S.C.A. No. 02668

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Cite as: Maritime Life Assurance Company v. Tracy-Gould, 1992 NSCA 20

Clarke, C.J.N.S., Matthews and Freeman, J.A.

BETWEEN:

THE MARITIME LIFE ASSURANCE COMPANY, a body corporate appellant - and - CYNTHIA TRACY-GOULD respondent	)	E. Anthony Ross for the appellant Donald L. Stevenson for the respondent Appeal Heard: November 13, 1992 Judgment Delivered: November 30, 1992

THE COURT: Appeal dismissed with costs to the respondent at 40% of the costs taxed or agreed upon at trial plus disbursments per reasons for judgment of Matthews, J.A.; Clarke, C.J.N.S. and Freeman, J.A. concurring.

MATTHEWS, J.A.:

At issue on this appeal is whether the insured's death was accidental within the meaning of the provisions of an insurance policy issued by the appellant.

The evidence before the trial judge consisted of an agreed statement of facts and certain exhibits. There was no **viva voce** testimony.

The following is the agreed statement of facts:

> "1. When this action was commenced the plaintiff was a dental assistant. She is now a second year student at the University of New Brunswick and resides at Fredericton, New Brunswick.
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> 2. The defendant is a body corporate, incorporated under the laws of Nova Scotia, having its head office at Halifax, Nova Scotia, and is authorized to transact business in New Brunswick.
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> 3. Under written Group Insurance Policy number 901251 dated January 1, 1973, between the defendant as insurer and Trustees of Local Unions 213,772,694,512,799, New Brunswick Plumbers, Pipe Fitters and Sprinker Fitters, Welfare Trust Plan (hereinafter referred to as New Brunswick Plumbers et al) as the insured, in consideration of monetary premiums paid and to be paid by New Brunswick Plumbers et al to the defendant, the defendant insured William Timothy Burns, among others, against death in the amount of $30,000 and accidental death in the amount of an additional $30,000 and such policy was in full force and effect on August 18, 1989.
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> 4. On August 18, 1989, William Timothy Burns, late of Nordin in the County of Northumberland and Province of New Brunswick, was a member of the New Brunswick Plumbers et al and thereby insured against death in the amount of $30,000 and accidental death in the amount of a further $30,000 under Group Insurance Policy number 901251 described in paragraph 3 herein.
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> 5. The plaintiff is the named beneficiary of William Timothy Burns under policy 901251, having been designated in writing as such by Mr. Burns on January 22, 1986.
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> 6. William Timothy Burns died at Vautour's garage at on near Douglastown, Northumberland County, New Brunswick, on August 18, 1989.

7. The circumstances leading to the death of Mr. Burns were as set out in the Statements of Walter & Irene Vautour dated August 18, 1989.

8. The death of Mr. Burns was investigated by Newcastle R.C.M.P. Constable L.J.R. Houle and he reported his findings to the coroner by written report dated August 20, 1989.

9. On August 19, 1989, an autopsy was performed on Mr. Burns at The Moncton Hospital by Dr. Wai-Leung Ying. He determined the cause of death to have been asphyxia as a result of aspiration. For details see Dr. Ying's final autopsy report dated September 8, 1989. Dr. Ying gave Cst. Houle blood, urine and other samples from the deceased.

10. The blood and urine samples were analyzed at the Forensic Laboratory in Sackville, New Brunswick, and as indicated in the report of D.R. Smith dated September 5, 1989, the blood contained 429 milligrams of ethyl alcohol in 100 millilitres of blood and the urine was found to contain 459 milligrams of ethyl alcohol in 100 millilitres of urine.

11. By cheque dated January 12, 1990, in the amount of $30,908.46, the defendant paid the plaintiff, as named beneficiary, the basic life portion (Group Death Claim 12140) under Group Insurance Policy number 901251.

12. By letter to the defendant dated February 8, 1990, the plaintiff advised the defendant that she, as named beneficiary under the Group Insurance Policy described herein, claimed from the defendant the accidental death benefit of $30,000 under that policy.

13. By letter dated February 16, 1990, from the defendant to the plaintiff, the defendant advised the plaintiff that it denied liability under the accidental death provisions of the policy in relation to the death of William Timothy Burns.

14. The deceased's driving record dated November 29, 1991, is an exhibit herein.

15. Policy number 901251 herein is the same as the policy in MacIsaac v. Assurance Company and Maritime Life Assurance Company, [1979] 32 N.S.R. (2d) 380 (Appeal Division).

16. On December 3, 1991, a report was prepared by Dr. Albert Fraser, a toxicologist at the Victoria General

> Hospital stating that alcohol was a significant contributing factor to the death of William Timothy Burns."

In addition, the pertinent information extracted from the exhibits as commented upon by the trial judge is:

> "The policy, with respect to accidental death states:
>
> If an employee suffers...(loss of life)... as a result of an injury suffered from accidental, external and violent means, the Insurer will pay...(the full amount of the regular insurance)."
>
> ...
>
> "An autopsy was performed on Burns by Dr. Ying at the Moncton Hospital who determined the cause of death to have been asphyxia as a result of aspiration."
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> "The coroner's declaration indicates the cause of death as asphyxiation, stating 'he choked on his own food.'"
>
> "A report of Dr. Albert D. Fraser, head of the Toxicology Laboratory of the Victoria General Hospital...based upon only the autopsy report and the blood and urine samples report, reviewed the effects of blood alcohol at various levels and concluded that he would consider this death as 'an alcohol associated fatality.' He stated that Burns intoxication was a contributing factor to his death and the adverse effects of alcohol may have caused the vomiting and his inability to move."
>
> "While noting that death occurs from respiratory depression at ethanol levels exceeding 500 mg/dL and that fatalities with ethanol levels over 300 mg/dL usually have an associated history or chronic alcoholism, Dr. Fraser indicated that chronic alcoholics may exhibit few clinical signs of intoxication at blood levels between 300 and 450 mg/dL."

Counsel agreed that "the cause of death was asphyxia as a result of aspiration".

After analyzing the arguments of counsel and some of the applicable law, the trial judge found "that the death resulting from asphyxia caused by aspiration was a loss of life suffered 'as a result of an injury suffered from accidental, external and violent means'.

It is important to note that although the insured consumed a considerable quantity of alcohol resulting in a reading after death of .429, clearly the cause of death was, as Dr. Ying found,

and as earlier mentioned, agreed upon by counsel, "asphyxia as a result of aspiration", or as the coroner put it "he choked on his own food".

