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# WHAT DOES ACCIDENTAL MEAN?: AUTOEROTIC ASPHYXIATION AS AN ILLUSTRATION OF THE PROBLEMS AFFECTING ACCIDENT INSURANCE

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## I. INTRODUCTION

Autoerotic asphyxiation is the practice of cutting off one's air supply while masturbating in order to achieve a more intense orgasm.<sup>1</sup> The techniques employed to cut off air supply are strangulation with a rope or other ligature, chest compression, or covering the face with a plastic device or mask.<sup>2</sup> When practitioners of autoerotic asphyxiation cut off their air supply, they are momentarily depriving their brains of oxygen resulting in a feeling of lightheadedness and exhilaration called hypoxia. The feelings produced by hypoxia result in a magnification of the physical sensation of orgasm.<sup>3</sup> Far from being suicidal, those who practice autoerotic asphyxiation intend to survive the experience.<sup>4</sup> Accordingly, most people who engage in this activity install some safety measures to ensure continued existence.<sup>5</sup> Although practitioners of autoerotic asphyxiation intend to survive the experience, it is not surprising that death does sometimes result from the practice regardless of the measures the deceased has taken to ensure their safety.

Confusion arises when the families of those who died while practicing autoerotic asphyxiation attempt to collect under the accidental death portion of the decedent's life insurance policy. Such accidental death policies usually take the

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<sup>1</sup> *Critchlow v. First UNUM Life Ins. Co. of Am.*, 378 F.3d 246, 250 (2d Cir. 2004).

<sup>2</sup> Federal Employees' Group Life Insurance Program Handbook: Types and Amounts of Insurance, available at <http://www.opm.gov/insure/life/handbook/amounts2.asp>.

<sup>3</sup> Andrew P. Jenkins, *When Self-Pleasuring Becomes Self Destruction: Autoerotic Asphyxiation Paraphilia*, *THE INT'L ELECTRONIC J. HEALTH EDUC.*, 208, 209 (2000).

<sup>4</sup> *Id.* at 209. ("Despite the potential for a fatal episode, suicidal intent is not usually evident.") See also *Critchlow*, 378 F.3d at 250; *Sigler v. Mutual Benefit Life Ins. Co.*, 306 F. Supp. 542, 543 (S.D. Iowa 1981); *Simms v. Monumental Life Ins. Co.*, 778 F. Supp 325, 326 (E.D. La. 1990).

<sup>5</sup> Robert R. Hazelwood, et al., *The Investigation of Autoerotic Fatalities*, 9 *J. POLICE SCI. & ADMIN.* 404 (1981) (Stating that self-release mechanisms are typically found at autoerotic asphyxiation death scenes).

form of double indemnity clauses, which insurance companies sell as a supplement to life insurance plans. These double indemnity clauses allow families to collect roughly double the life insurance if death is the result of an accident.<sup>6</sup> Insurance companies usually refuse to award accident insurance in cases where the decedent died while engaging in autoerotic asphyxiation, forcing the policyholder to pursue the matter in court.<sup>7</sup> Because of the bizarre nature of autoerotic asphyxiation and the uncertainty of courts in performing accident analysis in accident insurance claims, it is not surprising that courts do not reach consistent results when these families resort to litigation.<sup>8</sup>

Accident insurance policies typically do not honor the double indemnity supplement for accidental death when the death is caused by mental or physical illness; diagnosis or treatment of physical or mental illness; bacterial infection not caused by accidental physical injury; an act of war; suicide or attempted suicide; purposeful injury; illegal or legally obtained drugs that are self-administered; or driving a motor vehicle while intoxicated.<sup>9</sup> Of these exceptions to double indemnity payouts for accidental death, autoerotic asphyxiation is affected by the suicide, purposeful injury, and the mental illness exceptions. The suicide exception is traditionally a weak argument for the insurers to use in asphyxiation cases because it is typically easy to prove the decedent intended to survive.<sup>10</sup> The mental illness exceptions are alluded to in cases and briefs but have not yet been seriously considered.<sup>11</sup>

The strongest opposition to payment of the double indemnity portion of a life insurance policy in asphyxiation cases comes from the intentional self-injury exception. Because the intention of the decedent to survive the experience in most cases is easily provable, death itself is not seen as an injury. The question of intentional injury thus hinges on whether autoerotic asphyxiation would have resulted in an injury if death had not occurred.<sup>12</sup> Courts have been inconsistent in deciding whether the prevention of oxygen flow to the brain during autoerotic asphyxiation results in an injury.<sup>13</sup>

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<sup>6</sup> LEE R. RUSS & THOMAS F. SEGALIA, *COUCH ON INSURANCE* §179:5 (3d ed. 2006).

<sup>7</sup> See generally *Critchlow*, *supra* note 1; *Sigler v. Mutual Benefit Life Ins. Co.*, 306 F. Supp. 542 (S.D. Iowa 1981); *Simms v. Monumental General Life Ins. Co.*, 778 F. Supp. 325 (E.D. La. 1990); *MAMSI Life and Health Ins. Co. v. Calloway*, 825 A.2d 996 (2003).

<sup>8</sup> Compare *Critchlow*, *supra* note 1, with *MAMSI Life and Health Ins. Co. v. Calloway*, 825 A.2d 996 (Md. 2003). (a comparison of these two cases illustrates two courts that fully examine both positions regarding whether autoerotic asphyxiation is an "injury" yet come to differing results).

<sup>9</sup> Federal Employees' Group Life Insurance Program Handbook, *supra* note 2.

<sup>10</sup> See *Hazelwood, et al.*, *supra* note 5.

<sup>11</sup> Brief for Plaintiff-Appellant, *Critchlow v. First UNUM Life Ins. Co. of Am.*, No. 02-7585 (2d Cir. Aug. 7, 2002).

<sup>12</sup> See generally *Critchlow v. First Unum Life Ins. Co. of Am.*, 378 F.3d 246, 254 (2d Cir. 2004); *MAMSI Life and Health Ins. Co. v. Calloway*, 825 A.2d 996, 998 (Md. 2003); *Simms v. Monumental Gen. Life Ins. Co.*, 778 F. Supp. 325, 328 (E.D. La. 1990); *Sigler v. Mutual Benefit Life Ins. Co.*, 306 F. Supp. 542, 545 (S.D. Iowa 1981).

<sup>13</sup> See *supra* note 8.

Adding to the difficulty that courts have faced in these cases is the confusion surrounding what counts as an accidental death for insurance purposes. Various courts have applied two different methods of analysis for resolving insurance disputes involving accidental death. Some courts use an analysis that subscribes to the plain language of the insurance policy and seeks only to determine if the death was an accident.<sup>14</sup> Other courts employ an “accidental means” analysis in which the court determines if the insured willingly engaged in the activity that led to death.<sup>15</sup>

This Note begins by tracing the origins of accident insurance and its development in the United States. It follows with an explanation of “accidental means” analysis in accident insurance cases, compares it to “accidental results” analysis, and examines the inconsistency that results from the usage of “accidental means” analysis. The Note then examines accident insurance cases in which the decedent engaged in high-risk behavior that resulted in death. A comparison of the courts’ results in these cases will be made to the results in autoerotic asphyxiation cases.

The purpose of this Note is to propose that insurance companies are in a better position than the courts to correct the confusion that occurs when the family of an insurance policyholder who has died while practicing autoerotic asphyxiation attempts to collect the on an accidental death provision of the insurance. Because the personal views of judges deciding these cases result in decisions that vary widely depending on the jurisdiction, federal regulation is needed to provide protection to a mobile population. The nature of this regulation should persuade insurance companies to offer coverage for death by both “accidental means” and “accidental results,” to define further what is meant by both of these policy types, and to articulate further what is meant by the ambiguous word “injury.” Insurance companies benefit from these uncertainties because they can deny payment to many accidental death claims and litigate in the few instances in which they are forced by the beneficiaries of the policies.

## II. HISTORY OF ACCIDENT INSURANCE AND DOUBLE INDEMNITY

Technology and the unsatisfactory state of tort law compelled the development of accident insurance in mid-nineteenth century London,<sup>16</sup> when railroads were still in the early stages of development and imperfections often led to accidents. These accidents were widely reported in local newspapers like the *London Times* and caused a great deal of public anxiety.<sup>17</sup> At the same time, tort

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<sup>14</sup> See generally *Critchlow*, 378 F.3d at 246.

<sup>15</sup> See generally *Landress v. Phoenix Mut. Life Ins. Co.*, 291 U.S. 491, 496-97 (1934).

<sup>16</sup> Adam F. Scales, *Man, God, and the Serbonian Bog: The Evolution of Accidental Death Insurance*, 86 IOWA L. REV. 173, 177-178 (2000).

