bodily sickness or disease". The Respondent, of course, points out these facts at

this time for the reason that some of the cases relied upon by Appellant bottom their holdings on the qualifying language quoted above, which is not present in the Policy in question. Further, Courts have construed insurance policies which do not have the limiting language as in this case in a much more liberal manner than if such language had been present. Basically, the Appellant is making legal arguments as if the Policy in question had the limiting and qualifying language which was not present in this case.

B. The Trial Court required the Respondent to show that the decedent died as a result of an accident.

Point I of the Appellant's Brief is concerned with persuading this Court that there was a requirement that the decedent died as a result of an accident. This Point, it is respectfully submitted, is irrelevant in view of the fact that the trial court submitted the issue of whether an accident had occurred to the jury and the jury resolved that issue against appellant. Much ado is made by the Appellant as to the position taken by the Respondent in her Trial Memorandum (The Respondent did take the position and cited authority to the effect that she was entitled to a direct verdict. The Court, however, denied this Motion (R. 485, 486) and proceeded on the basis outlined above.) The instructions to the Jury which will be discussed in Point IV show that the case was properly presented and was presented under the theory that the Appellant is now urging.

C. The Utah Law sustains plaintiff's theory

As set forth in our Statement of Facts, the Plaintiff proceeded on the theory and the testimony sustained the fact that the decedent, immediately prior to his death, was under undue

decided

stress and strain, and that said strain precipitated his death. A remarkably similar case was ~~also~~ by this Court in a unanimous decision in 1968 in the case of *Thompson vs. American Casualty Company*, 20 Utah 2d, 439 P.2d 276. The Trial Court in that case found as a matter of law, based upon deposition and affidavits, that the Claimant did not sustain an accident. This Court stated, at the commencement of its opinion, that the ". . . pivotal question is whether or not the disability resulted from accidental means as provided in the insurance contract".

The record in the *Thompson case, Supra.* showed that the Plaintiff was employed by the State of Utah as a custodian and maintenance man. The facts were that on July 13, 1964 he assumed duties and tasks which required him to use an electric jackhammer of 35 to 40 pounds. During the week in which he performed this task, he experienced feelings of exhaustion at the end of each working day. On Saturday, the Plaintiff rested at home. On Sunday, the following day, he drove with his wife on a short trip to visit relatives. That night, that is some 48 hours subsequent to his job activities, he was awakened from his sleeping by seizures and was rushed to a hospital where his condition was described as "a prolonged generalized status of epilepticus, with a left side emphasis".

It is interesting to note that the plaintiff's prior medical history was strikingly similar to the medical history of the decedent in this case. The history shows (1) An injury some 28 years prior thereto which necessitated brain surgery; (2) arteriosclerosis cerebral vascular disease and (3) pulmonary emphysema. We have, therefore, the same situation that was presented in this case —evidence of unusual activity, fatigue and a resulting physiological disorder. This Court discussed the

Utah Law and ruled that the Trial Judge erred because there was a general issue of fact as to whether or not the condition of the Plaintiff was "unexpected and unforeseen in consideration of his health and physical condition prior to and during the time he engaged in this drilling." This Court therefore, has held that evidence of unusual exertion and stress raises a Jury question of whether or not the loss was brought about by accident.

Of course, the Respondent now relies on the recent case of *Inga-Lill Elton vs. The Utah State Retirement Board*, No. 12809, decided by this Court on November 15, 1972. The facts as to the activities of the decedent are identical to the facts which were found by the Trial Court in the case at bar.

The Court, in arriving at its decision, construed the language of the Judicial Retirement Act, (Section 49-7-4, U.C.A., 1953, as amended) which provides in part as follows:

" . . . every Judge who is killed by accident arising out of or in the course of his employment . . . "

and found that the exertion experienced by the decedent constituted an accident under Utah Law. As discussed earlier, the Policy in question in this case affords coverage "for an accident".

