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Burden of Proof for Recovery on Accident Policy Where the Defense Is Suicide-Virginia's Answer

BURDEN OF PROOF FOR RECOVERY ON ACCIDENT POLICY WHERE THE DEFENSE IS SUICIDE– VIRGINIA'S ANSWER

When the defense of suicide is raised in opposition to a claim for recovery on a life insurance policy, on a double indemnity provision for accidental death therein, or on an accident policy, courts are troubled by the allocation of the burden of proof. If the claim is made on a standard life insurance policy, suicide must be expressly excluded to be a valid defense.[1] If so excluded, the defendant-insurer bears the burden of proving that the death was suicidal.[2] On the other hand, if the claim for recovery is on an accident policy or on a double indemnity provision for accidental death within a life policy, the accepted view is that the beneficiary bears the burden of bringing himself within the provisions of the insurance contract.[3] These distinctions in allocation of the burden of proof have been widely recognized throughout the United States, but the Virginia Supreme Court of Appeals recently determined that they would not be made in Virginia.

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1 Suicide is encompassed within the risk insured by a life insurance policy; therefore it must expressly be made an exception to coverage. *See* Parker v. DesMoines Life Ass'n, 108 Iowa 117, 78 N.W. 826 (1899); Jackson v. Loyal Additional Ben. Ass'n, 140 Tenn. 495, 205 S.W. 318 (1918); Howell, *Burden of Proof: Accidental Death Insurance*, 31 INS. COUNSEL J. 223 (1964) (distinguishes between a true exception and a definitive limitation); VANCE, INSURANCE § 94, at 560 (3d ed. 1951).

2 *See* Beaver v. Fidelity Life Ass'n, 313 F.2d 111 (10th Cir. 1963); Pilot Life Ins. Co. v. Boone, 236 F.2d 457 (5th Cir. 1956); Houston v. Canada Life Assurance Co., 137 F.Supp. 583 (S.D. Cal. 1956), *aff'd*, 241 F.2d 523 (9th Cir. 1957); Michael v. John Hancock Mut. Life Ins. Co., 138 Colo. 450, 334 P.2d 1090 (1959); Gulf Life Ins. Co. v. Nash, 97 So.2d 4 (Fla. 1957); Metropolitan Life Ins. Co. v. Brock, 87 Ga. App. 919, 75 S.E.2d 663 (1953); Kettlewell v. Prudential Ins. Co. of America, 4 Ill.2d 383, 122 N.E.2d 817 (1954); Strassberg v. Equitable Life Assurance Soc. of United States, 196 Misc. 387, 91 N.Y.S.2d 903 (1949); Outlaw v. Calhoun Life Ins. Co., 238 S.C. 199, 119 S.E.2d 685 (1961); Life Ins. Co. v. Brockman, 173 Va. 86, 3 S.E.2d 480 (1939); Mutual Ins. Co. v. Marshall, 157 Va. 427, 161 S.E. 61 (1931); Life Ins. Co. v. Hairston, 108 Va. 832, 62 S.E. 1057 (1908); Cosmopolitan Life Ins. v. Koegel, 104 Va. 619, 52 S.E. 166 (1905).

3 *See* New York Life Ins. Co. v. Gamer, 303 U.S. 161 (1938); Travellers' Ins. Co. v. McConkey, 127 U.S. 661 (1888); Beaver v. Fidelity Life Ass'n, 313 F.2d 111 (10th Cir. 1963); Lambert v. Nat. Casualty Co., 249 Ala. 85, 29 So.2d 572 (1947); Murray v. Travelers Ins. Co., 143 Colo. 258, 352 P.2d 678 (1960); Bacon v. Life & Casualty Ins. Co., 121 A.2d 724 (D.C. 1956); World Ins. Co. v. Kincaid, 145 So.2d 268 (Fla. 1962); Magich v. John Hancock Mut. Life Ins. Co., 32 N.J.S. 33, 107 A.2d 665 (1954); United States Nat. Bank v. Underwriters, 239 Ore. 298, 396 P.2d 765 (1964); Coleman v. Palmetto State Life Ins. Co., 241 S.C. 384, 128 S.E.2d 699 (1962).

In *Life & Casualty Ins. Co. v. Daniel*[4] the defense of suicide to recovery on an accident policy was raised by the insurer. The insured's body was recovered from a reservoir, fully clothed and unmarked. In his car, found locked at the water's edge, was the insured's hat, containing his glasses, a pack of cigarettes and a handkerchief. Insured had made inferences of suicide to his wife, but she never took him seriously. The Court, in allowing recovery, held that the plaintiff-beneficiary had the burden of proving accidental death; that he was aided in doing so by a presumption against suicide; that, in effect, the presumption shifted the burden of proof to the defendant-insurer; and that to overcome the presumption, the insurer had to do so by clear and satisfactory evidence to the exclusion of any reasonable hypothesis of accidental death.

