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THE "HEART CASES" IN WORKMEN'S COMPENSATION: AN ANALYSIS AND SUGGESTED SOLUTION

*Arthur Larson**

THE compensability of heart attacks continues to be probably the most prolific and troublesome problem in workmen's compensation law.

There is nothing complex about the typical fact situation. A worker whose customary duties involve lifting 100-pound sacks from a floor onto a platform suffers a heart attack immediately after one such exertion. Is this an "injury by accident arising out of and in the course of employment"? The range of precipitating events can be as broad and as varied as the entire spectrum of exertions or emotional conditions capable of contributing to the onset of a heart attack, from walking up a flight of stairs to engaging in a heated argument with a supervisor.

The gravity of this problem within the workmen's compensation system is not surprising. Given the dominant position of heart disease as a source of disability and death, the extent to which workmen's compensation assumes both medical and income maintenance responsibility for the victims of heart disease naturally has a heavy bearing on the comprehensiveness, cost, and ultimate direction of the system. Obviously if the heart attack is a genuinely work-connected injury, to deny compensation benefits would be a gross violation of the legislative purpose and of the workman's rights. It is equally obvious that, under the coverage clause quoted at the outset, compensation cannot be paid for every heart attack which happens to make its appearance during working hours. Thus, the task of the courts, armed with little more than this generally-worded coverage formula, has been to draw the line between the legitimate application of the Act and the indiscriminate distribution of compensation funds to almost all employed heart victims.

It is one of the great tragedies of the workmen's compensation story that almost all courts, in their perfectly justifiable search for a legal barrier that would keep compensation heart liability from getting out of hand, have seized upon the wrong component in the coverage formula. The words "by accident" or their equivalent were pressed into service for this task, and they have proved to be a most

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ill-fitting tool for this function. If the courts had followed the more logical course of testing these cases by the causal principle prescribed by the words "arising out of the employment," there would still have been difficult evidentiary questions of medical causation, but we would have been spared the Niagara of intricate and frustrating decisions that have struggled with the intellectually unmanageable question: When does a heart attack occur by accident?

I. THE REQUIREMENT OF ACCIDENTAL INJURY

Since the heart cases rest almost entirely on the "by accident" provision in workmen's compensation statutes, we must begin by indicating briefly the present posture of statutory law. The requirement that the injury be accidental in character has been adopted either legislatively or judicially by all but six states.¹ The usual phrase found in statutes containing the requirement is injury "by accident," a phrase taken from the original British Act. This phrase occurs in the statutes of thirty states.² Nine states,³ the District of Columbia, and the Longshoremen's Act use the phrase "accidental injury." The Ohio Code introduces the "accidental" factor by defining injury to include "any injury, whether caused by external accidental means or accidental in character and result,"⁴ while Montana and Washington choose different wording, the former preferring "from an unexpected cause"⁵ and the latter "a sudden and tangible happening, of a traumatic nature." In three states, Michigan, West Virginia, and Wyoming, the basic coverage clause does not contain an express accident requirement, but the word "accident" is used elsewhere in the statute, usually to fix the beginning of the period in which notice of injury must be given or claim must be made. The courts of these three states have read "accidental" into the coverage

1. The six states are California, Iowa, Massachusetts, Minnesota, Rhode Island, and Texas. Rhode Island deleted the requirement in 1949. R.I. Laws 1949, ch. 2282. Minnesota removed the word "accident" in 1953. Minn. Laws 1953, ch. 755, § 2. The United States Employees' Compensation Act also omits the requirement. 39 Stat. 742 (1916), as amended, 5 U.S.C. § 751a (1964).

2. Alabama, Arizona, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, and Wisconsin.

3. Alaska, Arkansas, Connecticut, Illinois, Maryland, Mississippi, New York, Oklahoma, and Oregon.

4. OHIO REV. CODE ANN. § 4123.01 (Page 1965).

5. The Montana statute, which formerly called for "some fortuitous event," was amended to substitute the quoted language in 1961. MONT. REV. CODES ANN. § 92-418 (1963).

clause,⁶ although Michigan has all but read it out again.⁷ Texas also began to read accidental into the coverage clause but later held that the term "injury" covered all injuries whether accidental or not.⁸

When we turn to the decisional interpretation of the "by accident" concept, we discover several components. The basic and indispensable ingredient of "accident" is unexpectedness. The first leading English case, *Fenton v. J. Thorley & Company*,⁹ embodied this factor in the following definition: "an unlooked for mishap or an untoward event which is not expected or designed."¹⁰ Up to this point, it can be seen that there is nothing in the "accident" requirement which seriously circumscribes liability in heart cases. There would be almost no heart attacks which are "expected or designed" as the result of whatever the claimant was doing, for, if the claimant expected a heart attack or death as a result of his action, he presumably would have avoided the action. Indeed, the difficulties and the voluminous litigation that have swirled around the accident concept have flowed not from this common-sense dictionary meaning of "by accident," but from two very questionable limitations or distortions of the term, limitations which may or may not have been consciously adopted in order to build a retaining wall around liability in heart and comparable cases.

The first of these two misreadings was the subtle conversion of the phrase "accidental injury" or the equivalent phrase "injury by accident" into the phrase "by an accident." This is unjustifiable both as a matter of grammar and as a matter of statutory intention. In the original British formula, "personal injury by accident arising out of and in the course of employment," and in the many statutes which have adopted this exact wording, the phrase "by accident" is clearly a modifier meaning the same as "accidental."¹¹ True, the

6. Michigan: *Arnold v. Ogle Constr. Co.*, 333 Mich. 652, 53 N.W.2d 655 (1952); *Marlowe v. Huron Mountain Club*, 271 Mich. 107, 260 N.W. 130 (1935); see note 25 *infra* for a detailed discussion. West Virginia: *Martin v. State Compensation Comm'n*, 107 W. Va. 583, 149 S.E. 824 (1929); *Archibald v. Compensation Comm'r*, 77 W. Va. 448, 87 S.E. 791 (1916), 1916D L.R.A. (n.s.) 1013. Wyoming: *In re Scroggham*, 52 Wyo. 232, 73 P.2d 200 (1937); *Pero v. Collier-Latimer, Inc.*, 49 Wyo. 131, 52 P.2d 690 (1935).

7. See notes 30-43 *infra* and accompanying text.

8. *Texas Employers' Ins. Ass'n v. Mincey*, 255 S.W.2d 262 (Tex. Civ. App. 1953). The statement in *Middleton v. Texas Power & Light Co.*, 108 Tex. 96, 185 S.W. 556 (1916), that the statute covered only industrial accidents, was intended merely to distinguish wilful injuries, the remedy for which was thought to be guarded by the Texas Constitution.

9. [1903] A.C. 443.

10. *Id.* at 448.

11. "It was held that 'injury by accident' meant nothing more than 'accidental

wording in some state acts has been altered so that "accident" has become the noun, itself modified by the "arising" phrase, but this is not true of the formula in its original and most common version. Of course, having once rewritten the statute so as to read "by *an* accident," the courts were then in a position to set forth on their endless search for "*the* accident" in heart cases and other situations in which there did not happen to be some obvious industrial mishap or highway collision.

An even greater source of difficulty in the heart cases has been the gratuitous insistence by many courts that the accidental quality of the episode be found in the cause rather than in the result. The most familiar manifestation of this insistence is the development of the "unusual-exertion" requirement for compensability in heart cases. To refer again to our original case of the man who has lifted 100-pound sacks many times a day and then suffers a heart attack while lifting one such sack in the usual way: It is evident that if a court construes the idea of an "untoward event" or "unlooked for mishap" as confined exclusively to the cause, that is, the outward circumstances immediately preceding the injury, nothing unexpected can be shown. But if accidental content can be supplied by the unexpected effect on this individual, then the injury can correctly be described as accidental.

This entire controversy should have been and could have been avoided if the courts had followed the well-settled doctrine that when a legislature adopts a statute which has already been authoritatively construed, it has adopted that construction.¹² Well before any American states copied the "injury by accident" terminology of the British Act, it was settled beyond question in England that, although the *cause* of injury was routine and not accidental, a claim was compensable if the *effect* on the employee was unexpected and catastrophic, and therefore accidental. The House of Lords considered this exact situation in 1903¹³ and again in 1910.¹⁴ In the latter case, the routine strain of tightening a nut caused an aneurysm to break, and this was held to be injury by accident. In February, 1912, Professor Bohlen wrote an article which was widely read as a guide

injury'" Lord MacNaghten in *Clover, Clayton & Co. v. Hughes*, [1910] A.C. 242, 248, 3 B.W.C.C. 775, 781.

12. *Fuller-Toponce Truck Co. v. Public Serv. Comm'n*, 99 Utah 28, 96 P.2d 722 (1939).

13. *Fenton v. J. Thorley & Co.*, [1903] A.C. 443.

14. *Clover, Clayton & Co. v. Hughes*, [1910] A.C. 242, 3 B.W.C.C. 775. For a good review of the English cases before and since this case, and of the Australian cases, see Ford, *Workmen's Compensation—"Injury by Accident,"* 4 RES JUDICATAE 160 (1949).

to the drafting of compensation acts, pointing out these cases as establishing the authoritative meaning of the phrase.¹⁵ In spite of this background, however, a substantial number of American jurisdictions adopted the requirement that a heart attack, to be compensable, must have been produced by an exertion that was unusual for the particular worker.

The jurisdictions which allow recovery for heart attacks caused by usual exertion now outnumber by almost two to one those that require unusual exertion. This is not to suggest that the exact position of each jurisdiction can be classified with precision, but rather to give an overall impression of the present state of compensation law. Precision is impossible for many reasons, including contradictory decisions within jurisdictions, conflicts between abstract statements of rules and actual holdings on the facts, and assorted variants, exceptions, and distinctions that defy classification. With these preliminary caveats, one may hazard the statement that heart attacks from usual exertion may be compensable under federal decisions,¹⁶ and in twenty states,¹⁷ while twelve jurisdictions still appear to require unusual exertion.¹⁸

15. Bohlen, *A Problem in the Drafting of Workmen's Compensation Acts*, 25 HARV. L. REV. 328, 337-43 (1912).

16. *Hancock v. Einbinder*, 310 F.2d 872 (D.C. Cir. 1962), under District of Columbia Compensation Act; *Vinson v. Einbinder*, 307 F.2d 387 (D.C. Cir. 1962); *Southern Stevedoring Co. v. Henderson*, 175 F.2d 863 (5th Cir. 1949), under Longshoremen's Act; *Liberty Mut. Ins. Co. v. Donovan*, 124 F. Supp. 320 (D.D.C. 1954); *Jenkins v. American Mut. Liab. Ins. Co.*, 113 F. Supp. 250 (E.D. Tenn. 1953); *Oceanic Fisheries Co. v. Alaska Industrial Bd.*, 109 F. Supp. 103 (D. Alaska 1953); *Harbor Marine Contracting Co. v. Lowe*, 61 F. Supp. 964 (S.D.N.Y.), *aff'd*, 152 F.2d 845 (2d Cir. 1945), under Longshoremen's and Harbor Workers' Act.

17. Alabama: *W. T. Smith Lumber Co. v. Raines*, 271 Ala. 671, 127 So. 2d 619 (1961). Arizona: *Phelps Dodge Corp. v. Cabarga*, 79 Ariz. 148, 285 P.2d 605 (1955); *cf. Pierce v. Phelps Dodge Corp.*, 42 Ariz. 436, 26 P.2d 1017 (1933).

Arkansas: *Rebsamen West, Inc. v. Bailey*, 396 S.W.2d 822 (Ark. 1965); *Arkansas-Best Freight Sys., Inc. v. Shinn*, 235 Ark. 314, 357 S.W.2d 661 (1962); *Johnson v. Bear Brand Roofing, Inc.*, 233 Ark. 639, 346 S.W.2d 472 (1961); *International Paper Co. v. Myers*, 233 Ark. 378, 345 S.W.2d 1 (1961); *United States Fid. & Guar. Co. v. Dorman*, 232 Ark. 749, 340 S.W.2d 266 (1960); *Freeman v. Farmers Bank & Trust Co.*, 232 Ark. 654, 339 S.W.2d 427 (1960); *Harding Glass Co. v. Albertson*, 208 Ark. 866, 187 S.W.2d 961 (1945); *McGregor & Pickett v. Arrington*, 206 Ark. 921, 175 S.W.2d 210 (1943); *cf. the following cases in which the outcome is dependent upon which rule was followed by the Commission: Latimer v. Sevier County Farmers' Co-op., Inc.*, 233 Ark. 762, 346 S.W.2d 673 (1961); *Duke v. Pekin Wood Prods. Co.*, 223 Ark. 182, 264 S.W.2d 834 (1954); *C. & B. Constr. Co. v. Roach*, 220 Ark. 405, 248 S.W.2d 368 (1952); *Farmer v. L. H. Knight Co.*, 220 Ark. 333, 248 S.W.2d 111 (1952); *Baker v. Slaughter*, 220 Ark. 325, 248 S.W.2d 106 (1952).

Georgia: *Burson v. Howell*, 112 Ga. App. 675, 145 S.E.2d 718 (1965); *Sears, Roebuck & Co. v. Poole*, 112 Ga. App. 527, 145 S.E.2d 615 (1965); *Callaway Mills Co. v. Yates*, 106 Ga. App. 9, 126 S.E.2d 305 (1962); *Fulton County v. Windsor*, 100 Ga. App. 237, 110 S.E.2d 594 (1959); *Georgia Dep't of Revenue v. Hughes*, 99 Ga. App. 127, 108 S.E.2d 184 (1959); *Liberty Mut. Ins. Co. v. Thomas*, 99 Ga. App. 124, 108 S.E.2d 180 (1959); *Atlanta*

Newspapers v. Clements, 88 Ga. App. 648, 76 S.E.2d 830 (1953); Federated Mut. Implement & Hardware Ins. Co. v. Elliot, 88 Ga. App. 266, 76 S.E.2d 568 (1953); Pacific Employer's Ins. Co. v. Donaldson, 81 Ga. App. 629, 59 S.E.2d 529 (1950); Lumbermen's Mut. Cas. Co. v. Kitchens, 81 Ga. App. 470, 59 S.E.2d 270 (1950). *But cf.* Gurin v. Bituminous Cas. Co., 107 Ga. App. 823, 131 S.E.2d 566 (1963).