The Utah Court has discussed the meaning of the word "accident" in insurance policies. See *Richards vs. Standard Accident Insurance Company*, 58 Utah 622, 200 P. 1017. The Court in this case stated:

The rule of applying the popular meaning to words found in insurance policies is doubly strengthened when the additional rule is invoked that insurance policies should be construed liberally in favor of the insured and their beneficiaries so as to promote and not defeat

the purpose of insurance. In this connection we call attention to the workmen's compensation cases on the subject of sunstroke, which offer a striking analogy to the case at bar.

The English Workmen's Compensation Law provides that compensation is granted to employees who "sustain personal injuries by accident," with the further provision that the accident must grow out of and be in the course of the employment. "Personal injuries by accident," and 'bodily injuries by accidental means,' cannot be differentiated without resorting to subtile and refined distinctions. If injury or death by sunstroke is within the purview of Workmen's Compensation Acts, why is it not covered by an insurance policy that insures against loss resulting from bodily injuries by accidental means? (Page 631. Emphasis added.)

This Court, therefore, has concluded in an insurance accident case, that evidence of unusual activity and exertion constitutes a Jury question as to whether or not benefits are afforded. See Thompson vs. American Casualty Company, Supra. This Court has held that stress and death brought about by unusual activities constitutes an accident within the meaning of the Judicial Retirement Act. See Elton vs. The Utah State Retirement Board, Supra. This Court has held that exertion in the course of employment is covered under the Utah Compensation Act for accidents. See Powers vs. The Industrial Commission, 19 Utah 2d 140, 427 P2d 740, 1967 cited with the approval in Elton vs. Utah State Retirement Board, Supra. To argue, therefore, that under the facts of this case, after a favorable Jury verdict, Judge Elton's death was not an accident would be "resorting to subtile and refined distinctions" which this Court has clearly rejected in Richards vs. Standard Accident Insurance Company, Supra.

POINT II

THE EVIDENCE SUSTAINS THE PROPOSITION THAT JUDGE ELTON'S DEATH WAS DUE TO ACCIDENT.

We have heretofore, in Point I, cited authority which shows that under fact situations, similar to those in the case at bar, this Court has supported findings as to the existence of accidents. Inherent within the Appellant's argument, that Judge Elton's death was foreseeable and not unexpected, are certain factual determinations and arguments that are not supported by the record. In Appellant's Statement of Facts, strenuous effort is made to convince this Court that Judge Elton died from a progressive disease. The record overwhelmingly shows, however, that his death was due to unusual stress which shortened his life, and that he (the decedent) was not predestined to die on May 13, 1970 from a stroke.

We submit that under the cases cited by the Appellant, the Respondent's theory of accident is sustained.

In its Point I, the Appellant cites *Richards vs. Standard Accident Insurance Company*, 58 Utah 622, 200 P. 1017 (1921), as some authority to sustain his theory that no accident occurred. Initially, the Appellant argues that "there was apparently no disease exclusion in the Policy in question". The fact of the matter is that there was such exclusion in *Richards* which is evidenced by the protracted discussion as to whether or not sunstroke would be considered "bodily injury" or "disease". In any event, the issue presented was whether or not there was an accident, since it was argued, as in this case, that the decedent voluntarily exposed himself to the danger in ques-

tion and reasonably could have anticipated or foreseen the resulting injury . . . that is, the sunstroke.

The same argument was, therefore, made in that case as is being made in this case by the Appellant. The Court stated, as to the contention of foreseeability and unexpectedness:

"But Richards was pursuing his usual occupation. He was under no duty to stop at the six mile point and weigh the probability as to whether there might be danger. He was following his vocation and had a right to proceed * * *"

"Unless the deceased intended to produce the very result which occurred, the element of danger is both unimportant and immaterial . . ."

It should also be noted that in the *Richards* case the Court directed a verdict for the Plaintiff. We see nothing inconsistent between the holding of that case and the case at bar.