<sup>17</sup> *Id.* at 177. (“In 1848, the hazards of rail travel were very much on the minds of Londoners. During the preceding year, over one hundred train accidents were reported in the *Times of London*.”).

law was codified in the Fatal Accidents Act, which created a cause of action for anyone who was negligently killed by another.<sup>18</sup> Recovery under the Fatal Accidents Act was based solely on monetary loss. This method of recovery led to an unsatisfactory result in which the wealthy recovered in cases of accidental death while the poor recovered nothing.<sup>19</sup>

In 1849, the Railway Travelers Assurance Company (RTAC) was founded to provide relief to those who suffered injuries in a railway accident. The formation of RTAC provides the first example of accident insurance.<sup>20</sup> RTAC negotiated with the railroad companies to provide accident insurance for passengers who “sustain[ed] any personal injury whatever incident to, and consequent on, railway traveling.”<sup>21</sup> The ticket holders could elect to buy insurance for their railway trip for a small sum additional to the cost of their railway ticket.<sup>22</sup>

The amount of insurance one was able to receive was based on how much was paid for insurance. How much a passenger paid for insurance was based on the class of ticket purchased. First class ticket holders paid a higher sum than second or third class ticket holders and received a larger amount of money in the event of an injury causing accident. Second class ticket holders paid less than the first class ticket holders and received half as much as a first class ticket holder in the event of an accident. Third class ticket holders paid less than the second class ticket holders for railway insurance and received less than half of what second class ticket holders would in the event of accident.<sup>23</sup>

The RTAC began to expand the time frame of their coverage by offering insurance protection for railway accidents for extended periods of time. A commuter, rather than buying insurance for a single ride could purchase insurance protection against railway death for a period of months, years, or even for life.<sup>24</sup> Because railway accidents received widespread coverage in newspapers, a large demand was created for the service that RTAC provided.<sup>25</sup> However, the probability of dying in a train accident was quite low.<sup>26</sup> The unlikelihood of death by train accident combined with large public demand made accident insurance a

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<sup>18</sup> *Id.* at 178.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 179.

<sup>21</sup> *Id.*

<sup>22</sup> Scales, *supra* note 16, at 180.

<sup>23</sup> *Id.*

The initial rate structure was as follows: for an additional three pence (1/80 of a pound), the holder of a first-class ticket could secure a policy that would provide  $\geq 1000$  in the event of his death. Second-class ticket holders could pay two pence for a  $\geq 500$  policy, and third-class passengers would receive  $\geq 200$  of protection in return for a single penny. (Internal citations omitted).

<sup>24</sup> *Id.* at 183.

<sup>25</sup> *Id.* at 181-182. (“By the end of 1851, nearly 600,000 travelers had availed themselves of the company’s protection.”).

<sup>26</sup> *Id.* at 182.

very profitable business.<sup>27</sup>

Entrepreneurs recognized the potential of accident insurance and in 1850; the Accidental Death Insurance Company was founded. This company offered insurance protection for death caused by all types of injury, expanding the coverage of the RTAC, which only protected insurers from railway accidents.<sup>28</sup> This type of business became very successful because it offered less limited insurance. In mid-nineteenth century England, few people could afford life insurance. The Accidental Death Insurance Company offered a more limited coverage than life insurance, but it was affordable to greater number of people.<sup>29</sup>

In the 1860s, accident insurance traveled across the Atlantic Ocean with the formation of the Travelers Insurance Company.<sup>30</sup> In the same period many other insurance companies were formed, most of which were swallowed-up by Travelers Insurance or were soon out of business because they generally started their business with inadequate financing. When these companies did have to make payouts, those payouts forced them out of business.<sup>31</sup> The realization that the insurance business carried with it significant risks forced insurance companies to expand exclusions in the policy and to introduce limitations on benefits.<sup>32</sup> The increase in these exclusions prompted competition among insurers to create other incentives to attract customers.<sup>33</sup> One of the products that insurance companies developed to attract customers was the creation of double indemnity clauses in life insurance policies. Double indemnity clauses allowed the families of the insured to collect double the base amount which could be collected under the policy if death occurred as a result of an accident.<sup>34</sup> The value of accident insurance as a substitute for life insurance decreased as more people were able to afford life insurance.<sup>35</sup> In addition, travel became safer, making the need for accident insurance as it was originally conceived out of date. Thus, accident insurance gradually changed from an instrument to protect train passengers to bonus coverage that insurance agents

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<sup>27</sup> *Id.* (“[T]he actual likelihood of dying in an accident, particularly a rail accident, was nevertheless extremely low. For an insurance company offering a new product, these were ideal conditions.”).

<sup>28</sup> Scales, *supra* note 16, at 183.

<sup>29</sup> *Id.* at 184:

The genius of accident insurance from a marketing standpoint was that it allowed the consumer to buy just a little insurance. Few people had life insurance policies in the early to mid-1800s. It is likely that many could not afford the large initial premium required of a traditional policy. Yet they still needed, or at least could be persuaded that they needed, some protection for their families.

*Id.*

<sup>30</sup> *Id.* at 185.

<sup>31</sup> *Id.* at 186. (“The same disasters which spurred the creation of new companies wiped them out just as quickly. In its first half-century, the business was characterized by a cycle of expansion, followed by retrenchment, followed in turn by further expansion.”).

<sup>32</sup> *Id.* at 187.

<sup>33</sup> *Id.*

<sup>34</sup> RUSS & SEGALIA, *supra* note 6.

<sup>35</sup> Scales, *supra* note 16, at 188.

sold to life insurance customers in the form of a double indemnity.<sup>36</sup>

### III. COURTS HAVE DIFFICULTY DEFINING WHAT CONSTITUTES AN ACCIDENT

#### A. *Accidental Results, Accidental Means, and the "Common Speech of Man"*

After the emergence of accidental death insurance, courts had difficulty defining what an "accident" was within the meaning of the accidental death insurance policies. Making the task more difficult was the language used in the policies, which could state an accident as "accidental death" or "death by external and accidental means." Insurance policies using "accidental means" language ushered in a new method for insurance companies to contest accidental death claims by creating confusion as to what should be considered an accident. Courts that utilized "accidental means" analysis looked to the actions of the deceased: if the deceased voluntarily engaged in an activity that led to their death, then recovery would be barred.<sup>37</sup> Other courts, however, proceeded with a case-by-case analysis that sought to determine if the accident resulting in death was an accident according to the "common speech of man."<sup>38</sup> Unsurprisingly, these differing methods for determining accidental death within the meaning of insurance policies created inconsistent results in accident insurance litigation.

An early example of the use of accidental death analysis despite "accidental means" language being employed in the policy is the case of *Lewis v. Ocean Accident & Guarantee Corp.*<sup>39</sup> In *Lewis*, the deceased, who had an insurance policy that provided coverage for "bodily injuries effected solely through accidental means," died as a result of picking a pimple on his lip.<sup>40</sup> The pimple did not heal normally and the deceased developed an infection and eventually died from complications caused by this infection.<sup>41</sup> The court determined this was an accidental death according to the "common speech of man."<sup>42</sup> Under the "common speech of man" test in this factual situation, the court found the infection sustained by the deceased was an unexpected consequence of the deceased picking the

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<sup>36</sup> *Id.* at 190. ("We have, then, an insurance product whose function has evolved from securing against the dangers of rail travel to a general-purpose sweetener used to promote the sale of other products.").

<sup>37</sup> See RUSS & SEGALIA, *supra* note 6, at §139:23. Stating:

[i]n the . . . cases in which some voluntary action of the insured plays some role in the . . . causal chain that produces the injury or death, the distinction between accidental results and accidental means, a rather slight one . . . has been the root of considerable confusion, consternation, and . . . litigation.

<sup>38</sup> See *Lewis v. Ocean Accident & Guarantee Corp.*, 120 N.E. 56, 57 (N.Y. 1918).

<sup>39</sup> *Id.* at 56.

<sup>40</sup> *Id.* at 56-57.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* ("This test—the one that is applied in the common speech of men—is also to be applied by courts.").

pimple and that death was thus accidental.<sup>43</sup>

In contrast, the Supreme Court of Arkansas, in *Continental Casualty Co. v. Bruden*, decided a sunstroke case in which the words “accidental means” were not used in the insurance policy.<sup>44</sup> The deceased died of heat prostration that was brought about as a result of working as a machinist underneath a car engine. The court discussed accidental means analysis only long enough to define it and compare it with unforeseen consequences analysis.<sup>45</sup> In finding that the family of the machinist should recover under the policy, the court did not consider accidental means as a point of contention in this fact situation. This omission illustrates that earlier courts required “accidental means” language in the policy if it was to engage in “accidental means” analysis.

However, in *Landress v. Phoenix Mutual Life Insurance Co.*, the United States Supreme Court—prompted by language in the insurance policy—engaged in accidental means analysis in another sunstroke case.<sup>46</sup> In *Landress*, a man who died of heat prostration while golfing held an accident insurance policy that stated, “directly and independently of all other causes from bodily injuries effected through external, violent, and accidental means....”<sup>47</sup> The Court denied payment to the family, drawing a distinction between accidental death and accidental results, following the accidental means language in the policy.<sup>48</sup> Because the deceased voluntarily exposed himself to the sun’s rays while golfing, the Court found the means that led to his death were not accidental.<sup>49</sup>

Justice Cardozo’s influential dissent in *Landress* disagrees with the courts that distinguish between accidental means and accidental results. In his famous dissent, Cardozo stated that the “... attempted distinction between accidental results

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<sup>43</sup> *Id.* at 57. (“Unexpected consequences have resulted from an act which seemed trivial and innocent in the doing. Of itself, the scratch or the puncture was harmless.”).