Generally, in order for a beneficiary to recover under an accident policy or a double indemnity provision within a life policy, he must establish that the death of the insured was caused by violent, external, and accidental means within the terms of the policy.[5] It is also generally recognized that if the beneficiary proves that the insured's death was by violent and external means, a rebuttable presumption arises in the beneficiary's favor that the death was not suicidal.[6] Beyond this point,

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[4] 209 Va. 332, 163 S.E. 2d 577 (1968).

[5] *See* O'Bar v. Southern Life & Health Ins. Co., 232 Ala. 463, 168 So. 580 (1936); Gulf Life Ins. Co. v. Moore, 82 Ga. App. 82, 60 S.E.2d 547 (1950); Evans v. Continental Life & Accident Co., 88 Idaho 254, 398 P.2d 646 (1965); Goldstein v. Metropolitan Life Ins. Co., 324 Ill. App. 168, 57 N.E.2d 645 (1944); Metropolitan Life Ins. Co. v. Glassman, 224 Ind. 641, 65 N.E.2d 503 (1946); Allison v. Bankers Life Co., 230 Iowa 995, 299 N.W. 889 (1941); McKenzie v. New York Life Ins. Co., 153 Kan. 439, 112 P.2d 86 (1941); Prudential Ins. Co. of America v. Keeling's Adm'x, 271 Ky. 558, 112 S.W.2d 994 (1938); Costello v. Sovereign Camp, W.O.W., 236 Mo. App. 1103, 162 S.W.2d 322 (1942); Dalbey v. Equitable Life Assurance Soc. of United States, 105 Mont. 587, 74 P.2d 432 (1937); Hrybar v. Metropolitan Life Ins. Co., 140 Ohio St. 437, 45 N.E.2d 114 (1942); McCarty v. Occidental Life Ins. Co., 268 P.2d 221 (Okla. 1954); Seater v. Penn. Mut. Life Ins. Co., 176 Ore. 542, 156 P.2d 386 (1945); Goethe v. New York Life Ins. Co., 183 S.C. 199, 190 S.E. 451 (1937); General Accident, Fire & Life Assurance Corp. v. Murray, 120 Va. 115, 90 S.E. 620 (1916); Dorsey v. Prudential Ins. Co. of America, 124 W.Va. 100, 19 S.E.2d 152 (1942); Annot., 142 A.L.R. 742 (1943); Annot., 12 A.L.R.2d 1264 (1950).

[6] The presumption is based on love of life and man's inherent nature not to destroy himself. *See* Hines v. Prudential Ins. Co. of America, 357 F.2d 726 (6th Cir. 1956); Beaver v. Fidelity Life Ass'n, 313 F.2d 111 (10th Cir. 1963); Boswell v. Gulf Life Ins. Co., 227 F.2d 578 (5th Cir. 1955); Travelers Ins. Co. v. Bell, 188 F.2d 725 (5th Cir. 1951); United Ins. Co. v. Nicholson, 119 A.2d 925 (D.C. 1956); Kennesaw Life & Accident Ins. Co. v. Templeton, 102 Ga. App. 867, 118 S.E.2d 247 (1960), *rev'd*, 216 Ga. 750, 119 S.E.2d 547, *aff'd per curiam*, 103 Ga. App. 562, 120 S.E.2d 128 (1961); Turner v.

however, the cases cease to be uniform, as the courts begin to take different approaches to the weight and sufficiency of the presumption.

Many courts recognize the so-called Thayer theory[7] which views the presumption as merely a procedural device to shift the burden of going forward with the evidence to the other party.[8] Under this theory the presumption disappears when varying amounts[9] of evidence are introduced in rebuttal.[10] A second theory is that the presumption has evidentiary weight and is considered by the trier of fact as evidence.[11]

Mutual Ben. Health & Accident Ass'n, 316 Mich. 6, 24 N.W.2d 534 (1946); Lynde v. Western & Southern Life Ins. Co., 293 S.W.2d 147 (Mo. 1956); Moorman v. Nat. Casualty Co., 45 Ohio L. Abs. 586, 68 N.E.2d 359 (1946), *motion to dismiss appeal denied*, 48 Ohio L. Abs. 447, 75 N.E.2d 77, *rev'd*, 49 Ohio L. Abs. 61, 75 N.E.2d 806 (1947); Federal Life Ins. Co. v. Maples, 204 Okla. 1195, 228 P.2d 363 (1951); Lawson, *The Law of Presumptions: A Look at Confusion, Kentucky Style*, 57 KY. L.J. 7, 47 (1968); Richardson and Breyfogle, *Problems of Proof in Distinguishing Suicide from Accident*, 56 YALE L.J. 482 (1947).

