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Accidental Injury Under the New York Workmen's Compensation Law

appeals, aware of the danger in finding an ill-defined duty of the public toward individuals, was careful to limit its holding to the facts of the case: "[W]here persons actually have aided in the apprehension or prosecution of enemies of society under the criminal law, a reciprocal duty arises on the part of society to use reasonable care for their police protection, at least where reasonably sought."[58]

CONCLUSION

It is submitted that no general rule can be drawn from the *Schuster* case that the duties inherent in the concept of police power run to the individual members of the community;[59] that the result of the *Murrain* case would still be the same if tried today, i.e., that no right of action accrues to a member of a crowd injured because the police department failed to provide sufficient policemen at the scene. The duty of a municipality to provide police protection remains to the *community at large.* But where a *special relationship* arises between an individual and the police, the latter having knowledge of the unique danger to the individual if it fails to provide the assistance and protection he can reasonably expect, the police should be held to have an obligation to exercise due care for that person's safety. The concept of duty should not be restricted to a mere inspection of a statute to determine who are the intended beneficiaries of it; rather it admits of a broader view: "It is the duty and the right . . . of every citizen, to assist in prosecuting, and in securing the punishment of, any breach of peace of the United States. The right of a citizen informing of a violation of law . . . to be protected against lawless violence . . . arises out of the creation and establishment by the Constitution itself of a national government. . . . [I]t is the duty of that government to see that he may exercise this right freely, and to protect him from violence while so doing."[60]

ACCIDENTAL INJURY UNDER THE NEW YORK WORKMEN'S COMPENSATION LAW

The prominence of Workmen's Compensation as a possible solution to the human and social losses resulting from work injuries creates some basic and special problems in the administration of the system, the foremost being the interpretation of what constitutes compensable disability.[1] The New York

58. 5 N.Y.2d at 81, 154 N.E.2d at 537, 180 N.Y.S.2d at 269.

59. The court of appeals stated: "To uphold such a liability [as in the Schuster case] does not mean that municipalities are called upon to answer in damages for every loss caused by outlaws or by fire. Such a duty to Schuster bespeaks no obligation enforcible in the courts to exercise the police powers of government for the protection of every member of the general public." 5 N.Y.2d at 81, 154 N.E.2d at 537, 180 N.Y.S.2d at 269.

60. In re Quarles & Butler, 158 U.S. 532 (1895).

1. The requirements for compensation are usually the occurrence of an accident or the contraction of a disease, a causal relationship between the work and the accident or disease, and a connection between the employment and the work when the accident occurs or the disease is contracted. See Riesenfeld, Basic Problems in the Administration of Workmen's

Workmen's Compensation Law defines injury and personal injury as including "only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom."[2] Whether "accidental" refers to and modifies injuries or rather describes the cause of the injury, and how it qualifies disease or infection have been constant problems.

UNEXPECTED CAUSE VS. UNEXPECTED RESULT

The English Rule

The term "accidental injuries" appears in many compensation statutes.[3] Does it mean that the injury or death to be compensable must not only arise out of and in the course of employment but must also be caused accidentally? The English Workmen's Compensation Act of 1897,[4] on which the majority of American statutes are based, defined compensable disability as "personal injury by accident arising out of and in the course of employment."[5] The English courts gave the word "accident" a liberal construction as an "unlooked-for mishap or an untoward event . . . not expected or designed . . ."[6] and held that an unexpected result from usual or customary exertion, even though there was no unexpected or fortuitous cause, constituted a compensable accident.[7]

A substantial majority of courts in this country have followed the English rule, and have held that the injury is accidental when *either* the cause *or* the result of the injury is unexpected, unforeseen or unintended. In these states, where the ordinary exertion or straining of employee's usual work causes the unexpected and disabling event or injury, or accelerates or hastens its consummation, that in itself constitutes a compensable accident since the injury and disability are due to the employment.[8] In the minority of states the disability or injury resulting from the ordinary and usual strain or exertion of the employment, whether great or small, which may accelerate an existing infirmity does not constitute a compensable accident, unless there was an external fortuitous accident or an abnormal strain or exertion in the cause,[9] some states strictly applying the view that the injury be proximately caused by some unusual event even to cases where there is no evidence of pre-existing disease.[10]

Compensation, 8 NACCA L.J. 21 (1951); Riesenfeld, Forty Years of American Workmen's Compensation, 35 Minn. L. Rev. 525 (1951).

2. N.Y. Workmen's Comp. Law § 2(7).

3. See Schneider, Workmen's Compensation Statutes (3d ed. 1939), where all of the United States' Compensation Acts are reprinted.

4. 1897, 60 & 61 Vict., c. 37 (repealed). England abolished the Act in order to achieve a broader scheme of national insurance by the National Ins. (Industrial Injuries) Act, 1946, 9 & 10 Geo. 6, c. 62.

5. 1897, 60 & 61 Vict., c. 37, § 1(1) (repealed).

6. Fenton v. Thorley [1903] A.C. 443, 448 (H.L.).

7. See 53 Colum. L. Rev. 130, 131 (1953).

8. Schneider, Workmen's Compensation Text § 1446 (perm. ed. 1946). See also 1 Larson, Workmen's Compensation Law § 38 (1952) [hereinafter cited as Larson].

9. Schneider, op. cit. supra note 8, § 1446.

10. 53 Colum. L. Rev. 130, 131 (1953). See also 1 Larson § 38.

ACCIDENTAL CAUSE VS. RESULT IN NEW YORK

The New York courts in their earlier decisions did not follow the view that the basic ingredient of the accident idea, the "unexpected," might inhere either in the cause of the disability or the effect which was the occurrence of the injury itself, but were prone to look for the accidental in the cause, thereby requiring an accident separate and distinct from the injury. Thus, in *O'Connell v. Adirondack Elec. Power Corp.*[11] it was held that the chief operator of an electrical system who had suffered a heart attack from the exertion of restoring power after an electrical failure could not recover as no accident had occurred, because power failures and the strain of repairing them were to be expected as a normal part of the employment. As to whether disease might constitute accidental injury, *Richardson v. Greenberg*[12] early established that disease and accidental injury were mutually exclusive, the former not comprehended by the latter except when it followed as a natural consequence thereof. In that case the court denied compensation to a stableman who, while so employed, having been required to lead a horse affected with glanders through the streets contracted the disease. The court said that the disability was due to an inhalation and did not follow a traumatic injury or result from the application internally or externally of an external force.[13]

The Lerner Doctrine

The distinction between disease and injury appeared in *Connelly v. Hunt Furniture Co.*,[14] where an undertaker's assistant suffered an infection through a cut finger which spread through contact with a pimple on his neck. Judge Cardozo, writing for the majority of the court of appeals, said: "We attempt no scientifically exact discrimination between accident and disease or between disease and injury. None perhaps is possible, for the two concepts are not always exclusive, the one or the other, but often overlap. The tests to be applied are those of common understanding as revealed in common speech."[15] Compensation was accordingly granted, as the court found that the infection was of traumatic origin and the episode accidental in all its phases, its origin in causes engendered by the employment. Previously, in *Jeffreyes v. Sager Co.*,[16] the

11. 193 App. Div. 582, 185 N.Y. Supp. 455 (3d Dep't 1920).