Idaho: Laird v. State Highway Dep't, 80 Idaho 12, 323 P.2d 1079 (1958); Lewis v. Department of Law Enforcement, 79 Idaho 40, 311 P.2d 976 (1957); Smith v. Sunshine Mining Co., 72 Idaho 8, 236 P.2d 87 (1951); Warlick v. Driscoll, 68 Idaho 552, 200 P.2d 1014 (1948); Teater v. Dairymen's Co-op. Creamery, 68 Idaho 152, 190 P.2d 687 (1948). *But cf.* Brown v. Stevens, 84 Idaho 432, 373 P.2d 332 (1962); Sutton v. Brown's Tie & Lumber Co., 83 Idaho 265, 361 P.2d 793 (1961); Dunn v. Morrison-Knudsen Co., 74 Idaho 210, 260 P.2d 398 (1953); Swan v. Williamson, 74 Idaho 32, 257 P.2d 552 (1953); Carrie v. Carrie, 73 Idaho 503, 254 P.2d 410 (1953).

Illinois: Bruno v. Industrial Comm'n, 31 Ill. 2d 447, 202 N.E.2d 13 (1964); Clifford-Jacobs Forging Co. v. Industrial Comm'n, 19 Ill. 2d 236, 166 N.E.2d 582 (1960); Laclede Steel Co. v. Industrial Comm'n, 6 Ill. 2d 296, 128 N.E.2d 718 (1955); Bethlehem Steel Co. v. Industrial Comm'n, 6 Ill. 2d 290, 128 N.E.2d 714 (1955); Town of Cicero v. Industrial Comm'n, 404 Ill. 487, 89 N.E.2d 354 (1949).

Kansas: Geurian v. Kansas City Power & Light Co., 192 Kan. 589, 389 P.2d 782 (1964); Pence v. Centex Constr. Co., 189 Kan. 718, 371 P.2d 100 (1962); Karle v. Board of Comm'rs, 188 Kan. 800, 366 P.2d 241 (1961); Bohanan v. Schlozman Ford, Inc., 188 Kan. 795, 366 P.2d 28 (1961); Price v. McSpaden, 188 Kan. 578, 363 P.2d 533 (1961); Thuillez v. Yellow Transit Freight Lines, Inc., 187 Kan. 618, 358 P.2d 676 (1961); Alpers v. George-Nielsen Motor Co., 182 Kan. 790, 324 P.2d 177 (1958); Pinkston v. Rice Motor Co., 180 Kan. 295, 303 P.2d 197 (1956); Peterson v. Safeway Stores, 158 Kan. 271, 146 P.2d 657 (1944); Hill v. Etchen Motor Co., 143 Kan. 655, 56 P.2d 103 (1936); *cf.* Transmeier v. Blaw-Knox Constr. Co., 191 Kan. 321, 380 P.2d 322 (1963).

Kentucky: Johnson v. Stone, 357 S.W.2d 844 (Ky. 1962). See also Grimes v. Goodlett & Adams, 345 S.W.2d 47 (Ky. 1961); Terry v. Associated Stone Co., 334 S.W.2d 926 (Ky. 1960); *cf.* Nashville Coal Co. v. Epley, 350 S.W.2d 463 (Ky. 1961); Salmon v. Armco Steel Corp., 275 S.W.2d 590 (Ky. 1955); H. Smith Coal Co. v. Marshall, 243 S.W.2d 40 (Ky. 1951).

Louisiana: Prater v. Liberty Mut. Ins. Co., 182 So. 2d 805 (La. App. 1966); Richard v. United States Fid. & Guar. Co., 247 La. 943, 175 So. 2d 277 (1965); Spivey v. Aetna Cas. & Sur. Co., 127 So. 2d 297 (La. App. 1961); McKnight v. Clemons, 114 So. 2d 114 (La. App. 1959); Brian v. Employers Cas. Co., 111 So. 2d 161 (La. App. 1959); Sharp v. Esso Standard Oil Co., 72 So. 2d 601 (La. App. 1954).

Maine: Taylor's Case, 127 Me. 207, 142 Atl. 730 (1928).

Michigan: Zaremba v. Chrysler Corp., 377 Mich. 226, 139 N.W.2d 745 (1966); Mottonen v. Calumet & Hecla, Inc., 360 Mich. 659, 105 N.W.2d 33 (1960); Barger v. City of Saginaw, 358 Mich. 423, 100 N.W.2d 208 (1960). The following cases applying an earlier rule are now obsolete: Wieda v. American Box Board Co., 343 Mich. 182, 72 N.W.2d 13 (1955); McGregor v. Michigan Dep't of Conservation, 338 Mich. 93, 61 N.W.2d 68 (1953); O'Neil v. W.R. Spencer Grocer Co., 316 Mich. 320, 25 N.W.2d 213 (1946); Poindexter v. Department of Conservation, 316 Mich. 235, 25 N.W.2d 182 (1946).

Mississippi: I.B.S. Mfg. Co. v. Dependents of Cook, 241 Miss. 256, 130 So. 2d 557 (1961); Pennington v. Dependents of Smith, 232 Miss. 775, 100 So. 2d 569 (1958); Schilling v. Mississippi State Forestry Comm'n, 226 Miss. 858, 85 So. 2d 562 (1956); Thornbrough Well Servicing Co. v. Brown, 223 Miss. 322, 78 So. 2d 159 (1955).

Montana: Murphy v. Anaconda Co., 133 Mont. 198, 321 P.2d 1094 (1958); Rathbun v. Taber Tank Lines, 129 Mont. 121, 283 P.2d 966 (1955).

New Jersey: Dwyer v. Ford Motor Co., 36 N.J. 487, 178 A.2d 161 (1962); Ciuba v. Irvington Varnish & Insulator Co., 27 N.J. 127, 141 A.2d 761 (1958).

Oklahoma: C. T. Hughes Constr. Co. v. Phillips, 401 P.2d 498 (Okla. 1965); H. J. Jefferies Truck Line v. Grisham, 397 P.2d 637 (Okla. 1964); Lea Mach. Co. v. Emmons, 395 P.2d 857 (Okla. 1964); Co-operative Publishing Co. v. Jestes, 373 P.2d 33 (Okla. 1962); Ben Hur Coal Co. v. Orum, 366 P.2d 919 (Okla. 1961); Rigdon & Bruen Oil Co.

II. THE MICHIGAN EXPERIENCE

Before undertaking an analytical judgment concerning the optimum working rule for heart cases, one may first set the stage by tracing in detail two of the more interesting attempts by states to arrive at a solution. The Michigan experience is significant because it provides one of the most dramatic illustrations of the over-all trend in the heart cases. Michigan began establishing restrictions based on the "accident" concept without even having a "by accident" limitation in its basic statutory coverage clause. However, in

v. Beerman, 346 P.2d 169 (Okla. 1959); State Highway Dep't v. Powell, 258 P.2d 1189 (Okla. 1953); Boettcher Oil & Gas Co. v. Lamb, 208 Okla. 192, 255 P.2d 277 (1953); Gulf Oil Corp. v. Rouse, 202 Okla. 395, 214 P.2d 251 (1949); Clarksburg Paper Co. v. Roper, 196 Okla. 504, 166 P.2d 425 (1946).

Oregon: Olson v. State Industrial Acc. Comm'n, 222 Ore. 407, 352 P.2d 1096 (1960).

Tennessee: Blair v. Aluminum Co. of America, 217 F. Supp. 471 (E.D. Tenn. 1962); Gluck Bros. v. Breeden, 387 S.W.2d 825 (Tenn. 1965); Ward v. Commercial Ins. Co., 213 Tenn. 100, 372 S.W.2d 292 (1963); Coleman v. Coker, 204 Tenn. 310, 321 S.W.2d 540 (1959); Lay v. Blue Diamond Coal Co., 196 Tenn. 63, 264 S.W.2d 223 (1953); Patterson Transfer Co. v. Lewis, 195 Tenn. 474, 260 S.W.2d 182 (1953); cf. Hagewood v. E. I. DuPont De Nemours & Co., 206 Tenn. 239, 332 S.W.2d 660 (1960).

Texas: Midwestern Ins. Co. v. Wagner, 370 S.W.2d 779 (Tex. Civ. App. 1963); United States Fid. & Guar. Co. v. Herzik, 359 S.W.2d 914 (Tex. Civ. App. 1962); Texas Employers Ins. Ass'n v. Frazier, 259 S.W.2d 242 (Tex. Civ. App. 1953); Texas Employers Ins. Ass'n v. Smith, 235 S.W.2d 234 (Tex. Civ. App. 1950); Southern Underwriters v. Hoopes, 120 S.W.2d 924 (Tex. Civ. App. 1938).

Utah: The heart cases in Utah which appeared to require overexertion have been expressly superseded by the generally-applicable rule laid down in Purity Biscuit Co. v. Industrial Comm'n, 115 Utah 1, 201 P.2d 961 (1949), an intervertebral disc award.

West Virginia: Gilbert v. Compensation Comm'r, 121 W. Va. 10, 1 S.E.2d 167 (1939).

18. Colorado: Skinner v. Industrial Comm'n, 152 Colo. 97, 381 P.2d 253 (1963); Industrial Comm'n v. Hesler, 149 Colo. 592, 370 P.2d 428 (1962); Huff v. Aetna Ins. Co., 146 Colo. 63, 360 P.2d 667 (1961).

Delaware: Faline v. Guido & Francis DeAscanis & Sons, 192 A.2d 921 (Del. 1963).

Florida: Friendly Frost Used Appliances v. Reiser, 152 So. 2d 721 (Fla. 1963); cf. Gray v. Employers Mut. Liab. Ins. Co., 64 So. 2d 650 (Fla. 1953), which accepted the unexpected-result rule.

Indiana: Douglas v. Warner Gear Div. of Borg Warner Corp., 131 Ind. App. 664, 174 N.E.2d 584 (1961); cf. Slaubaugh v. Vore, 123 Ind. App. 497, 110 N.E.2d 299 (1953).

Missouri: State *ex rel.* Hussman-Ligonier Co. v. Hughes, 348 Mo. 319, 153 S.W.2d 40 (1941); Flippin v. First Nat'l Bank, 372 S.W.2d 273 (Springfield, Mo., Ct. App. 1963); Joiner v. Farmers Exchange Co-op. Ass'n No. 304, 368 S.W.2d 547 (Kansas City, Mo., Ct. App. 1963); Love v. Land, 356 S.W.2d 105 (Kansas City, Mo., Ct. App. 1962).

Nebraska: Cochran v. Bellevue Bridge Comm'n, 174 Neb. 761, 119 N.W.2d 292 (1963); Hamilton v. Huebner, 146 Neb. 320, 19 N.W.2d 552 (1945); Rose v. City of Fairmont, 140 Neb. 550, 300 N.W. 574 (1941).

North Carolina: Ferrell v. Montgomery & Aldridge Sales Co., 262 N.C. 76, 136 S.E.2d 227 (1964); Bellamy v. Morace Stevedoring Co., 258 N.C. 327, 128 S.E.2d 395 (1962); West v. North Carolina Dep't of Conservation & Dev., 229 N.C. 232, 49 S.E.2d 398 (1948).

Ohio: Meese v. Wylie, 169 Ohio St. 252, 158 N.E.2d 891 (1959); Gerlich v. Republic Steel Corp., 153 Ohio St. 463, 92 N.E.2d 393 (1950); McNees v. Cincinnati St. Ry., 152 Ohio St. 269, 89 N.E.2d 138 (1949); Nelson v. Industrial Comm'n, 150 Ohio St. 1, 80 N.E.2d 430 (1948); Stewart v. Young, 112 Ohio App. 433, 176 N.E.2d 322 (1961); Heath v. Standard Oil Co., 68 Ohio L. Abs. 571, 112 N.E.2d 405 (Ct. App. 1953).

common with two other jurisdictions,¹⁹ Michigan read the "accidental" requirement into the coverage formula anyway, and, so equipped, proceeded to develop a typical line of cases denying compensation in the absence of unusual exertion. For example, compensation was denied for heart attacks suffered by a salesman while driving in a snow storm,²⁰ a fire warden while performing his duties,²¹ and an employee while testifying in court.²²

At the same time, Michigan, like every other jurisdiction with the unusual-exertion requirement, was occasionally producing a case which gave the unmistakable impression of clutching at straws in order to save awards by finding unusualness in the most trivial circumstances. For example, in *Schlange v. Briggs Mfg. Co.*,²³ a coronary thrombosis was attributed to the workman's "performing his usual work in an unusual manner and with the exertion of unusual force." The unusualness arose from the fact that the workman was using a round collet instead of a hexagonal one to hold a hexagonal fixture, and extra effort was required because of the tendency of the fixture to slip.

An important part in the unfolding Michigan story was contributed by the legislature in 1943 when it removed all but five of the fifty-four uses of the word "accident" in the Act and introduced the "single-event" test.²⁴ One of the few places from which the accident

Pennsylvania: *Good v. Pennsylvania Dep't of Property & Supplies*, 346 Pa. 151, 30 A.2d 434 (1943); *McGowan v. Upper Darby Pet Supply*, 207 Pa. Super. 329, 217 A.2d 846 (1966); *Shatto v. Bardinnet Exports, Inc.*, 170 Pa. Super. 16, 84 A.2d 388 (1951); *Cope v. Philadelphia Toilet Laundry & Supply Co.*, 167 Pa. Super. 205, 74 A.2d 775 (1950); *Powell v. Hills Garage*, 150 Pa. Super. 17, 27 A.2d 773 (1942).

South Carolina: *Walker v. City of Columbia*, 146 S.E.2d 856 (S.C. 1966); *Lorick v. South Carolina Elec. & Gas Co.*, 245 S.C. 513, 141 S.E.2d 662 (1965); *Jones v. Williamsburg County*, 245 S.C. 434, 141 S.E.2d 100 (1965); *Rhodes v. Guignard Brick Works*, 245 S.C. 304, 140 S.E.2d 487 (1965); *Black v. Barnwell County*, 243 S.C. 531, 134 S.E.2d 753 (1964); *West v. City of Spartanburg*, 236 S.C. 553, 115 S.E.2d 295 (1960); *Sims v. South Carolina Comm'n of Forestry*, 235 S.C. 1, 109 S.E.2d 701 (1959); *Price v. B. F. Shaw Co.*, 224 S.C. 89, 77 S.E.2d 491 (1953).

South Dakota: *Cooper v. Vinatieri*, 73 S.D. 418, 43 N.W.2d 747 (1950).

