INSURANCE—HOSPITALIZATION POLICY—OBESITY IS A DISEASE

> One of the most celebrated trials of our literature was the confrontation of Portia and Shylock as they struggled with the problem of the removal of a pound of flesh. Now, once again, the removal of a pound of flesh, or more properly several pounds of flesh, has created a weighty legal problem for resolution by the Court.
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> The hopes, despairs and conflicts of our time, and ultimately every crisis, custom and social neurosis find reflection in the matters brought before the courts, the great mirror of our society. While not of the same magnitude as wars, depressions or the disasters of nature, the problem of obesity has persistently troubled part of mankind, but even more of womenkind, ever since man first eked out more than the marginal subsistence required for bare survival, accumulated the luxury of a surplus food supply, and began to live to eat instead of eating to live.[1]

In *Aetna Life Insurance Co. v. Sanders*,[2] plaintiff Elizabeth Sanders brought an action against the defendant insurance company under her group surgical, hospital, and major medical expense policy to recover her expenses incurred for the performance of a jejuno-ileostomy operation,[3] which was prescribed by a physician for the treatment of exogenous obesity.[4] The trial court entered judgment for the plaintiff. On appeal the Georgia Court of Appeals affirmed the decision of the lower court.

Appellee, Mrs. Sanders, was at all times relative to her claim an

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1. Mount Sinai Hosp. v. Zorek, 50 Misc. 2d 1037, 1038, 271 N.Y.S.2d 1012, 1013 (N.Y. City Ct. 1966).

2. 127 Ga. App. 352, 193 S.E.2d 173 (1972).

3. The operation in question is a modification of one devised in 1912 for controlling incurable metabolic disorders. It is based on the fact that shortening the digestive tract cuts down on caloric absorption, enabling excessively overweight people to shed pounds regardless of how much they eat.

To perform the jejuno-ileostomy the surgeon severs the small intestine at a point fourteen inches from the ligament of Treitz (near the end of the jejunum, the first section of the small intestine) and connects it to the ilium (the last section of the small intestine) at a point four inches above the ileocecal junction (that point at which the ilium joins the large intestine), the result being that the length of the active small intestine is reduced from about twenty-three feet to approximately thirty inches, thereby drastically lessening the amount of time it takes for food to pass through the system, and thereby reducing the amount of material which can be absorbed through the intestinal walls. *See* Wills, *Jejuno-Ileostomy for Obesity*, 58 J. MED. ASS'N GA. 456 (1969); *See also* Scott, Law, Sandstead, Lanier & Younger, *Jejunoileal Shunt in Surgical Treatment of Morbid Obesity*, 171 ANNALS OF SURGERY 770 (1970); *Dead End*, TIME, April 24, 1972 at 65.

4. Exogenous obesity is defined as a condition of becoming obese or fat from eating more than is required for one's daily bodily need.

employee of Liquid Carbonic Corporation, a subsidiary of Houston Natural Gas Corporation. As an employee of Liquid Carbonic Corporation she was insured under a master group policy[5] issued by appellant, Aetna Life Insurance Company.

Mrs. Sanders had been overweight since an early age and had consulted her family physician in Atlanta regarding her overweight condition. She had attempted many weight reduction programs including diets and pills, and as a result of at least one of them, the Weight Watchers' program, had lost thirty pounds. On January 7, 1971, Mrs. Sanders consulted Dr. Charles Wills, Jr., of Washington, Georgia, regarding her weight problem. At this time Mrs. Sanders was carrying 206 pounds (down from a maximum weight of between 215 and 220 pounds) on her five-foot-three-inch frame. As a result of this single visit, at which time Dr. Wills did not physically examine her, or elicit her prior medical history, Mrs. Sanders was scheduled for a jejuno-ileostomy in early March 1971.

Upon her admission to the hospital[6] on March 1, 1971, Mrs. Sanders' medical history was obtained and she was physically examined. The diagnosis of appellee's condition following the examination was "exogenous obesity, possibly other allied medical illnesses," which Dr. Wills termed sufficient to warrant the operation. The scheduled jejuno-ileostomy was performed on March 3, 1971. Mrs. Sanders paid her doctor and the hospital bills and subsequently filed proper proof of claim with appellant in the amount of $952.30. Aetna denied this claim and appellant subsequently filed suit on the policy. The trial court held, and appellant enumerated as error, that "[for the purposes of this particular case] the word disease encompassed the condition of exogenous obesity which contributed to urinary incontinence causing unsuccessful anterior repairs, all as a direct result of the obesity."[7] Also enumerated

5. Aetna Life Ins. Co. Master Policy No. G.C. 55402.

6. Wills Memorial Clinic, Washington, Georgia.

7. While Georgia along with other jurisdictions has wrestled with the question of what is a disease, nowhere has obesity previously been ruled to fall within the meaning of disease. In Mount Sinai Hospital v. Zorek, 50 Misc. 2d 1037, 271 N.Y.S.2d 1012 (N.Y. City Ct. 1966), the New York courts allowed recovery on a hospitalization insurance policy for treatment of obesity, but they circumvented the question of obesity as a disease stating "The test of coverage . . . is not what condition or disease caused the hospitalization, but whether confinement [in a hospital] is necessary for proper treatment." *Id.* at 1015.