Appellant further cites *Handley vs. Mutual Life Insurance of New York*, 106 Utah 184, 147 P.2d 319 (1944) to sustain his position. This case holds in Respondent's favor. It is interesting to note the Court in that case analyzes *Richards*, *Supra.*, and negates the Appellant's proposition that a finding of an accidental, unexpected or unforeseen *event* was necessary in order to constitute an "accident". There the Court stated with reference to the *Richards* case:

"Having determined that sunstroke was an injury, it chose also to rest the decision on the ground that even though the extra journey was not accidental but intended, the *result* was unexpected, unanticipated and, therefore, accidental."

Further, that Court cites the *Richards* decision wherein it defines the meaning of the word "accident", stating:

"... an effect which is not the natural or probable consequence of the means which produced it, an effect which does not ordinarily follow and cannot be reasonably anticipated from the use of these means, an effect which the actor did not intend to produce, and which he cannot be charged with the design of producing under the maxim to which we have adverted (that every man must be held to intend the natural and probable consequence of his deeds), is produced by accidental means. It is produced by means which were neither designed nor calculated to cause it . . ." (*Handley*, Page 323 Pac. 192 Utah). (Parenthesis ours)

Appellant also cites *Whaticott vs. Continental Casualty Company*, 85 Utah 406, 39 P.2d 723. The Respondent has no quarrel with this case and agrees that the result of death, from the Insured's hypersusceptibility to novocain, was unexpected and an unforeseen result.

Appellant also cites *Kellogg vs. California Western States Life Insurance Company*, 114 Utah 567, 201 P.2d 949. This case is of no help to Appellant for the holding of the case is bottomed on the conclusion that the death was a result of disease and such risk was specifically excluded from the Policy.

The distinction made between *Handley* and *Whaticott*, on one hand and *Kellogg*, on the other hand, based on the prior medical history of the Insured, is spurious. The true distinction is the type of Policy which was in issue.

As stated, the Respondent has no quarrel with the ~~older~~ ^{older} Utah cases cited by Plaintiff when there was a struggle in de-

fining the difficult situations which would constitute an accident.

Recently, however, these cases and their holdings have been summarized. For example, in *Thompson vs. American Casualty, Supra.*, the Court, in sustaining the proposition that it was a jury question as to whether or not an accident occurred, found that unusual stress and strain meets the test of an accident in that said occurrence is unexpected and unforeseen. The Court stated:

“There is a genuine issue of fact as to whether the Plaintiff’s disability was unexpected, and unforeseen in consideration of his health and physical condition prior to and during the time he was engaged in the drilling work.”

The Court in arriving at this conclusion, cited as its authority, *Whitcott vs. Continental Casualty Company, Supra.*; *Handley vs. Mutual Life Insurance of New York, Supra.*, and *Kellogg vs. California Western States Life Insurance Company, Supra.*, authority that Appellant now claims sustains his position that there was no accident.

Cases from other jurisdictions also sustain the Respondent’s position in this case. In *Pearce vs. Pacific Mutual Life Insurance Company of California*, 109 P.2d 322, involved a factual situation where the Insured was almost involved in an automobile accident. The mental stress, according to the testimony, caused him to suffer from a stroke. The Court negated the position that, since mental stress was not accompanied by physical impact, the facts were not sufficient to constitute an accident. Also, see *Little vs. J. Cober & Co.*, 71 N.M. 294, 378 P.2d 119, which involved an employee who

became emotionally upset because of his work activities. The evidence showed that the Claimant had a serious preexisting arteriosclerotic condition. The Court held that the emotional stress was sufficient to constitute an accident. Also, see *Schechter vs. State Insurance Fund*, 6 N.Y. 2d 506, 190 N.Y. Supp. 2d 656, involving a trial lawyer who had an increase in his work load and suffered from a cardiovascular disorder. The evidence showed that he was doing more work than usual for him and that, as a result, this activity set into motion his cardiovascular disorder resulting in a coronary occlusion. And, finally, in *Klimas vs. Trans-Caribbean Airways*, 10 N.Y. 2d 209, 176 N.E. 2d 714, the Court held compensable an injury due to a heart attack by reason of mental disturbance and emotional distress from work activity.