Washington: *Windust v. Department of Labor & Indus.*, 52 Wash. 2d 33, 323 P.2d 241 (1958), *overruling* *Merritt v. Department of Labor & Indus.*, 41 Wash. 2d 633, 251 P.2d 158 (1952), *and* *McCormick Lumber Co. v. Department of Labor & Indus.*, 7 Wash. 2d 40, 108 P.2d 807 (1941). See also *Taylor v. Department of Labor & Indus.*, 416 P.2d 455 (Wash. 1966); *Warner v. Department of Labor & Indus.*, 414 P.2d 628 (Wash. 1966); *Lawson v. Department of Labor & Indus.*, 63 Wash. 2d 79, 385 P.2d 537 (1963); *Kruse v. Department of Labor & Indus.*, 52 Wash. 2d 453, 326 P.2d 58 (1958).

19. See note 6 *supra*.

20. *O'Neil v. W. R. Spencer Grocer Co.*, 316 Mich. 320, 25 N.W.2d 213 (1946).

21. *McGregor v. Michigan Dep't of Conservation*, 338 Mich. 93, 61 N.W.2d 68 (1953).

22. *Poindexter v. Department of Conservation*, 316 Mich. 235, 25 N.W.2d 182 (1946).

23. 326 Mich. 552, 40 N.W.2d 454 (1950).

24. Mich. Pub. Acts 1943, No. 245.

concept was not removed was the title, where the reference to compensation for accidental injuries was retained. After a period of some uncertainty, the Michigan Supreme Court specifically concluded, by a vote of five to three, that accidental injury was still required despite the 1943 amendments.²⁵

Coming changes in legal doctrine are often heralded by a persuasive dissenting opinion. In the Michigan heart cases, this function was performed by the dissenting opinion of Justice Smith in *Wieda v. American Box Board Company*,²⁶ a case in which the majority denied compensation for a coronary thrombosis. The dissent examined both the general effect of the 1943 amendments on the accident requirement and the specific application of the statute to unexpected-result and usual-exertion heart cases. As to the former, Justice Smith said:²⁷

It will be observed that the insertion of the suggested word "accidental" has been rejected. It should also be noted that the same amendment undertook a wholesale excision of the words "accident" and "accidental injury," from other portions of the act, and the substitution of the word "injury."

As to the latter, he said that the word "accident" includes both the expected cause and the expected result,²⁸ and he adduced the following quotation from the original English case of *Fenton v. J. Thorley & Company*:²⁹

If a man, in lifting a weight or trying to move something not easily moved, were to strain a muscle or rick his back, or rupture himself, the mishap in ordinary parlance would be described as an accident. Anybody would say that the man had met with an accident in lifting a weight, or trying to move something too heavy for him.

The decisions which finally reversed the Michigan rule were not heart cases, but there was never any doubt that the heart cases were embraced within the new principles established in *Sheppard v.*

25. *Arnold v. Ogle Constr. Co.*, 333 Mich. 652, 53 N.W.2d 655 (1952). For a discussion of the varying points of view on the significance of cases between the 1943 amendments and *Arnold*, see the opinions in *Sheppard v. Michigan Nat'l Bank*, 348 Mich. 577, 83 N.W.2d 614 (1957). The principal cases during this period include: *Kasarewski v. Hupp Motor Car Corp.*, 315 Mich. 225, 23 N.W.2d 689 (1946); *Anderson v. General Motors Corp.*, 313 Mich. 630, 22 N.W.2d 108 (1946); *Hagopian v. Highland Park*, 313 Mich. 608, 22 N.W.2d 116 (1946).

26. 343 Mich. 182, 72 N.W.2d 13 (1955).

27. *Id.* at 203, 72 N.W.2d at 24.

28. *Id.* at 196, 72 N.W.2d at 19.

29. [1903] A.C. 443, at 446. For previous discussion of *Fenton*, see text accompanying notes 9 & 10 *supra*.

*Michigan National Bank*³⁰ and *Coombe v. Penegor*.³¹ *Sheppard* involved a back injury which occurred when claimant tugged at a tray of cards weighing about twenty-five pounds. *Coombe* involved a cerebral hemorrhage and stroke resulting from the claimant's strenuous but usual exertion in fastening logs onto a logging truck with chains. For anyone having more than a passing interest in this topic in Michigan, the eighty pages of opinion, concurring opinions, dissenting opinions, and addenda in the report of these two cases are required reading. The reader's task will be lightened by the fact that there is a sense of high drama pervading these printed pages which shines through in some of the most vivid legal writing imaginable. The language of the battlefield repeatedly turns up in the opinions. Justice Black, in his first opinion in *Coombe*, after citing a number of conflicting opinions, asked: "Who is to say, until we do, which of these warring groups of decisions shall determine [the] applicability of part 7?"³² Again, in his opening opinion in *Sheppard*, Justice Black wrote:

Brazauskis (Brazauskis v. Muskegon County Board of Road Commissioners, 345 Mich. 480), the 4 to 4 deadlock of April 2d last, and now the misshapen 3-2-2 monster known as Beltinck's Case (Beltinck v. Mt. Pleasant State Home and Training School, 346 Mich. 494), unitedly prove the parable. Indeed, they liken us to the Etruscan array, faltering at Tiber's bridge. Here we stand, wavering from term to term, fearful of unvarnished avowal, pictured as by Macaulay's pen:

"But those behind cried 'Forward!'
And those before cried 'Back!'"³³

Finally, Justice Edwards, concurring in *Sheppard*, on learning that a clear majority of the court had now appeared for the new rule, appended an addendum beginning with the cry of triumph: "Say not, the struggle naught availeth."³⁴

What clearly emerges from the dust of battle is that the accidental quality of an injury in Michigan can now be supplied by an unexpected result, that unusual exertion is not indispensable in heart and similar cases, and that pre-existing weakness or disease

30. 348 Mich. 577, 83 N.W.2d 614 (1957).

31. 348 Mich. 635, 83 N.W.2d 603 (1957).

32. *Id.* at 640, 83 N.W.2d at 606.

33. 348 Mich. at 579, 83 N.W.2d at 627. The lines of poetry are from *Horatius* stanza 50, in MACAULEY'S LAYS OF ANCIENT ROME (1928).

34. 348 Mich. at 627, 83 N.W.2d at 636. The quote is the first line of Arthur Hugh Clough's, "Say not the Struggle Naught availeth," found in the OXFORD BOOK OF ENGLISH VERSE, 1250-1918, at 898 (Quiller-Couch ed. 1940).

does not alter this basic rule. What is not quite so clear is whether the court has gone all the way in removing the accident requirement from the statute, undoing what was started by the *Marlowe* case,³⁵ and what was given a new lease on life by the *Arnold* case.³⁶ In *Sheppard* and *Coombe*, all of the concurring justices except Justice Edwards stopped short of announcing a blanket elimination of the accident concept from the Michigan statute. There are a number of statements to the effect that the 1943 amendments eliminated the accident concept as previously interpreted by the court, and that the concept was abolished once and for all insofar as it formerly required an accidental or unexpected cause. But Justice Smith, in his concurring opinion in *Sheppard*, said:

Eula Sheppard and Ewart Coombe are each entitled to compensation, not because we "eliminate" accident from the act, not because of the presence or lack of a pre-existing ailment . . . but *simply because each suffered an unexpected mishap (an accident, in our everyday speech) while doing his ordinary work in his ordinary way.*³⁷

Justice Black, who wrote the primary opinion for the majority, announced that he was signing this opinion of Justice Smith. The opinions of Justice Edwards and Chief Justice Dethmers are designated merely as "concurring," *i.e.*, presumably concurring with the primary opinion of Justice Smith. Justice Kelly, in turn, concurred with Chief Justice Dethmers, but in the process evenhandedly divided his approval between those of the justices who accepted the accident requirement and even extended it to require an accidental result as well as cause, and of Justice Edwards, whom Justice Kelly quoted as saying: "There is no longer a requirement that 'an accident' or 'a fortuitous' event (this court's previous definition of 'accident') be proven as a condition precedent for recovery of workmen's compensation for a single-event personal injury which arises out of and during the course of employment."³⁸ There is thus some question of precisely what Justice Kelly concurred in.

This is not the end of the matter. In 1960, Justice Edwards found himself in the position of writing the majority opinion in the case which clearly applied the new doctrine to a heart attack, *Mottonen v. Calumet & Hecla, Inc.*³⁹ Understandably, Justice Edwards in-

35. 271 Mich. 107, 260 N.W. 130 (1935).

36. 333 Mich. 652, 53 N.W.2d 655 (1952).

37. 348 Mich. at 605, 83 N.W.2d at 626. (Emphasis supplied by the court.)

38. *Id.* at 634, 83 N.W.2d at 640.

39. 360 Mich. 659, 105 N.W.2d 33 (1960).

serted into the majority opinion of *Mottonen* his own interpretation of *Sheppard* and *Coombe*:

The *Sheppard* and *Coombe* Cases served to eliminate from construction of the Michigan workmen's compensation statute the former case-law requirement of proof of an accident ("a fortuitous circumstance") (see *Arnold v. Ogle Construction Co.*, 333 Mich. 652) as a condition precedent to recovery of compensation where statutorily-required proofs were present.⁴⁰

Although this restatement of his own interpretation is not surprising, there may be some significance in the fact that Justice Edward's opinion was concurred in by three other justices, including Justice Smith, who said explicitly in *Sheppard* that the basis of the *Sheppard* and *Coombe* opinions was *not* that accident was "eliminated" from the act.

Although it is something of an anti-climax after this excursion through the byways of the judicial process, one must nevertheless observe that it probably does not make very much difference in heart and other strain cases whether one accepts Justice Edward's view that *Sheppard* and *Coombe* eliminated the accident requirement, or the more cautious interpretation that they simply established the unexpected-result and usual-exertion rules. This observation is supported by the Michigan Supreme Court's decision in *Zaremba v. Chrysler Corporation*,⁴¹ in which one final attempt to make the *Sheppard* and *Coombe* rule stop short of the usual-exertion test was firmly put down by the court. The Workmen's Compensation Board's interpretation of the cases was rejected and the court held that the exertion which caused disability or death did not have to be "strenuous" in character. The supreme court quoted from the Arkansas case of *Bryant Stave & Heading Company v. White*:⁴²

Notwithstanding anything we may have said in prior cases, we hold that an accidental injury arises out of the employment when the required exertion producing the injury is too great for the person undertaking the work, *whatever the degree of exertion or the condition of his health*, provided the exertion is either the sole or a contributory cause of the injury. In short, that an injury is accidental when either the cause or result is unexpected or accidental, *although the work being done is usual or ordinary*. [Emphasis by the Michigan Supreme Court.]

40. *Id.* at 660, 105 N.W.2d at 33.

41. 377 Mich. 226, 139 N.W.2d 745 (1966).

42. 227 Ark. 147, 155, 296 S.W.2d 436, 441 (1956), quoted in *Zaremba v. Chrysler Corp.*, 377 Mich. 226, 231, 139 N.W.2d 745, 748 (1966). This same language was also quoted by Justice Smith in *Sheppard v. Michigan Nat'l Bank*, 348 Mich. 577, 582-83, 83 N.W.2d 614, 615 (1957).

This quotation is followed by the statement: "It is difficult to tell from the 5 separate opinions [in *Sheppard*] exactly what the case stood for then and what it stands for now. If it does not stand for the foregoing quoted rule, I think it ought to."⁴³ Four justices concurred in this opinion, while three justices concurred separately on the ground that the Commission was warranted in finding that the employee's work was unrelated to his heart attack. Consequently, for whatever the observation is worth, we now seem to have at least a five to three majority agreeing upon the meaning of *Sheppard*. So understood, the Michigan rule as to the range of heart and similar cases which are compensable as accidental injuries is now as generous as that of any jurisdiction in the country.

III. THE NEW YORK EXPERIENCE

The other state whose experience deserves detailed examination is New York. The history of what has happened in New York is of prime interest to any state which is still trying to apply the unusual-exertion test, because it shows what happens to that rule when a sufficient volume and variety of cases puts it to every possible test. The net result amounts to this: New York began with an emphatic requirement of unusual and even catastrophic cause, but, by a gradual decrease in the "unusualness" of the unusual cause required, it reached a point where, in effect, any heart attack to which the employment contributed seemed to be held accidental; then, apparently impressed by the need for some principle that would keep heart case liability from being virtually unbounded, it added an alternative test—the strain must have been "greater than the ordinary wear and tear of life."

A. *The Results in New York*

The New York story may be opened with the following quotation from an opinion by Judge Pound, speaking for a unanimous Court of Appeals in *Lerner v. Rump Brothers*:⁴⁴

43. *Zaremba v. Chrysler Corp.*, *supra* note 42, at 231, 139 N.W.2d at 748.

44. 241 N.Y. 153, 155, 149 N.E. 334, 335, 41 A.L.R. 1122 (1925). In *Lerner*, from which this quotation is taken, decedent caught a cold as a result of spending ten minutes in a refrigerator, following which he died of causes traceable to the lowered resistance produced by the cold. Compensation was denied for want of anything catastrophic or extraordinary. By contrast, in *Matter of Connelly v. Hunt Furniture Co.*, 240 N.Y. 83, 147 N.E. 366 (1925), cited in the quotation, an undertaker's assistant contracted an infection through a cut finger which spread through contact with a pimple on his neck. This episode was held to be accidental in all its phases.

A distinction exists between accidental injury and disease, but disease may be an accidental injury. The exception arises out of abnormal conditions which must be established to sustain an award. Two concurrent limitations have been placed on the right to recover an award when a disease, not the natural and unavoidable result of the employment, is developed during the course of the employment, although it does not follow that compensation should be awarded in all cases coming literally within these limitations. *First*, the inception of the disease must be assignable to a determinate or single act, identified in space or time. (*Matter of Jeffreyes v. Sager Co.*, 198 App. Div. 446; 233 N.Y. 535) *Secondly*, it must also be assignable to something catastrophic or extraordinary. (*Matter of Connelly v. Hunt Furniture Co.*, 240 N.Y. 83).