<sup>44</sup> *Continental Cas. Co. v. Bruden*, 11 S.W.2d 493 (Ark. 1928) (The insurance policy stated, “the insurance given by this policy is against loss of life . . . resulting from a personal bodily injury which is effected solely and independently of all other causes by the happening of an external, violent, and purely accidental event.”).

<sup>45</sup> *Id.* In discussing accidental means and unexpected consequences, the Court stated:

There are two clearly defined lines of cases on this question. One holds that, where an unusual or unexpected result occurs by reason of the doing by insured of an intentional act, where no mischance, slip, or mishap occurs in doing the act itself, the ensuing injury or death is not caused through accidental means; that it must appear that the means used was accidental, and it is not enough that the result may be unusual, unexpected, or unforeseen. The other line of cases holds that, where injury or death is the unusual, unexpected, or unforeseen result of an intentional act, such injury or death is by accidental means, even though there is no proof of mishap, mischance, slip, or anything out of the ordinary in the act or event which caused such injury or death.

*Id.* at 493-494.

<sup>46</sup> See generally *Landress v. Phoenix Mut. Life Ins. Co.*, 291 U.S. 491 (1934).

<sup>47</sup> *Id.* at 492.

<sup>48</sup> *Id.* (“[H]ere the carefully chosen words defining liability distinguish between the result and the accidental means which produces it. The insurance is not against an accidental result.”).

<sup>49</sup> *Id.*

and accidental means will plunge this branch of the law into a Serbonian Bog.”<sup>50</sup> Instead of attempting to discern if sunstroke resulted in death by accidental means or results, Cardozo expressly advocated for the “common speech of man” approach he had used earlier in *Lewis*.<sup>51</sup>

The unpopularity of the majority’s decision in *Landress* can be seen in an examination of *Weiking v. Phoenix Mutual Life Insurance of Hartford, Conn.*<sup>52</sup> As was the case in *Landress*, the deceased policyholder in *Weiking* died of sunstroke while playing golf and carried an accidental death insurance policy that utilized accidental means language. In order to avoid the rule of *Landress*, the plaintiff did not commence an action to recover the proceeds of the double indemnity accident policy until after the Supreme Court decided *Erie Railroad Co. v. Tompkins*, a decision that abolished federal common law.<sup>53</sup> Not having to look to *Landress* for precedent, the *Weiking* court examined other state decisions to help them determine if sunstroke could be considered an accidental death. Upon using prior state decisions as precedent, the court determined that under the facts of the case, the sunstroke was accidental.<sup>54</sup> Specifically, because the court declined to identify instances in which sunstroke would not be accidental,<sup>55</sup> the Seventh Circuit opinion seems to indicate that what constitutes an accident in an accident insurance policy containing accidental means language is an issue that should be determined by the courts based on the facts of the matter being litigated.

The case of *Hammer v. Mutual Benefit Health & Accident Ass’n* also illustrates the lack of esteem the Supreme Court’s *Landress* decision received.<sup>56</sup> *Hammer* is another sunstroke case in which the deceased had an accident insurance policy that contained accidental means language.<sup>57</sup> The *Hammer* court did not find the need to even mention *Landress*, and in its rejection of accidental means analysis, the court squarely stated that “... it is unnecessary, in order to warrant a recovery, that the exposure to the sun should be the result of an accident.”<sup>58</sup> Instead, the court proceeded in a method of reasoning similar to the “common speech of man” test advocated by Cardozo in *Landress* and *Lewis*, in stating that exposure to the sun that results in death by sunstroke is not the “common experience of men.”<sup>59</sup>

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<sup>50</sup> *Id.* at 499

<sup>51</sup> *Landress*, 291 U.S. at 498 (“Sunstroke, though it may be a disease according to the classification of physicians, is none the less an accident in the common speech of men.”). *See also* *Lewis v. Ocean Accident & Guarantee Corp.*, 120 N.E. 56, 57 (N.Y. 1918).

<sup>52</sup> *See generally* *Weiking v. Phoenix Mut. Life Ins. of Hartford, Conn.*, 116 F.2d 90 (7th Cir. 1940).

<sup>53</sup> *Id.* at 92. *See also* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

<sup>54</sup> *Weiking*, 116 F.2d at 93.

<sup>55</sup> *Id.* (“What is an unaccidental sunstroke? We are not called upon to answer that question. It is sufficient to say that the facts here presented constitute an accidental sunstroke . . .”).

<sup>56</sup> *See* *Hammer v. Mutual Ben. Health & Accident Ass’n*, 109 N.E.2d 649 (Ohio 1952).

<sup>57</sup> *Id.* at 649-650.

<sup>58</sup> *Id.* at 650.

<sup>59</sup> *Id.* at 651. (“ . . . while the insured was so voluntarily exposed, the sudden prostration or sunstroke occurred and it is not the usual happening under such circumstances in the common

The sunstroke cases illustrate the reluctance of courts to adopt an accidental means analysis like the one used by the Supreme Court in *Landress*. Instead, subsequent courts have adopted reasoning similar to Cardozo's "common speech of man" test used in *Lewis* and suggested in *Landress*. Of course, Cardozo's "common speech of man" test does have perils of its own. Such a method of reasoning encourages courts to decide accident injury cases based on the facts of each case. Such a fact-specific style of decision-making has led to inconsistent results in the area of accidental death insurance.

*B. Courts Will Come to Different Results Based on Their Views of a Particular Set of Facts*

A difficulty some courts have in deciding accidental death cases, in addition whether to apply accidental means analysis, is determining what constitutes an accident within the meaning of the policy. The endless supply of factual situations that can result in death of an insured guarantees confusion and contradiction among court decisions dealing with accident insurance law. Whether an "accidental means" or a "common speech of man" analysis is used, courts still face the difficult task of making fine distinctions in reasoning based on each case's particular facts. The inconsistent results which follow from this analysis are apparent in cases where the deceased engaged in risky behavior that was reasonably foreseeable to end in death.

In *Thompson v. Prudential Insurance Co. of America*, the insured, whose accident insurance policy contained accidental means language, died while playing a game of Russian roulette.<sup>60</sup> Russian roulette is a dangerous activity in which the participants place one live round in a revolver, spin the revolver's cylinder, point the barrel of the gun to their head, and pull the trigger.<sup>61</sup> Of course, this is a controlled risk in many situations because the person who pulls the trigger has the ability to see where the bullet is in the chamber of the gun relative to the hammer that will discharge the bullet. If the bullet is not next to the hammer, no shot will be fired. The deceased in the *Thompson* case was playing this modified version of Russian roulette when the gun discharged, killing him.<sup>62</sup> Because the facts clearly showed that the insured did not intend to kill himself, the court's decision acknowledged Cardozo's concerns in *Landress*, then stated that accident insurance cases "... are in irreconcilable conflict." The court, using accidental means

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experience of men . . .").

<sup>60</sup> *Thompson v. Prudential Ins. Co.*, 66 S.E.2d 119 (Ga. Ct. App. 1951).

<sup>61</sup> *Id.* at 120.

<sup>62</sup> *Id.*

The insured demonstrated a number of times that he could remove all of the cartridges from the cylinder of the revolver except one, spin the cylinder, and the remaining cartridge would stop at or near the bottom of the cylinder . . . in such a position that the hammer or plunger would not strike the cartridge when the trigger was pulled.

*Id.*

analysis, found against the beneficiaries of the insured because the deceased voluntarily pointed a loaded gun to his head and pulled the trigger, making the means that lead to death not accidental.<sup>63</sup>

A comparison of *Thompson* and *New York Life Insurance Co. v. Harrington* shows the widely different results that can occur depending on the method of analysis the court chooses to use, and on the court's reaction to a given set of facts.<sup>64</sup> In *Harrington*, the insured died after pulling the trigger of a gun that he was pointing at his head in an attempt to demonstrate the gun's safety feature.<sup>65</sup> Because the deceased knew the safety button of the gun was activated and the gun inexplicably fired despite this fact, the insured's beneficiaries claimed his death was an accident within the meaning of the policy. The insurance company's position was that the insured, by pointing a loaded gun at his own head and pulling the trigger was involved in an act so dangerous that death was a natural and foreseeable outcome.<sup>66</sup> Whether or not the insurance claim was to be evaluated according accidental means analysis was not a point of contention in this case because the language of the insurance policy did not contain accidental means language and the court expressed reluctance to use accidental means analysis even in the event that accidental means language had appeared in the policy.<sup>67</sup> The Ninth Circuit, using a version of Cardozo's "common speech of man" test,<sup>68</sup> allowed recovery because the insured did not expect his death. The court attempted to distinguish the facts of this case from *Thompson* by stating that *Harrington's* belief that the gun was safe was much more reasonable than *Thompson's*, because he had previously demonstrated the gun's safety feature by pulling the trigger when the safety feature was activated.<sup>69</sup> However, this is a false distinction because there was evidence in *Thompson* that the deceased had also demonstrated the gun's inability to fire if the hammer was not next to the chamber and thus possessed knowledge of what circumstances would cause the gun not to discharge.<sup>70</sup>

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<sup>63</sup> *Id.* at 123.