Over the years, Utah cases have clearly established the procedure for determining whether an accidental bodily injury occurred within the meaning of an accidental injury insurance policy. These cases demonstrate that, absent some additional restricting language or exclusionary clause, recovery will be allowed where the Court determines, from the evidence that (1) a bodily injury occurred, which includes such incidents as sunstroke (*Richards*) or cerebral vascular disorders (*Thompson*) and (2) that bodily injury resulted from unusual stress and strain which, in turn, and without the design, consent, cooperation or actual expectation and prior knowledge of the Insured, caused the bodily injury.

In the case at bar, the jury so found and, in accordance with those findings, rendered judgment for the Insured.

POINT III

JUDGE ELTON'S DEATH WAS CAUSED BY ACCIDENT

In Appellant's Point III, authority is cited from other jurisdictions wherein it has been held that coverage would not be afforded when the cause of death was brought about by a progressive disease. Many of these cases, for example, *Tomainoli vs. United States Fidelity and Guarantee Company*, 75 H. J. Super. 192, 182 Ore. 2d 582, involve a policy of insurance that had a provision stating that coverage is not effected if the loss is caused or contributed to by "disease". As pointed out in this Brief, the policy in this case has no such exclusion. To quote from such authority is of no help to the Court in this case.

The Appellant, in its Brief, italicizes a portion of his quote from Couch On Insurance, 2nd Section 44:380. That portion does not apply to the policy in this case. Rather, a prior sentence is applicable in this instance. That prior sentence states:

"Where, under a policy containing only the first phrase (the independent and exclusively phrase) the accidental injuries acts upon a pre-existing disease causing total disability which except for such disease would not have occurred, the injury is determined to be the proximate cause of the disability entitling recovery." (Parenthesis ours)

In Point IV, under the discussion of the type of instruction given to the jury in this case, it should be pointed out that by Instruction No. 13 the Court required the jury to determine whether or not the accident caused the death or the

disease caused the death. The jury verdict shows that they believed, based upon the evidence, the former.

In *Dienes vs. Safeco Life Insurance Company*, 21 Utah 2d 147, 442 P.2d 468 (1968), the Court examined a policy of insurance where the "exclusionary provision" was not that found in the "normal" policy. In discussing that unique provision, the Court quoted at length from *Browning vs. Equitable Life Assurance*, 94 Utah 532, 72 P.2d 1060, wherein the Court stated that since the Insurer is in a superior position, "the rule of *strictissimi juris* has been applied almost universally to insurance contracts, and this jurisdiction, like many others, has declared in favor of a liberal construction in favor of the Insured* * *".

The Court further noted that most policies deny payment where death was caused in whole or in part from disease but that the exclusion in this case merely excluded benefits for "accidental death* * * caused by disease". The Court, held that the proper interpretation to be applied is that the Insured may recover if he died as a result of "*injuries*" sustained by accident and stated that "it is no defense to the action that a normal person would not have died as a result of the injuries received". This Court, therefore, has construed strictly against the Insurer an exclusionary provision that was not a classical one. Certainly, the Appellant cannot now argue a contributory disease theory when there is no exclusion at all in the policy here.

The recent Utah case of *Whitlock vs. Old American Insurance Company*, 21 Utah 2d 131, 442 P.2d 26 (1968), involved a case where there was an exclusion for "any mental or

bodily sickness or disease". The issue was whether or not the deceased died from the disease, from the injuries he received in the accident, or a combination of both. The Court stated that the defendant's argument was simply that if a person "insured under an accident policy dies following an injury suffered in an accident, if he had any diseased condition which in any degree contributed in causing his death, in that a more robust person would not have died from that injury, recovery is prevented by the exception in his policy". The Court, notwithstanding an exclusionary provision in his policy (*which is not present in the case at bar*), rejected this reasoning. The Court stated:

"If this narrow restriction were accepted and followed to its logical conclusion it would in practical effect substantially cut away accident insurance coverage for people over middle age. A high percentage of them have some frailty or affliction from which they would die eventually and because of which an injury might more readily result in death than it would to a person not so afflicted. If this would prevent recovery under a accident policy the insurance sold to cover accidents would be put an illusion and acceptance of the premiums a fraud. . .