In determining what ailments are diseases, courts generally look for two elements: a change in bodily condition, and reoccurrence or some degree of permanence. Courts have had little difficulty in finding such ailments as rheumatism, Robinson v. State, 212 Ala. 459, 102 So. 693 (1925), arteriosclerosis, Preferred Accident Ins. Co. v. Combs, 76 F.2d 775 (8th Cir. 1935), and bronchopneumonia, Southern Life & Health Ins. Co. v. Drake, 22 Ala. 494, 117 So. 401 (1928), to be

as error was the trial court's holding that reasonable charges for a surgical procedure recommended and approved by appellee's duly licensed and accredited physician could be recovered under her hospitalization policy regardless of the existence of alternative available means of alleviating her condition.

As to the first enumerated error, it was appellant's contention that exogenous obesity, not being specifically covered by the policy and not being a condition usually or ordinarily considered to be a disease,[8] could only through a strained construction be included within the policy. Appellant argued that the courts have no more right by strained construction to make a policy more beneficial by extending the coverage contracted for than they would have to increase the amount of insurance.[9]

Recognizing that obesity could bring on such health hazards as high blood pressure, arthritis, cirrhosis of the liver, heart disease, renal disease, varicose veins, hemorrhoids, and gall bladder disease, appellant noted that the urinary incontinence[10] from which Mrs. Sanders did suffer was admittedly common to all women, with or without obesity. It was therefore contended by appellant that exogenous obesity was not a disease as contemplated by the policy, but was merely a condition which created a pre-disposition for disease.

The court of appeals, in rejecting the appellant's contentions, relied on *Moore v. Allstate Insurance Co.*,[11] for the proposition that a policy of insurance is to be construed liberally in favor of the object to be accomplished, and strictly against the insurance company. The court interpreted the clauses of the policy which provided for coverage of non-occupational disease[12] to include exogenous obesity within the *Black's*

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diseases, and such ailments as heat exhaustion, Mitchell v. Metropolitan Life Ins. Co., 124 W. Va. 20, 18 S.E.2d 803 (1942), heat stroke, Union Central Life Ins. Co. v. Boulware, 238 S.W.2d 722 (Tex. Civ. App. 1954), hernia, Rauert v. Loyal Protective Ins. Co., 61 Idaho 671, 106 P.2d 1015 (1940), pregnancy, Carter v. Howard, 160 Or. 507, 86 P.2d 451 (1939) and Raiscot v. Royal Neighbors, 18 Idaho 85, 108 P. 1049 (1910), and headache, Mutual Life Ins. Co. v. Simpson, 28 S.W. 837 (Tex. Civ. App. 1894), not to be diseases. The difficulty has come in the differentiation between such conditions as drunkenness, held not to be a disease, New York Life Ins. Co. v. Hoffman, 236 Ala. 648, 193 So. 104 (1940), and chronic drunkenness, which has been found to be within the meaning of disease, Knowlton v. John Hancock Mut. Life Ins. Co., 146 Me. 220, 79 A.2d 581 (1951), the only difference being the reoccurrence of the condition.

8. Cherokee Credit Life Ins. Co. v. Baker, 119 Ga. App. 579, 168 S.E.2d 171 (1969).

9. Prudential Ins. Co. v. Kellar, 213 Ga. 453, 99 S.E.2d 823 (1957).

10. Inability to restrain the discharge of urine; the involuntary or unconscious discharge of urine. I. J. SCHMIDT, ATTORNEY'S DICTIONARY OF MEDICINE AND WORD FINDER 302 (1972).

11. 108 Ga. App. 60, 131 S.E.2d 834 (1963), decided subsequent to the enactment of GA. CODE ANN. § 56-2419 (Rev. 1971).

12. "If, solely because of any non-occupational disease or non-occupational injury a covered

Law Dictionary definition of disease,[13] this definition having been previously recognized and accepted by the court in construing insurance contracts.[14]

Medical authorities appear to concur with the court of appeals in this determination. A breakdown of the *Black's Law Dictionary* definition will aid in the illustration of this point:

1. "Deviation from the healthy or normal condition of any of the functions or tissues of the body."