[7] THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW, Appx. B, 575, 576 (1898).

[8] *See, e.g.*, New York Life Ins. Co. v. Gamer, 303 U.S. 161 (1938); Hill v. American Home Assurance Co., 193 So.2d 638 (Fla. 1967); Hamilton v. Metropolitan Life Ins. Co., 71 Ga. App. 784, 32 S.E.2d 540 (1944); 9 WIGMORE, EVIDENCE, § 2491 (3d ed. 1940); MODEL CODE OF EVIDENCE rule 304 (1942). *But see* UNIFORM RULE OF EVIDENCE 14 (1953).

[9] Courts and authorities have failed to be uniform in determining the weight of evidence necessary to overcome the presumption. *See, e.g.*, New York Life Ins. Co. v. Gamer, 303 U.S. 161 (1938) (substantial); Hamilton v. Metropolitan Life Ins. Co., 71 Ga. App. 784, 32 S.E.2d 540 (1944) (credible); Hinds v. John Hancock Mut. Life Ins. Co., 155 Me. 349, 155 A.2d 721, 730 (1959) (". . . until the contrary evidence persuaded the fact finder that the balance of probabilities was in equilibrium"); Hrybar v. Metropolitan Life Ins. Co., 140 Ohio St. 437, 24 Ohio 437, 45 N.E.2d 114, 117 (1942) ("evidence to the contrary"); Empire Gas & Fuel Co. v. Muegge, 135 Tex. 520, 143 S.W.2d 763, 767 (1940) (positive); Woodmen of the World v. Alexander, 239 S.W. 343, 345 (Tex. Civ. App. 1922) (sufficient); Tyrrell v. Prudential Ins. Co., 109 Vt. 6, 192 A. 184, 188 (1937) ("enough . . . to make a question for the jury"); 9 WIGMORE, EVIDENCE, § 2491 (3d ed. 1940) ("enough to satisfy the judge's requirement of some evidence").

[10] This theory is also referred to as the rule of disappearing presumptions. *See generally* Beaver v. Fidelity Life Ass'n, 313 F.2d 111 (10th Cir. 1963); Hinds v. John Hancock Mut. Life Ins. Co., 155 Me. 349, 155 A.2d 721 (1959); DiPaoli v. Prudential Ins. Co., 384 S.W.2d 861 (Mo. App. 1964); Mustard v. St. Paul Fire & Marine Ins., 183 Neb. 15, 157 N.W.2d 865 (1968); Koger v. Mutual of Omaha Ins. Co., 163 S.E.2d 672 (W.Va. 1968).

[11] *See* Canada Life Assurance Co. v. Houston, 241 F.2d 523 (9th Cir. 1957); Alliance Assurance Co. v. United States, 252 F.2d 529 (2d Cir. 1958); Equitable Life Assurance Soc. of United States v. Irelan, 123 F.2d (9th Cir. 1941); Mutual Life Ins. Co. v. Maddox, 221 Ala. 292, 128 So. 383 (1930); Pennsylvania Mut. Life Ins. Co. v. Cobbs, 23 Ala. App. 205, 123 So. 94 (1929); Byers v. Pacific Mut. Life Ins. Co., 133 Cal. App. 632, 24 P.2d 829 (1933); Brown v. Metropolitan Life Ins. Co., 233 Iowa 5, 7 N.W.2d 21 (1942); Eckendorff v. Mutual Life Ins. Co., 154 La. 183, 97 So. 394

A third theory would utilize the presumption to shift the burden of proof to the insurer who must then establish suicidal death.[12]

The Virginia Supreme Court in the *Daniel* case recognizes the beneficiary's initial burden of proof and the presumption that arises in his favor. The Court in *Daniel*, however, synthesizes the second and third theories stated above to produce a rule which heavily favors the beneficiary. Under *Daniel* not only does the presumption stand throughout the trial to be considered as evidence, but it is also used to shift the burden of proof to the insurer who must negate every reasonable hypothesis of accidental death in order to prevail. It must be noted, however, that the decision is not an arbitrary defiance of the majority rule in the United States, but an unavoidable consequence of prior case decisions in this state.