Dr. Albert D. Fraser, in his report of December 3, 1991, said:

> "Death occurs from respiratory depression at ethanol levels exceeding 500 mg/dL. Fatalities with ethanol levels over 300 mg/dL usually have an associated history of chronic alcoholism. However, chronic alcoholics may exhibit few clinical signs of intoxication at blood levels between 300 and 450 mg/dL and survival levels exceeding 500 mg/dL.
>
> ...
>
> This individual presumably died due to asphyxia but his intoxication by alcohol was a significant contributing factor to his death. The adverse effects of alcohol may well have caused vomiting or the inability to move (positional asphyxia), etc.
>
> In summary, a blood alcohol concentration of 429 mg/dL is a very high concentration. In many individuals, the direct toxic effects of alcohol alone could result in death at this concentration. I consider this case an alcohol associated fatality." (emphasis added)

The difficulty with some of these observations is, with deference, they are suppositions. Dr. Fraser did not examine the deceased. His opinions were not tested by cross-examination. His report, some three and a half months after the death, is based solely upon the documents provided to him; as he put it: "...the Coroner's declaration, the final autopsy report and the R.C.M.P. toxicology report". Although Dr. Fraser states that "the adverse affects of alcohol may well have caused vomiting or inability to move", there is no evidence of either supposition. Indeed, to repeat, the coroner said "he choked on his own food" and Dr. Ying stated that in his opinion "the cause of death is attributed to asphyxia as a result of aspiration". Neither report speaks of any evidence of vomiting. Had there been such evidence, it is reasonable to expect that those experts who examined the body shortly after death would have said so. On the facts of this case, it would appear certain, that any conclusion other than those of the coroner and Dr. Ying is speculation.

In my opinion we may take judicial notice of the many reports in the media of persons

choking on particles of food, some causing death, when there has been no excessive consumption of alcohol. See as well **Koch v. Empire Life Insurance Co.** (1981), 124 D.L.R. (3d) 161.

The meaning of "accident" in insurance policies has been considered in many cases. In **Mutual of Omaha Insurance Co.** v. **Stats**, [1978] 2 S.C.R. 1153, (1978), 87 D.L.R. (3d) 169, Spence, J. at p. 181 of the D.L.R. commented:

> "The word 'accident' found in an insurance policy is to be given its ordinary and popular meaning. There is no technical definition of 'accident' to be applied. There is a mass of authority for that proposition but I need only cite **Canadian Indemnity Co.** v. **Walkem Machinery & Equipment Ltd.** (1975), 53 D.L.R. (3d) 1 at p. 6, [1976] 1 S.C.R. 309 at pp. 315-6, [1975] 5 W.W.R. 510, per Pigeon, J."

The only limiting words (if they may be called that) in the policy in issue are as earlier mentioned: the loss of life must be "as a result of an injury suffered from accidental, external and violent means". As Spence J. remarked in **Stats**, if the insurer had desired to limit those broad words it could have done so; many policies do contain a much narrower description.

The trial judge characterized the positions of the parties before him in this way:

> "The plaintiff alleges that death occurred from asphyxia as a result of aspiration and therefore the death was accidental. Although alcohol may have been a contributing factor, it is the unexpectedness of the result that is the essence of what is meant by the term 'accident or accidental' in insurance policies such as here, and one cannot foresee that he will asphyxiate or aspirate nor is that result one that he could plan or expect.
>
> ...
>
> The defendant, on the other hand, contends that the death in this case was not accidental. It was not a result which was 'unexpected or unusual', the recognized characteristics of an accident, but rather was 'courted or looked for' by the deceased's voluntary consumption of a large amount of alcohol. Simply put, the defendant says the deceased deliberately and voluntarily consumed alcohol to such an extent that he courted the risk that killed him. Asphyxiation can be a result of severe alcohol intoxication and, whatever the final mechanism of

> asphyxia, the significant factor is that the mechanism was not caused by accident."

The appellant's counsel argues "that there is a distinction between an 'accidental death' which focuses on the result and death caused by 'accidental means' which focuses on the conduct which produces the result."

In support of that statement he cites principally two Supreme Court of Canada decisions: **Columbia Cellulose Co. Ltd. et al** v. **Continental Casualty Co.** (1963), 40 D.L.R. (2d) 297 and **Smith** v. **British Pacific Insurance Company** (1965), 51 D.L.R. (2d) 1. He points out that in each of those cases since the conduct of the insured was found to be deliberate, the loss was not caused by accident as required by the policy.

In **Columbia Cellulose**, the insured, after touring some plants of his employer during the day, became ill in the evening, was taken to hospital where early the following morning, he died. The medical doctors called by the parties agreed "that death was due to myocardia infarction following a blocking of the coronary artery and thereby preventing the flow of blood to the heart and that was due to atherosclerosis;...". However the doctor called by the defendant contended that death may have occurred through disease quite apart from exertion, contrary to the opinion of the plaintiff's doctor. The British Columbia Court of Appeal upheld the decision of the lower court dismissing the claim.

At p. 300-301 Sheppard, J.A. said:

> "The meaning of 'accident' presents no difficulty. **Welford's Accident Insurance,** 2nd ed., p. 268 says:
>
> > 'The word "accident" involves the idea of something fortuitous and unexpected, as opposed to something proceeding from natural causes; and injury caused by accident is to be regarded as the antithesis to bodily infirmity caused by disease in the ordinary course of events.'
>
> A like definition is found in Murray's Oxford Dictionary, vol. 1, p. 55.

> The difficulty arises in applying the definition, that is, to determine whether 'accident' under a particular policy relates to the cause or to the consequence. Under this policy the event insured against, namely 'a bodily injury caused by an accident' consists of three parts: (1) a bodily injury, (2) an accident, and (3) that the accident cause the bodily injury. Under the policy there must be an accident which caused the bodily injury and therefore the accident must be distinct and separate from that bodily injury so as to be the cause thereof. On the literal meaning of the policy the accident must be the cause of the injury: it is not sufficient that the injury, that is the consequence, be an accident."

He quoted from one of the doctors who testified that the exertion "was abnormal in the case of" the insured. He then remarked:

> "The exertion would be deliberate and not an accident; only the injury, that is the consequence, at the most would be an accident. Hence the plaintiff's case is that the wilful act of exertion, which was no accident, has caused an unexpected consequence which is said to be an accident, but that is the reverse of what the policy requires."