In the heart cases, the issue almost from the start centered on the question whether there was anything unusual about the exertion producing the attack or about the circumstances surrounding it. In 1935, compensation was denied to an employee who collapsed and died shortly after having performed a routine job of lifting and moving merchandise in a store basement.⁴⁵ But, in 1939, an award to a truck driver who died of a heart attack from the strain of cranking his truck was unanimously affirmed;⁴⁶ the catastrophic or unusual element seems to have been supplied by the fact that the condenser and distributor on the truck had burned out. The next year, compensation was denied for the death of a blacksmith who, because of icy weather, carried his tools three blocks to a stable instead of having the horses come to the shop.⁴⁷ And in 1941, compensation was similarly denied to an employee whose heart attack was brought on by the exertion, normal in his work, of pushing an overhead tree loaded with 400 pounds of meat.⁴⁸

Shortly thereafter, the courts became somewhat more willing to find that the activity causing the attack was "unusual." In 1942, the heart attack of a housekeeper in an apartment house was deemed accidental since it followed her climbing four flights of stairs three times within fifteen or twenty minutes, the last time carrying a heavy mirror.⁴⁹ In 1943, the looser "unusualness" rule was adum-

45. *Frankel v. National 5, 10 and 25 Cent Stores*, 243 App. Div. 841, 278 N.Y.S. 450, *aff'd*, 268 N.Y. 509, 198 N.E. 378 (1935).

46. *Green v. Geiger*, 255 App. Div. 903, 7 N.Y.S.2d 762 (1938), *aff'd*, 280 N.Y. 610, 20 N.E.2d 559 (1939).

47. *La Fountain v. La Fountain*, 259 App. Div. 1095, 21 N.Y.S.2d 193, *aff'd*, 284 N.Y. 729, 31 N.E.2d 199 (1940).

48. *Dworak v. E. Greenbaum Co.*, 261 App. Div. 1023, 25 N.Y.S.2d 829, *aff'd*, 287 N.Y. 555, 38 N.E.2d 224 (1941).

49. *McCormack v. Wood Harmon Warranty Corp.*, 263 App. Div. 914, 32 N.Y.S.2d 145, *aff'd*, 288 N.Y. 614, 42 N.E.2d 613 (1942).

brated in the case of a furnace-stoker who collapsed after throwing a dozen shovels of coal, each weighing about forty pounds, on the fire. This was held to be an accidental injury, in spite of the fact that the shoveling was his regular job.⁵⁰ During the next two years, a plant patrolman's coronary occlusion was found accidental because he had patrolled an outside beat in extremely cold weather and during a heavy snowstorm (although his job was to patrol in all kinds of weather);⁵¹ the exertion of a fireman who ran up two flights of stairs, halfway down, and then up again was deemed "unusual," (although realistically it was surely a routine activity for a fireman);⁵² and the necessity of remaining in a cramped position for an hour to tamp new firebrick inside a boiler was deemed sufficient to convert a strain into an accidental injury.⁵³ Beginning with *Cooper v. Brunswick Cigar Company*⁵⁴ in 1948, the newer view began to affect even the language of the opinions, in that reference to the unusualness of the exertion was sometimes altogether omitted. In *Cooper*, an award was made for the death of a trucker who, because he had no helper, had put in an unusually hard day, lifting cartons two at a time in order to save time. The Appellate Division's opinion said that "the board could find that the heart attack which caused the death was produced by the labor incident to the employment."⁵⁵

From 1948 on, a series of cases emerged which threatened to reduce the unusualness test to a hollow shell. In one case a painter had placed his ladder so that he had to stretch his arm "all the way out" in order to paint, and the Appellate Division held that the "extreme exertion and extension of his arms in painting" satisfied the requirement of accidental injury.⁵⁶ In another instance, a deliveryman who suffered a heart attack while carrying a sixty-pound case of beer was granted compensation: the only non-routine feature in his case was the fact that the driveway on which he was walking was somewhat slippery.⁵⁷ But—to show that the old requirement

50. *Bohm v. L. R. S. & B. Realty Co.*, 264 App. Div. 962, 37 N.Y.S.2d 173 (1942), *aff'd*, 289 N.Y. 808, 47 N.E.2d 52 (1943).

51. *Flammer v. Bethlehem Steel Co.*, 268 App. Div. 944, 51 N.Y.S.2d 258 (1944), *aff'd*, 295 N.Y. 817, 66 N.E.2d 588 (1946).

52. *Godsman v. Grumman Aircraft Eng'r Corp.*, 268 App. Div. 945, 51 N.Y.S.2d 368 (1944), *aff'd*, 295 N.Y. 708, 65 N.E.2d 339 (1946).

53. *Brooks v. Elliott Bates, Inc.*, 269 App. Div. 792, 55 N.Y.S.2d 671 (1945), *aff'd*, 295 N.Y. 710, 65 N.E.2d 340 (1946) (two judges dissenting).

54. 273 App. Div. 1038, 79 N.Y.S.2d 867, *aff'd*, 298 N.Y. 731, 83 N.E.2d 142 (1948).

55. *Id.* at 1038, 79 N.Y.S.2d at 867.

56. *Ruby v. Lustig*, 274 App. Div. 954, 83 N.Y.S.2d 665 (1948), *aff'd*, 299 N.Y. 759, 87 N.E.2d 672 (1949).

57. *Serie v. F. & M. Schaefer Brewing Co.*, 273 App. Div. 833, 76 N.Y.S.2d 50 (1948).

was still capable of defeating claims—in the same year and only nine pages away in the same volume of reports, the same court denied compensation for the death of a house superintendent who suffered a coronary occlusion while carrying down stairs garbage cans which weighed seventy pounds—ten pounds more than the beer case and on stairs at that.⁵⁸

Then came a series of cases which held that accidental injury could be shown merely by proof that the decedent had been working harder than he had worked at some time in the past. For example, one claimant, upon being promoted to the responsible job of supervising construction of three new shops, worked long hours seven days a week for nine or ten months, experiencing heart symptoms from time to time. The Appellate Division found this assignment to be “unusual work,” and held that “claimant sustained accidental injuries arising out of and in the course of employment due to long and arduous hours of work.”⁵⁹ In 1949, an inspector was brought within the protective orbit of “accident” solely because “the work done by claimant had about a month earlier been changed so that fewer men were doing the same volume of inspections which increased claimant’s physical effort.”⁶⁰ In other words, a strain which had been usual and routine for a month was an “accident” because a month earlier the claimant had had lighter work.

By 1950, the Court of Appeals apparently felt it had had enough of this sort of thing, and, in *Masse v. James H. Robinson Company*,⁶¹ while awarding compensation to a man who had undergone unusually arduous work during the week preceding a heart attack which occurred at home, it made the following unqualified statement: “A heart injury such as coronary occlusion or thrombosis when brought on by overexertion or strain in the course of daily work is compensable, though a pre-existing pathology may have been a contributing factor.”⁶² Nothing was said about unusual strain; the language indicated that recovery would be permitted not only for overexertion, but also for “strain in the course of daily work.”

Later in the same year, while finding compensable the effects of

58. *Chiara v. Villa Charlotte Bronte, Inc.*, 273 App. Div. 834, 76 N.Y.S.2d 59, *aff'd*, 298 N.Y. 604, 81 N.E.2d 332 (1948).

59. *Furtardo v. American Export Airlines, Inc.*, 274 App. Div. 954, 83 N.Y.S.2d 745, 746 (1948), *leave to appeal denied*, 298 N.Y. 933 (1949).

60. *Carlin v. Colgate Aircraft Corp.*, 276 App. Div. 881, 93 N.Y.S.2d 791, 792 (1949), *aff'd*, 301 N.Y. 754, 95 N.E.2d 626 (1950).

61. 301 N.Y. 34, 92 N.E.2d 56 (1950).

62. *Id.* at 37, 92 N.E.2d at 57.

spending five or ten minutes in the usual cramped position a steam fitter has to assume while working on the inside of a boiler, the Appellate Division summarized New York law from *Lerner* to *Masse*:

Appellants . . . cite the definition of an accident as something extraordinary or catastrophic, assignable to a determinate or single act, identified in space or time. [Citing *Lerner*.]

As an abstract legal proposition undoubtedly this definition is unassailable. However whether an event is to be found an industrial accident is not to be determined by legal definition "but by the common-sense viewpoint of the average man." [Citing *Masse*.] Hence the issue almost invariably falls within the realm of fact, and if the facts and circumstances sustain, upon any reasonable hypothesis, the conclusion that an average man would view the event as accidental, then the determination of the Board is final. We think such determinative facts and circumstances were presented in the instant case, and that common men would regard decedent's injuries as accidental. At least we cannot say as a matter of law that such is not the case. Applications of this principle, though often not expressed, are inherent in many decisions.⁶³

There is something indescribably poignant about the periodic efforts of highly-trained legal minds to dispose of intricate and troublesome questions of law by invoking "the common-sense viewpoint of the average man." Would the average man who saw a steam fitter crouched in his usual position or a carpenter operating a mortising machine in the usual way view the resulting injuries as "accidental"? The plain fact is that the viewpoint of the average man would quickly eliminate the entire tortuous usual-unusual exertion distinction, since it is not common sense to equate the merely unusual with the accidental.

It is salutary at this point to recall the words of Lord Coke, Chief Justice of England in the early seventeenth century, responding to King James I's statement that the law was founded upon reason, that the King as well as the judges possessed reason, and that the King might therefore remove from the judges any causes he pleased and decide them himself. Lord Coke answered:

[T]rue it was that God had endowed His Majesty with excellent sciences and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life or inheritance, or goods or fortunes of his subjects, are

63. *Broderick v. Liebmann Breweries, Inc.*, 277 App. Div. 422, 424, 100 N.Y.S.2d 837, 839 (1950); *accord*, *Clayback v. Globe Woven Belting Co.*, 282 App. Div. 973, 125 N.Y.S.2d 493 (1953).

not to be decided by natural reason but by the artificial reason and judgment of [the] law . . .⁶⁴

In the period following *Masse*, the "artificial reason and judgment of the law" again came into play, and in place of the permissive and vague "common sense" rule, there emerged a set of two, and perhaps three, discernible tests operating side by side. Before distilling these tests from the mass of reported cases, however, it might be useful to set forth in summary factual form the panorama of awards and denials since *Masse*.

The most common causal situation is that of a heart attack caused by lifting; awards have been based in whole or in part on lifting weights ranging from thirteen pounds to one hundred and fifty pounds.⁶⁵ Cases in which awards have been made have involved the lifting of articles varying from four empty bottles,⁶⁶ shoe boxes,⁶⁷

64. Conference between King James I and the Judges of England, Roberts' Case, 12 Co. Rep. 65, 77 Eng. Rep. 1344 (K.B. 1612). Note that in 1612 the word "artificial" did not carry the somewhat derogatory implication it conveys today. It was a complimentary word, connoting highly-developed skill, learning, and inventiveness. For example, note the inscription preceding the Sixth Pavin in ROBERT DOWLAND, *VARIETIE OF LUTE LESSONS* (1610): "Composed by the most Artificiall and famous Alfonso Terrabasco of Bologna."

65. *Schutz v. Gelobters Distribs.*, 24 App. Div. 2d 793, 263 N.Y.S.2d 850 (1965) (10 to 30 pounds); *Abbott v. Bedford Prod. Div., Nat'l Dairy Prod. Corp.*, 15 App. Div. 2d 31, 221 N.Y.S.2d 840 (1961) (13 pounds); *Puccio v. General Cable Corp.*, 13 App. Div. 2d 558, 211 N.Y.S.2d 966 (1961) (15 pounds); *Uletas v. Elliott*, 18 App. Div. 2d 849, 236 N.Y.S.2d 487 (1963) (20 pounds); *Castellano v. B & A Specialties Co.*, 23 App. Div. 2d 931, 259 N.Y.S.2d 405 (1965), *aff'd*, 269 N.Y.S.2d 720, 216 N.E.2d 712 (1966) (30 pounds); *Williams v. Bumper & Auto Plating, Inc.*, 16 App. Div. 2d 997, 229 N.Y.S.2d 731 (1962) (40 pounds); *Greenberg v. Standard Overall Co.*, 13 App. Div. 2d 565, 212 N.Y.S.2d 1 (1961) (40 pounds); *Erde v. Morris Erde, Inc.*, 9 App. Div. 2d 797, 192 N.Y.S.2d 784 (1959) (40 pounds); *Colone v. Tavern on the Green*, 21 App. Div. 2d 930, 251 N.Y.S.2d 129 (1964) (50 pounds); *Geschwer v. Tee Jay Toys, Inc.*, 15 App. Div. 2d 615, 222 N.Y.S.2d 771 (1961) (50 pounds); *Gillar v. Jarcho Bros.*, 282 App. Div. 968, 125 N.Y.S.2d 465 (1953) (55 pounds); *Post v. Wallauer Paint Co.*, 22 App. Div. 2d 981, 254 N.Y.S.2d 720 (1964) (60 pounds); *Witten v. Sargoy & Stein*, 15 App. Div. 2d 617, 222 N.Y.S.2d 369 (1961) (64 pounds); *Wood v. John C. Monroe, Inc.*, 12 App. Div. 2d 829, 209 N.Y.S.2d 339 (1961) (70 pounds); *Szesniak v. Whitney*, 12 App. Div. 2d 366, 211 N.Y.S.2d 581 (1961) (70 pounds); *Adler v. N. Adler's Son, Inc.*, 24 App. Div. 2d 1050, 265 N.Y.S.2d 703 (1965) (75 pounds); *Gordon v. Cenu Fibres*, 10 App. Div. 2d 655, 196 N.Y.S.2d 349 (1960) (85 pounds); *Webb v. Twelve Pine Street, Inc.*, 12 App. Div. 2d 555, 206 N.Y.S.2d 1015 (1960) (90 pounds); *Wagner v. City Prod. Corp.*, 11 App. Div. 2d 551, 199 N.Y.S.2d 807 (1960) (100 pounds); *Brilli v. Brilli*, 283 App. Div. 905, 130 N.Y.S.2d 142 (1954) (100 pounds); *Rubin v. Elite Store Cleaners, Inc.*, 283 App. Div. 906, 130 N.Y.S.2d 58 (1954) (100 pounds); *Gioia v. A. J. Courtmel Co.*, 283 App. Div. 40, 126 N.Y.S.2d 94 (1953) (100 pounds); *Gostinsky v. Diamond Bake Shop*, 11 App. Div. 2d 847, 203 N.Y.S.2d 160 (1960) (105 pounds); *Johnson v. Swift & Co.*, 10 App. Div. 2d 656, 196 N.Y.S.2d 330 (1960) (138 pounds); *Chenier v. H. W. Rohlfis & Son*, 282 App. Div. 792, 122 N.Y.S.2d 463 (1953) (150 pounds).

66. *Miller v. F. & M. Schaefer Brewing Co.*, 16 App. Div. 2d 718, 226 N.Y.S.2d 927 (1962).