One of these cases[13] involved a claim on a life insurance policy where the defense of suicide was interposed. The Virginia Court held that there was a presumption of natural death and the burden was on the insurer to establish suicide by clear and satisfactory evidence to the exclusion of any reasonable hypothesis of natural or accidental death. Using this decision as a foundation, the Court later held in *Harless v. Atlantic Life Ins. Co.*[14] that the burden of proving suicide was on the insurer where the beneficiary's claim was based on a double indemnity provision for accidental death within a life policy. Because such double indemnity provisions are essentially the same as accident policies,[15] the Virginia Court, in order to follow the principal of stare decisis, had no choice but to follow *Harless* in the recent *Daniel* decision. But the establishment of more equitable results should have outweighed the Court's inclination to follow the *Harless* decision.

Daniel provided the Court with an excellent opportunity to bring the law of Virginia into line with the great majority of jurisdictions.

(1923); Lewis v. New York Life Ins. Co., 113 Mont. 151, 124 P.2d 579 (1942); Wycoff v. Mutual Life Ins. Co., 173 Ore. 592, 147 P.2d 227 (1944); Annot., 103 A.L.R. 185, 191 (1936); Annot., 12 A.L.R.2d 1264, 1368 (1950); Annot., 5 A.L.R.3d 19, 35, 45 (1966).

[12] *See* Dick v. New York Life Ins. Co., 359 U.S. 439, 443 (1959); Union Cent. Life Ins. Co. v. Sims, 206 Ark. 1069, 189 S.W.2d 193, 196 (1945); Aetna Life Ins. Co. v. Little, 146 Ark. 70, 225 S.W. 298 (1920); Svihovec v. Woodmen Accident Co., 69 N.D. 259, 285 N.W. 447, 449 (1939).

[13] Life Ins. Co. v. Brockman, 173 Va. 86, 3 S.E.2d 480 (1939).

[14] 186 Va. 826, 44 S.E.2d 430 (1947).

[15] The language of the insuring clause in each case is essentially the same—i.e., loss of life "by bodily injury effected soley through violent, external, and accidental means and if such bodily injury is the direct, independent, and proximate cause of death."

To overrule *Harless,* applicable to double indemnity provisions, and to apply the majority rule to accident policies as well, would have accomplished the necessary result. Without specifically overruling *Harless,* the Court could not have applied the majority rule in *Daniel* with effective results.[16] As for the presumption against suicide, one of two alternatives would have produced a better solution: 1) the presumption should stand,[17] but the amount of evidence necessary for the insurer to overcome it should be reduced, or 2) the presumption should fall upon the introduction of evidence to the contrary[18] and the jury should consider the problem in light of all the evidence presented by both parties. Once the presumption is invoked, the burden of going forward with the evidence should shift to the insurer. The risk of non-persuasion, however, should still be upon the beneficiary.[19] Such a solution would tend somewhat to relieve the insurer of the extremely heavy burden which has been thrust upon him.

What effect this burden will have upon insurance companies and on similar future actions can only be speculative at this point. Certainly the bargaining power of insurance companies will be impaired when they are faced with settlement on such claims. Knowing the extreme burden that the insurer must bear, no beneficiary will be inclined to settle his claim if he feels he can be more justly compensated by the court. Consequently, a greater number of disputes on accidental death should go to trial. It is well established that voluntary settlement of disputes between parties is to be encouraged,[20] but the effect of the *Daniel* decision may be to discourage such settlements.

Faced with the problem of increasing litigation and a resultant increase in payments, insurance companies will have to deploy some scheme of absorption or set-off. Such a scheme could be in the form

[16] To do so would have established a separate rule for allocating the burden of proof in claims on accident policies, while leaving the rule for allocation in claims on life policies and on double indemnity provisions therein equated and unchanged. Such distinctions would have been unprecedented in the law. The distinctions that have, in fact, been made by the *Daniel* decision may be unprecedented, but at least they are simpler—apply the same rule in all three situations.

[17] See cases cited note 9 *supra.*

[18] See cases cited note 10 *supra.*

[19] The idea is based, of course, on the universal proposition that the burden of proof never shifts, only the burden of going forward with the evidence.

[20] *See* Bergman v. Bergman, 247 Iowa 98, 73 N.W.2d 92 (1955); Bakke v. Bakke, 242 Iowa 612, 47 N.W.2d 813 (1951); Selig v. Wunderlich Contracting Co., 159 Neb. 57, 65 N.W.2d 233 (1954).

of a reduction of policy benefits or an increase in exclusions from the policies. Therefore, the interests of a great number of people may be subjected to the interest of a "big business" institution. The effect of the decision then is that the defendant-insurer is faced with inequitable results and his efforts to compensate for such results may bring about inequities for many policy holders.

S. T. T.