He concluded at p. 306:

> "...The express words in the policy here in question require not only that there be an accident, but also that such accident cause the injury complained of. The injury complained of here is the haemorrhage and the consequences caused by the exertion, but the exertion was not an accident but deliberate and therefore the loss was not caused by accident as required by the policy."

On further appeal, the opinion of the Supreme Court of Canada is brief, holding "...that the judgments of the Courts below were correct".

In **Smith, supra,** the basic facts are as set out in the headnote:

> 'Deceased, insured against death from 'bodily injury caused by an accident...resulting directly and independently of all other causes in death', died of a heart attack caused by over-exertion on his part in attempting to 'rock' his car out of a snow-drift by rapidly switching the gears from forward into reverse and moving his body in unison with the movement of the car."

It is of importance that in **Smith** the deceased suffered a heart attack in April or May,

1961. He was hospitalized and there treated for abut two weeks after which he remained home recuperating for about a month before returning to work. He was instructed by his doctor not to do any heavy work such as lifting and not to climb stairs except slowly one at a time with a rest between each step. The final heart attack resulting in death occurred on September 29, 1961.

After reviewing at some length the judgment of Sheppard, J.A. in **Columbia Cellulose, supra,** Hall, J. at p. 6 concluded:

> "In the present case the exertion of driving and handling the steering wheel of the automobile and, at the last, of rocking the automobile by alternately shifting from forward to reverse gear was deliberate and, in the words of Sheppard, J.A., just quoted 'the loss was not caused by accident as required by the policy'."

The Court of Appeal of Saskatchewan, in **Milashenko** v. **Co-operative Fire and Casualty Company** (1968), 1 D.L.R. (3d) 89; 66 W.W.R. 577, by majority allowed an appeal and dismissed an action under the provisions of a policy providing indemnity "against injury or loss of life occurring while this policy is in force and resulting from accidental bodily injuries due to external force or violence". The deceased, while opening a case of poisonous insecticide, inhaled fumes and immediately experienced severe chest pains and a choking sensation in his throat. Shortly thereafter he collapsed and died. However, some medical evidence disclosed that death was not caused by the inhalation of poisonous fumes but by a heart attack which commenced some four hours earlier and of which the deceased was probably unaware. The majority of the court held that the chest pains and choking sensation suffered by the deceased were attributable to the developing heart attack and that although the stress and anxiety caused by the pains and choking may well have transformed a minor attack into a fatal one, the plaintiff had failed to establish that the stress and anxiety were induced by the inhalation of fumes.

Milashenko in the main was decided upon the appreciation of the facts by the three judges on appeal, each of whom wrote opinions. Culliton, C.J.S. in the minority was the only member of the court to mention **Columbia Cellulose** and **Smith**. After referring to these two cases

he remarked at p. 585 of the W.W.R.:

> "I think the dominant principle established by the foregoing decisions is that no right of recovery lies under an accident policy when the injury is accidental in that it was unforeseen and unexpected, when such injury was the result of an act voluntarily and deliberately committed by the insured; in such a case, while the result is an accident, the means is not."

And further at pp. 588-9:

> "The evidence as to the emotional condition of Milashenko was given primarily by Dr. Hooge, who spoke to him on the telephone. He said Milashenko was so wrought up and excited that it was difficult to get a coherent history. He said he was extremely agitated - so extremely nervous and excited that it was difficult to get information from him. It is obvious that at that time Dr. Hooge was satisfied that the condition of Milashenko, both emotional and physical, was due to his inhalation of Dieldrin. I think it is also a matter of common sense to say that if Dr. Hooge at that time had thought Milashenko was undergoing a heart attack, he would have prescribed some treatment for that condition and in all likelihood would have gone to the farm without delay. As a matter of fact, there is not in the evidence any suggestion that Milashenko was suffering a heart attack until after he died.
>
> I am satisfied that the evidence establishes that Milashenko experienced a severe emotional reaction resulting in stress, strain and worry. I am equally satisfied that he attributed his physical conduct to the inhalation of Dieldrin. In this, of course, he may have been mistaken - the pain and choking sensation which he experienced at the dugout may have been due entirely to the heart attack. According to the evidence of Mrs. Milashenko, the inhalation of the Dieldrin was followed almost immediately by the physical symptoms. On the other hand, Dr. Hooge stated that Milashenko told him that he had inhaled Dieldrin, following which he became quite ill, suffering a choking sensation and a burning pain in his throat and chest. However, whether the physical symptoms were due to the inhalation of the Dieldrin, or the onset of a heart attack, seems to me immaterial. The evidence is clear that Milashenko attributed his physical condition to the inhalation of Dieldrin which resulted in his emotional reaction. This state of mind was due to the accident. What his reaction would have been had he suffered a heart attack without having inhaled the poison is not for me to speculate. I think it is equally clear that

> Dr. Hooge attributed the agitated, excited and worried condition of Milashenko to the fear which Milashenko experienced as a result of his inhalation of the fumes.
>
> In my respectful view, the evidence established that Milashenko suffered an accident within the terms of the policy, resulting in a severe emotional reaction of stress and strain arising from worry and fear. I think, too, the learned trial judge was entitled to accept the opinion evidence of Drs. Hooge and Allen, that the preponderance of the probabilities was that Milashenko would have survived the heart attack but for the emotional disturbance caused by the accident. The finding of the learned trial judge, which I do not think should be disturbed, that the preponderance of evidence is that death would not have occurred but for the accident, makes that accident the proximate cause of death."

On appeal to the Supreme Court of Canada the dissenting judgment of Culliton, C.J.S. was upheld without reasons and the appeal allowed: (1970) 11 D.L.R. (3d) 128n; [1970] S.C.R. VI.

Applying the reasoning of Chief Justice Culliton at p. 585, in this instant case, the choking on the particle of food must have been unforeseen and unexpected; it was an accident; it caused death. Both the means, choking on the food, and the result, death, were accidental.

That it is necessary to draw "a distinction between an 'accidental death' which focuses on the result and death caused by 'accidental means' which focuses on the conduct which produces the result" (as phrased by appellant's counsel) has not met with acceptance by all courts in Canada or other jurisdictions.