12. 188 App. Div. 248, 176 N.Y. Supp. 651 (3d Dep't 1919).

13. Reasoning that the statute in expressly mentioning disease which is the consequence of injury excluded necessarily all diseases not preceded by accidental injury, the court felt that it could not find the disease itself as constituting the accidental injury. Thus, it rejected the argument that the cause of disease is external, violent and accidental, distinguishing disease caused by bacteria from disability or death from sunstroke or frostbite where the producing cause is an external force though not necessarily violent. Hence, the court could only conclude that disease constituted accidental injury merely where the statute included it by particular definition.

14. 240 N.Y. 83, 147 N.E. 366 (1925).

15. Id. at 85, 147 N.E. at 367.

16. 198 App. Div. 446, 191 N.Y. Supp. 354 (3d Dep't 1921), aff'd mem., 233 N.Y. 535, 135 N.E. 907 (1922).

claim of a photographer based on the loss of a finger through the gradual action of photographic chemicals had been disallowed as the court found no accidental injury, the intentional contact having the expected result and there being no occurrence referable to a definite moment of time. The problem arose again in *Lerner v. Rump*,[17] where decedent caught a cold as a result of spending ten minutes in a refrigerator and died of causes traceable to the lowered resistance resulting therefrom. Judge Pound, for a unanimous court, said:

> 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 those limitations.[18]

Then he announced the rule that was to be applied literally for years later—the double test based on the *Jeffreyes* and *Connelly* decisions—that the inception of the disease be assignable to a determinate or single act, identified in space or time, and to something catastrophic or extraordinary. Compensation was then denied for want of anything "catastrophic or extraordinary" in cause, the case being held one of ordinary exposure resulting in a cold. The court of appeals was fully aware that acceptance of the *Jeffreyes* decision represented a departure from the English rule but it was determined to exclude cases of voluntary prolonged contact resulting in disease.[19]

Accidental Injury from Routine Exertion

Erosion of the Lerner Doctrine: The Breakage Rule

The requirement that a worker could not hope for a recovery unless something in the nature of physical violence happened to him was a stringent construction of what was "progressive" legislation.[20] For the majority of courts who, seeking a more liberal construction, accepted the unexpected occurrence of the injury itself without unexpected cause, the accidental character of the effect was dependent upon the definiteness of the harm produced.[21] The majority of jurisdictions hold the injury to be accidental when the usual exertion leads to something definite—an "actual breaking," "herniating" or "let-

17. 241 N.Y. 153, 149 N.E. 334 (1925).

18. Id. at 155, 149 N.E. at 335.

19. The court later said of this decision that it thought to the average man there would seem to be no accident in such a sequence of events. Lurye v. Stern Bros. Dep't Store, 275 N.Y. 182, 9 N.E.2d 828 (1937).

20. 27 Fordham L. Rev. 462, 463 (1958).

21. 1 Larson § 38.10. Larson ascribes this indefiniteness of whether the court will require an accidental cause or will be satisfied with an accidental result to the fact that the two parts of the accident concept—unexpectedness and definiteness of time—do not in practice remain distinct. 1 Larson § 38.10, at 518.

ting go" with an accompanying obvious sudden mechanical or structural change in the body.[22] This view has become known as the "breakage rule."[23]

New York, in an attempt to avoid the harsh results of the rule of unusual cause, also resorted to treating internal injuries on the same terms as external injuries, and accepted the "breakage rule" for a limited number of injuries. The courts, without looking for the unusual in cause, began to hold that there was enough of an accident if the effect was some unexpected, drastic and dramatic change in the body structure itself, and allowed compensation for cerebral hemorrhage,[24] herniated disc[25] and other structural changes.[26] However, if the courts felt that there was no "breakage" in the situation before it, they resorted again to the test of making an award dependent upon the unusual in cause; hence, in the generalized heart condition cases, where the courts found only a clogging or cessation of a function, compensation was denied if there was want of unusual cause.[27]

In an effort to liberalize the requirement of accidental injury in the heart cases and to find an exception to the unusual strain rule, the courts began to liken a ruptured aorta due to ordinary exertion to a breaking, and awarded compensation if the injury were traceable in whole or in part to an usual exertion or exposure. This position was taken in *Kayser v. Erie County Highway Dep't*,[28] wherein the court affirmed an award of the Compensation Board to a laborer who had suffered a heart attack while raking slag, this being his usual work, and thereafter died from a ruptured aorta. The court reasoned that the situation before it was similar to one where the usual effort of the employment

22. 1 Larson § 38.20. Thus, these courts would compensate for hernia, cerebral hemorrhage, arterial or blood-vessel rupture, ruptured aneurysm, apoplexy, ruptured appendix, herniating intervertebral disc, stomach rupture, dislocated kidney, dislocated cervical chord, and detached retina, even if the exertion or conditions producing the change were not out of line with the ordinary duties of the job.

23. 1 Larson § 38.20.

24. See, e.g., Saari v. Crawford, 284 App. Div. 1079, 135 N.Y.S.2d 913 (3d Dep't 1954) (hemorrhage suffered by superintendent after unloading metal fence posts from truck); Jackness v. B. & B. Realty Co., 280 App. Div. 1009, 116 N.Y.S.2d 806 (3d Dep't 1952) (hemorrhage suffered by janitress after scrubbing floors in absence of an assistant who usually performed the duty). See also Kot v. Crouse-Hinds Co., 281 App. Div. 935, 119 N.Y.S.2d 652 (3d Dep't 1953) (sudden weakness and collapse of molder while carrying a heavy pot of molten brass, collapse being caused by rupture of pre-existing angioma of the brain).

25. See, e.g., Sorace v. General Elec. Co., 5 App. Div. 2d 711, 168 N.Y.S.2d 770 (3d Dep't 1957).

26. See, e.g., Nicoletti v. S. H. Pomeroy Co., 283 App. Div. 1129, 131 N.Y.S.2d 699 (3d Dep't 1954) (lumbrosacral strain sustained by power press operator).

27. But see the following cases denying compensation for "breakage" from routine exertion: Di Sarro v. Stone, 308 N.Y. 996, 127 N.E.2d 847 (1955) (aggravation of back condition and rupture of disc caused by long hours of driving and opening trunk); Kobinski v. George Weston, Ltd., 302 N.Y. 432, 99 N.E.2d 227 (1951) (protrusion of previously compensable cracked spinal disc due to no unusual strain in bending and lifting cookie and cracker boxes).