Where one places a loaded pistol to his head and voluntarily pulls the trigger, knowing the gun to be loaded . . . it is unquestionably no accident that his action results in his injury or death, nor can his death or injury be said to have been effected by accidental means.

<sup>64</sup> *New York Life Ins. Co. v. Harrington*, 299 F.2d 803 (9th Cir. 1962).

<sup>65</sup> *Id.* at 805.

<sup>66</sup> *Harrington*, 299 F.2d 803, 805. ("We first consider the contention that as a matter of law the findings show that the death was not accidental because it resulted from an act so dangerous that death followed as a foreseeable and natural consequence.")

<sup>67</sup> *Id.* (The court explains that ". . . a recurring distinction [is] made between accidental 'results' and accidental 'means,' the parties are in apparent agreement that it is not material in this case, and in any event, there is evidence that it is no longer strictly adhered to by the California courts.")

<sup>68</sup> *Id.* ("California courts have held that the terms of an insurance policy must be construed so as to accord with the understanding of the ordinary person.")

<sup>69</sup> *Id.* at 806. ("[u]nlike the insured in *Thompson* . . . Mr. *Harrington* here had a far more reasonable basis for his belief that the gun was safe. He could not have made the previous clicking noises without the gun discharging unless the safety was in place.")

<sup>70</sup> See *supra* note 62.

*C. Courts Will Examine Special Knowledge and Abilities of the Deceased in Determining if Death is Accidental for Insurance Purposes*

In *Knight v. Metropolitan Life Ins. Co.*, the court was faced with the question of whether an experienced cliff diver who died after making an unsuccessful jump died as a result of an accident as it is defined in his insurance policy.<sup>71</sup> In the *Knight* case, the deceased, an experienced cliff diver, had accident insurance whose policy contained “accidental means” language.<sup>72</sup> In a daring dive off of a dam—a feat the insured had performed in the past—the diver accidentally rolled backwards in the final stage of his dive, causing him injuries that led to death.<sup>73</sup> In evaluating whether the death was accidental, the court declined to use accidental means analysis and used Cardozo’s “ordinary speech of man” method for determining if the dive was an accident within the meaning of the policy.<sup>74</sup> In determining that the diving mishap was an accident, the court stated that it should not be considered whether or not ordinary people would consider the stunt foolhardy, because the insured felt he could perform the feat and that his rolling backward just before contact with the water was an accident.<sup>75</sup>

In *Wickman v. Northwestern Nat’l Ins.*, the insured died after a fall off of a bridge after he had climbed over the guardrail.<sup>76</sup> Although there was evidence that the death was suicide and the medical examiner listed the cause of death as suicide, the court assumed *arguendo* that the deceased did not intend to kill himself.<sup>77</sup> The *Wickman* court decided that the “accidental means” and “accidental results” distinction was too confusing and instead looked for another way of determining whether or not an “accident” had occurred.<sup>78</sup> As an alternative, the court proceeded to determine if the deceased’s expectations for survival were reasonable under the circumstances.<sup>79</sup> In making such a determination, the court used a test

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<sup>71</sup> *Knight v. Metropolitan Life Ins. Co.*, 437 P.2d 416 (Ariz. 1968).

<sup>72</sup> *Id.* at 417.

<sup>73</sup> *Id.* at 418.

<sup>74</sup> *Id.* at 420. (“The term ‘accidental means’ as used in this policy should not be construed in a technical sense but should be given its ordinary and popular meaning according to common speech and usage and the understanding of the average man.”).

<sup>75</sup> *Id.* at 421. The court explained:

That a reasonable man might consider his voluntary stunt foolhardy does not of itself make the result any less accidental. He thought he could successfully perform the feat; and if he had not suffered the mishap of rolling over on his back just before he hit the water who is there to say that he would not be attempting dives from even greater heights today?

*Id.*

<sup>76</sup> *Wickman v. Northwestern Nat’l Ins. Co.*, 908 F.2d 1077 (1st Cir. 1990).

<sup>77</sup> *Id.* at 1083. (“Assuming *arguendo* the third scenario, an inadvertent or mistaken fall . . .”).

<sup>78</sup> *Id.* at 1086. (In discussing the distinction between “accidental death” and “accidental means,” the court declared “. . . we conclude that the better reasoning rejects the distinction. Thus, we elect to pursue a path . . . which safely circumvents this “Serbonian Bog.”).

<sup>79</sup> *Id.* at 1088. (“[O]ne must ask whether a reasonable person, with background and characteristics similar to the insured, would have viewed the injury as highly likely to occur as a result of the insured’s intentional conduct.”).

that first sought to determine if the deceased expected to survive, and second, if the deceased expected to survive, whether the expectation of survival was reasonable.<sup>80</sup> In finding that the beneficiaries of the insured could not recover the accident insurance, the court decided that it was unreasonable for the deceased to expect to survive because he possessed no special abilities that would make his survival likely.<sup>81</sup>

#### IV. AN EXAMINATION OF ACCIDENTAL DEATH INSURANCE LAW APPLIED TO AUTOEROTIC ASPHYXIATION

##### *A. Cases Involving Policies that Contain "Accidental Means" Language*

Courts have come to erratic results in deciding if autoerotic asphyxiation is an accident within the meaning of policies that contain "accidental means" language. Despite the general unpopularity of "accidental means" analysis, some jurisdictions continue to apply it, or a variation of it. The result has been erratic decisions that vary by jurisdiction. Further ambiguity in the way a court may decide based on jurisdiction is whether the claim was brought under the Employee Retirement Income Security Act (ERISA), which is codified in 29 U.S.C. §1001 et seq.<sup>82</sup> Under ERISA, courts may ignore state law that is contrary to the provisions of ERISA, applying a test to determine if the death was an accident based on the precedent of federal substantive law.<sup>83</sup>

An example of a court refusing to apply "accidental means" analysis in an autoerotic asphyxiation case regardless of the language used, can be seen in *Parker v. Danaher Corp.*<sup>84</sup> It was undisputed by the parties that the deceased did not intend to kill himself;<sup>85</sup> at issue was whether his death could be called an "accident" within the meaning of the "accidental death" policy.<sup>86</sup> In *Parker*, the deceased was insured as part of a group policy that protected the employees of the corporation where he worked.<sup>87</sup> When the deceased's beneficiaries brought suit

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<sup>80</sup> *Id.* ("If the fact-finder determines that the insured did not expect an injury similar in type or kind to that suffered, the fact-finder must then examine whether the suppositions which underlay that expectation were reasonable.")

<sup>81</sup> *Id.* at 1089. ("[G]iven the height of the bridge, the narrow foothold, that Wickman possessed no extraordinary gymnastic, acrobatic, or other athletic skills, and the absence of evidence that would have enabled him to hold on . . .").

<sup>82</sup> See generally 29 U.S.C. § 1001, et seq. (2000).

<sup>83</sup> See *Wickman*, 908 F.2d at 1084 ("The benefit provisions of an ERISA regulated group life insurance program must be interpreted under principles of federal substantive law.")

<sup>84</sup> See generally *Parker v. Danaher Corp.*, 851 F. Supp. 1287 (W.D. Ark. 1994).

<sup>85</sup> *Id.* at 1295. ("In this case, it is undisputed that the insured did not expect to die as a result of performing the autoerotic act. Rather, the insured was merely involved in an act designed to enhance his sexual gratification.")

<sup>86</sup> *Id.* at 1288. (The court explicitly stated that, "[t]he sole issue is whether a death resulting from a man's hanging himself by the neck in order to restrict the flow of oxygen to his brain during an act of sexual gratification is an accidental death within the meaning of an accidental death insurance policy.")

<sup>87</sup> *Id.* at 1288. (The court stated that the deceased "was insured under a group policy covering the

under ERISA, the court first had to determine to what extent Arkansas state law would be applied.<sup>88</sup> The court decided that ERISA dictated that the word “accident” could not be defined in a way that would confuse the average layperson.<sup>89</sup> The court, though agreeing with the *Wickman* court that the “accidental means” and “accidental results” distinction should not be considered, did not think the test employed in *Wickman* provided any clarity.<sup>90</sup> Instead, the court adopted the position put forth by Justice Cardozo in his *Landress* dissent, finding that the common person would regard the deceased’s death as an accident.<sup>91</sup> It should be noted that the court pointedly mentioned that its holding did not affect another area of contention in accident insurance claims involving autoerotic asphyxiation, “intentional self-injury.”<sup>92</sup>

An illustration of “accidental means” analysis used in an autoerotic asphyxiation case can be seen in *Runge v. Metropolitan Life Ins. Co.*, a case decided much earlier than *Parker*.<sup>93</sup> The facts of the case were undisputed; the insured died while engaged in autoerotic asphyxiation and had a life insurance policy. The Metropolitan Life Insurance Company paid the face value amount of the policy, but declined to pay the double indemnity for “accidental death” because the policy contained “accidental means” language.<sup>94</sup> The beneficiary appealed the district court’s use of “accidental means” analysis because there were no express provisions in the policy that provided for exclusions for recovery based on voluntary exposure to a risk.<sup>95</sup> The court noted the beneficiary’s position and

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employees of Danaher Corporation.”).