In the instant case the trial judge considered **Columbia Cellulose** and **Smith** but preferred the reasoning of this Court in **MacIsaac** v. **CNA Assurance (1979), 32 N.S.R. (2d) 380**. There the insured died as a result of alcohol consumption with "passing out" and falling in a position which impaired breathing. This Court upheld the decision of the trial judge allowing the beneficiary's claim. Death was accidental; it was not expected or designed. Hart, J.A. did not refer to either **Columbia Cellulose** or **Smith**, **supra**. He did follow the reasoning in **Mutual of Omaha** v. **Stats**, **supra**.

In **Stats** a woman who was driving her vehicle while impaired by alcohol crashed into a brick wall killing herself and her passenger. The issue was whether death occurred "from accidental bodily injuries" within the meaning of the insuring policy. The trial judge dismissed the beneficiary's claim. The Court of Appeal of Ontario reversed that decision holding that the circumstances did come within the term "accident" and that the injuries were "accidental". Speaking for the majority, Spence, J., dismissed the appeal. At p. 180 he commented:

> "Therefore, I am in agreement with Blair, J.A., when, in giving reasons, he said that there was every justification for the learned trial Judge's description of the deceased woman's conduct as dangerous and grossly negligent but that was far different from finding that the insured actually and voluntarily 'looked for' or 'courted' the risk of the collision that killed her."

He mentioned the meaning of "accident", to which I have earlier referred. He then said at p. 182:

> "A variety of dictionary definitions have been attempted and text writers have used very astute and logical analyses of what would constitute an accident, but remembering that it is an ordinary word to be interpreted in the ordinary language of the people, I ask myself what word would any one of the witnesses of this occurrence use in describing the occurrence. Inevitably, they would have used the word 'accident'. I am ready to agree that one has to have a knowledge of all the circumstances before one's use of the ordinary language can have a determinative effect but even with all the knowledge of the circumstances which I have outlined in such detail, the ordinary person would still use the word 'accident'. Pigeon, J., in **Canadian Indemnity Co.** v. **Walkem Machinery & Equipment, supra,** adopted Halsbury's words, 'any unlooked for mishap or occurrence', and in **Fenton** v. **Thorley & Co., Ltd.,** [1903] A.C. 443, Lord Macnaghten said at p. 448:
>
> > '...the expression "accident" is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed.'
>
> These two definitions would bring within the term 'accident those which result from the negligence of the actor whose acts are being considered even if that

> negligence were gross. With this view, I agree for the reason that to exclude from the word 'accident' any act which involved negligence would be to exclude the very largest proportions of the risks insured against."

He referred to **Candler** v. **London & Lancashire Guarantee & Accident Co. of Canada et al** (1963), 40 D.L.R. (2d) 408. There Grant, J. said at pp. 421-2 D.L.R.:

> "Even though Candler's acts were grossly negligent such fact would not of itself exclude recovery under the policy in the absence of such an exception. As to whether death occurred by 'accident' or by 'accidental means' is determined rather by the foreseeability of the result naturally following the deceased's actions. If the fall from the coping was not an unusual or unexpected incident associated with the deceased's actions, it cannot be termed as occurring by accidental means. There can be no doubt that Candler was quite aware of the danger of falling, particularly when he placed his body at right angles across the coping and with his hips and feet extending out into space. The purpose of his action was to show his friend that he had sufficient nerve to take the risk of falling that was obviously associated with his actions."

The claim in **Candler** was denied. **Candler** is often referred to as setting out the courting of the risk concept.

Spence, J. then said at p. 183:

> "As Blair, J.A., points out in the portions of his reasons which I have already cited, the evidence in this case does not support a similar finding. There is, therefore, no need at this time to express the view of this Court as to **Candler** v. **London & Lancashire Guarantee & Accident Co. of Canada et al., supra.**"

He concluded:

> "Negligence is a finding made whereby the conduct of a person is judged by the concept of a reasonable man under certain circumstances. A person may be found to have been negligent or even grossly negligent but at the time that that person performed the acts in question he might never have thaught himself to be negligent. If, on the other hand, the person realized the danger of his actions and deliberately assumed the risk of it, then in Grant, J.'s view his actions could not be characterized as accidental. I agree with the Court of Appeal that such analysis does

> not apply to the circumstances in this case and I agree, therefore, with the view of the Court of Appeal that this occurrence was an 'accident' within the words of this policy."

It is interesting to note that neither the majority nor the minority opinion in **Stats** refers to **Columbia Cellulose** or **Smith**, **supra**, or the distinction set out therein.

As mentioned, neither did Hart, J.A. in **MacIsaac**. He did say at pp. 391-2:

> "The Maritime Life policy does use the expression 'injury suffered from accidental, external and violent means.' On the other hand, the word, 'injury' is defined to mean 'only a bodily injury sustained accidentally by external means'.
>
> What was sold by Maritime Life was an accidental death policy, and, in my opinion, the conflicting use of these expressions within the policy must be interpreted against the insurer before any limitation can be placed upon the coverage. I would make no distinction between the cause of the injury and the result and find that if the cause would not be expected by the ordinary reasonable person to produce the result which was itself unexpected, that the death would be accidental and come within the meaning of the policy. It is only when the action taken by the insured is known or ought to be known to be likely to bring about the type of injury which was sustained that the loss suffered under the policy has not been accidental.
>
> I understand that the artificial distinction between the accidental cause of an accident and the accidental result of an act no longer holds sway in most of the United States jurisdictions. See **Knight** v. **Metropolitan Life Insurance Company,** 7 Life Cases (2d) 1143. Nor is there any such problem facing the English courts as is pointed out in MacGillivray and Parkington on **Insurance Law**, 6th ed., 2050:
>
> > '2050 **Accidental means.** The phrase "accidental means" has given rise to great difficulties in jurisdictions outside England. If it is interpreted strictly, it forms a contrast with phrases such as "accidental injury" or "injury caused by accident" since it looks to the means by which the result is achieved not the result itself, and whereas many injuries are accidental in that the insured did not expect or intend them to occur, many such injuries would not be caused by accidental

> means. In **Landress** v. **Phoenix Insurance Co.,** 291 U.S. 491 (1933), the Supreme Court of the United States held that death by sunstroke was not death by accidental means because the means by which the insured met his death were not accidental in that the insured intended to do everything which he did. Cardozo, J., delivered a powerful dissenting judgment in which he said with some perspicuity, "The attempted distinction between accidental results and accidental means will plunge this branch of the law into a Serbonian bog." English law has not yet been bedevilled by this particular terminological difficulty; the only case in which the problem has been discussed is **Hamlyn** v. **Crown Accidental Insurance Co.,** [1893] 1 Q.B. 750, in which the insured stooped forward to pick up a marble dropped by a child. He stood with his legs together and, separating his knees, leaned forward and made a grab at the marble; in so doing he wrenched his knee. It is not difficult to see that there was an accident but it was argued that the injury had not occurred by accidental means. The Court of Appeal disposed of this argument by saying that the insured did not intend to wrench his knee or did not intend to get into such a position as to wrench his knee and that therefore the injury had been sustained by accidental means. If this is the case, it must be said that the words "accidental means" add nothing to the word "accident", or, in the words of Cardoza, J., add nothing to the problem which the court has to consider, viz, whether the injury happened accidentally.'"