28. 276 App. Div. 789, 92 N.Y.S.2d 612 (3d Dep't 1949).

causes failure in a previously weakened body structure, likening the ruptured aorta to a broken arm. Noting that New York at that time drew a distinction between heart cases and other injuries for the purpose of the usual exertion test, it concluded:

> Here the usual effort is shown to have caused a specific failure in a specific artery. This has always been regarded as an industrial 'accident.' The 'heart cases' where it is usually required to show some special effort as a precipitating cause of the attack, stand in a class by themselves, but they do so because their generalized nature makes it difficult factually to attribute the attack to the work.[29]

The court found no such difficulty in the specifically attributed failure of the aorta in the case before it and, consequently, no necessity of showing some special effort as the precipitating cause of the attack. As the ruptured aorta was caused by the effort or usual nature of the work, it was found an industrial accident, and the court "carve[d] an exception out of the unusual-strain rule . . . ."[30]

The certainty and simplicity of this view had a definite appeal. It was employed in *Pioli v. Crouse-Hinds Co.*[31] to find the traumatic myositis and neuritis suffered by claimant, a molder employed in the business of making electrical parts, compensable. In that case claimant's usual job was to dip a ladle into a pot of molten metal, and then twist it around to pour the metal into the molds, a procedure that was his regular day by day course of operation. The court, in affirming the award and decision of the Board, concluded:

> Even though the work is quite the usual work of the employee such an injury is a compensable accident in the classic sense of accident in workmen's compensation law. A man might lift a weight every day for years in his regular work, but if one day he lifted the weight and broke his arm no one could doubt that the injury would be compensable.[32]

That recovery should depend on a breaking or drastic change in the body structure, and that such has been made the basis for distinguishing the heart cases, and denying compensation therefor, has been criticized in no uncertain terms by Professor Larson and other authorities in the field.[33] Larson finds the distinction between internal failures which consist of a breaking and "generalized" condition failures arbitrary and artificial, and proposes that neither as a matter of medical theory nor common sense is there any difference; for while much is made of the fact that there is an identifiable mechanical structural change in the cerebral hemorrhage, ruptured aorta, and slipped disc cases, it is his contention that even in such a common heart failure case as coronary thrombosis there is a "plugging up" action by a blood clot which is

29. Id. at 789, 92 N.Y.S.2d at 613. Larson finds that the purpose behind such distinction is the fear that heart cases and related types of injury would get out of hand unless some kind of arbitrary boundaries were set. 1 Larson § 38.81.

30. See 1 Larson § 38.72, at 559.

31. 281 App. Div. 737, 117 N.Y.S.2d 734 (3d Dep't 1952).

32. Id. at 737, 117 N.Y.S.2d at 735.

33. 1 Larson § 38.73. Larson maintains that to hold a cerebral hemorrhage as more of an accident than a coronary thrombosis is to enter the domain of medicine rather than law.

identifiable in space and time and causes a mechanical change.[34] He admits that the "breakage rule" is perhaps well applied to heart cases due to stoppage or fibrillation where a post mortem examination might not reveal a distinct structural change, but insists that generally it serves only to inspire tenuous medico-legal distinctions.[35]

Requirement of Strain in Coronary Thrombosis

Although a clear majority of jurisdictions accept routine conditions as leading to an accident when the effect is a "breaking," the rule holding injuries resulting in a less distinctive structural change to be accidental has not been so well received.[36]

In New York compensation for injury or death due to coronary thrombosis provided the most fruitful instances for the application of the *Lerner* doctrine, the issue from the beginning being whether there was anything unusual about the exertion producing the heart attack or the circumstances surrounding it.[37] Thus, in *Green v. Geiger*[38] the court of appeals, without opinion, unanimously affirmed the award of the Board in favor of a truck driver with a pre-existing heart condition who collapsed and died of a heart attack from the strain of cranking his truck. The doctrine was satisfied because, although a truck driver might crank his truck occasionally, the catastrophic or unusual element which removed the situation from the ordinary was supplied by the fact that the condenser and distributor on the truck had burned out.

The *Lerner* rule continued to be applied literally by the appellate division to the cases before it, and whenever awards were denied it was not because there had been no determinate or single act to which the heart attack could be assigned, but rather because such act had not been anything "catastrophic or extraordinary," the employee merely doing his work in a usual manner.[39] How-

34. Larson further points out that even in the "generalized" cases there is some kind of disintegration or "breaking," although on a much smaller scale, such as the hemorrhaging that may precede a thrombosis. 1 Larson § 38.73.

35. Without a post mortem examination medical experts can "only surmise what happened to a heart, and even with such an examination they can only speculate to why." Levitan, The Liability Phase of the Cardiac Problem, 41 Marq. L. Rev. 347, 351 (1958).

36. 1 Larson § 38.30. These cases include coronary thrombosis, myocarditis, dilation of the heart, arteriosclerosis, arthritis, bursitis, back or muscle strain and appendicitis.

37. See 1 Larson § 38.64(a). See, e.g., Frankel v. National 5, 10 & 25 Cents Stores, 243 App. Div. 841, 278 N.Y. Supp. 450 (3d Dep't), aff'd mem., 268 N.Y. 509, 198 N.E. 378 (1935), where compensation was denied to an employee who collapsed and died shortly after a routine job of lifting and moving a consignment of merchandise in the basement of employer's store, the opinion of the court indicating that there was no substantial medical testimony to substantiate the claim. The Workmen's Compensation Board there had found as a fact that there was no specific act, definite in time, constituting an accident.

38. 255 App. Div. 903, 7 N.Y.S.2d 762 (3d Dep't 1938), aff'd mem., 280 N.Y. 610, 20 N.E.2d 559 (1939).

39. See, e.g., Dworak v. E. Greenbaum Co., 261 App. Div. 1022, 25 N.Y.S.2d 829 (3d Dep't), aff'd mem., 287 N.Y. 555, 38 N.E.2d 224 (1941) (employee suffered fatal heart attack after pushing an overhead tree with four hundred pounds of meat, the activity

ever, a change was apparent in *McCormack v. Wood Harmon Warranty Corp.*,[40] where an award was affirmed for a fifty-seven year old housekeeper in an apartment house who suffered a heart attack after having been required to climb four flights of stairs three times within fifteen or twenty minutes, the last time carrying a heavy mirror. Moreover, in *Bohm v. L.R.S. & B. Realty Co.*,[41] wherein the superintendent's helper collapsed after throwing a dozen shovelfuls of coal, each weighing about forty pounds, there appears to be a real departure from the former rule. Here it was held that claimant's aggravation of his existing condition of arteriosclerosis was an accidental injury in spite of the fact that shoveling was part of his regular duties. A modification of the rule was now becoming apparent. There were attempts to find catastrophic and extraordinary elements in an ordinary and expected situation, and heart attacks were found compensable if they could be tied to a *particular* strain, whether accidental or not in the former meaning of the word. A semblance of the rule was still observed in that there had to be a *specific* event or exertion to which the attack could be ascribed.