<sup>88</sup> *Id.* at 1291. (“[T]he court may look to state law for guidance unless state law is contrary to the provisions of ERISA.”).

<sup>89</sup> *Parker*, 851 F. Supp. at 1291, citing 29 U.S.C.A. § 1022 (a)(1) (1994). The court wrote, “Section 1022(a)(1) requires an employee benefit plan to furnish a plan description that is ‘written in a manner calculated to be understood by the average plan participant’”.

<sup>90</sup> *Id.* at 1295. (In discussing the various methods of determining the meaning of “accident” within the policy, the court stated, “[w]e agree with the *Wickman* court that the means-result distinction should not be adopted in ERISA cases. However, we find that the *Wickman* subjective/objective analysis sheds little light in an area of the law already unduly complicated by reference to various artificial distinctions.”).

<sup>91</sup> *Id.* In using the Cardozo position in *Landress* the court wrote:

In keeping with the directions of the Eighth Circuit and the teachings of Justice Cardozo in his dissent in *Landress*, we believe the common man on the street regards an accident as being something unintended, not according to the usual course of things, or not as expected. In this case, it is undisputed that the insured did not expect to die as a result of performing the autoerotic act. Rather, the insured was merely involved in an act designed to enhance his sexual gratification.

*Id.*

<sup>92</sup> *Id.* (In leaving the field open for exclusions in autoerotic asphyxiation cases, the court stated, “[w]e hasten to say that we are not faced in this case with an exclusionary clause for injury resulting directly or indirectly from an intentionally self-inflicted injury.”).

<sup>93</sup> See *Runge v. Metropolitan Life Ins. Co.*, 537 F.2d 1157 (4th Cir. 1976).

<sup>94</sup> *Id.* at 1158. (In its statement of the facts, the court noted that, “Metropolitan paid the face amounts but declined to pay double on plaintiff’s contention that death resulted from injuries sustained ‘solely through violent, external, and accidental means’ within the meaning of the double indemnity clauses of the policies.”).

<sup>95</sup> *Id.* at 1159. (In recounting the beneficiary’s position, the court wrote, “[o]n appeal Mrs. Runge

regretfully stated that it had no choice but to apply "accidental means" analysis because of precedent.<sup>96</sup> In applying "accidental means" analysis, the court made quick work of the case, stating:

[W]e hold that Wilbur L. Runge, Jr., did not die as a result of "accidental means." Runge deliberately placed his neck into a noose that he himself had designed and constructed, having first locked the doors to his house to prevent intrusion, and at a time when interruption was unlikely. He then intentionally and deliberately self-induced asphyxia by hanging himself in the noose, lost consciousness, and died. Death, under these circumstances, was a natural and foreseeable, though unintended, consequence of Runge's activity.<sup>97</sup>

*Parker* and *Runge* show the general confusion surrounding accident insurance claims involving autoerotic asphyxiation and the different methods of analysis that varying jurisdictions will apply. The *Runge* court did not allow recovery, but was compelled to apply the "accidental means" analysis because of precedent. In contrast, the *Parker* court allowed recovery because precedent guided its decision. The *Parker* court provided the caveat that its decision had no effect on the "intentional self-injury" argument; an argument, as we shall see, that is often made by insurance companies, which has the same practical effect as the "accidental means" analysis.

*B. The Courts Begin to Use "Intentional Self-Injury" Exclusions as a Substitute for "Accidental Means" Analysis*

With the growing reluctance of courts to apply the "accidental means" analysis, a new analysis was formed to replace it. The most popular replacement was a combination of the "reasonable expectation" test of *Wickman* and the "intentional self-injury" exclusion most policies carry.

In *Sigler v. Mutual Benefit Life Ins. Co.*, the court discussed a wide sample of past and future arguments that have been used in accident insurance cases.<sup>98</sup> The facts surrounding the death of the insured were undisputed. The insured's death was a result of autoerotic asphyxiation with no intention by the deceased to commit suicide.<sup>99</sup> In making a determination regarding the accidentalness of the death, the court stated that in Iowa, a test derived from Cardozo's "common speech of man"

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contents that the issue is whether the district court correctly or incorrectly 'read into' the insurance policies an implied exclusion for voluntary exposure to a known risk where no express exclusion appeared anywhere in the policies.").

<sup>96</sup> *Id.* (In discussing the beneficiary position, the court stated, "[w]e are inclined to think this may be a more accurate formulation of the question than the more traditional 'accidental means' test. But it is not for us to say. In this diversity case we are to apply Virginia law as written by its highest court.").

<sup>97</sup> *Id.*

<sup>98</sup> See generally *Sigler v. Mutual Benefit Life Ins. Co.*, 506 F. Supp. 542 (S.D. Iowa 1981).

<sup>99</sup> *Id.* at 543. (In establishing that there were no points of contention surrounding the death, the court wrote, "Both parties concede that plaintiff's husband's death was not the result of suicide or foul play; instead, it is agreed that his death resulted from an autoerotic experience.").

test would be used.<sup>100</sup> Although the court applied the “common speech of man” test, the court maneuvered around it by interpreting the test in a way that, in effect, was the “accidental means” analysis. The court moved to the “accidental means” analysis by first denying an “accident” according to the “common speech of man,” which proposed that when “the insured does a voluntary act, the natural and usual, and to be expected result of which is to bring injury upon himself, then a death so occurring is not an accident.”<sup>101</sup> The court then combined the “voluntary” language prevalent in the “accidental means” analysis with a looser standard of the “reasonable expectations” test later used in the *Wickman* case, concluding that because the deceased voluntarily put himself into a position where death could occur, his death was not an accident.<sup>102</sup>

Although the *Sigler* court found against the beneficiaries, with what was essentially the “accidental means” analysis, the court went on to discuss what would be the future of autoerotic asphyxiation litigation when it examined the “intentional self-injury” exclusion to recovery.<sup>103</sup> The court analyzed this problem by applying a two-pronged examination of “intentionally self-inflicted injury” by first concluding that because the deceased intentionally strangled himself, the “intentionally self-inflicted” portion of the question was satisfied.<sup>104</sup> Having determined that the “intentionally self-inflicted” element of the test was satisfied, the court concluded that the second prong of “injury” was satisfied because if someone else had strangled the deceased, it would definitely constitute an “injury.”<sup>105</sup> A comparison of *Sigler* with *Todd v. AIG Life Ins. Co.* illustrates the courts’ inconsistent results in determining whether autoerotic asphyxiation fatalities are “intentional self-injury.”<sup>106</sup> In *Todd*, it was again undisputed that the deceased

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<sup>100</sup> *Id.* at 544. (In discussing the standard used to determine if death was accidental, the court stated that “the words ‘accident’ and ‘accidental’ have never acquired any technical meaning in law, and when used in an insurance contract, they are to be construed and considered according to the common speech and common usage of the people generally.”)

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* In combining the “accidental means” analysis with the precursor to the “reasonable expectation” test, the court held:

... the Court is of the opinion that plaintiff’s husband’s death was not an accident since a reasonable person would have recognized that his actions could result in his death. The Court finds that a reasonable person would comprehend and foresee that placing a noose around his neck and subsequently hanging himself with the noose for the purpose of inducing asphyxia could result in his death.

*Id.*

<sup>103</sup> *Id.* at 545. (The court, in introducing the “intentional self-injury” exclusion argument, noted, “[e]ven if Mr. Sigler’s death was found to be accidental within the meaning of the policy, recovery would be barred by the clause excluding from coverage an ‘intentionally, self-inflicted injury of any kind.’”)

<sup>104</sup> *Sigler*, 506 F. Supp. at 545 (Stating that where the act is voluntary, “the elements of ‘intentionally, self-inflicted’ are satisfied.”)

<sup>105</sup> *Id.* (In determining that autoerotic asphyxiation was an “injury,” the court stated that “[i]f someone else had placed Mr. Sigler in the same position as he placed himself to temporarily restrict his ability to breathe, it would have been an injury. In the Court’s opinion, it continues to be an injury even when it is self-inflicted.”)

<sup>106</sup> Compare *Todd v. AIG Life Ins. Co.*, 47 F.3d 1448 (N.D. Tex. 1995) with *Sigler v. Mut. Benefit*

did not commit suicide.<sup>107</sup> What was different in the *Todd* court's statement of the facts was the emphasis placed on the safety mechanism the deceased devised to prevent death.<sup>108</sup> Relying on this information, the court did not agree that the injuries sustained by the deceased were intentional and, instead, stated that the injuries that led to death were unintended.<sup>109</sup>

Having determined that the death was not the result of "intentional self injury," the court turned its focus on whether the death itself was "accidental" within the meaning of the policy.<sup>110</sup> To answer this question, the court followed the district court and used the "reasonable expectation" test adopted by the *Wickman* court.<sup>111</sup> After establishing that the *Wickman* test would be used, the court upheld the district court's ruling, which determined that if the deceased had a "reasonable expectation" for survival, the death must be "substantially certain" to deny that the death was an accident.<sup>112</sup> In agreeing with the district court that death was not "substantially certain" to occur as a result of autoerotic asphyxiation, the court stated "the materials... clearly indicated that the likelihood of death from autoerotic activity falls short of what would be required to negate coverage...."<sup>113</sup>

Life Ins. Co., 506 F. Supp. 542 (S.D. Iowa 1981).