67. *Farber v. Harbor Shoes Co.*, 12 App. Div. 2d 578, 206 N.Y.S.2d 1011 (1960), *rev'd on other grounds*, 223 N.Y.S.2d 503, 179 N.E.2d 508 (1961).

and an armful of dishes,⁶⁸ to heavy barrels,⁶⁹ hot steel billets,⁷⁰ and an accident victim.⁷¹ Other types of exertion represented in successful cases include changing a tire,⁷² removing an automobile bumper,⁷³ moving a machine,⁷⁴ working in an awkward or cramped position,⁷⁵ and general heavy strain.⁷⁶ On the other hand, recovery has been denied in cases involving the lifting of things varying from a four to six pound briefcase⁷⁷ to a fifty-pound nail keg.⁷⁸ Compensation has also been denied for heart attacks attendant upon the work

68. *Burke v. Chef's Hat Restaurant*, 16 App. Div. 2d 712, 226 N.Y.S.2d 955 (1962).

69. *Holly v. Queensboro Corp.*, 9 App. Div. 2d 819, 192 N.Y.S.2d 664 (1959).

70. *Evans v. Allegheny Ludlum Steel Co.*, 22 App. Div. 2d 838, 253 N.Y.S.2d 853 (1964).

71. *Woodworth v. County of Onondaga—Sheriff's Dep't*, 20 App. Div. 2d 945, 249 N.Y.S.2d 239 (1964); *cf. Stewart v. Devon Realty Corp.*, 12 N.Y.2d 1005, 189 N.E.2d 626 (1963) (refuse cans); *Sineni v. Sun Tire Sales—Phils Sunoco Service*, 271 N.Y.S.2d 335 (App. Div. 1966) (cans of anti-freeze); *Mandelblatt v. Gold Star Baking Corp.*, 22 App. Div. 2d 966, 254 N.Y.S.2d 432 (1964), *aff'd*, 265 N.Y.S.2d 289, 212 N.E.2d 775 (1965) (a bulky carton); *Romanelli v. Hueblein Liquor Co.*, 14 App. Div. 2d 980, 221 N.Y.S.2d 408 (1961) (cases of liquor); *Katz v. Greenberg Flooring, Inc.*, 13 App. Div. 2d 561, 211 N.Y.S.2d 922 (1961) (lumber); *Grear v. P. J. Garvey Carting & Storage, Inc.*, 11 App. Div. 2d 582, 200 N.Y.S.2d 684 (1960) (furniture); *Silverman v. Calvert Coat Mfg. Co.*, 9 App. Div. 2d 973, 193 N.Y.S.2d 681 (1959) (bundles containing 45 coat sleeves); *Wasserman v. Covington Fabrics Corp.*, 9 App. Div. 2d 554, 189 N.Y.S.2d 503 (1959) (heavy inventory books); *Luongo v. Caristo Constr. Corp.*, 284 App. Div. 1078, 135 N.Y.S.2d 821 (1954) (lumber); *Sabasowitz v. Gold Theatre*, 283 App. Div. 899, 130 N.Y.S.2d 121 (1954) (a heavy case of motion picture film); *Bingold v. Krebs*, 282 App. Div. 786, 122 N.Y.S.2d 580 (1953) (a step ladder and two gallon cans of paint); *Wolner v. Ronnie Bake Shop, Inc.*, 281 App. Div. 932, 119 N.Y.S.2d 627 (1953) (a heavy pail of water).

72. *O'Brien v. Long Island State Parkway Comm'n*, 13 App. Div. 2d 855, 214 N.Y.S.2d 786 (1961). See also the following cases which involved various kinds of pulling: *Fisher v. Merrill Ann Creations*, 13 App. Div. 2d 562, 212 N.Y.S.2d 18 (1961); *Deutsch v. Garey*, 12 App. Div. 2d 830, 209 N.Y.S.2d 420 (1961); *Hurt v. Burns Bros.*, 283 App. Div. 907, 129 N.Y.S.2d 878 (1954); *Rivers v. Malone Bronze Powder Works, Inc.*, 277 App. Div. 1071, 100 N.Y.S.2d 575 (1950).

73. *Baum v. B. & B. Auto Works*, 15 App. Div. 2d 616, 222 N.Y.S.2d 559 (1961).

74. *Moses v. Steel Drum Co.*, 8 App. Div. 2d 864, 186 N.Y.S.2d 953 (1959); see the following cases which involved driving a truck or car: *Grodsky v. Front St. Parking, Inc.*, 13 App. Div. 2d 586, 212 N.Y.S.2d 212 (1961); *Napolitano v. Fusco*, 9 App. Div. 2d 802, 192 N.Y.S.2d 520 (1959); *Sanders v. Samuel Adler, Inc.*, 5 App. Div. 2d 1028, 173 N.Y.S.2d 322 (1958); *cf. Bleich v. 63rd Building Corp.*, 15 App. Div. 2d 584, 221 N.Y.S.2d 806 (1961) (removing snow); *Jackson v. Board of Educ.*, 12 App. Div. 2d 542, 206 N.Y.S.2d 737 (1960) (removing snow).

75. *Cronberg v. Lenmar Holding Corp.*, 17 App. Div. 2d 885, 233 N.Y.S.2d 370 (1962); *Strickland v. Justice Motors, Inc.*, 9 App. Div. 2d 805, 192 N.Y.S.2d 517 (1959); *Bahn v. Wolfensohn, Inc.*, 286 App. Div. 902, 142 N.Y.S.2d 2 (1955).

76. *Fish v. Smithville Volunteer Fire Co.*, 12 App. Div. 2d 573, 206 N.Y.S.2d 822 (1960); *Fisher v. Buffalo Elec. Co.*, 2 App. Div. 2d 612, 151 N.Y.S.2d 959 (1956); *Landy v. C. & S. Plumbing Co.*, 284 App. Div. 918, 134 N.Y.S.2d 346 (1954).

77. *Goldman v. White & Case*, 9 N.Y.2d 763, 215 N.Y.S.2d 71, 174 N.E.2d 744 (1961); *cf. Kane v. Canal Offset Plate Serv., Inc.*, 24 App. Div. 2d 810, 263 N.Y.S.2d 818 (1965) (a batch of flats weighing 15 pounds); *Botwinick v. Arnolds Men Shop, Inc.*, 12 App. Div. 2d 868, 210 N.Y.S.2d 87 (1961) (a 35-pound form).

78. *Burris v. Lewis*, 2 N.Y.2d 323, 141 N.E.2d 424 (1957).

of cutting and attaching pipe,⁷⁹ and upon the normal work of a mechanic.⁸⁰

Another common cause of heart attacks encountered in compensation cases is climbing. There have been numerous awards involving heart attacks caused by climbing both stairs⁸¹ and ladders,⁸² although there have also been some denials of claims arising out of such circumstances.⁸³

An increasingly prolific category of cases is that in which the causative element is found in excitement, fear, anger, worry, nervous strain, or tension caused by overwork, rather than in some physical exertion. Among the fact situations that have grounded awards are: an unusually heavy and strenuous period of litigation for an attorney;⁸⁴ the emotional strain of possible removal for failure to meet a project deadline coupled with worry about incurring excessive costs;⁸⁵ an argument with the employee's superior;⁸⁶ the excitement of a night watchman observing suspicious acts of two men;⁸⁷ and the

79. *Bobb v. Weaderhorn Constr. Co.*, 8 App. Div. 2d 888, 186 N.Y.S.2d 814 (1959).

80. *Hawthorne v. Eagle Delivery Truck Renting Corp.*, 20 App. Div. 2d 824, 247 N.Y.S.2d 448 (1964).

81. *E.g.*, *Himovitch v. Chiaet Ornamental Iron Works*, 24 App. Div. 2d 799, 263 N.Y.S.2d 971 (1965); *Nutis v. Saloway's Restaurant*, 16 App. Div. 2d 846, 227 N.Y.S.2d 591 (1962); *Corso v. Tandy & Allen Associates*, 10 App. Div. 2d 741, 197 N.Y.S.2d 510 (1960); *Riccobono v. Continental Cas. Co.*, 2 App. Div. 2d 718, 152 N.Y.S.2d 543 (1956); *Neyman v. Charlie Baker Clothier*, 283 App. Div. 755, 128 N.Y.S.2d 214 (1954); *Klein v. Louis Candel, Inc.*, 280 App. Div. 1029, 116 N.Y.S.2d 618 (1952); *Kehoe v. London Guar. & Acc. Ins. Co.*, 278 App. Div. 731, 103 N.Y.S.2d 72 (1951).

82. *E.g.*, *Harmonay v. Harmonay*, 24 App. Div. 2d 800, 263 N.Y.S.2d 623 (1965); *Hutton v. Ford Motor Co.*, 9 App. Div. 2d 589, 189 N.Y.S.2d 448 (1959).

83. *E.g.*, *Bloom v. Israel Cohen & Son*, 16 App. Div. 2d 841, 227 N.Y.S.2d 747 (1962) (stairs); *O'Brien v. Ronneberg*, 8 App. Div. 2d 880, 186 N.Y.S.2d 725 (1959) (ladder).

84. *Schechter v. State Ins. Fund*, 6 N.Y.2d 506, 160 N.E.2d 901 (1959); *cf.* *Goodwin v. Workmen's Compensation Bd.*, 20 App. Div. 2d 951, 249 N.Y.S.2d 63 (1964) (a workmen's compensation referee who had to handle an extra case load and deal with several emotional claimants); *Mueller v. Rutgers Club, Inc.*, 278 App. Div. 619, 101 N.Y.S.2d 953 (1951) (long hours and unusual excitement causing the death of a social club steward).

85. *Klimas v. Trans Caribbean Airways, Inc.*, 12 App. Div. 2d 551, 207 N.Y.S.2d 72 (1960), *rev'd*, 10 N.Y.2d 209, 219 N.Y.S.2d 14, 176 N.E.2d 714 (1961); *cf.* *Ferreri v. General Auto Driving School, Inc.*, 26 App. Div. 2d 601, 271 N.Y.S.2d 421 (1966) (suspended inspector on way to take lie detector test); *Hamilton v. Transport Workers Union*, 21 App. Div. 2d 434, 251 N.Y.S.2d 104 (1964) (the emotional strain of a union employee caused by a hearing concerning his alleged malfeasance).

86. *Wilson v. Tippetts-Abbott-McCarthy-Stratton*, 22 App. Div. 2d 720, 253 N.Y.S.2d 149 (1964); *Chavkin v. Rotter*, 20 App. Div. 2d 158, 245 N.Y.S.2d 435 (1963).

87. *Albarella v. Glick Dev., Inc.*, 19 App. Div. 2d 920, 244 N.Y.S.2d 107 (1963); *cf.* *Lobman v. Bernhard Altmann Corp.*, 19 App. Div. 2d 931, 244 N.Y.S.2d 425 (1963) (the strain of a promotional trip on a sales manager); *Antonini v. Progressive Electronics*, 15 App. Div. 2d 842, 224 N.Y.S.2d 481 (1962) (fright when awakening to find one's truck on fire); *Cappozalo v. City Housing Authority*, 1 App. Div. 2d 709, 146 N.Y.S.2d 747 (1955) (the stress of conducting lectures without the usual assistance).

strain of attempting to avoid a traffic accident.⁸⁸ Perhaps because of the somewhat more elusive nature of emotional causation, the proportion of denials of recovery is higher in this category than in the others. Thus, there are unsuccessful cases involving hard-working attorneys,⁸⁹ emotion-ridden bookkeepers,⁹⁰ and tension-racked business executives.⁹¹ In addition, there are a number of frustrated claims which were based on arguments⁹² and altercations.⁹³

This catalog of heart cases arranged according to factual background may be concluded by a brief reference to a category which—at least as to its ability to satisfy the “by accident” concept—is one of the least controversial: that in which the heart failure is associated with some obvious mishap, such as a trauma,⁹⁴ a fall,⁹⁵ or a slip.⁹⁶

B. *The Legal Tests*

We are now ready to attempt to decipher the pattern of legal tests that lies buried in this mass of cases. These tests are to be found partly in the occasional efforts of the New York courts to verbalize their rules and partly in the mosaic made by their actual decisions, a large proportion of which announce a result based on the particular facts without providing any specific articulation of the legal principle which is being applied.

The clue to understanding the current state of the law in New York is the realization that, while the courts still insist upon some kind of “unusualness” in the precipitating event, that unusualness can take at least two, and perhaps three, different forms. The word “unusual” is a relative term; the event must therefore be unusual

88. *Eckhaus v. Adeck Stores, Inc.*, 11 App. Div. 2d 569, 200 N.Y.S.2d 515 (1960), *rev'd*, 11 N.Y.2d 862, 227 N.Y.S.2d 680, 182 N.E.2d 287 (1962); *Wiltcher v. National Transp. Co.*, 283 App. Div. 977, 130 N.Y.S.2d 586 (1954).

89. *Greenfield v. Goldrich*, 271 N.Y.S.2d 504 (1966); *Gallagher v. County of Oswego*, 14 App. Div. 2d 463, 216 N.Y.S.2d 134 (1961).

90. *Roth v. Model Pawnbrokers*, 16 App. Div. 2d 841, 227 N.Y.S.2d 543 (1962). See also *Gordon v. Temple Beth El*, 18 App. Div. 2d 855, 236 N.Y.S.2d 101 (1963), *aff'd*, 14 N.Y.2d 742, 199 N.E.2d 508, 250 N.Y.S.2d 429 (1964).

91. *Lesnik v. National Carloading Corp.*, 285 App. Div. 649, 140 N.Y.S.2d 907 (1955), *aff'd*, 309 N.Y. 958, 132 N.E.2d 326 (1956).

92. *Cramer v. Barney's Clothing Store*, 13 N.Y.2d 711, 191 N.E.2d 901, 241 N.Y.S.2d 844 (1963); *Zygler v. Tenzer Coat Co.*, 19 App. Div. 2d 660, 240 N.Y.S.2d 543 (1963), *aff'd*, 15 N.Y.2d 562, 203 N.E.2d 217, 254 N.Y.S.2d 537 (1964); *Coleman v. Guide-Kalkhoff-Burr, Inc.*, 10 N.Y.2d 857, 178 N.E.2d 912, 222 N.Y.S.2d 689 (1961); *Santacroce v. 40 W. 20th St., Inc.*, 10 N.Y.2d 855, 178 N.E.2d 912, 222 N.Y.S.2d 689 (1961).

93. *Unterberg v. Department of Labor*, 16 App. Div. 2d 668, 242 N.Y.S.2d 256 (1963).