Hart, J.A. applied the reasoning of Spence, J., in **Stats**, and at p. 389, commented:

> "In my view it is the unexpectedness of the result that is the essence of what is meant by the term 'accident or accidental' in policies of this sort. If a result of the type or kind that actually happens could be foreseen as a natural and probable result of the act engaged in, then the actor can be said to be courting the risk. What follows then ceases to be accidental even though it was hoped that a particular result would not follow."

Hart, J.A. was satisfied, on the facts of **MacIsaac**, that the trial judge properly found that the death of Mrs. MacIsaac was accidental within the meaning of both insurance policies in issue.

Apparently, neither the Supreme Court of Canada in **Stats** nor our Court in **MacIsaac** wanted to "plunge this branch of the law into a Serbonian bog". It is inconceivable that the Supreme Court of Canada in 1978 was not aware of its previous judgments in **Columbia Cellulose, Smith** and **Milashenko** at the time of writing **Stats**. Hart. J.A. referred to and rejected the distinction, preferring the reasoning as expressed in **Stats**.

Maritime Life was the insurer in **MacIsaac** as well as in the case at bar. The operative words in both policies are the same. Mrs. MacIsaac died on April 1, 1977; the judgment of Hart, J.A., is dated June 15, 1979. We must assume that Maritime Life was well aware of the import of the judgment in **MacIsaac**. If it disagreed with that judgment it could have limited the effect of it by limiting the words of its policies accordingly as suggested by Spence, J., in **Stats**. It did not do so. Any knowledgeable person would assume that, faced with a claim against Maritime Life, the reasoning in **MacIsaac** would prevail. Maritime Life did not appeal **MacIsaac** to the Supreme Court of Canada. In saying this however, I am keeping in mind that the policy in question in the instant case was issued in 1973.

The Supreme Court of Canada in **Canadian Indemnity Co.** v. **Walkem Machinery & Equipment Ltd.** [1976] 1 S.C.R. 309; (1975), 53 D.L.R. (3d) 1, considered the meaning of "accident" as contained in a comprehensive business liability policy. The claim arose out of a collapse of a crane by reason of the negligence of the insured while repairing it. Admittedly the setting differs from the instant case, but Pigeon, J., confronted with the argument that the conduct of the insured was negligent and therefore not an accident, refused to apply a restrictive meaning to "accident", preferring a more comprehensive "everyday use" as "denoting any unlooked for mishap or occurrence". No mention was made of **Columbia Cellulose** or **Smith**.

In **Colby** v. **Excelsior Life Insurance Co.** (1979), 19 A.R.(C.A.) the deceased, who died of carbon monixide poisoning, was found seated in the middle passenger front seat of a truck inside

a closed garage. The engine was running. **Stats** was followed. It could not be said that the deceased courted the risk. As Lieberman, J.A. said at p. 279:

> "Thus, in this case, we must consider not merely whether Colby's death was an objectively foreseeable result of his actions, but also whether he foresaw the possibility of his death and deliberately assumed the risk of it. All the evidence is contrary to such a conclusion and I agree with the learned trial jduge in his finding that Colby's death was accidental within the meaning of the policy."

There was no distinction made between "accidental death" and "death caused by accident".

In **Koch** v. **Empire Life Insurance Co.** (1981), 124 D.L.R. (3d) 161 death occurred during sleep from inhalation of regurgitated food. Quigley, J. of the Alberta Court of Queen's Bench, held that death was caused "solely by external, violent and accidental means" within the meaning of a life insurance policy. There was no evidence of alcohol or drug intoxication. For the definition of "accident" or "accidental" he referred to Spence, J., in **Stats**. He quoted the comments of Hart, J.A. in **MacIsaac**, making no distinction between the cause of the injury and the result and that "...It is only when the action taken by the insured is known or ought to be known to be likely to bring about the type of injury which was sustained that the loss suffered under the policy has not been accidental". Quigley, J., said:

> "Counsel for the defendant relied on **Columbia Cellulose Co. Ltd. and Bartlett** v. **Continental Casualty Co.** (1963), 40 D.L.R. (2d) 297, 43 W.W.R. 355; affirmed by the Supreme Court of Canada 42 D.L.R. (2d) 401n, [1964] S.C.R. V, 46 W.W.R. 512n. In that case the Court held that the cause of the bodily injury resulting in death was the deliberate act of the deceased of overexerting himself. Counsel for the defendant suggests that the cause of bodily injury resulting in death in the present case was the deliberate act of the deceased of eating. In my opinion that is not so. The acts of the deceased which caused the injury were the acts of regurgitation and aspiration, neither of which were deliberate. On the contrary they were involuntary."

Similarly, in the instant case, the weight of the evidence is that death resulting from

asphyxia was caused by aspiration, he choked on his own food.

While reviewing several interesting and relevant cases, Quigley, J., remarked:

> "In **Life & Casualty Ins. Co. of Tennessee** v. **Brown** (1957), 98 S.E. 2d 68, the insured, while being administered ether vomited and the food particles in his stomach lodged in his windpipe causing anoxaemia of the brain resulting in his death. In giving judgment, Townsend J., said in part at p. 71: 'Here the patient, while being operated on for appendicitis, was injured by accidental means (the loding of food particles in his windpipe) which injury caused his death.'
>
> There do not appear to be any English authorities dealing with this issue in so far as death by aspiration of **vomitus** is concerned. However, as far back as 1857 Cockburn C.J., speaking for the English Court of Appeal, expressed the view in **Trew et al** v. **Railway Passengers' Ass'ce Co.** (1861) 6 H. & N. 839 at p. 844, 158 E.R. 346 at p. 348, that: 'We ought not to give to those policies a construction which will defeat the protection of the assured in a large class of cases."