<sup>107</sup> *Todd*, 47 F.3d at 1456. (In establishing that there was no contention that the deceased committed suicide, the court wrote, "[t]hat Todd neither intended nor expected to die as the result of his autoerotic conduct AIG does not dispute.")

<sup>108</sup> *Id.* at 1450. (In emphasizing that the deceased had installed safety measure to ensure his survival, the court observed that the deceased had "designed the system of leashes to loosen the ligature in the event he became unconscious; unfortunately, the collar failed to release and ultimately terminated the flow of oxygen permanently.")

<sup>109</sup> *Id.* at 1453. In determining that the injuries that led to death were not intentional within the meaning of the policy, the court argued:

[E]ven if we assume that Todd intended the degree of injury from asphyxia that would cause him to lose consciousness, it is plain enough that this condition is not an injury that necessarily leads to death. It is commonplace for those who suffer from such a condition to regain consciousness and survive without any permanent damage. What killed Todd was not the mere loss of consciousness from the temporary lack of oxygen in his brain; it was the further injury to the brain and other bodily functions caused by the prolonged lack of oxygen-laden blood. To claim that such additional injury was intended is to aver that Todd intended to die, which AIG expressly agrees he did not.

*Id.*

<sup>110</sup> *Id.* ("Of course, the central question in this case remains to be decided: whether, even though Todd did not intend or expect to die, the injury that killed him was or was not an 'accident' within the meaning of the policy.")

<sup>111</sup> *Id.* at 1456. (In discussing the district court's use of the *Wickman* test, the court noted that "... the court adopted the essentials of the *Wickman* approach.")

<sup>112</sup> *Todd*, 47 F.3d at 1456. In showing approval for the lower court's standard in evaluating whether the deceased had a "reasonable expectation" for survival when it stated,

[The] expectation must be reasonable; and, as we see it and as we think the district court saw it, the expectation would be unreasonable if the conduct from which the insured died posed such a high risk of death that his expectation of survival was objectively unrealistic. The district court concluded that the risk of death involved in the conduct at issue must reach the level of "substantial certainty" before the resulting death could be deemed non-accidental.

*Id.*

<sup>113</sup> *Id.* The court was no doubt influenced by the safety mechanism and the likelihood that the deceased had practiced autoerotic asphyxiation in the past when it wrote:

In using the word “materials,” the court was undoubtedly referring to the strong possibility that the deceased had practiced autoerotic asphyxiation in the past and emphasized the influence of the safety mechanisms. This reference to past practice and safety mechanisms shows further adherence to the *Wickman* decision, which considered the special abilities of the deceased when determining if death was accidental.<sup>114</sup>

*Simms v. Monumental General Life Ins. Co.* is an example of a court that is attempting to resort to what is in effect “accidental means” analysis in autoerotic asphyxiation cases by giving it the label of “intentional self injury.”<sup>115</sup> Rather than engage in its own extended reasoning of the case, the *Simms* court quotes extensively from the *Sigler* decision and ultimately adopts the *Sigler* holding.<sup>116</sup> Although the *Simms* court used portions of the *Sigler* reasoning, it took this reasoning even closer to “accidental means” analysis by failing to even mention Cardozo’s “common speech of man” test; a test even the *Sigler* court found necessary to use.<sup>117</sup> The court was able to avoid the “common speech of man” test by refusing to make the determination that test seeks to discover, namely whether a death or injury was an accident. The court found that determining whether or not the death was an accident was irrelevant to deciding if the recovery could be avoided based on the “intentional self injury” exclusion in the contract.<sup>118</sup>

In determining whether the policy exclusion for “intentional self injury” could be applied, the court first decided that the deceased’s acts were voluntary.<sup>119</sup> Once the deceased’s actions were held to be voluntary, the court was left to decide if the partial strangulation was an “injury.” In deciding that partial strangulation was an “injury” the court, borrowing from *Sigler*, stated that if another person had put a rope around the deceased’s neck it would be considered an injury; then the court stated that the rope caused damage to the neck and that the reduction of

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This leaves us with the question whether the district court erred in holding that, as a matter of law, the autoerotic conduct in this case did not risk death to a “substantial certainty” (or its equivalents). In our opinion, there was no error. The record is silent on whether and how often Todd had previously practiced this conduct without dying. Why Todd’s death was not a “substantial certainty.” But the materials before the court clearly indicated that the likelihood of death from autoerotic activity falls far short of what would be required to negate coverage under the policy we have before us.

*Id.*

<sup>114</sup> See *Wickman v. Northwestern Nat’l Ins. Co.*, 908 F.2d 1077 (1st Cir. 1990).

<sup>115</sup> See generally *Simms v. Monumental Gen. Life Ins. Co.*, 778 F. Supp. 325 (E.D. La. 1990).

<sup>116</sup> *Id.* at 328. (After an extensive quote from *Sigler*, the court states, “With the restriction of the insured’s breathing as the focal point of whether the self-inflicted injury exclusion applies, the Court finds the rationale of the *Sigler* court more persuasive.”; see also *Sigler v. Mutual Benefit Life Ins. Co.*, 506 F. Supp. 542 (S.D. Iowa 1981)).

<sup>117</sup> See generally *Simms*, 778 F. Supp. at 325. See also *Sigler*, 506 F. Supp. at 544.

<sup>118</sup> *Simms*, 778 F. Supp. at 327. (In determining that whether or not the death was an accident was irrelevant, the court noted: “[e]ven assuming *arguendo* that the Court would find that Mr. Brumfield’s death was accidental, the policy exclusion for ‘intentionally self-inflicted injury’ bars coverage.”).

<sup>119</sup> *Id.* at 328. (In determining that the deceased voluntarily engaged in the conduct that killed him, the court noted that the deceased’s “. . . voluntary acts were intended to temporarily restrict the oxygen to his brain. Thus, the elements of ‘intentionally, self-inflicted’ are satisfied herein.”).

oxygen to the brain also caused an injury.<sup>120</sup>

The decision in *Connecticut General Life Ins. v. Tommie* stands in sharp contrast to the *Simms* decision because it comes to a different conclusion in determining what constitutes an injury within an “intentional self-injury” exclusion and addresses more issues to reach that conclusion.<sup>121</sup> In *Tommie*, the deceased had accidental death protection in his life insurance policy that provided payment in the event that the death resulted from “accidental bodily injury” and specifically excluded recovery in the event of “intentional self-injury.”<sup>122</sup> Although determining whether or not the practice of autoerotic asphyxiation results in an injury within the meaning of the policy was crucial to the decision, the *Tommie* court, unlike the *Simms* court, addressed whether the death was accidental according to “ordinary persons,” language reminiscent of the “common speech of man” test.<sup>123</sup> In addition, unlike *Simms*, the *Tommie* court considered the extent to which the deceased had engaged in this form of autoerotic activity in the past.<sup>124</sup> The *Tommie* court’s acknowledgement that the deceased had engaged in such conduct in the past led it to make a determination regarding the accidentalness of the death that mirrored the *Wickman* court’s “reasonable expectation” test. *Tommie* stated that the activity of the deceased “was not of such a nature that the insured should have reasonably known that it would probably result in his death.”<sup>125</sup> After addressing the additional arguments which were not taken up by the *Simms* court, the *Tommie* court reasoned that the “intentional self-injury” exclusion of the policy ran counter to the determination made by the *Simms* court. Unlike *Simms*, the *Tommie* court did not address whether or not the deceased “voluntarily” engaged in

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<sup>120</sup> *Id.* at 328. In determining that the deceased had caused himself injury in engaging in autoerotic activity, the court stated:

[I]f another party had choked off Mr. Brumfield’s air supply in the same fashion as he himself utilized, this Court would have found that Mr. Brumfield had been injured. The rather severe method of strangulation that is part of the autoerotic practice is clearly harmful to the tissues of the neck that are being constricted by the rope or cord commonly used to cut off the air supply, as well as to the brain tissue that are denied oxygen.

*Id.*

<sup>121</sup> See generally *Connecticut Gen. Life Ins. v. Tommie*, 619 S.W.2d 199 (Tex. Civ. App. 1981).

<sup>122</sup> *Id.* at 201. In discussing the terms of the life insurance policy, the court wrote:

The insurance policy provided that accidental death benefits would be payable if the insured ‘has received an accidental bodily injury, and as a result of the injury, directly and independently of all other causes, has suffered . . . loss of Life.’ The policy specifically excludes from coverage any loss which results directly or indirectly from ‘suicide or intentionally self-inflicted injury. . . .’

*Id.*

<sup>123</sup> *Id.* at 204. (Instead of using “the common speech of man” language, the court stated, “. . . the questions of accidental and self-inflicted injury are to be determined according to the normal and usual meaning ascribed to those terms by ordinary persons. . . .”).