94. *De Luca v. Garrett & Co.*, 12 App. Div. 2d 569, 206 N.Y.S.2d 839 (1960).

95. *Friedman v. Fada, Inc.*, 12 App. Div. 2d 866, 209 N.Y.S.2d 936 (1961).

96. *Wasserman v. Covington Fabrics Corp.*, 9 App. Div. 2d 554, 189 N.Y.S.2d 503 (1959).

in relation to some specified norm which is accepted as "usual." While a large number of New York cases use the word "unusual" without identifying the norm taken as "usual," there are a sufficient number of cases specifying the benchmark of "usualness" to support the following breakdown:

An event (exertion, excitement, etc.) is sufficiently unusual to impart accidental character if it is unusual in relation to *any one* of the three following norms:

- (a) The employee's own usual work;
- (b) The "wear and tear" of ordinary non-employment life; or
- (c) The usual work of other employees.

The addition of test (b) is the most significant development since the *Masse* case in the refinement of the New York rule. The test seems to be traceable to the case of *Burris v. Lewis*,⁹⁷ which demonstrated that, while *Masse* would permit an award even though the claimant had merely been engaged in his regular duties, *Masse* did not open the floodgates to permit awards for the results of any exertion, however ordinary. Rather, the New York Court of Appeals read *Masse* as meaning that an exertion which was regular and routine in relation to an employee's usual employment duties could be the basis of an award if, and only if, it was greater than the ordinary wear and tear of non-employment life.⁹⁸ The court also scrupulously insisted on the medical causation factor by adding that the heart attack must be shown to have been caused by the unusually hard work thus demanded.

The *Masse* case decided that the precipitating cause need not be something more strenuous than the normal performance of the work demanded, provided that the ordinary course of the work was sufficiently strenuous to require more than normal exertion. But where, as here, a heart has deteriorated so that any exertion becomes an overexertion, where the mere circumstance that the employee was engaged in some kind of physical labor is what impels the doctor to testify that his work caused his death, we would have reached a point, if this award were to be upheld, where all that is necessary to sustain an award is that the employee shall have died of heart disease.⁹⁹

97. 2 N.Y.2d 323, 141 N.E.2d 424 (1957).

98. See also *Carrasquillo v. Santini Bros.—The Original*, 13 N.Y.2d 245, 196 N.E.2d 52, 246 N.Y.S.2d 392 (1963); *Stein v. 200 Lafayette St. Corp.*, 22 App. Div. 2d 996, 254 N.Y.S.2d 956 (1964); *Jackson v. Board of Educ.*, 12 App. Div. 2d 542, 206 N.Y.S.2d 737 (1960).

99. 2 N.Y.2d at 326, 141 N.E.2d at 426.

The "wear and tear" rule has been pressed into service in New York since 1957 both to support awards¹⁰⁰ and to defeat them.¹⁰¹ This test appears to be aimed essentially at distinguishing between heart attacks that are the result of the "natural progression" of heart disease and those that are not, and the distinction is sometimes explicitly phrased in these terms, both in awards,¹⁰² and in denials.¹⁰³ However, it must be stressed that the "wear and tear" rule has not displaced the rule that heart attacks are compensable when caused by exertion greater than that normally required of the employee; the new rule merely supplements the old, or forms an exception to it. In other words, it is only necessary to appeal to the "wear and tear" rule when the facts show no more than regular exertion in the employee's normal activities.

The fact that the new test is an alternative is amply demonstrated by the large number of awards that are still made on the basis of unusualness in relation to the employee's own regular work. This unusualness can take many forms. An obvious example is the case in which, at the time of his heart attack, the employee was engaged in duties that were themselves different from or in addition to his normal duties. Now and then an executive or salesman, not toughened to the demands of muscular exertion by his accustomed sedentary or verbal activities, has occasion to lift some object whose weight proves to be too much for him.¹⁰⁴ But unusualness may also be found when the shift is from one kind of physical work to another, as from watering lawns to pitching leaves into a truck,¹⁰⁵ or

100. *E.g.*, *Dodson v. Frank Vanecek & Son*, 24 App. Div. 2d 787, 263 N.Y.S.2d 774 (1965); *Lerner v. Terrycab Co.*, 20 App. Div. 2d 615, 245 N.Y.S.2d 565 (1963); *Shefick v. Lefrak*, 11 App. Div. 2d 828, 202 N.Y.S.2d 410 (1960); *Burke v. New York World Telegram & Sun*, 10 App. Div. 2d 742, 198 N.Y.S.2d 108 (1960); *Johnson v. Swift & Co.*, 10 App. Div. 2d 656, 196 N.Y.S.2d 330 (1960); *Gibalski v. Elmira Country Club*, 8 App. Div. 2d 883, 187 N.Y.S.2d 159 (1959); *Moses v. Steel Drum Co.*, 8 App. Div. 2d 864, 186 N.Y.S.2d 953 (1959).

101. *E.g.*, *Goldman v. White & Case*, 9 N.Y.2d 763, 174 N.E.2d 744, 215 N.Y.S.2d 71 (1961); *Burris v. Lewis*, 2 N.Y.2d 323, 141 N.E.2d 424 (1957); *Hawthorne v. Eagle Delivery Truck Renting Corp.*, 20 App. Div. 2d 824, 247 N.Y.S.2d 448 (1964); *O'Brien v. Ronneberg*, 8 App. Div. 2d 880, 186 N.Y.S.2d 725 (1959).

102. See, *e.g.*, *Abbott v. Bedford Prod. Div., Nat'l Dairy Prod. Corp.*, 15 App. Div. 2d 31, 221 N.Y.S.2d 840 (1961); *Moses v. Steel Drum Co.*, 8 App. Div. 2d 864, 186 N.Y.S.2d 953 (1959).

103. See, *e.g.*, *Bloom v. Israel Cohen & Son*, 16 App. Div. 2d 841, 227 N.Y.S.2d 747 (1962); *Bobb v. Weaderhorn Constr. Co.*, 8 App. Div. 2d 888, 186 N.Y.S.2d 814 (1959).

104. *Adler v. N. Adler's Son, Inc.*, 24 App. Div. 2d 1050, 265 N.Y.S.2d 703 (1965); *Witten v. Sargoy & Stein*, 15 App. Div. 2d 617, 222 N.Y.S.2d 369 (1961); *O'Brien v. Long Island State Parkway Comm'n*, 13 App. Div. 2d 855, 214 N.Y.S.2d 786 (1961); *Gordon v. Cenu Fibres*, 10 App. Div. 2d 655, 196 N.Y.S.2d 349 (1960); *Erde v. Morris Erde, Inc.*, 9 App. Div. 2d 797, 192 N.Y.S.2d 784 (1959); *Sabasowitz v. Gold Theatre*, 283 App. Div. 899, 130 N.Y.S.2d 121 (1954).

105. *Gibalski v. Elmira Country Club*, 8 App. Div. 2d 883, 187 N.Y.S.2d 159 (1959).

from a carpenter's repair and alteration work to the operating of a mortising machine.¹⁰⁶ In one interesting case, the comparison was made not with the normal demands of the employee's present job, but rather with the demands of his previous job; an award was accordingly made for the death of a bulldozer operator who, two weeks earlier, had the less strenuous job of an oiler.¹⁰⁷ Somewhat less obviously unusual is the performance of a task or exertion which, while not of frequent occurrence, does recur with some degree of regularity. For example, one employee had extra duties each Wednesday evening and had a fatal heart attack after one such evening's work.¹⁰⁸ Another had a heart attack as the result of an activity he normally undertook once a month.¹⁰⁹ Compensation was awarded in both instances. It is thus quite clear that unusualness may be a matter of degree, as well as of kind.¹¹⁰ It may appear in the duration,¹¹¹ strenuousness,¹¹² distance,¹¹³ or other circumstances¹¹⁴ involved in the execution of routine assignments.

Three norms were mentioned above as operating side by side when the usualness of an exertion is determined in New York: the employee's own normal strain; the wear and tear of non-employment life; and the normal strain of other employees. The vast majority of the cases fall within the first two categories. The third is illustrated by a pair of cases involving emotional strain. In one, the heart failure was allegedly caused by the employee's argument with a superior. Compensation was denied on the express ground that the emotional

106. *Clayback v. Globe Woven Belting Co.*, 282 App. Div. 973, 125 N.Y.S.2d 493 (1953).

107. *Hudson v. Waddington Constr.*, 14 App. Div. 2d 463, 217 N.Y.S.2d 130 (1961).

108. *Domash v. Standard Coat, Apron & Linen Serv.*, 11 App. Div. 2d 575, 201 N.Y.S.2d 142 (1960), *aff'd*, 9 N.Y.2d 889, 175 N.E.2d 831, 216 N.Y.S.2d 702 (1961). See also *Kushner v. Landau, Newman & Rosen*, 13 App. Div. 2d 564, 211 N.Y.S.2d 744 (1961).

109. *Wheaton v. Chevrolet-Buffalo Div. of General Motors Corp.*, 9 App. Div. 2d 591, 189 N.Y.S.2d 419 (1959); *cf. Deutsch v. H. & S. Dairy Prod., Inc.*, 12 App. Div. 2d 845, 209 N.Y.S.2d 570 (1961); *Botke v. Globe Stationery & Toy Co.*, 278 App. Div. 621, 101 N.Y.S.2d 850 (1951).

110. See *Schechter v. State Ins. Fund*, 6 N.Y.2d 506, 160 N.E.2d 901 (1959).

111. *Martinelli v. Metropolis Trucking Co.*, 8 N.Y.2d 806, 168 N.E.2d 254 (1960). *Johnson v. Gristede Bros.*, 278 App. Div. 732, 103 N.Y.S.2d 39 (1951), *on the authority of Westbrook v. Southside Sportmen's Club*, 274 App. Div. 954, 83 N.Y.S.2d 664 (1948), *aff'd*, 299 N.Y. 748, 87 N.E.2d 669 (1949).

112. *Carpenter v. Sibley, Lindsay & Curr Co.*, 302 N.Y. 304, 97 N.E.2d 915 (1951); *Brilli v. Brilli*, 283 App. Div. 905, 130 N.Y.S.2d 142 (1954).

113. *Burke v. New York World Telegram & Sun*, 10 App. Div. 2d 742, 198 N.Y.S.2d 108 (1960).

114. *Brocklebank v. Union Carbide Int'l Co.*, 17 App. Div. 2d 1009, 234 N.Y.S.2d 69 (1962), *aff'd*, 13 N.Y.2d 1036, 195 N.E.2d 313, 245 N.Y.S.2d 604 (1963); *Burke v. Chef's Hat Restaurant*, 16 App. Div. 2d 712, 226 N.Y.S.2d 955 (1962); *Sanders v. Samuel Adler, Inc.*, 5 App. Div. 2d 1028, 173 N.Y.S.2d 322 (1958); *Sleator v. National City Bank*, 285 App. Div. 393, 137 N.Y.S.2d 289, *aff'd*, 309 N.Y. 708, 128 N.E.2d 415 (1955).

strain involved was no greater than that to which all workers are subjected.¹¹⁵ Three years later, in another case involving an argument with a superior—this one conducted through an intermediary located midway between the parties—compensation was awarded on the express ground that there was “greater emotional strain or tension than that to which all workers are occasionally subjected.”¹¹⁶ It is difficult to see how a test based on the “normal strain of all other employees” could be successfully extrapolated beyond the immediate fact situation, that of emotional stress growing out of a work argument. Even in that situation, it is a questionable norm; for is there some fixed measurable quantity of emotional tension common to all employments? In any event, there is plainly no such fixed quantity as to physical exertion, such as lifting or climbing. In short, it is doubtful that the already complex law as to the compensability of heart attacks is enriched or clarified by adding this third norm to the tests based on the employee's own normal strain and on the stress of non-employment life.

IV. A CRITICAL APPRAISAL

We have traced in some detail the experience of one major jurisdiction which abruptly reversed its rule from the unusual-exertion rule to the usual-exertion and accidental-result formula, and of another major jurisdiction which has demonstrated both the problems created by the unusual-exertion test and the need for a more sophisticated criterion. We may now attempt a critical appraisal of the competing doctrines. The central question is whether the unusual-exertion test is a valid and workable test by which to determine the accidental character of an injury. It is subject to criticism on three grounds.

The first is its assumption that the accidental character of an injury must be found in the cause rather than in the result. Except when express statutory language inserts some such requirement,¹¹⁷ there is nothing in the “accident” concept which demands this limitation, and, as shown above, the accidental-result interpretation

115. *Santacrose v. 40 W. 20th St., Inc.*, 10 N.Y.2d 855, 222 N.Y.S.2d 689 (1961).

116. *Wilson v. Tippetts*, 22 App. Div. 2d 720, 721, 253 N.Y.S.2d 149, 150 (1964).

117. The 1961 amendments to MONT. REV. CODES ANN. § 92-418 (1947) define an injury as happening “from an unexpected cause.” The prior wording referred to “some fortuitous event.” See also statutes expressly adopting the unexpected or accidental result theory: “[A]ccident” shall mean only an unexpected or unusual event *or result*.” FLA. STAT. § 440 (1965). Ohio has defined injury as: “any injury, whether caused by accidental means or accidental in character *and result*.” OHIO REV. CODE ANN. § 4123.01 (Page 1965). (Emphasis added.)

was already well embedded in the phrase "by accident" by the time the phrase was taken over by the states from the British Act.¹¹⁸ Georgia is a good example of a state which has carried to its ultimate expression the reasoning that an unexpected result is sufficient to supply the accidental element, whether the cause is extraordinary or not.¹¹⁹ It adopted the following formula: "An accident arises out of the employment when the required exertion producing the accident is too great for the man undertaking the work, whatever the degree of exertion or the condition of health."¹²⁰ In one case in which this rule was applied, the Georgia court actually deemed accidental a heart failure following exertion which was lighter than usual, since the exertion did in fact precipitate the attack.¹²¹ In this case, the decedent had asked to be put on less strenuous work because he was not feeling well, and at the time of his death he was only carrying one-by-four boards, none of which weighed over twenty pounds—about the weight of a portable typewriter or a pail of water. Yet it was established by the medical testimony that, because of his extremely bad heart condition, even this exertion was capable of precipitating the collapse. In the same month, Georgia also awarded compensation for a heart attack suffered five minutes after a bookkeeper had walked up a single flight of stairs to his office.¹²²

The second criticism of the unusual-exertion requirement—an equally elementary criticism going to the plain meaning of the word "accident"—involves the assumption that whatever is unusual is accidental. Whether one takes the everyday colloquial meaning or the most technical dictionary meaning of the term accidental, this assumption is not true. Whether a thing is accidental depends on whether it is unexpected or unintended. One can deliberately do the unusual and one often does. If an employee intentionally and knowingly undertakes to lift an unusual load, the lifting is no more accidental than if he had deliberately lifted a normal load. Or if a gardener deliberately continues to mow the lawn in the rain,¹²³ an observer would not say that the gardener was experiencing an accident merely because it is unusual to mow lawns in the rain. Yet on

118. See notes 13-15 *supra* and accompanying text.

119. See *Aetna Cas. & Sur. Co. v. Pulliam*, 99 Ga. App. 406, 108 S.E.2d 823 (1959); *Williams v. Maryland Cas. Co.*, 67 Ga. App. 649, 21 S.E.2d 478 (1952).