. . . the insurer takes the insured as he is; that even though he may have some diseased condition which would eventually result in his death, or that the injury would not have resulted in death to a more robust person, if an accident occurs which hastens his death, recovery can be had under the policy. The critical question to be determined is whether the real and efficient cause, or as sometimes stated, the proximate cause of death was the disease, or the accident, and where the evidence would reasonably permit a finding either way, the issue is for the jury."

This Court in *Whitlock* cited with approval and as a basis for its holding *Brooks vs. Metropolitan Life Insurance Co.*, 27 Cal. 2d 305, 163 P.2d 689, and *Gennari vs. Prudential Insurance Co. of America*, (MO. 1960), 335 S.W. 2d 55. *These cases clearly show that the law in this State is not that contended by the Appellant and does not restrictively view the concept of causation.*

"A case supporting this view which is close to our own on its facts is *Brooks vs. Metropolitan Life Insurance Co.* Even though the deceased had had incurable cancer the Court stated that the presence of such a pre-existing disease would not relieve the insurer from liability if the accident was the prime or moving cause of the death. In *Gennari vs. Prudential Ins. Co. of America* the defendant company claimed that the death was caused by a prior condition of hypertensive cardiovascular disease and arteriosclerosis. The Court stated that 'It is well settled that although a person may have a weakened body * * * as the result of * * * disease, nonetheless if death is directly caused by * * * accidental means * * * recovery may be had * * * if he dies by reason of it, even if he would not have died if his previous health had been different. In such event the condition of previous health is merely predisposing and remote cause and not the direct, proximate cause, as contemplated by the policy, notwithstanding such condition might have cooperated, concurred in and contributed to death.'"

POINT IV

THE JURY WAS PROPERLY INSTRUCTED.

The Appellant initially states in his Point IV that error was committed by the Court in that the instructions cited and particularly Instruction No. 10, indicated that the jury need

only find that "Leonard Elton was working hard at the time of his death and that this in some way contributed to or hastened his death" in order to sustain Plaintiff's theory. This, he alleges, allowed the jury to grant judgment for Respondent even though they did not find unusual stress and even though they did not find that the stress constituted anything other than a mere "contributing factor" to his death. Each instruction, however, must be read in the context of the other instructions given by the Court. The Court instructed, in Instruction No. 13, as follows:

"If you find from the evidence in this case, that prior to his death, Leonard W. Elton was suffering from arteriosclerosis or a heart condition and that his death was brought about by the natural progression of this disease or condition, then the Plaintiff may not recover in this case even though you should also find that the stress that he was under at the time of his death may have contributed to some extent to his death at the particular time in question, but did not in and of itself cause his death at that time."

This instruction clearly placed the burden on Respondent which Appellant now claims the Court failed to do in Instruction 10. The Court required by this instruction that recovery must be denied unless the jury found: (1) death was not "brought about by the natural progression of this disease", and (2) that the stress was more than simply a contributing cause and, in fact, did "in and of itself cause his death at that time".

Appellant takes further exception to the Court's Instruction No. 10 alleging that the Instruction failed to indicate that the decedent had to die as a result of an accident. No single

instruction, however, can contain the entire theory of a lawsuit. Sufficient to say Instruction No. 7, given prior thereto, clearly indicated that the injury must be produced by accident. Objection is then made by Appellant to the description, within that instruction, of mental stress and strain. We have covered this Point earlier. It should be pointed out, however, that in Instruction No. 14 the Court defined with specificity the type of stress and strain that was necessary in order to constitute an accident. Instruction No. 14 as follows:

"Even though you should find that Leonard W. Elton was under considerable stress at the time of his death and that such stress brought about his death, nevertheless the Plaintiff would not be entitled to recover unless there was something unusual, unexpected, or out of the ordinary about the stress he was under at the time. All of us are subject to varying degrees of stress at different times in the course of our lives. Moreover, persons in certain professions or occupations are subjected to more stress than persons engaged in other occupations. Persons who are ill may be subjected to stress by the very nature of the illness or the consequences of their illness. This is not the kind of stress which would justify an award in this case. The kind of stress we are talking about in this case is that which is unusual, unexpected, or not found in the ordinary affairs of life."