That the "catastrophic and extraordinary" element of the *Lerner* doctrine was now defunct was further shown in *Furtado v. American Export Airlines, Inc.*,[42] wherein claimant had been assigned to supervise the construction of three new shops, which responsibility involved working long hours seven days a week for nine to ten months, and had experienced heart symptoms from time to time before suffering the disabling attack. The appellate division found the assignment to be "unusual" work, and affirmed the Board's finding that claimant had sustained accidental injuries arising out of and in the course of the employment due to long arduous hours of work. In other cases that followed,[43] the appellate division continued to exert a concerted effort to find the

being all in a day's work for him). See Meriam & Thornton, "Accidental Injury" in the Court of Appeals: The Metamorphosis of a Rule of Law, 16 Brooklyn L. Rev. 203 (1950), for an excellent analysis of this phase of development of the Lerner rule; La Fountain v. La Fountain, 259 App. Div. 1095, 21 N.Y.S.2d 193 (3d Dep't), aff'd mem., 284 N.Y. 729, 31 N.E.2d 199 (1940) (blacksmith suffering from heart disease carried his tools three blocks to a stable rather than have the horses come to the shop in the icy weather, the fatal attack occurring while he was shoeing a horse).

40. 263 App. Div. 914, 32 N.Y.S.2d 145 (3d Dep't), aff'd mem., 288 N.Y. 614, 42 N.E.2d 613 (1942).

41. 264 App. Div. 962, 37 N.Y.S.2d 146 (3d Dep't 1942), aff'd mem., 289 N.Y. 808, 47 N.E.2d 52 (1943). But see Altschuller v. Bressler, 289 N.Y. 463, 46 N.E.2d 886 (1943), where a blocker of hats suffered a heart attack, and consequently became disabled, after lifting heavy kettles of water weighing between seventy-five and one hundred and twenty-five pounds in order to empty them. It was not his practice to lift the kettles, and as the strain was ascribable to an unusual event and was extraordinary the Lerner rule was satisfied.

42. 274 App. Div. 954, 83 N.Y.S.2d 664 (3d Dep't 1948), leave to appeal denied, 298 N.Y. 933 (1949).

43. See, e.g., Carlin v. Colgate Aircraft Corp., 276 App. Div. 881, 93 N.Y.S.2d 791 (3d Dep't 1949), aff'd mem., 301 N.Y. 754, 95 N.E.2d 626 (1950) (coronary thrombosis of inspector allegedly caused by an increase of physical work over the prior month due to a decrease of employees); Anderson v. State Dep't of Labor, 275 App. Div. 1010, 91

unexpected event in physical exertion that was not ordinary to employee's regular course of employment. Thus, the strict application of the minority view that the injury must have been proximately caused by some unusual event had so far been eroded by the appellate division that an accident could be found where the claimant had been working harder than at some time in the past, and the heart attack was traceable to the work, which itself was arduous enough so that it contributed to the heart ailment.

Finally, in the light of this progress, the court of appeals, in *Masse v. Robinson Co.*,[44] reversed a lower court and awarded compensation to a claimant who, having previously experienced cardiac symptoms, was required to do unusually arduous work in the regular course of employment during the week preceding the heart attack which occurred at home. The court unqualifiedly said: "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."[45] Nothing was said about unusual strain, and the effect of the decision was noticeable in *Broderick v. Liebmann Breweries, Inc.*[46] There, in finding that the five or ten minutes during which a steamfitter had to assume a cramped position while working on the inside of a boiler made for a compensable injury, the court summed up the evolution from *Lerner* to *Masse.* It reasoned that while the definition of an accident as something extraordinary or catastrophic, assignable to a determinate or single act identified in space or time, was undoubtedly unassailable as an abstract legal proposition, it was more in keeping with the purposes of Workmen's Compensation that an event be determined an industrial accident not by legal definition, but "by the common-sense viewpoint of the average man."[47] New York, while nominally requiring unusual exertion in coronary thrombosis cases, has in effect reversed the rule by treating almost any exertion as unusual.[48] Hence, New York's unusual and catastrophic

N.Y.S.2d 710 (3d Dep't 1949), leave to appeal denied, 300 N.Y. 759 (1950) (strain could be ascertained as there was a measurable criterion provided due to the nature of claimant's employment in a standard position).

44. 301 N.Y. 34, 92 N.E.2d 56 (1950).

45. Id. at 37, 92 N.E.2d at 57 (Emphasis added.)

46. 277 App. Div. 422, 100 N.Y.S.2d 837 (3d Dep't 1950).

47. The court, thus, concluded that "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." Id. at 424, 100 N.Y.S.2d at 839.

48. Gioia v. Courtmel Co., 283 App. Div. 40, 126 N.Y.S.2d 94 (3d Dep't 1953). In this case the court in awarding compensation for a heart attack sustained while carrying a hundred pound bag of plaster across a wide walk and down a few steps, a procedure which was claimant's usual work, stated: "Under the [Masse] test . . . the fact of usual work is no longer decisive. Strain or unusual effort may be found even though the work, generally considered, is no different than that which the claimant has been doing over some period of time. The element of overexertion or strain is one of fact to be determined, not by any catch phrase, but by the peculiar circumstances of the individual case." Id. at 43, 126 N.Y.S.2d at 97. See also Rubin v. Elite Store Cleaners, Inc., 283 App. Div. 906, 130

requirement insofar as it relates to heart attacks has been diminished to the extent that practically all employment-caused heart attacks are held accidental.[49] It remains, of course, essential to prove that the injury arose out of

N.Y.S.2d 149 (3d Dep't 1954) (award for heart attack for pulling basket weighing one hundred pounds when usual work consisted of handling baskets weighing from seventy-five to one hundred pounds); Clayback v. Globe Woven Belting Co., 282 App. Div. 973, 125 N.Y.S.2d 493 (3d Dep't 1953) (award to carpenter who suffered coronary occlusion from operating mortising machine which he was required to do once or twice a month).

49. 1 Larson § 38.64. For evaluation of these decisions as establishing heart failure as a "quasi-occupational" disease, see Meriam & Thornton, "Accidental Injury" in the Court of Appeals: The Metamorphosis of a Rule of Law, 16 Brooklyn L. Rev. 203 (1950).