Obesity is clearly within this section. In fact, obesity, by definition, is adiposity (the accumulation of fat which is stored in the adipose tissue)[15] in excess of that consistent with good health,[16] or more simply, weight in excess of the normal amount.[17]

2. "An alteration in the state of the body or some of its organs, interrupting or disturbing the performance of the vital functions, and causing or threatening pain or weakness."

There can be no argument that obesity, no matter how gradual its manifestation, does alter the body in many respects. This condition is recognized as being associated with an increased incidence of a number of degenerative diseases such as arteriosclerosis, diabetes, and arthritis,[18] and has been recognized as directly causing impairment of the functions of the vital organs, such as the heart.[19] One authority has gone so far as to state that "one may fairly consider the condition obesity as a morbid state tending directly to shorten life."[20] In fact, the only com-

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family member becomes confined in a hospital . . . .", Article II, Title H.E.B. § 1, or "If solely because of any non-occupational disease or non-occupational injury, a surgical procedure is performed . . . .", Article II, Title S.E.B., § 2, then certain benefits are payable under the policy. Brief for Appellant at 7, Aetna Life Ins. Co. v. Sanders, 127 Ga. App. 352, 193 S.E.2d 173 (1972).

13. "Deviation from the healthy or normal condition of any of the functions or tissues of the body; an alteration in the state of the body or some of its organs, interrupting or disturbing the performance of vital functions, and causing or threatening pain or weakness . . . ." BLACK'S LAW DICTIONARY 554 (4th ed. 1961). This definition has been adopted by the courts of other jurisdictions. *See* Order of the United Commer. Travelers v. Nicholson, 9 F.2d 7 (2d Cir. 1925); Brinkoetter v. Pyramid Life Ins. Co., 377 S.W.2d 560 (Mo. App. 1964); McGregor v. General Acc., Fire & Life Assur. Corp., 214 N.C. 201, 198 S.E. 641 (1938); Merriman v. Hamilton, 64 Or. 476, 130 P. 406 (1913).

14. Lovett v. American Family Life Ins. Co., 107 Ga. App. 603, 131 S.E.2d 70 (1962).

15. G. THORN, HARRISON'S PRINCIPLES OF INTERNAL MEDICINE § 48 (6th ed. 1970).

16. M. Albrink, *Overnutrition and the Fat Cell* in DUNCAN'S DISEASES OF METABOLISM, ENDOCRINOLOGY AND NUTRITION 1267 (6th ed. 1969).

17. P. BEESON, CECIL—LOEB TEXTBOOK OF MEDICINE 692 (13th ed. 1971).

18. THORN, note 15 *supra*.

19. C. GREEN, MEDICAL DIAGNOSIS FOR THE STUDENT AND PRACTITIONER 171 (1917).

20. *Id.* at 182.

mon cause of death that does not strike earlier in the obese than in the lean is suicide.[21]

Appellant's final contention was based on the provision in the insurance policy that no payment would be made for any unnecessary treatment, since the weight loss could have been accomplished by other means. Appellant urged that in light of the facts: (1) that an alternative treatment, dieting, is immeasurably superior to a jejuno-ileostomy in terms of benefits to the patient;[22] (2) that such an operation is not considered good medical practice except in the treatmentof morbidly obese persons;[23] and (3) most importantly, that the cost of dieting is at most negligible, the expenses of a jejuno-ileostomy are not reasonably and necessary medical expenses and therefore are not covered by the policy.

The court of appeals held that the existence of or the cost to pursue an alternative treatment for the disease in question is of no consequence in determining whether the expenses incurred were reasonable. The court also held that whether the treatment used was the proper one is not a question for judicial determination. Rather, the court ruled that the standard to be used to determine which alternative treatment is proper is the judgment of the attending, duly licensed and accredited physician.

Except in cases of palpable collusion between patient and doctor, only such a standard as that propounded by the court in *Sanders* is feasible. Any other would involve an immeasurable amount of second guessing, with every case calling for a Dr. Gillespie to review and determine the correctness of the decision of the attending Dr. Kildare. Diagnosis and treatment must be within the competence of the attending physician, and is not a matter for judicial determination. A hospitalization insurer must not be permitted to decline to pay a claim on the basis that others have determined that the treatment administered was not the best under the circumstances.

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21. GREEN, note 19 *supra*.

22. Brief for Appellant at 28, Aetna Life Ins. Co. v. Sanders, 127 Ga. App. 352, 356, 193 S.E.2d 173, 176 (1972).

23. Scott, Law, Sanstead, Lanier & Younger, *Jejunoileal Shunt in Surgical Treatment of Morbid Obesity*, 171 ANNALS OF SURGERY 770 (1970).