120. *Williams v. Maryland Cas. Co.*, 67 Ga. App. 649, 653, 21 S.E.2d 478, 481 (1952); *accord*, *Triebisch v. Athletic Mining & Smelting Co.*, 218 Ark. 379, 237 S.W.2d 26 (1951).

121. *Lumbermen's Mut. Cas. Co. v. Kitchens*, 81 Ga. App. 470, 59 S.E.2d 270 (1950).

122. *Bussey v. Globe Indem. Co.*, 81 Ga. App. 401, 59 S.E.2d 34 (1950).

123. See *Dotola v. Hill*, 257 App. Div. 870, 11 N.Y.S.2d 889 (1939) (*held*, contraction of sciatica accidental under such circumstances).

this broken reed—the identification of unusual with accidental—lean the hundreds of cases that have swollen the compensation reports with distinctions between the usual and the unusual in working conditions.

The third criticism is that, in practice, the usual-unusual distinction is unworkable. The distinction assumes that there is a quantum of exertion or exposure in any occupation which is usual or normal—an assumption which is questionable at best, and certainly difficult to apply. Any employee looking forward to his coming year's work knows that he will work long hours as well as short hours, in cold weather as well as hot, sometimes faster and sometimes more slowly.¹²⁴ The butcher will lift both light and heavy sides of beef, and one day he will encounter the heaviest side of beef he has lifted all year. Will that be a usual lift?¹²⁵ The fireman will have easy fires and difficult fires; the loader will lift little boxes and bigger boxes and biggest boxes; the policeman will arrest complaisant drunks and difficult drunks.¹²⁶ None of this is either unusual or unexpected; yet a surprising number of cases will hold an exertion unusual when it is nothing more than the heaviest part of the claimant's usual work.¹²⁷

Holmes' statement that the life of the law has been not logic but experience is probably truer in compensation law than in any other field. Although most of the law built up around the "accident" requirement, for example, has been based on false premises and embroidered with irrelevant distinctions, there has been a utilitarian purpose behind it all which cannot be disregarded when all of the logical criticisms have been exhausted. That practical consideration is the fear that heart and related cases will get out of control, and will become compensable whenever they take place within the time and space limits of employment, unless some kind of arbitrary boundaries are set. Most states have chosen to press the "accident"

124. See *Walsh v. United States Rubber Co.*, 238 S.C. 411, 120 S.E.2d 685 (1961), in which the claimant suffered a heart attack. The court found that continual interruption by the claimant's superiors, who ordered him to abandon his usual duties as stockman in order to fetch special materials, constituted unusual exertion when he tried to "double-up" in order to get his regular work done by the end of the day and compensation was awarded.

125. *Industrial Comm'n v. Luger*, 54 Ohio. App. 148, 6 N.E.2d 573 (1936) (*held*, accidental).

126. See *De Esch v. Borough of Emmaus*, 143 Pa. Super. 225, 18 A.2d 89 (1941) (*held*, coronary thrombosis accidental).

127. See, e.g., *York v. State Workmen's Ins. Fund*, 131 Pa. Super. 496, 200 Atl. 230 (1938), in which compensation was awarded because, although dumping cars was the miner's usual work, it was the hardest part of it.

concept into service as one of these arbitrary boundaries, but, with a few exceptions, one gets the impression that what is behind it all is not so much an insistence on accidental quality for its own sake as the provision of an added assurance that compensation will not be awarded for deaths not really caused in any substantial degree by the employment.

Unfortunately, the unusual-exertion requirement is a clumsy and ill-fitting device with which to ensure causal connection, although it undoubtedly does frequently rule out cases in which work-connection is questionable. The fallacy of testing work-connection by a comparison of a man's particular fatal exertion with his usual exertion is that, in many occupations, even the usual exertion is clearly capable of causing the heart collapse. Conversely, in many occupations the usual exertion requires so little effort that, even when it is exceeded, it is medically improbable that the "unusual" exertion could cause heart failure. It is not as though continuous heavy work over a long period produced a strong heart, while desk work for the same period resulted in a weak heart. The longshoreman and the salesman may have hearts which, weakened by disease, are no different in their ability to withstand strain. In *Philadelphia Dairy Products Company v. Farran*,¹²⁸ a salesman indulged in the (for him) unusual effort of carrying a fifteen-pound parcel, while the claimant in *Marlowe v. Huron Mountain Club*¹²⁹ lifted 200-pound sacks of mail, which for him was routine. Farran got compensation; Marlowe did not. The point is that, as a matter of medical causation, the only question is the ability of the particular strain to affect the particular diseased heart; the character of the claimant's previous exertions is of much less relevance to this issue than is the medical question whether, given this heart and this exertion, the exertion in fact contributed to the collapse. One would assume that a causal connection could more readily be shown when the object lifted was 200 pounds than when it was fifteen.

V. A SUGGESTED SOLUTION

The beginning point in any attempt to articulate a sound working rule for the heart cases is the recognition of the fact that, while limits must be put on heart liability, the essence of the problem

128. 44 Del. 380, 57 A.2d 88 (Super. Ct.), *aff'd*, 44 Del. 437, 61 A.2d 400 (Sup. Ct. 1948).

129. 271 Mich. 107, 260 N.W. 130 (1935). *Marlowe* was decided under the earlier Michigan rule. See notes 6 & 7 *supra* and accompanying text.

is causation. The fact that an increasing number of jurisdictions accept this beginning point is a step in the right direction, but there is one additional preliminary step which is indispensable to an orderly analysis, and that is to recognize that the causation question has two distinct parts: the legal and the medical. The *law* must define what kind of exertion satisfies the test of "arising out of the employment"; then the *doctors* must say whether the exertion which has been held legally sufficient to support compensation has in fact caused the heart attack. All too often these two tests are scrambled together. When this happens, the courts usually lose sight of one of them. Thus, obsession with the legal test of unusual exertion may lead to a holding that a very slight exertion, because it satisfies the legal test in that it is unusual for the particular employee, is adequate to support an award, although its ability to account medically for the collapse seems remote. Conversely, obsession with medical causation sometimes leads to a slighting of the need for precision in defining the legal rule, with the result that decisions may be based on statements by doctors that an exertion did or did not cause a heart attack, although neither the doctors nor the lawyers may have had a clear concept of what the term "cause" meant in this setting.

The first task, then, is to state plainly the legal test of causation. If we can keep to one side the complications that have been introduced by attempts to cram this problem into the "accident" mold, we will see that the causation issue can be solved by invoking the distinction which exists in compensation law between neutral-risk situations (where there is no obvious personal or employment element contributing to the risk) and personal-risk situations (where a personal risk contributes to the injury, although perhaps in a relatively small degree).¹³⁰ As to situations which do not involve any personal risk element, the better rule goes beyond the old rule, which demanded that the employment contribute an increased or peculiar risk, and accepts actual risk,¹³¹ or even positional risk.¹³² The reason is that there is no competing personal risk to overcome. Any employment contribution, even merely putting the employee in the place where the injury from a neutral force occurred, is enough, because it is greater than the zero employee contribution. But when the employee contributes some personal element of risk—*e.g.*, by having a personal enemy who assaults him,¹³³ or a personal

130. See 1 LARSON, LAW OF WORKMEN'S COMPENSATION § 7 (1965).

131. *Id.* §§ 8.43 & 9.40.

132. *Id.* § 10.

133. *Id.* § 11.23.

disease which figures causally in his injury¹³⁴—the employment must contribute something substantial to increase the risk. The reason is that the employment risk must offset the causal contribution of the personal risk. The result in idiopathic fall cases in most jurisdictions is that there is no compensation unless some height or object associated with the work adds to the risk.¹³⁵

In heart cases, the effect of applying this distinction between neutral-risk and personal-risk situations would be clear. If there is some personal causal contribution *in the form of a previously weakened or diseased heart*, a heart attack would be compensable only if the employment contribution takes the form of an exertion greater than that of non-employment life. Note that the comparison is not with *this employee's* usual exertion *in his employment*, but rather with the exertions present in the normal *non-employment* life of this or any other person. On the other hand, if there is no personal causal contribution, that is, if there is no prior weakness or disease, *any* exertion connected with the employment and causally connected with the collapse as a matter of medical fact would be adequate to satisfy the *legal* test of causation. This is the heart-case application of the actual risk test: *this* exertion in fact causally contributed to *this* collapse. In both situations, whether or not there was prior personal weakness or disease, the claimant would also have to show that *medically* the particular exertion contributed causally to the heart attack.

To highlight the difference in practice between the old unusual-exertion test and the suggested rule, let us postulate two extreme cases. Suppose first that X's job involves the frequent lifting of 200-pound bags, and that one such 200-pound lift medically produces a heart attack. Under the old unusual-exertion rule there would be no compensation, regardless of any previously existing heart condition, because the activity was not unusual for X.¹³⁶ Under the suggested rule there would be compensation, even in the presence of a history of heart disease, because people generally do not lift 200-pound weights as a part of non-employment life, and therefore the employment contributed a strain which was beyond the ordinary wear and tear of life. At the other extreme, suppose that Y's usual job in-

134. *Id.* §§ 12.10-14.

135. *Id.* § 12.14.

136. See *Marlowe v. Huron Mountain Club*, 271 Mich. 107, 260 N.W. 130 (1935). See also *Latimer v. Sevier County Farmers Co-op., Inc.*, 233 Ark. 762, 346 S.W.2d 673 (1961), in which lifting four 100-pound sacks was insufficient evidence of a causal relation between the employment and a fatal coronary thrombosis.

volves no lifting. Suppose he lifts a fifteen-pound weight on the job, and suppose there is medical testimony that this lift caused his heart attack. Under the old test, which was concerned exclusively with the comparison between an employee's usual exertions and the precipitating exertion, there would be compensation.¹³⁷ Under the suggested rule, the result would depend on whether there was a personal causal element in the form of a previously weakened heart. If there was no history of heart disease, compensation would be awarded since the employment contributed something to the employee's collapse and his personal life contributed nothing. If the employee had a previously weakened heart, compensation would be denied in spite of the medical causal contribution of his employment, because legally the personal causal contribution was substantial, while the employment added nothing to the usual wear and tear of life—which certainly includes lifting objects weighing 15 pounds, such as bags of golf clubs, step ladders, or sets of *The Law of Workmen's Compensation* (with Annual Supplement).¹³⁸

The suggested rule has borrowed from the most recent New York test, the "wear and tear" concept. The decisive advance over the old unusual-exertion test is the alteration in the norm of exertion with which the precipitating exertion is compared. The old norm was the particular employee's usual exertion. The new norm is the exertion of ordinary non-employment life. What New York now must do, in order to bring its heart case story to an orderly conclusion, is hold that the "wear and tear" rule applies only in cases of prior heart weakness, adapt its own actual-risk test to all other cases by giving awards in these cases for heart attacks caused by usual exertion, and sweep away the vestiges of the old unusual-exertion-for-this-employee test.

As for Michigan, its energies have been so thoroughly devoted to the one gigantic effort of throwing off the unusual-exertion requirement that it has hardly had time to face the more subtle problems of keeping the heart cases within appropriate bound-

137. See *Philadelphia Dairy Prods. Co. v. Farran*, 44 Del. 380, 57 A.2d 88 (Super Ct.), *aff'd*, 44 Del. 437, 61 A.2d 400 (Sup. Ct. 1948).

138. It is this feature that distinguishes the proposed rule from the rule that accepts in all heart cases any exertion as long as medical causation is shown. In other words, under the proposed rule, there will be cases in which employment exertion was medically capable of accounting for the collapse, and in which denials will nevertheless result because the exertion does not rise above the "wear and tear of life" level. See, e.g., *Di Cicco v. Liebmman Breweries, Inc.*, 11 App. Div. 2d 613, 201 N.Y.S.2d 123 (1960), in which medical testimony that any effort would trigger the fatal attack resulted in the court denying the compensation award because the ordinary wear and tear of life would have produced the same result.

aries without the aid of the unusual-exertion test. However, one point should be emphasized immediately to dispel any apparent inconsistency between the proposed solution and some passages in the *Sheppard* case. In that case, the Michigan Supreme Court went to considerable lengths to denounce and destroy the distinction between cases involving previous disease and weakness, and cases involving previously healthy claimants. However, it condemned this distinction specifically for the purpose of demonstrating, quite correctly, that there should not be a difference in the "by accident" rule applicable to the two types of cases. The point of the distinction between previously healthy and previously diseased claimants in the rule suggested in this article is purely one of causation. Clearly there should not be one "by accident" rule for workers with prior heart disease and another for those with no such history. Equally clearly, it would be unrealistic to deny that the presence or absence of pre-existing heart disease has relevance in determining whether the final heart collapse was causally related to the employment or occurred merely by coincidence during working hours. If the workman had a previously healthy heart, the question whether the heart attack was simply the result of the natural progression of the disease could not arise, while, in a case involving advanced heart deterioration, the causal contribution of the personal pre-existing disease may loom so large that it blots out any possible finding of employment causation.

After the resolution of this question about *Sheppard*, there should be no particular difficulty in adopting the suggested rule in Michigan. The controversial cases until now have been wrestling primarily with the accident concept and can be distinguished on that ground, whereas the suggested rule constitutes merely an adaptation and refinement of basic principles drawn from the words "arising out of . . . employment." Indeed, the same route for the adoption of the proposed rule is open to practically every other jurisdiction, whether it has already accepted the usual-exertion test or whether it is merely ripe for such a change.