He permitted the claim holding that the inhalation of the regurgitated food, not being intended, was accidental.

The facts in **Leontowicz** v. **Seaboard Life Insurance Co.** (1984), 16 D.L.R. (4th) 95; 58 A.R.66 (Alta. C.A.) are set out at p. 67 of the A.R.:

> ""The insured, a young mother, attended a party which concluded with her and a group of others rapidly consuming liquor which was 'unsold' at the end of the party. A substantial amount of alcohol was consumed in 15 to 30 minutes. Shortly after consuming the alcohol the deceased entered an automobile as a passenger and was left sleeping in that automobile. She died about an hour after leaving the party. A blood sample showed a level of 390 milligrams of alcohol in 100 millilitres of blood, a quantity sufficient to depress the respiratory centre and end breathing. The insured was not an experienced drinker and the trial judge properly concluded that death was totally unexpected.
>
> By the insuring agreement the policy insures for 'loss resulting from injury to the extent herein provided', and defines 'injury' as 'bodily injury caused by an accident occurring while the policy is in force...and resulting directly and independently of all other causes.'"

The main issue was the interpretation of the expression "bodily injury caused by an accident" when that injury, there loss of life, arose from the ingestion of excessive amounts of alcohol. The insurer alleged a distinction between an accidental injury, concentrating on the nature of the result and an injury caused by an accident concentrating on the nature of the cause.

Stevenson, J.A. speaking for the Alberta Court of Appeal said at p. 67: "The distinction is not always recognized but it is recognized in two decisions of the Supreme Court of Canada", that is in **Columbia Cellulose** and **Smith**. He reviewed those two cases as well as, among others **Stats,** commenting that upon the latter case "there was not need to characterize or distinguish between cause and result". He also referred to **Walkem Machinery & Colby** and at p. 68 commented upon the fact that:

> "In **Koch** the policy insured against death by 'accidental means'. The deceased had died of asphyxiation when he aspirated his own vomit, with no discernible pathological cause for the original vomiting. The **MacIsaac** case was applied and the **Columbia Cellulose** case distinguished on the basis that in that case there was a deliberate act of over exertion while in **Koch** the cause of death was regurgitation and aspiration, neither being deliberate or voluntary actions."

In commenting upon **MacIsaac** he said:

> "Hart, J.A., characterizes the distinction between an accidental cause of an accident and an accidental result as 'artificial' and notes that it no longer holds sway in the United States. It is apparent that the court's attention was not drawn to the two decisions of the Supreme Court of Canada."

I note that he made no similar comment respecting the Supreme Court of Canada in **Stats** which also did not refer to **Columbia Cellulose** or **Smith**.

With deference, I cannot conclude that the attention of the court in **MacIsaac** was not drawn to those two decisions anymore than I would conclude that in **Stats** the attention of the Supreme Court of Canada was not drawn to them. In my opinion, Hart, J.A. preferred, for good reason, the opinion in **Stats**, and **Stats** ignored them.

Stevenson, J.A. allowed the appeal and set aside the decision of the trial judge which had allowed the action. In doing so he said he shared Judge Cardozo's "anxiety that we may, having regard to the situs of this case, enter into muskeg in trying to identify and distinguish accidental causes", but he concluded that:

> "we are bound by the decisions of the Supreme Court of Canada to respect the distinction between cause and result and on those authorities, the beneficiary must be able to point to an accident. I cannot distinguish those cases, cannot ignore them, and am unable to sustain the beneficiary's suggestion that their authority is weakened by the later cases."

He further said:

> "The Supreme Court cases compel the continuation of the distinction, and this insured fails when it is made."

He thus accepted the argument of the insurer that **Columbia Cellulose** and **Smith** governed and that the voluntary consumption of alcohol, which was the cause of death, was not an accident.

Leave to appeal to the Supreme Court of Canada was refused.

I cannot disagree with the conclusion reached in **Leontowicz** on the facts of that case. With respect, in my opinion, it was not necessary to draw the distinction as enunciated in those two Supreme Court of Canada decisions to achieve that result. As the trial judge said in respect to the present case:

> "Both Supreme Court of Canada decisions relied upon in **Leontowicz** are distinguishable on their facts."

In contrast with **Leontowicz,** here death was not caused by the voluntary consumption of alcohol or by deliberate exertion as in **Canadian Cellulose** and **Smith** but by the deceased choking on his own food.

In **Jones** v. **Allstate Insurance Company of Canada** (1980), 40 N.S.R. (2d) 469, the insured, who was an alcoholic, died as a result of aspiration of vomitus. Mr. Justice Morrison, then of the Trial Division of this province, applied the meaning of "accident" as set out in **MacIsaac** and

in **Trynor Construction** v. **Canadian Surety** (1970), 1 N.S.R. (2d) 299. He then commented:

> "In the **MacIsaac** case that I have just quoted circumstances may be compared to the case at Bar. In that case, Mrs. MacIsaac was found in a sort of sitting position with her knees under her and her buttocks resting on the calves of her legs, dead. The upper part of her body had fallen forward and the left side of her face was touching the floor. One arm was thrown forward and the other arm was under her body. In that case, the medical examiner testified at the trial of the matter that he was of the opinion that the lady died as a result of asphyxiation and that the asphyxiation was due primarily to a high blood alcohol level and that her death was due to acute alcohol intoxication. He also found that she had a blood alcohol reading of .350 mg/dl which is considerably higher than in the case of Mr. Jones.
>
> In that case, the trial judge reached the conclusion that he was not convinced that Mrs. MacIsaac would have died from the alcohol alone had it not been for the unfortunate manner in which she came to rest on the bedroom floor. The Nova Scotia Court of Appeal upheld this finding of the trial judge and Hart, J.A., made the comments regarding the meaning of accident to which I have referred above.
>
> I rely on the reasoning of both the trial judge and the Court of Appeal in the **MacIsaac** case, **supra**, as I find a great similarity to the facts in this case. The major difference is that it has been established that Jones in the case at Bar was a chronic alcoholic and had been for many years. However, his death was due to aspiration which, in the circumstances described, I take as meaning that some material had lodged in his windpipe and he had choked to death. Certainly this is not the type of thing which Jones could have foreseen as a natural and probable result of his drinking. After all, he had been drinking most of his life and had been, as the evidence suggests, a confirmed alcoholic for twelve to fifteen years. He certainly did not foresee nor was it a reasonably foreseeable consequence that he would aspirate on this particular occasion.
>
> In the **MacIsaac** case, indeed, the medical examiner testified in court and gave it as his opinion in court that death was due to alcoholism but nevertheless neither the trial judge nor the Court of Appeal accepted this opinion. In the case at Bar the medical examiner did not testify; we have only a written comment in his report which has not been explained or justified to the court.