<sup>124</sup> *Id.* at 202. (In noting that the deceased had engaged in autoerotic asphyxiation in the past, the court considered the evidence supplied by an expert when it wrote, “[I]t was likely that Mr. Tommie had engaged in the practice for several years, considering his age and the fact that such behavior generally begins in young men during pubescence or shortly thereafter.”).

<sup>125</sup> *Id.*

the activity that ultimately killed him; instead the court focused upon whether the autoerotic activity constituted an injury with the meaning of the policy.<sup>126</sup> In determining that the autoerotic activity was not an injury within the meaning of the policy, the court noted that such activity was not an injury within the usual meaning of the term.<sup>127</sup> The two most recent conflicting autoerotic death cases clearly articulate the different results courts can come to in evaluating if an “injury” has occurred within the meaning of an insurance policy exclusion for “intentional self-injury.” Comparing *MAMSI Life & Health Ins. v. Calloway* and *Crichtlow v. First UNUM Ins. Co. of America* shows two courts that fully examine both positions regarding whether autoerotic asphyxiation is an “injury” yet come to differing results.<sup>128</sup>

Although the *MAMSI* court generally discusses “accidental death” case law, it decides whether recovery should occur based on the “intentional self-injury exclusion.”<sup>129</sup> After making this decision, the court explained that the insurance policy contained language requiring inquiries into whether the death was “accidental” and whether the death was the result of “intentional self-injury.”<sup>130</sup> Following this discussion of the policy, the court noted that a death could be accidental and the decedent’s policy could be excluded on the basis of “intentional self-injury.”<sup>131</sup> Because a determination that the death was an accident was irrelevant as to whether the death occurred as a result of “intentional self-injury,” the court did not make a determination regarding the accidental nature of the death.

The *MAMSI* court examined the position of both the insurance company and the family of the deceased regarding the “intentional self-injury” exclusion of the

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<sup>126</sup> Compare *Simms v. Monumental Gen. Life Ins. Co.*, 778 F. Supp. 325 (E.D. La. 1990) with *Tommie*, 619 S.W.2d 199.

<sup>127</sup> *Tommie*, 619 S.W.2d at 203. In stating that autoerotic asphyxiation was not an injury within the common meaning of the term, the court noted that the autoerotic activity:

[S]imply alters the amount of oxygen in the brain, thus heightening or intensifying certain body sensations, and that it may be accomplished by various drugs as well as by other means. We believe this evidence and the reasonable inferences which may be drawn therefrom constitute some probative evidence that Mr. Tommie did not intentionally inflict upon himself bodily injury in the normal and usual meaning of that term. . . .

*Id.*

<sup>128</sup> Compare *MAMSI Life & Health Ins. v. Calloway*, 825 A.2d 995 (Md. 2003) with *Crichtlow v. First UNUM Ins. Co. of Am.*, 378 F.3d. 246 (2d Cir. 2004).

<sup>129</sup> *MAMSI*, 825 A.2d at 1002. In determining what issue will decide the outcome of the case, the court examined four questions the case raised. The third question was,

[w]hether death resulting from autoerotic asphyxiation was death from intentional self-injury as described in the insurance policy.” The court, in deciding to decide the case based on “intentional self-injury” stated, “[w]e find Question III to be dispositive of this case. Accordingly, we shall not reach or decide the other questions.

<sup>130</sup> *Id.* at 1006. (The court wrote “[t]he language and structure of the policy establish two separate and independent inquiries: first, whether the Insured’s death was an accident under the policy; and, if so, second, whether the death resulted from a self-inflicted injury pursuant to the exclusion.”)

<sup>131</sup> *Id.* (In finding that a policy could be excluded despite a finding that the death was an “accident” within the meaning of the policy, the court wrote “[i]t is possible . . . to find the death itself to have been accidental although the Insured may have intended the events that eventually led to his death.”)

policy before determining that the autoerotic practice resulted in an injury that ultimately led to the death of the insured.<sup>132</sup> The *MAMSI* court was forced to address the arguments allowing recovery based on a finding that autoerotic asphyxiation was not an “intentional self-injury” because the lower court did not find that an injury occurred within the meaning of the policy.<sup>133</sup> The lower court concluded that a brief intentional reduction of oxygen flow to the brain was not an injury within the meaning of the intentional self-injury exclusion in the policy.<sup>134</sup> The lower court reached this decision because the terms of the policy were ambiguous as to whether an injury had occurred, and whether a layperson could believe an injury had occurred. Therefore, any ambiguity in the policy should favor the policyholder.<sup>135</sup> The *MAMSI* court noted that the lower court compared autoerotic asphyxiation to other dangerous activities such as rock-climbing and that the lower court in finding that no injury occurred stated that “but for the accident,” no injury would have occurred.<sup>136</sup>

Despite the time taken to articulate the lower court’s reasoning, the *MAMSI* court reversed because it disagreed with the lower court on its opinion of how a layperson would regard partial strangulation in an autoerotic context. In contrast to the lower court, the *MAMSI* court determined that a layperson knows that partial strangulation is an injury.<sup>137</sup> The court baldly rejected the lower court’s comparison of partial strangulation in an autoerotic context to a person holding their breath underwater by simply saying, “we disagree.”<sup>138</sup> The court agreed with the *Sigler* court and used their example stating that it would be an injury if someone other than the deceased were the strangler.<sup>139</sup>

A strong contrast to *MAMSI* can be found in *Critchlow v. First UNUM Life*

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<sup>132</sup> See generally *Id.*

<sup>133</sup> See generally *Callaway v. MAMSI Life & Health Ins. Co.*, 145 Md. App. 567 (2002).

<sup>134</sup> *Id.* at 603.

<sup>135</sup> *Id.*

<sup>136</sup> *MAMSI*, 825 A.2d at 272. The court noted the lower court’s holding and consequently the arguments against finding autoerotic asphyxiation an “injury” within the meaning of the “intentional self-injury” exclusions when it wrote:

But for the accident that occurred, the Insured would not have suffered any injury. The Court of Special Appeals analogized autoerotic asphyxiation with other activities that are inherently dangerous, although apparently more socially acceptable in the mainstream of extreme human recreational activities—skydiving, bungee jumping, white water rafting, parasailing, mountain climbing, and scuba diving—to support its finding that the injuries sustained by the Insured were the result of an accident and were not intentionally self-inflicted.

*Id.*

<sup>137</sup> *Id.* at 283. (“We conclude that a layperson would understand partial strangulation to be an injury as that term is commonly used.”).

<sup>138</sup> *Id.* at 282-83. (“According to the intermediate appellate court, autoerotic asphyxiation is similar to a swimmer holding his or her breath while under water without sustaining injury. We disagree.”).

<sup>139</sup> *Id.* at 283. (The *Sigler* hypothetical is once again cited in this decision as the court wrote, “As the *Sigler* court observed, if another person had partially strangled the Insured there would be no argument that the strangulation was not an injury.”).

*Ins. Co. of America*.<sup>140</sup> Like *MAMSI*, the *Critchlow* court reversed a lower court determination of what constituted an injury within the meaning of an “intentional self-injury” exclusion of an insurance policy.<sup>141</sup> The lower *Critchlow* court did not accept the argument that autoerotic asphyxiation could be compared to extreme sport activities such as rock climbing because extreme sport practitioners did not set out to injure themselves and took a controlled risk.<sup>142</sup> According to the court, injury occurs the moment asphyxiation begins and that the deceased may have thought that he could stop the injury before death occurred does not mean there was no injury.<sup>143</sup> The lower court’s reasoning relied heavily on the assumptions made by the *Sims*, *Sigler*, and *MAMSI* courts that the very act of reduction of oxygen flow to the brain constitutes an injury.<sup>144</sup>

In reversing, the Second Circuit started its analysis with the assumption that autoerotic asphyxiation, if successfully performed, does not constitute an injury within the meaning of the policy.<sup>145</sup> Having made this assumption, the court focused on the safety mechanisms erected by the deceased and evidence that the deceased had engaged in this type of behavior in the past.<sup>146</sup> The court next noted the insurance company itself admitted that recovery on the policy would not be excluded if death had occurred as a result of an accident while engaged in an “extreme sport” because, according to the insurance company, engaging in an

<sup>140</sup> *Critchlow v. First UNUM Life Ins. Co. of Am.*, 378 F.3d 246 (2d Cir. 2004).

<sup>141</sup> Compare *Critchlow v. First UNUM Life Ins. Co. of Am.*, 378 F.3d 246 (2d Cir. 2004) with *Critchlow v. First UNUM Life Ins. Co. of Am.*, 198 F. Supp. 2d 318 (W.D.N.Y. 2002).

<sup>142</sup> *Critchlow*, 198 F. Supp. 2d at 327. The court wrote:

I am not persuaded by plaintiff’s attempt to analogize decedent’s death to death caused by a rockclimbing or skydiving accident. There is a difference between taking a controlled risk and flirting with death. Skydivers and rockclimbers do not set out to injure themselves, believing that they can stop the progress of the injury before it becomes severe enough to kill them.