See the following cases for exertions that have been held compensable since the Masse decision: Carpenter v. Sibley, Lindsay & Curr. Co., 302 N.Y. 304, 97 N.E. 915 (1951) (detached retina of bookstore clerk caused by working harder than usual for some unspecified time); Sanders v. Samuel Adler Inc., 5 App. Div. 2d 1028, 173 N.Y.S.2d 322 (3d Dep't 1958) (strain in operating milk route from manner in which truck was loaded); Riccobono v. Continental Cas. Co., 2 App. Div. 2d 718, 152 N.Y.S.2d 543 (3d Dep't 1956) (coronary occlusion of attorney, an insurance investigator, having been assigned additional territory covering tenement houses, from climbing stairs to interview witnesses); Cappozalo v. Housing Authority, 1 App. Div. 2d 709, 146 N.Y.S.2d 747 (3d Dep't 1955) (conducting two lectures without usual assistance); Bahn v. S. Wolfensohn Inc., 286 App. Div. 902, 142 N.Y.S.2d 2 (3d Dep't 1955) (awkwardness in working on picture frame twelve feet long and three inches in width); Sleator v. National City Bank, 285 App. Div. 393, 137 N.Y.S.2d 289 (3d Dep't), aff'd mem., 309 N.Y. 708, 128 N.E.2d 415 (1955) (death of engineer having extremely bad heart while trying to repair some leaky pipes having steam in them); Landy v. C. & S. Plumbing Co., 284 App. Div. 918, 134 N.Y.S.2d 346 (3d Dep't 1954) (plumber subject frequently to heavy strain, having experienced chest pains following heavy work for six months before death); Wiltcher v. National Transp. Co., 283 App. Div. 977, 130 N.Y.S.2d 586 (3d Dep't 1954) (heart attack of taxicab driver from strain and excitement of efforts to avoid collision with another car); Brilli v. Brilli, 283 App. Div. 905, 130 N.Y.S.2d 142 (3d Dep't 1954) (lifting of one hundred pound quarter of beef by butcher unaccustomed to lifting such heavy weights); Sabasowitz v. Gold Theatre, 283 App. Div. 899, 130 N.Y.S.2d 121 (3d Dep't 1954) (coronary occlusion of motion picture operator having previously suffered from cardio-vascular disease caused by lifting a heavy case of movie film); Hurt v. Burns Bros., 283 App. Div. 907, 129 N.Y.S.2d 878 (3d Dep't 1954) (coronary occlusion of garage mechanic caused by removing tire from truck); Neyman v. Charlie Baker Clothier, 283 App. Div. 755, 128 N.Y.S.2d 214 (3d Dep't 1954) (store manager carrying heavy bolts of cloth, suits and overcoats up several flights of stairs); Gillar v. Jarcho Bros., 282 App. Div. 968, 125 N.Y.S.2d 465 (3d Dep't 1953) (sixty-four year old plumber walking up six floors with a fifty-five pound load, and working about an hour and a half); Chenier v. H. W. Rohlfs & Son, 282 App. Div. 792, 122 N.Y.S.2d 463 (3d Dep't 1953) (death two years after lifting a one hundred and fifty pound case in the regular course of work, and suffering a coronary thrombosis); Bingold v. Krebs, 282 App. Div. 786, 122 N.Y.S.2d 580 (3d Dep't 1953) (death following loading of truck in which painter's helper carried heavy parcels, the fact of a bad heart being known to employer); Wolner v. Ronnie Bake Shop, Inc., 281 App. Div. 932, 119 N.Y.S.2d 627 (3d Dep't 1953) (baker carried a heavy pail of water); Klein v. Louis Candel, Inc., 280 App. Div. 1029, 116 N.Y.S.2d 618 (3d Dep't 1952) (heart attack following climb up four flights of stairs during elevator strike); Kehoe v. London Guar. & Acc. Ins. Co., 278 App. Div.

and in the course of employment.[50]

This emphasis on the necessity of positively establishing a *causal* relationship between the employment and disability is seen in *Lesnik v. National Carloading Corp.*,[51] where the court reversed the award of the Board for the heart attack suffered by a business executive while at the race track pursuant to his job of making himself available for the entertainment of a customer. The court did not find anything on the record to suggest any unusual physical stress, notwithstanding the fact that decedent had been following an unusually active schedule for a period of time, or any emotional impact at the track to suggest accidental causation of employee's physical condition. The Commission had awarded compensation not on the basis that anything particular had happened at the track in connection with the work, but rather that the employee for about five months had been under great tension due to his employer's financial losses, having been called upon to follow an unusually heavy schedule to build up revenue. It felt that claimant, having been worn down by this continued effort that involved considerable travelling and longer working hours, suffered the heart attack as a result. The court reasoned, however, that the illness was not accidental as there was no eventful happening demonstrated to have caused it, the only connection with the work being the gradual physical deterioration over a period of time. The court felt that this kind of physical deterioration was not comprehended in the term "accidental" in the sense used in the Workmen's Compensation Law, and pointed out that diseases growing out of employment, but not caused by a *definite happening* at work, are in a class by themselves, being treated as special or occupational risks and given a separate allocation in the compensation structure.

Applying the test suggested by *Masse,* the court determined that it would be unlikely that claimant's heart attack would be thought of as an accidental product of a "particular event" in employment if resort were had to the common sense of the average man. It recognized that the event intended was not entirely an intraorganic physical change, but rather a physical happening in the *external employment environment* operative upon the human organism; and it pointed out that while in the development of the theory of industrial accident in the heart cases there was a policy of marked liberality in interpreting the *Lerner* test of the catastrophic nature of the accident, even there the happening of some *external*

731, 103 N.Y.S.2d 72 (3d Dep't 1951), aff'd mem., 303 N.Y. 973, 106 N.E.2d 59 (1952) (climbing subway stairs on the way to work without evidence of special haste, in the course of employment); Bottke v. Globe Stationery & Toy Co., 278 App. Div. 621, 101 N.Y.S.2d 850 (3d Dep't 1951) (erecting partitions in store which was regularly done at certain seasons); Mueller v. Rutgers Club, Inc., 278 App. Div. 619, 101 N.Y.S.2d 953 (3d Dep't 1951) (long hours and unusual excitement causing death of steward of social club); Rivers v. Malone Bronze Powder Works, Inc., 277 App. Div. 1071, 100 N.Y.S.2d 575 (3d Dep't 1950) (pulling a machine which was pulled regularly seven times a day).

50. 1 Larson § 38.83. As to whether there is any distinction between "arising out of" and "in the course of" employment, see 1 Larson § 29.

51. 285 App. Div. 649, 140 N.Y.S.2d 907 (3d Dep't 1955), aff'd mem., 309 N.Y. 958, 132 N.E.2d 326 (1956).

event in connection with the work and causing the heart condition was required.[52] Indeed, it pointed out that the rule of the eventful nature of the accident has been more rigidly applied to physical consequences other than heart conditions,[53] and reasoning that the relaxation of the heart rule of unusualness should not be extended to fringe cases where there was no single incident which the common man would regard as an accident, it felt that the situation before it was not compensable.