The last comment is apt here when considering the report of Dr. Fraser.

The conclusion as stated by Morrison, J. is equally applicable here:

> "As I have stated repeatedly throughout this decision, death was caused by aspiration. There is nothing in the evidence to support the contention that this was anything but an accident. It was an accident which occurred directly and independently of all other causes within the meaning of the insurance certificate introduced into evidence as Exhibit 2. The death of Mr. Jones, in my opinion, was accidental within the meaning of the insurance policy."

The Ontario Court of Appeal considered the issue of a claim under a policy insuring the plaintiff against "loss resulting directly and independently of all other causes from accidental bodily injuries" in **Voison** v. **Royal Insurance Co. of Canada** (1988), 66 O.R. (2d) 45. The facts are set out in the headnote:

> "The plaintiff was insured under a policy covering 'loss resulting directly and independently of all other causes from accidental bodily injuries'. While engaged in remodelling his house he suffered an occlusion of the anterior spinal artery as a result of a trauma sustained when he assumed an awkward position and extended his neck. A spinal cord malfunction occurred and the plaintiff was totally disabled. Such an occurrence was highly unusual. A slightly protruding disc might have been a contributing factor but could not have caused the damage by itself. Plaintiff's action for a declaration that his injury was within the risk insured was dismissed."

On allowing the appeal Robins, J.A. said at pp. 49-51:

> "The first question to be addressed is whether the plaintiff's bodily injuries can properly be described as 'accidental' and thus within the insuring provision covering 'loss resulting directly or independently of all other causes from **accidental bodily injuries**' [emphasis added]. The word 'accidental', like 'accident', is, as the cases demonstrate, not susceptible of precise definition. In the context of an accident insurance policy which contains no express definition, it is well established that these words are to be given their ordinary, usual and popular meaning as indicating an unlooked for mishap or an untoward event which is not expected or designed; or as an event which takes place out of the usual course of events without the foresight or expectation of the person

> injured; or as an injury happening by chance unexpectedly, or not as expected. In determining whether a certain result is accidental, the occurrence is to be viewed from the standpoint of an ordinary reasonable person to see whether or not, from his or her standpoint, it was unexpected, unusual and unforeseen. It is irrelevant that a person with expert knowledge would have expected the occurrence or regarded it as inevitable: **Fenton** v. **J. Thorley & Co. Ltd**., [1903] A.C. 443 (H.L.); **Mutual of Omaha Ins. Co**. v. **Stats** (1978), 87 D.L.R. (3d) 169, [1978] 2 S.C.R. 1153, [1978] I.L.R. ¶1-1014 (S.C.C.); 25 Hals., 4th ed., p. 311; para, 594, and **MacGillivray & Parkington on Insurance Law**, 6th ed. (1975), para. 2021 **et seq.**
>
> Recovery under a policy insuring against accidental injury is not necessarily confined to cases where there is 'an accident' in the sense of an antecedent mishap from which injury results or where injury results from circumstances which can be separately visualized and described as 'an accident'. An injury may be regarded as accidental where an insured engages in a voluntary act not intending to cause himself harm and the consequent harm could not reasonably have been foreseen or expected. Where, for instance, an insured voluntarily subjects his body to stress, strain or exertion and suffers injury as a result, it is difficult to visualize a separate or external event preceding the injury which could be classified as 'an accident'. The fact that the injury happened through the insured's own act does not, however, necessarily prevent it from being an accidental injury. Where the injury is unforeseen, unexpected and without design, and not likely to result naturally or ordinarily from the voluntary or intentional act, but rather constitutes an unusual result, it may be said that it is an accidental injury. There is ample authority in cases involving claims under policies for 'accidental injury' or 'accidental bodily injuries' or 'injury by accident' and, indeed, even under policies for injuries caused by 'violent, accidental, external and visible means', holding a risk of this nature to be covered: see generally, Halsbury, **op. cit**.,pp. 311-16, paras, 595-605; **MacGillivray & Parkington, op. cit**., paras. 2025-32, Couch, **On Insurance**, 2nd ed. (1982), vol. 10, paras. 41: 7-41:42; J.A. Appleman, **Insurance Law and Practice** (1981), vol. 1A, c. 19.

He continued:

> "...This contract of insurance covers loss resulting from 'accidental bodily injuries'. It does not require that the

> injuries be the result of 'accidental means' or 'accidental causes' or of 'an accident' in the sense of an antecedent mishap, all terms referring to an unintentional or unexpected occurrence or happening which produces a harmful result, although, as stated earlier, even on such wording, there is authority holding a risk of this nature to be covered. The policy as it is worded is concerned with the character of the harm, and requires only that the result, that is, the injuries, be accidental. While the plaintiff clearly intended to assume an awkward position and to extend his neck in the manner he did, the blockage of his spinal cord and the paralysis which followed could not have been anticipated or foreseen. These injuries, though in consequence of a deliberate or voluntary act, were not the natural or probable result of the acts undertaken by the plaintiff or something that could be foreseen or expected. In these circumstances, his injuries, in my opinion, were accidental and within the risk insured against by the policy."

He concluded at p. 57:

> "On the evidence in this case, the non-symptomatic disc condition alone would clearly not have produced the paralysis. But, even assuming that it was a condition necessary thereto, as I view the matter, it was no more than a condition **sine qua non** and not one amounting to a cause within the meaning of the policy. Once it is established that the disc defect alone would not have caused the injury, I do not think it can be said to have caused the injury when it became active only as a direct consequence of the act which produced the accidental trauma to the spinal artery. The disc defect is more accurately viewed, not as a disqualifying cause for insurance purposes of the resultant injury, but as a circumstance or condition forming the background against which the proximate or motivating cause of the paralysis operated or, in other words, as a passive ally of the agency activated by the accidental injury. On the wording of this policy, I would not consider the existing condition to be a cause of the plaintiff's injury such as to defeat coverage and preclude recovery. In my opinion, the plaintiff received an injury compensable under the terms of the policy issued to him by the insurer."