*Id.*

<sup>143</sup> *Id.*

. . . by constricting the flow of oxygen to his brain, to the point where loss of consciousness and death were certain to occur if the pressure were not released in a relatively short time, the decedent did injure himself. He simply believed (apparently) that he could bring that injury to a halt before the injury became life-threatening. That his belief proved incorrect does not save plaintiff’s claim.

*Id.*

<sup>144</sup> See *id.*

<sup>145</sup> *Critchlow v. First UNUM Ins. Co. of Am.*, 378 F.3d 246, 262 (2d Cir. 2004). (In finding that successful autoerotic asphyxiation does not result in death, the court stated, “. . . no scientific evidence before the court indicated that autoerotic asphyxiation, if practiced without accident, constitutes an injury. . .”).

<sup>146</sup> *Id.* at 258, 260. (In expressing that the safety mechanism showed the insured’s intent to survive the experience, the court wrote on page 260, “[c]ritchlow had not intended total strangulation, as it noted that he had set up a complicated escape mechanism ‘to ensure that he did not die of asphyxiation. . . .’” Further, on page 258, the court noted that practitioners of autoerotic asphyxiation engage in the activity repetitively when it wrote, “[a]utoerotic asphyxiation is a repetitive pattern of behavior that individuals engage in over a period of years, and generally the intent of the individuals performing this act is not death . . .”). (Emphasis omitted).

extreme sport is a “controlled risk.”<sup>147</sup> In response to this argument, the court noted that practitioners of autoerotic asphyxiation also seek to control the risks with the use of safety mechanisms.<sup>148</sup>

In deciding that successful autoerotic asphyxiation does not constitute an injury and that the practice involves a controlled risk similar to that inherent in extreme sports, the court focused on determining if Critchlow’s death was an accident within the meaning of the policy. The test the court used to find that the death was an accident was the “reasonable expectations” test similar to the one used in *Wickman*.<sup>149</sup> The court based its decision that Critchlow had a “reasonable expectation” for survival and his death was therefore an accident on the comparison of autoerotic asphyxiation to extreme sports; a comparison made possible by the escape mechanism and the past conduct of the deceased.<sup>150</sup>

## V. CONCLUSION

Accident insurance was born out an earlier public’s fear over the dangers created by the new technology of train travel. The earliest form of accident insurance was purchased as protection from injuries sustained as a result of train accidents. As more people were able to afford life insurance, insurers found that accident insurance could be an attractive bonus to potential customers. In addition, the low probability of an insured dying as a result of accident made this bonus coverage attractive to insurers as well.

Unfortunately, courts, insurers, and policyholders came to different conclusions concerning what constituted an accident within the meaning of these policies. Part of this confusion was as a result of the varying language of the policies that referred to death by “accidental results” or “accidental means.” This variation in policy language led courts to engage in two different types of analysis when called upon to determine if a death was accidental within the meaning of a policy. Today, a large and prominent area of litigation involving the question of

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<sup>147</sup> *Id.* at 262. (“UNUM appears to concede that death resulting from such ‘extreme-sport’ activities would not be excluded under the present policy, but it attempts to distinguish those activities by arguing that they involve ‘controlled risks.’) (Emphasis added by the court). See also Brief for Defendant-Appellee at 27, *Critchlow v. First UNUM Life Ins. Co. of Am.*, No. 02-7585 (2d Cir. Sept. 13, 2002).

<sup>148</sup> *Critchlow*, 378 F.3d at 262-263. (In finding that those who engage in autoerotic asphyxiation are taking a controlled risk similar to that taken by participants of extreme sports, the court wrote, “practitioners of autoerotic asphyxiation, wishing to survive the experience and to repeat the process, create escape mechanisms precisely to control the risk. . .”).

<sup>149</sup> *Id.* at 263. In articulating a version of the “reasonable expectation” test in *Wickman*, the court wrote:

For death under an accidental death policy to be deemed an accident, it must be determined (1) that the deceased had a subjective expectation of survival, and (2) that such expectation was objectively reasonable, which it is if death is not *substantially likely* to result from the insured’s conduct.

*Id.* (Emphasis added by the court.)

<sup>150</sup> *Id.* at 264. (“having determined . . . that Critchlow had a subjective expectation of survival and that his expectation was objectively reasonable because death was not likely to result, we must conclude that Critchlow’s death was accidental. . .”).

defining an “accident” within the meaning of an accidental death policy concerns risky behavior not generally accepted by society.<sup>151</sup> This article focused on autoerotic asphyxiation as an example of such litigation because it also illustrates how the various lines of reasoning employed by different courts are influenced by judicial attitudes concerning the definition of appropriate sexual conduct.

A comparison of all of the autoerotic death cases illustrates the inconsistent results that these cases provoked depending on the jurisdiction or attitudes of a particular court. These erratic results can be attributed partly to the lack of uniformity in the tests the different courts use. Some courts look to the “reasonable expectations” of the decedent to determine if an accident has occurred within the meaning of the policy. Other courts, when determining if death was a result of “intentional self injury,” use an analysis similar to that used by earlier courts in attempting to determine if an accident occurred. They focus on the “voluntariness” of the deceased. To make such an analysis possible, these courts assume that autoerotic asphyxiation, even if it does not result in death, constitutes an injury. These courts base this conclusion on the phrase, “if someone else had done this to the deceased, it would be an injury.”

The use of this phrase and the rejection by some courts of a comparison of autoerotic asphyxiation to extreme sports illustrates the discriminatory nature of the reasoning some courts use in finding against a sexual practice they find repulsive. These courts reject the contention that holding one’s breath underwater is not an injury, apparently not considering that if someone’s head was forced underwater against their will, an injury would result. Forcing someone into a perilous position against that person’s wishes would be considered an injury in most circumstances if we were to determine such things according to “the common speech of man” or the “ordinary layperson.” Therefore, any time a person intentionally flirts with danger; it should be considered an “injury” under the reasoning these courts use. Since rock climbers and extreme sport enthusiasts intentionally flirt with danger, these activities should also be considered an “injury” under the reasoning these courts use.

Aiding in the discriminatory thinking is the general confusion regarding the definition of an accident within the meaning of the policy, and the lack of uniformity in decisions among courts of varying jurisdictions that decide these cases. As the cases examined illustrate, historically there has been inconsistency in both policy language and the interpretation of this language. When a court is asked to decide what “accident,” “voluntary,” or “injury” means, it creates an opportunity

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<sup>151</sup> RUSS & SEGALIA, *supra* note 6 at §138:11.

There are a few contexts that currently give rise to the bulk of accident insurance coverage disputes. Most prominent of these is the situation in which the insured deliberately performs an act that is both frowned upon by society at large and which undeniably acts to increase the risk of the insured's injury or death. . . .

for judges to make decisions based on their prejudices.<sup>152</sup> The lack of uniformity among various courts creates cause for concern because the insured are mobile. This mobility creates protection for the insured that changes each time an insured moves from one jurisdiction to another or changes insurance carriers.

Due to the discriminatory treatment of odd and socially disturbing deaths as well as the mobility of the insured, the best option for reducing the confusion regarding accident insurance is federal governmental regulation. Governmental regulation is preferable because one of the goals of such regulation is to avoid discriminatory treatment.<sup>153</sup> Federal regulation is preferable to state regulation, as the federal government is better able to produce consistent treatment among a mobile population.<sup>154</sup>

The regulations regarding accident insurance should attempt to avoid confusion by more clearly defining what constitutes an "injury" and should encourage insurers to offer coverage for both "accidental means" and "accidental results" as bonus features of life insurance. In the event that an insurance company does not offer both types of protection, the "accidental results" analysis should be used as a default. Offering both types of insurance may be attractive to insurers because it creates another bonus coverage option for them to sell in conjunction with their life insurance policies. It will likewise better serve the insured because it gives them more options when choosing accident insurance bonus coverage. Those will not engage in risky behavior will have cheaper bonus coverage available and those who engage in riskier behavior, such as extreme sports or autoerotic asphyxiation, will have a more inclusive bonus coverage that they will rightly pay more to obtain. In addition, if insurance companies are encouraged to offer both types of accident coverage, courts will have less discretion in deciding what type of analysis to engage in.

These regulations should also more clearly define what constitutes an injury with in the meaning of the "intentional self-injury" exclusion that most policies contain. The reasoning that courts use in disallowing recovery in autoerotic death cases are over-inclusive and have the potential to exclude coverage in cases beyond autoerotic asphyxiation. A definition of intentional injury should require that substantial, permanent, and intentional physical damage be sustained by the insured. A definition with this type of requirement would allow recovery for extreme sport enthusiasts, practitioners of unusual sexual practices, and people who die as a result of picking a pimple.

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<sup>152</sup> BANKS MCDOWELL, *THE CRISIS IN INSURANCE REGULATION* at 61 (1989). ("The arbiter about the meaning of disputed terms has ultimate control over the content. That final arbiter is the judge.")

<sup>153</sup> *Id.* at 29. ("The goals of governmental regulation are to . . . avoid discriminatory treatment . . .")

<sup>154</sup> *Id.* at 50. ("Federal regulation can more neatly compel uniform treatment of a mobile and national population. Insurance relationships travel with those who are insured.")