Moreover, the court did not find the *Furtado*[54] decision controlling, as the attack in that case occurred while the employee was *actually engaged* in the employment activity which caused the strain, and continued at the same activity after the first attack, suffering another thereafter,[55] and thus was forced to conclude that "to affirm this award we must be ready to hold that if a man increases the tension of the administrative work and later suffers a heart attack while at rest, this is a compensable accident. We are not ready to go that far in the case before us."[56] Evidence that the exertion of the work constituted undue strain in the light of decedent's physical condition which was lacking in *Lesnik* was found, however, in *Cramer v. Sunshine Biscuits, Inc.*,[57] and the award for the salesman's death from coronary occlusion was unanimously affirmed. There decedent's duties as a salesman required extensive travel, and his usual work in each locality visited consisted in accompanying the regular salesman to customers' stores and servicing salesmen's accounts which included arranging displays of merchandise. Contrary to a doctor's advice of bed rest for high blood pressure, decedent continued his normal field activities, suffering a fatal coronary occlusion in his hotel room where he had retired after the end of a working day. The court was impressed in this case by the fact that de-

52. The court pointed out that in Kehoe v. London Guar. & Acc. Ins. Co., 278 App. Div. 371, 103 N.Y.S.2d (3d Dep't 1951), aff'd mem., 303 N.Y. 973, 106 N.E.2d 59 (1952), the employee was not engaged in his physical work, but having a heart condition for some time the normal route to work, which required a long climb up the subway stairs, involved considerable strain. Consequently, the death which followed the heart attack suffered as a result of the climb was compensable, the connection with the employment being satisfied by the fact that the employee did considerable work at home. Moreover, the court found that the employee in Broderick v. Liebmann Breweries, Inc., 277 App. Div. 422, 100 N.Y.S.2d 837 (3d Dep't 1950), was doing his usual work at the time of the attack and was under physical strain in his labor, the work he was then doing in the boiler being in temperatures "above normal."

53. See, e.g., Deyo v. Village of Piermont, Inc., 283 App. Div. 67, 126 N.Y.S.2d 523 (3d Dep't 1953).

54. See note 42 supra. Similarly, it did not find Anderson v. State Dep't of Labor, note 43 supra, controlling.

55. For further distinction made by New York in the gradual erosion of the unusual exertion requirement that continuation of normal exertion after awareness of symptoms makes the episode of collapse more unexpected and therefore more accidental, see 1 Larson § 38.64(c). As to how this distinction has influenced awards, see, e.g., Weitz v. Schreiber Brewing Co., 275 App. Div. 973, 90 N.Y.S.2d 235 (3d Dep't 1949).

56. Lesnick v. National Carloading Corp., 285 App. Div. 649, 652, 140 N.Y.S.2d 907, 910 (3d Dep't 1955).

57. 2 App. Div. 2d 719, 152 N.Y.S.2d 375 (3d Dep't 1956).

ceased suffered chest pains and other distress which signaled the beginning of the fatal attack while actually at work. Since in order to have an industrial accident there must still be the unexpected result and some exertion capable medically of causing the collapse,[58] this requirement was found satisfied by evidence that decedent by a miscalculation of his own strength inadvertently hastened his own death by such exertion as to cause the fatal breakdown.

Further clarification of this requirement was shown in *Burris v. Lewis*,[59] where the award of compensation was reversed for a claimant who dropped dead while lifting a fifty pound nail keg onto a truck, an autopsy showing such a long term deterioration of the heart that any stress or strain was sufficient to precipitate death. Pointing out that the *Masse* case required that the regular job activity should entail greater exertion than the ordinary wear and tear of life, the heart attack being produced by the unusually hard work demanded, the court determined that to allow compensation "where, as here, a heart has deteriorated so that any exertion becomes an overexertion . . . we have reached a point . . . where all that is necessary to sustain an award is that the employee shall have died of heart disease."[60] Thus, it seems that in New York today there must still be some causal connection between the work and the disability, but in order to constitute legal cause the employment must contribute more than a trace.[61]

Since the erosion of the unusual exertion requirement, it is the task of the expert medical witnesses and fact finders to keep the heart cases within proper bounds.[62] Such cases will be troublesome as long as there is conflicting medical testimony on the record as to whether the effort and the exertion have anything to do with the result.[63]

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58. 1 Larson § 38.83.

59. 2 N.Y. 323, 141 N.E.2d 424 (1957).

60. Id. at 326, 141 N.E. at 426. The dissent thought that an award should have been made as decedent had no prior warning or history of an existing heart condition, and furthermore had never done the task before.

61. For a good discussion of legal cause in the heart cases see Levitan, The Liability Phase of the Cardiac Problem, 41 Marq. L. Rev. 347 (1958). It is not essential that the employment be the sole cause or even the actual cause of the disability; it is sufficient if the employment aggravates a pre-existing condition or accelerates its development. 1 Larson § 12.20.

62. 1 Larson § 38.83. See Fisher v. Buffalo Elec. Co., 2 App. Div. 2d 612, 151 N.Y.S.2d 959 (3d Dep't 1956), where the court pointed out that there can be conflicting medical evidence in every heart case, and that consequently, since neither medical faction has any direct liaison with absolute certainty, the choice between conflicting opinions remains in the factual field.

63. 1 Larson § 38.83. Due to the Board's familiarity with such matters, the court of appeals has shown reluctance to interfere with the Board's handling of causation in granting awards. See, e.g., Kehoe v. London Guar. & Acc. Ins. Co., note 52 supra; Carpenter v. Sibley, Lindsay & Curr. Co., note 49 supra (finding of causal relationship upheld where doctor testified on direct examination that retinal detachment was caused by employment); Carney v. General Cable Corp., 278 App. Div. 868, 104 N.Y.S.2d 204 (3d Dep't 1951), aff'd mem., 303 N.Y. 885, 105 N.E.2d 108 (1952) (uncorroborated testimony showed clerk occasionally lifted heavy bags of suger in the stockroom). Only in

Evaluation of Breakage and Unusual Strain Rules

New York has apparently devised this special rule for heart cases because of the difficulty in proving that such an injury arose out of the employment,[64] the emphasis on the unusual concept serving as an arbitrary boundary to see that compensation was not awarded for deaths not really caused in any substantial degree by the employment. Finding such emphasis an ill-fitting device to insure causal connection, Larson has criticized the whole theory on four grounds:[65]

1. The English courts did not require that the accidental character of the injury be found in the cause rather than the result.

2. "Unusual" is not synonymous with "unexpected."[66]

3. There is seldom any yardstick to measure the usualness or unusualness of the exertion of any occupation.[67]

4. Mere unusualness does not connote a greater possibility of medical causation.

Horovitz, another leading authority in the field, has added to the above that the weight of reason is with the majority of jurisdictions which allow an award even though the work being done is routine and the strain endured ordinary, the mishap being within the coverage of "accidental" if the result is unforeseen and unexpected, whether or not the causal event was accidental, since:

1. The major purpose of the acts is to have industry bear its own burdens for work injuries rather than the individual worker or public or private charity.

2. Judicial fiat should not read into a humanitarian act any narrow limitation of accidental cause not really in the act.

3. If the word "accidental injury" is to be given a technical legal meaning, it should be the legal meaning in England from which the phrase is borrowed.