On the facts of the case at Bar it cannot be said that the aspiration of the food causing asphyxiation after the voluntary consumption of the large amount of alcohol was the natural and probable result of that voluntary consumption or something "that could be foreseen or expected".

Giving the word "accident" its ordinary, usual or popular meaning as indicating an unlooked for mishap or untoward event, death was caused by accident: he choked on his own food causing asphyxiation. The high blood alcohol reading was, at most, merely a condition upon which the accident, the choking, may have operated. The choking was the effective cause of death. There can be no doubt that the consumption of alcohol was associated with the death, but that does not make it the cause.

Here we do not have the factual situation as in **Tamelin** v. **Pioneer Life Assurance Company**, [1990] I.L.R. 9911 where the "final opinion" of the autopsy report was: "This man died of severe alcohol intoxication which led to respiratory depression and/or aspiration and death". The finding there was that "the voluntary consumption of alcohol is not an accident". Contrary to the facts in the case at Bar the trial judge in **Tamelin** commented that there did "not appear to be evidence in the autopsy report of anything that could be characterized as 'bodily injury'," although the presence of food was found in parts of the deceased's lungs. That is the opposite of the case at Bar where the autopsy report is clear: "...the cause of death is attributed to asphyxia as a result of aspiration".

Robins, J.A. in **Voison** reviewed several relevant cases. As noted in the quote above, he referred to **Stats**. He did not, as Hart, J.A. in **MacIsaac** did not and the Supreme Court of Canada in **Stats** did not, make reference to **Columbia Cellulose** or **Smith**.

The Ontario Court of Appeal made its position clear respecting the distinction between "accidental bodily injury" as opposed to "bodily injury caused by accident in the recent case of **Golding** v. **Citadel General Insurance Co.** (1990), C.C.L.I. 296. The insured died from cardiac arrhythmia shortly after taking diet pills. In an action to recover the accidental death benefit of a life insurance policy, the insurer's position was that death was not the result of "bodily injury caused by an accident". The trial judge found that the deceased did not know of the danger she was in by taking the pills. He allowed the action.

In dismissing the appeal the Court said:

> "On the facts of this case it is not clear when the event that caused death occurred, but certainly the facts are consistent with the submission of counsel for the respondent that it followed the voluntary act of taking the diet pills. It seems to us that what occurred was the unforeseen response of the deceased's body to the taking of the pills, causing a heart stoppage. This was the 'accident' implicitly found by the trial Judge that resulted in the loss of life of the deceased.
>
> Even accepting the submission of appellant's counsel that what occurred, on the facts of this case, amounted to 'accidental bodily injury' as opposed to 'bodily injury caused by an accident', we observe that Robins J.A., speaking for this Court in **Voison** v. **Royal Insurance Co. of Canada** (1988), 66 O.R. (2d) 45, held that the distinction was not a real one. See also **MacIsaac** v. **CNA Assurance Co.** (1979), 32 N.S.R. (2d) 380, 54 A.P.R. 380, 102 D.L.R. (3d) 160, [1979] I.L.R. 1-1134 (C.A.). To the extent that the decision of the Alberta Court of Appeal in **Leontowicz** v. **Seaboard Life Insurance Co.** (1984), 8 C.C.L.I. 290, 36 Alta. L.R (2d) 65, 58 A.R. 66, [1985] I.L.R. 1-1887, 16 D.L.R. (4th) 95 (C.A.), leave to appeal to S.C.C. refused (1985), 36 Alta. L.R. (2d) lxin, 61 N.R. 78 (S.C.C.), cannot be reconciled with the later decision of this Court in **Voison**, we feel obliged to follow the latter decision."

I agree with the comments in **MacIsaac, Voison** and **Golding**, the distinction is artificial; it is not real.

Even if I were to apply the distinction, on the facts of this case I would reach the same result.

I again refer to Culliton, C.J.S. in **Milashenko**:

> "I think the dominant principle established by the foregoing decisions (**Canadian Cellulose** and **Smith**) is that no right of recovery lies under an accident policy when the injury is accidental in that it was unforeseen and unexpected, when such injury was the result of an act voluntarily and deliberately committed by the insured; in such a case, while the result is an accident, the means is not."

In the case on appeal, the injury (death) was "accidental in that it was unforeseen and unexpected". However, it was not as a result of an act deliberately committed by the insured, that

is, the consumption of alcohol.

Appellant's counsel concluded his argument in his factum in this fashion:

> "It is the Appellant's contention that William Timothy Burns was reckless and courted the risk of excessive consumption of alcohol which caused his death. Adopting the reasoning in **Leontowicz** and **Tamelin**, there can be no accidental death because the voluntary ingestion of alcohol is not an accident."

However, unlike **Leontowicz** and **Tamelin** where it was clear that the voluntary consumption of an excessive amount of alcohol was the cause of death, in the case before us, I repeat, the cause of death was asphyxiation, he choked on his food.

Here the insured, an alcoholic, engaged in the voluntary act of drinking an excessive amount of alcohol. There was no evidence that he intended to cause himself harm and, in particular, cause death. The asphyxia as a result of aspiration was unforeseen, unexpected and without design and as such constituted an unusual result. It was an accidental injury. It caused his death.

As has been said in many of the cases to which I have referred including **Stats**, it is necessary to have knowledge of all of the circumstances before the question of the ordinary meaning of "accident" can have a determinative effect. Further, polices of insurance should not be given an interpretation which will defeat the protection sought by an insured. "Accident" or loss as a result of injury suffered from accidental means cannot be given a narrow meaning which would exclude, to use the words of Spence, J., in **Stats** at p. 182; "the very largest proportions of the risks insured against".

As has been stated repeatedly throughout this judgment, death was caused by asphyxiation as a result of the deceased choking on his own food. That was not a deliberate or voluntary act. It cannot be said that the deliberate consumption of alcohol was the cause of death. There was no evidence that aspiration was the result of diminished respiratory functioning caused by excessive consumption of alcohol. There was no proven nexus between the blood alcohol level and aspiration. The cause of death was an accident. Thus, if we were to apply the ratio in

Leontowicz, the beneficiary must establish that the cause of death, as distinct from the death itself, was an accident. I again refer to the cause of death. The voluntary consumption of alcohol was not an accident, but it was not the cause of death.

I would dismiss the appeal with costs to the respondent at 40% of the costs taxed or agreed upon at trial plus disbursements.

J.A.

Concurred in:

Clarke, C.J.N.S.

Freeman, J.A.