It must be recognized that the proposed rule raises one problem: in close cases a great deal necessarily turns on the question whether there was a pre-existing disease or weakness. If, as in a large proportion of claims, there is a provable history of heart disease, the resolution of this question presents little difficulty. But when there is no provable history of heart disease, doctors may still say that there must have been such a history, on the theory that a healthy

heart could not have given way under the particular exertion.¹³⁹ All that can be said here is that this has to be a determination of medical fact. Presumably the burden of proof would be upon the party alleging the existence of a prior heart condition as a fact essential to his case. More frequent use of autopsies, when possible, may be justified in cases in which this issue can be foreseen. Sometimes an autopsy can be distinctly helpful, as, for example, in the *Burris*¹⁴⁰ case, where the autopsy revealed no new lesions—only old ones.

Under the proposed solution, the decisional law on heart cases should not be substantially different under a "by accident" statute than under statutes like those of California, Iowa, Massachusetts, Minnesota, Rhode Island, and Texas, which do not contain such words in their coverage tests.¹⁴¹ If any court is disposed to worry about whether abandoning the unusual-exertion test would "open the flood gates,"¹⁴² it might find reassurance in the fact that getting an exertion award in such states as California,¹⁴³ Iowa,¹⁴⁴ Massachusetts,¹⁴⁵ Minnesota,¹⁴⁶ and Rhode Island¹⁴⁷ is no "pushover." In those states, the difference is that the battle is avowedly fought on the fundamental causation issue.¹⁴⁸

Up to this point, our concern has been with the first half of the

139. See, e.g., the inconclusive posture of this question in *Coombe v. Penegor*, 348 Mich. 635, 83 N.W.2d 603 (1957). The question is not settled by the opinion itself, but we find the following reference to the problem in the opinion of Justice Smith in *Sheppard v. Michigan Nat'l Bank*, 348 Mich. 577, 604, 83 N.W.2d 614, 626 (1957):

A majority is also affirming Ewart Coombe's award. Did he have a pre-existing ailment? His attending doctor says he "must" have had. The appeal board says he "may" have had. The defendants say he did have. Notwithstanding, it is proposed that his award of compensation under part 2 be affirmed. Authority? *Eula Sheppard's* case. Apparently it is no longer critical whether there was a pre-existing "disease or condition" or not. We agree. It never was.

140. *Burris v. Lewis*, 2 N.Y.2d 323, 141 N.E.2d 424 (1957).

141. See note 1 *supra*.

142. See the comment of Judge Latimer in his dissent in *Purity Biscuit Company* that the rule in that case "opens the flood gates and every internal failure becomes an accident just because it happens." *Purity Biscuit Co. v. Industrial Comm'n*, 115 Utah 1, 30, 201 P.2d 961, 975 (1949).

143. See, e.g., denials of compensation in *Daniels v. Industrial Acc. Comm'n*, 148 Cal. App. 2d 500, 306 P.2d 905 (1957); *Lancaster v. Industrial Acc. Comm'n*, 5 Cal. App. 2d 304, 42 P.2d 333 (1935); *Quail v. Industrial Acc. Comm'n*, 138 Cal. App. 412, 32 P.2d 402 (1934); *McNamara v. Industrial Acc. Comm'n*, 130 Cal. App. 284, 20 P.2d 53 (1933); *Singlaub v. Industrial Acc. Comm'n*, 87 Cal. App. 324, 262 Pac. 411 (1927).

144. See, e.g., *Hemker v. Drobney*, 253 Iowa 421, 112 N.W.2d 672 (1962); *Lindahl v. L. O. Boggs Co.*, 236 Iowa 296, 18 N.W.2d 607 (1945).

145. See, e.g., *Herlihy's Case*, 267 Mass. 232, 166 N.E. 556 (1929).

146. See, e.g., *Schuppel v. United Van Bus Co.*, 257 Minn. 444, 102 N.W.2d 24 (1960).

147. See, e.g., *Williams v. United Wire & Supply Corp.*, 194 A.2d 686 (R.I. 1963).

148. See, e.g., *Liberty Mut. Ins. Co. v. Industrial Acc. Comm'n*, 73 Cal. App. 2d 555, 166 P.2d 908 (1946).

proposed causation test in exertion cases: the question of the degree of exertion necessary to satisfy the legal test of work-connection. We now come to the second half of the test: the question whether, as a matter of medical fact, the exertion contributed causally to the collapse. A good statement of the need for medical-factual causal connection has been supplied by the Supreme Court of Georgia:

[I]t must be shown by evidence, opinion or otherwise, that the exertion attendant upon the duties of employment, no matter how slight or how strenuous, and no matter with what other factors—such as preexisting disease or predisposition to attack—it may be combined, was sufficient to contribute toward the precipitation of the attack. Where evidence as to the work engaged in shows it to be sufficiently strenuous, or of such a nature that, combined with the other facts of the case, it raises a natural inference through human experience that it did so contribute, this is sufficient. In other cases, the opinions of experts that the exertion shown by the evidence to exist would be sufficient is also sufficient to authorize a finding on the part of the fact-finding tribunal that it did. But, in one way or another, the fact must appear.¹⁴⁹

If heart failure overtakes the employee while he is waiting for a bus,¹⁵⁰ or an elevator,¹⁵¹ or walking,¹⁵² or riding in a car,¹⁵³ or doing routine clerical work,¹⁵⁴ there simply may be no strain at all in the employment activity which could cause a heart attack. The natural progress of the disease may bring the disease to its fatal climax during working hours,¹⁵⁵ but if the employee's activity at the time involves no effort, or effort which cannot medically support a causal connection, it can rightly be said that the outcome was not causally related to the employment.

149. *Hoffman v. National Sur. Corp.*, 91 Ga. App. 414, 417, 85 S.E.2d 784, 786 (1955); see *Trippe v. Lumberman's Mut. Cas. Co.*, 101 Ga. App. 373, 114 S.E.2d 72 (1960), in which a heart attack was held not compensable because merely filling an oil cup from a gallon can was insufficient exertion. See also *Finch v. Evins Amusement Co.*, 80 Ga. App. 457, 56 S.E.2d 489 (1949).

150. See *Ackerman v. H. B. Wiggins Sons*, 19 N.J. Misc. 519, 21 A.2d 628 (1941).

151. *Hyshiver v. Hotel Laurelton*, 246 App. Div. 660, 283 N.Y.S. 285 (1935); cf. *C. P. Chaney Sawmill, Inc. v. Robertson*, 233 Ark. 711, 348 S.W.2d 703 (1961).

152. See *Harper v. Henry J. Kaiser Constr. Co.*, 233 Ark. 398, 344 S.W.2d 856 (1961).

153. See *Prejean v. Bituminous Cas. Corp.*, 125 So. 2d 221 (La. App. 1960).

154. See *Union Producing Co. v. Dependents of Simpson*, 251 Miss. 183, 168 So. 2d 808 (1964).

155. See *Tritschler v. Merck & Co.*, 66 N.J. Super. 116, 168 A.2d 666 (1961); *Black v. Mahoney Troast Constr. Co.*, 65 N.J. Super. 397, 168 A.2d 62 (1961); cf. *Wheeler v. Industrial Comm'n*, 94 Ariz. 199, 382 P.2d 675 (1963); *Industrial Comm'n v. Wolfer*, 152 Colo. 205, 381 P.2d 19 (1963); *U. S. Steel Corp. v. Dykes*, 238 Ind. 599, 154 N.E.2d 111 (1958); *Hemker v. Drobney*, 253 Iowa 421, 112 N.W.2d 672 (1962); *Schuppel v. United Van Bus Co.*, 257 Minn. 444, 102 N.W.2d 24 (1960); *Hahne & Co. v. Guenther*, 114 N.J.L. 571, 178 Atl. 58 (1935); *Knight v. Berkline Corp.*, 210 Tenn. 318, 358 S.W.2d 323 (1962).

Proof that employment was not a medical cause of a heart attack can be provided in several ways. There may be direct physical evidence, perhaps afforded by an autopsy,¹⁵⁶ negating the existence of any new heart lesions or pathology.¹⁵⁷ There may also be medical opinion evidence denying the causal connection. In such cases, under familiar rules, an appellate court will not disturb a denial of compensation.¹⁵⁸ Or the medical testimony on which the claim rests may be too speculative or weak to meet the claimant's burden of proof.¹⁵⁹ In fact, the medical situation may sometimes be impossible to analyze. In such a case, if unaided by evidence connecting the injury with the employment, the claim may fail.¹⁶⁰

It is difficult enough in the heart cases merely to apply medical theory to observed facts, but the difficulty is compounded by the persisting cleavage in medical theory itself on the relation of exertion to thrombosis. Cases continue to reach the appellate courts on records in which the medical testimony is certain that exertion¹⁶¹

156. See *Burris v. Lewis*, 2 N.Y.2d 323, 141 N.E.2d 424 (1957).

157. See *Industrial Comm'n v. Daniels*, 124 Colo. 329, 236 P.2d 291 (1951); *Goldman v. White & Case*, 9 App. Div. 2d 160, 193 N.Y.S.2d 100 (1959), *aff'd*, 9 N.Y.2d 763, 174 N.E.2d 743, 215 N.Y.S.2d 71 (1961).

158. *Chapman v. C. Finkbeiner*, 230 Ark. 655, 324 S.W.2d 348 (1959); *Rorabaugh v. General Mills, Inc.*, 187 Kan. 363, 356 P.2d 796 (1960); *Scott v. Kentland-Elkhorn Coal Co.*, 335 S.W.2d 919 (Ky. App. 1960); *Batemarco v. New York Times Co.*, 9 App. Div. 2d 569, 189 N.Y.S.2d 516 (1959). *Wiederkehr v. Chambless-Rosen Drilling Co.*, 360 P.2d 513 (Okla. 1961); *Welch v. Schuler Fruit Co.*, 350 P.2d 604 (Okla. 1960).

159. See *Jones v. Industrial Comm'n*, 148 Colo. 253, 365 P.2d 689 (1961); *Thiel v. Department of Labor & Indus.*, 56 Wash. 2d 259, 352 P.2d 185 (1960).

160. *Fromer v. Stern Bros.*, 8 App. Div. 2d 868, 186 N.Y.S.2d 752 (1959).

161. *Trudenich v. Marshall*, 34 F. Supp. 486 (W.D. Wash. 1940); see *Chiara v. Villa Charlotte Bronte*, 273 App. Div. 834, 76 N.Y.S.2d 59, *aff'd*, 298 N.Y. 604, 81 N.E.2d 332 (1948) in which compensation was denied for the heart attack incurred by a janitor while carrying 75-pound garbage cans down stairs. This decision, which is out of line with the main stream of the New York cases, is explained by the following excerpt:

The employer's physician said: "... physical effort is not the cause of coronary sclerosis and coronary sclerosis is the cause of coronary thrombosis, therefore there is no causal relation No, effort is not the cause of coronary occlusion, and there is no question that the patient had a coronary occlusion; there are cases just as often when coronary occlusion occurs, while people are at rest and sometimes in bed."

Id. at 834, 76 N.Y.S.2d at 60.

Even if, as some doctors often say, coronary thrombosis can just as well occur at home in bed, it does not follow that a particular exertion or excitement did not contribute to it. See, e.g., *Marotte v. State Compensation Ins. Fund*, 145 Colo. 99, 357 P.2d 915 (1960), involving a policeman who was "shook-up" in a minor auto accident. Two days later, while still feeling "bad", he killed a garter snake for a group of excited women. Four days thereafter his own doctor diagnosed his condition as a myocardial infarction. The court awarded compensation and held that the fact that an infarction could occur while the claimant was at rest did not rebut the evidence that it occurred as the result of his employment. See also *Bundy v. Concrete Ready-Mix Co.*, 130 Ind. App. 542, 167 N.E.2d 477 (1960), in which the medical expert, when asked whether physical strain could have caused the heart condition, testified that the answer was much debated. For those people under age 40, strain could be the cause, while, after

and emotion¹⁶² have nothing to do with coronary thrombosis, while most heart cases are based on the opposite theory.¹⁶³

However, although medical evidence in a particular case may be uncertain or deficient, this will not necessarily bar an award if the exertion, taken with other facts, raises a natural inference of causal contribution.¹⁶⁴ In a recent New York case,¹⁶⁵ the medical expert admitted that he did not know how a thrombus would occur in a normal, healthy blood vessel, or why the thrombosis and infarction had not occurred previously when the claimant had performed much more strenuous labor. Nevertheless, the court affirmed an award, saying that "the nonmedical facts thus present a classic case of industrial-accident heart attack."¹⁶⁶

This question of the medical relation of exertion to thrombosis is something that will have to be left to the doctors. Meanwhile, it is up to the lawyers, administrators, and judges who are concerned with heart cases in workmen's compensation law to put the legal house in order. It is hoped that the solution suggested here may help toward that end.

age 40, perhaps 60% are caused by strain and the others from natural causes. Compensation was denied. See also *Fendell v. Industrial Comm'n*, 89 Ariz. 180, 359 P.2d 988 (1961), in which the coronary occlusion of a 69-year-old employee suffered while unloading a shipment of 50-pound packages was held causally unrelated to the employment on the basis of medical testimony that the attack was merely coincidental with the strenuous but usual labor.

162. See *Aromando v. Rubin Bros. Drug Sales Co.*, 47 N.J. Super. 286, 136 A.2d 11 (1957), in which compensation was awarded although there was a split in the medical testimony on whether unusual emotional stress could cause a coronary occlusion.

163. See Justice Hill's dissent in *Chiara v. Villa Charlotte Bronte*, 273 App. Div. 834, 76 N.Y.S.2d 59, *aff'd*, 298 N.Y. 604, 81 N.E.2d 332 (1948).

164. See *Thomas v. United States Cas. Co.*, 106 Ga. App. 441, 127 S.E.2d 169, *rev'd*, 218 Ga. 493, 128 S.E.2d 749 (1962); *Hoffman v. National Sur. Corp.*, 91 Ga. App. 414, 85 S.E.2d 784 (1955). The lower court opinion in *Thomas* contains an extensive bibliography of literature on heart disease and employment. The court in that opinion concluded that an award could not be substantiated upon natural inferences through human experience, but the Georgia Supreme Court reinstated the award.

Natural inferences may also negate a causal connection. See *Cole v. Industrial Comm'n*, 144 Colo. 183, 355 P.2d 537 (1960), in which compensation was denied because circumstances tended to disprove any connection between the accident and the thrombosis.

165. *Marinero v. Shapiro*, 10 App. Div. 2d 462, 200 N.Y.S.2d 687 (1960), *aff'd*, 10 N.Y.2d 910, 179 N.E.2d 520, 223 N.Y.S.2d 520 (1961).

166. *Id.* at 462, 200 N.Y.S.2d at 688.