4. The few states that still distinguish between unexpected cause and overexertion (both compensable) and unexpected result following usual exertion (noncompensable) have plunged themselves into a mass of litigation, the distinction often leading to a finding of overexertion where there was only heavy

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light of lack of proof of causation is the denial of compensation in Chiara v. Villa Charlotte Bronte, Inc., 273 App. Div. 834, 76 N.Y.S.2d 59 (3d Dep't), aff'd, 298 N.Y. 604, 81 N.E.2d 332 (1948), understandable, for employer's physician said: "[P]hysical effort is not the cause of coronary sclerosis and coronary sclerosis is the cause of coronary thrombosis, therefore there is no causal relation . . . . [E]ffort 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." 273 App. Div. at 834, 76 N.Y.S.2d at 60 (dissenting opinion of Hill, P.J.).

64. Kayser v. Erie County Highway Dep't, note 28 supra; 1 Larson § 38.81.

65. 1 Larson §§ 38.60-63, 38.81.

66. For the conclusion this assumption can lead to see, e.g., Dotola v. Hill, 257 App. Div. 870, 11 N.Y.S.2d 889 (3d Dep't 1939) (sciatica contracted by gardener who deliberately continued to mow lawn in the rain held unusual and, therefore, accidental).

67. For a good example of the unworkability of the usual-unusual distinction in practice, see, e.g., Johnson v. Gristede Bros., 278 App. Div. 732, 103 N.Y.S.2d 39 (3d Dep't 1951).

routine work.[68] Thus, the better view is that the whole question of compensation resolves itself into one of causation in the particular case whatever the degree of strain.[69]

ROUTINE EXPOSURE CAUSING DISEASE

Although a definite majority hold frostbite or sunstroke resulting from usual conditions accidental,[70] they do not hold disease resulting from routine exposure accidental.[71]

While the change in interpretation of heart ailments was occurring in New York, there was a similar experience in the field of routine exposure causing disease. At first the *Lerner* rule was applied literally, and compensation was denied in pneumonia cases,[72] since there was no catastrophic or extraordinary hazard, the exposure being normal to that kind of occupation. In *Robbins v. Enterprise Oil Co.*[73] a different result was reached without any announced change in the rule. In that case the pneumonia and death of a garage mechanic, who sustained a chill while lying on his back on the garage floor in a draft for two and a half hours to change the gears on a car, was held compensable. Moreover, in *Brennan v. Hockensmith Constr. Co.*,[74] an award was made for pneumonia contracted by an employee who worked, without boots, in mud and water two feet deep, in a flooded excavation. Hence, it appeared that the courts were willing to accept any departure from the routine as satisfying the unusual and extraordinary requirement of an accident.[75]

68. Horovitz, Reviews of Leading Current Cases, 19 NACCA L.J. 34, 40-43 (1957).

69. Pound, Comments on Recent Important Workmen's Compensation Cases, 14 NACCA L.J. 47, 48 (1954).

70. 1 Larson § 38.40.

71. Id. § 38.50. These diseases include pneumonia, rheumatism, common colds leading to complications, Bell's palsy, nephritis, silicosis, tuberculosis and others directly caused or precipitated by exposure to cold, heat, dampness, dust or fumes.

72. See, e.g., Lanphier v. Air Preheater Corp., 278 N.Y. 403, 16 N.E.2d 382 (1938); Peck v. Dugan O. Campbell, Inc., 251 App. Div. 914, 297 N.Y. Supp. 670 (3d Dep't 1937); D'Oliveri v. Austin, Nichols & Co., 211 App. Div. 295, 207 N.Y. Supp. 699 (3d Dep't 1925).

73. 252 App. Div. 904, 299 N.Y. Supp. 837 (3d Dep't 1937), aff'd mem., 278 N.Y. 611, 16 N.E. 123 (1938). See also Karp v. West 21st St. Holding Corp., 253 App. Div. 851, 1 N.Y.S.2d 399 (3d Dep't 1938) (falling into puddle of water during rain storm compensable).

74. 256 App. Div. 870, 9 N.Y.S.2d 62 (3d Dep't), aff'd mem., 281 N.Y. 703, 23 N.E.2d 538 (1939). See Waxman v. Paget, 264 App. Div. 967, 37 N.Y.S.2d 169 (3d Dep't 1942), where the pneumonia of a butcher going in and out of a refrigerator was held either accidental or an occupational disease.

75. See the following cases for accidental or unusual features of exposure which permit compensation: Lasky v. Frederick, 258 App. Div. 756, 14 N.Y.S.2d 753 (3d Dep't 1939) (pneumonia from drenching by rain while moving a building, claimant ordinarily not working in the rain but had to continue in this instance); Dotola v. Hill, 257 App. Div. 870, 11 N.Y.S.2d 889 (3d Dep't 1939) (gardener continued to mow the grass during the rain because he feared employer's anger if he suspended work). See also Kern v. Premier Coal Saving Device Corp., 246 App. Div. 661, 283 N.Y. Supp. 281 (3d Dep't 1935) (cold and tuberculosis caused by overheating as a result of working in a boiler).

But in *Schwalenstocker v. Department of Taxation and Finance*[76] the court of appeals reversed the appellate division without opinion and denied compensation to an auditor who, having spent an entire day in a very cold, damp and unheated office on a one day special assignment, contracted a cold and bronchitis, and suffered a coronary occlusion claimed to have been brought on by violent coughing. Relying on this case, the court of appeals, in *Horn v. Pals & Solow*,[77] reversed the award of the appellate division for a respiratory infection and activation of a pre-existing condition of rheumatic fever which had been dormant. The appellate division had affirmed the award, as it had found sufficient accidental character and causal relationship in the fact that the employee caught a cold in her unheated office because the radiator was broken.

When the *Masse* decision omitted any reference to unusual occurrence in the heart cases and permitted recovery for damage resulting from strain in the course of daily work, the question arose whether the courts would extend the holding to the exposure cases. In *Johnson v. Gristede Bros.*[78] the appellate division allowed an award for a claimant who spent an hour and a half in and out of a refrigerator while repairing it, this being the longest period of time the claimant had ever been required to spend in a refrigerated box. In reaching this decision the court did not even mention the *Lerner* case which was the classic "refrigerator" case.[79] However, in *Deyo v. Village of Piermont, Inc.*[80] the court relying on the *Horn* decision denied an award to a patrolman whose shoulder arthritis was aggravated while directing traffic for five hours in the cold, rain and sleet, saying:

> We are mindful of the trend in the so-called 'heart-cases' to somewhat relax the rule that the work or exertion must be unusual or beyond normal duty, providing the attack occurs from the exertion of the work . . . . However, we do not think the interpretation of what constitutes an 'accident' should be extended to fringe cases such as this, where there is no single incident which would be regarded as an accident by the common man. There must be some element of suddenness—something catastrophic—and some incident immediately noticeable."[81]

Hence, the *Lerner* doctrine survives to the extent that where the disease is the result of exposure and chilling, whether ordinary or extraordinary, expected or unexpected, there is to be no award where the disease is not directly consequent thereon. Thus, while New York has developed an exception to the

76. 266 App. Div. 1047, 45 N.Y.S.2d 284 (3d Dep't 1943), rev'd per curiam, 293 N.Y. 861, 59 N.E.2d 448 (1944).