Finally, Appellant complains of the phrase "and without design, consent or cooperation of Leonard W. Elton", and contends that this is not an adequate definition of "accident". We cite *Handley vs. Mutual Life Insurance Company of New York, Supra.*, (which is relied upon by Appellant) which states:

". . . an effect which the actor did not intend to produce, and which he cannot be charged with the design

of producing under the maxim to which we have adverted (that every man must be held to intend the natural and probable consequence of his deeds), is produced by accidental means. It is produced by means which were neither designed nor calculated to cause it . . .”

We submit, therefore, that instruction No. 10 was *not* erroneous, but rather, in all respects was proper.

The Appellant also urges that the Court erred in refusing to admit the policy of insurance in evidence and in instructing the jury on the legal import of the policy in question. In the Court’s Memorandum Decision, heretofore referred to (R. 146), the Trial Judge stated that he “assumed the responsibility imposed by *Dienes vs. Safeco*, and interpreted the Policy.”

In light of the language of *Dienes vs. Safeco Life Insurance Company*, 21 Utah 2d, 147, 442 P.2d 468, it would appear that Appellant’s argument is without merit. In that case, the Trial Court instructed the jury in the language of the policy. This Court held that, “by instructing in the language of the policy, the Trial Court erroneously permitted the jury to determine the legal effect therefrom” and reversed that case in part because of this error of the Trial Judge. The *Dienes* case was fully discussed during the trial of this matter and as stated earlier, was even cited by the Trial Judge in his Memorandum Decision. This action by the Court was in accordance with Utah law and, therefore this alleged error has no merit.

Instruction No. 9 was also objected to by Appellant because it failed to adequately define “accident”. Again, we refer the Court to Instruction No. 14 which does define “accident”

under this case and which evidently the Appellant does not object to. Instruction No. 9 merely states the general law. See 55 Am. Jur. 2d Section 1219 P.65. And it is in conformity with the Utah cases that we have heretofore cited.

The Appellant further objects to Instruction No. 16 which is the standard proximate cause definition found in J.I.F.U., 15.7. A central issue in this case was, of course, the cause of death of the decedent. In *Whitlock vs. Old American Insurance Company*, 21 Utah 2d 131, 442 P.2d 26 (1968), in a case involving the typical disease exclusionary provision, the Court explained that, even with such a provision, the Insurer takes the Insured as he is and that, "The critical question to be determined is whether the real and efficient cause, or as sometimes stated, the *proximate* cause of death was the disease, or the accident, and where the evidence would reasonably permit a finding either way, the issue is for the jury." (P. 28, emphasis ours).

Since the Appellant was urging that this was a case where death was caused by a progressive disease and the Respondent was urging that the real cause was the accident, certainly this instruction on proximate cause was and is relevant and material.

The Appellant also objects to Instruction Nos. 17 and 18. The Appellant at the trial level, as it is doing now, vigorously argued that there was a voluntary exposure to danger and, as such, there is no liability. This is not the law. In this regard, in *Richards vs. Standard Accident Insurance Company, Supra.*, the Court states as follows:

"But negligence is not here involved. Under this Policy it is not a defense which the Appellant may invoke.

Neither is 'voluntary exposure to danger' a defense. The Policy does not contain such a provision.

Unless the deceased intended to produce the very result which occurred, the element of danger is both unimportant and immaterial. . ."

This case and the quoted portion thereof not only limits the appellant's claims that Instruction Nos. 17 and 18 were in error but further negates his argument that Judge Elton's widow cannot recover the benefits of this policy due to some misplaced reliance on a theory of foreseeability.

The Appellant also objects to the Court's Instruction No. 12:

"You are instructed that it is no defense to this action that a normal person would not have died as a result of the injuries received and also it is not a defense to this action that Leonard W. Elton at the time of his death was suffering from arteriosclerosis."

and alleges error for failure to give his requested Instruction No. 4 which requires that the accident itself must be sufficient to cause damage to one of the organs of the body. Appellant's requested instruction was not given because it simply is not the law. Utah law is clearly in accordance with Instruction No. 12. In *Whitlock vs. Old American Insurance Company*, *Supra.*, the Court explained:

"It is generally held that insofar as coverage for accidents is concerned, the Insurer takes the Insured as he is, that even though he may have had some diseased condition which eventually results in his death, or that the injury would not have resulted in death of a more robust person, if an accident occurs which hastens his death recovery can be had under the Policy."

Also, see *Dienes vs. Safeco Life Insurance Company, Supra.*, which states:

"It is no defense to the action the claim that a normal person would not have died as a result of the injuries received. Even though the Life of the Insured hangs by a precarious thread, the beneficiaries under this type of Policy can recover when death results from injuries and would not have occurred at that time except for those injuries."

The instruction requested by the Defendant sets forth the proposition that the accident itself must be of sufficient trauma to, in and of itself, cause death to a "normal" person. That is not the law and the giving of the instruction would have been error. The issue of the cause of death was clearly before this Court in Instruction No. 13 as earlier set forth. Thus, Instruction No. 12 was a proper instruction and was required by the Utah cases.

In summary, the instructions, when read in their entirety, properly presented the theories of both parties, clearly stated the law and allowed the jury to determine the appropriate factual issues.

CONCLUSION

Judge Elton died on the 13th day of May 1970. An autopsy revealed that his death was caused by a cerebro-vascular accident and that he also had an underlying severe vascular disease. The medical evidence revealed that marked physical and emotional stress resulting from an overwhelming work load, interspersed with sensitive cases, during the last six

weeks of his life, "most probably markedly aggravated the underlying condition and did indeed precipitate the Decedent's death."

The language of the insurance policy entitles the beneficiary to recover if the loss occurred as a result of "accidental bodily injury." We have pointed out that said policy is unique in that it does not contain such exclusionary provisions as the "external, violent, and accidental" provision, or the "visible wound or contusion" provision, or the "sickness or bodily infirmity" exclusionary provision. Nor does it contain a limiting definition of the words "accidental bodily injury" as is the situation in a number of the cases cited by counsel for Appellant. Therefore, what is basically at issue here is whether a fact question was made out by the evidence as to whether Judge Elton died as a result of an "accidental injury." If it was, and the trial court properly submitted the issues to the jury, then the verdict should be allowed to stand.

The law of Utah is clear that physical failures brought on by unusual stresses and strains fall within the meaning of the term "accident." This is the ruling in Workmen's Compensation cases. See *Powers v. Industrial Commission*, supra. It is the ruling in Insurance coverage cases. See *Thompson v. American Casualty Company*, supra. It is also the ruling in Retirement Board cases. See *Inga-Lill Elton v. Utah State Retirement Board*, supra. And as was said in the case of *Richards v. Standard Life*, supra, "resorting to subtle and refined distinctions" can serve no useful purpose in determining such issues as whether a "bodily injury" has occurred.

The trial court presented to the jury the issue of whether Judge Elton died as a result of an accident or whether he died as a result of the natural progression of an underlying vascular disease. See Instruction No. 13. That issue was resolved against Appellant by the jury's verdict.

All life hangs on a slender thread. We await the inevitable hour when the superimposition of some final burden snuffs out the flame. The final burden in Judge Elton's life was a six-week struggle with an unusually difficult and at times overwhelming work load. His life was cut short by that burden. Utah law declares that he died as a result of an accident and that his beneficiary should recover. As was said by this Court in *Whitlock vs. Old American Insurance Company*, supra.:

" . . . the insurer takes the insured as he is; - - - even though he may have some diseased condition which would eventually result in his death, or that the injury would not have resulted in death to a more robust person, *if an accident occurs which hastens his death*, recovery can be had under the policy."

Respectfully submitted,

Robert D. Moore.