77. 299 N.Y. 575, 86 N.E.2d 103 (1949), reversing 274 App. Div. 860, 82 N.Y.S.2d 87 (3d Dep't 1948), reargument denied, 299 N.Y. 677, 87 N.E.2d 65 (1949).

78. See note 67 supra.

79. The court based its decision on Westbrook v. Southside Sportsmen's Club, 274 App. Div. 954, 83 N.Y.S.2d 664 (3d Dep't 1948), aff'd mem., 299 N.Y. 748, 87 N.E.2d 669 (1949), wherein the accident consisted of exposure to cold in a refrigerator by an employee who worked much longer than usual and came out coughing, suffering coronary occlusion as a result.

80. 283 App. Div. 67, 126 N.Y.S.2d 523 (3d Dep't 1953).

81. Id. at 69, 126 N.Y.S.2d at 525. In this case decedent first complained three days afterwards.

majority view that does not permit recovery in the usual exposure cases, it has not carried its reasoning so far that the unexpected result is sufficient to supply the accidental element to its ultimate expression. But it would appear that such cases as *Horn* and *Schwalenstocker,* holding nominally that sufficient unusual exposure has not been shown, might actually have been decided on the fact that the court was not satisfied with the proof of causation, which requirement also was lacking in many "generalized" condition cases where awards were denied for insufficient unusual exertion. In the freezing and sunstroke cases[82] there does not appear to have been any difficulty in awarding compensation, as the courts have apparently been content to make the "arising out of the course of employment" test the sole determinant.[83] Similarly, where a direct chain of causality between the exposure and resultant disability is found by the trier of fact it would seem to be anomalous to deny recovery for exposure, even if the disability is not as clear-cut as freezing and sunstroke.

Accidental Infectious Disease

Most states have held infectious diseases accidental where the germs entered through a scratch or through unexpected or abnormal exposure to infection.[84] New York early awarded compensation for the entry of germs through some scratch or lesion though slight, and in *Connelly v. Hunt Furniture Co.*[85] the court clarified the decision that had been reached in *Richardson,* one of the early infectious disease cases, saying:

> Germs may indeed be inhaled through the nose or mouth, or absorbed into the system through normal channels of entry. In such case their inroads will seldom, if ever, be assignable to a determinate or single act, identified in space or time. . . . For this as well as for the reason that the absorption is incidental to a bodily process both natural and normal, their action presents itself to the mind as a disease and not an accident. Our mental attitude is different when the channel of infection is abnormal or traumatic, a lesion or a cut.[86]

In *Connelly* both the unusualness and definiteness requirements for accidental injury were provided for the court by the scratch to the claimant.[87]

This requirement that the germ invasion be assisted by a break in the

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82. See, e.g., Hughes v. Trustees of St. Patrick's Cathedral, 245 N.Y. 201, 156 N.E. 665 (1927) (heat prostration of gravedigger on a hot day); Wiley v. Arbuckle Bros., 245 App. Div. 885, 282 N.Y. Supp. 281 (3d Dep't 1935) (finger frozen while unloading bags of ice in sub-zero weather).

83. 1 Larson § 38.82, at 563.

84. Id. § 40.

85. 240 N.Y. 83, 147 N.E. 366 (1925).

86. Id. at 85-86, 147 N.E. at 367.

87. 1 Larson § 40.20. For the role of a scratch in the award of compensation see, e.g., Hiers v. John A. Hull & Co., 178 App. Div. 350, 164 N.Y. Supp. 767 (3d Dep't 1917) (death from anthrax transmitted through a scratch on the hand occasioned by accident occurring in and growing out of the employment). As to whether, interpreting the reasoning of Connelly, the scratch itself must be received in the course of the employment, or whether its significance lies in the abnormality and definiteness of the entry of germs see,

skin has not been universally accepted.[88] The majority today hold the unexpected contraction of infectious disease to be injury by accident.[89]

As to whether New York recognizes the contraction of infectious disease through normal channels as accidental, the law is not clear. While *Connelly* drew a distinction between normal and abnormal channels of infection, the court of appeals, in *Gaites v. Society for the Prevention of Cruelty to Children*,[90] affirmed an award to a matron who contracted scarlet fever while taking care of children in a shelter which was under quarantine. Other cases[91] which have denied awards have not indicated clearly whether lack of causal connection or lack of accident influenced the decision.

While the accidental character of infectious disease can sometimes be based on the unusual exposure theory by analogy with the pneumonia cases,[92] there remains something of a paradox in that compensation can still be denied for infectious diseases, and be granted for certain occupational diseases specifically covered by legislation,[93] although the latter are contracted under conditions even less "unusual" than the former.

Time-Definiteness

While the accident concept in addition to the unexpected criterion has also been construed to include an element of reasonable definiteness in time as distinguished from gradual disintegration or deterioration, the necessity for such when the statute speaks of accidental injury is questionable, and can best be explained by the need to have some point of reference for granting the award.[94] Whereas the combination of indefiniteness and lack of unusual exertion will usually be fatal, a condition or disease caused by that which is sufficiently unusual will generally be held accidental, whether it be gradual or not.[95]

Similar to the unexpected concept, the concept of time-definiteness applies to either the cause or effect, and is satisfied if either the cause or manifest effect is of sudden or reasonably brief character; in the absence of either, as where

e.g., Lepow v. Lepow Knitting Mills, Inc., 288 N.Y. 377, 43 N.E.2d 450 (1942) (malaria contracted as a result of a mosquito bite held compensable accident).

88. 1 Larson § 40.30, at 585.

89. Id. § 40.30. These courts have attributed the accidental character of the infection to the unexpected appearance of germs in water and food, and the injury to the harmful work undertaken by the germs, although some time was required to bring about the result.

90. 277 N.Y. 534, 13 N.E.2d 461 (1938), affirming 251 App. Div. 761, 295 N.Y. Supp. 594 (3d Dep't).

91. See, e.g., Dyviniek v. Buffalo Courier Express Co., 296 N.Y. 361, 73 N.E.2d 552 (1947) (typhoid allegedly contracted by photographer in flood area not compensable). The dissenting opinion in the Dyviniek case, supra, relying on Gaites, note 90 supra, felt that an unusual degree of exposure to the infection satisfies the accidental character and should be compensated. See McDonald v. Belle Terre Lodge, 268 N.Y. 663, 198 N.E. 546 (1935) (typhoid allegedly contracted from food and drink supplied by employer not compensable).

92. 1 Larson § 40.50.

93. Id. § 40.60.

94. Id. § 39.10.

95. Id. § 38.71.

prolonged exposure leads to prolonged deterioration or disease, the accident is found by treating each impact or inhalation as a separate injury in itself, ultimately resulting in the disability.[96]

The impact of these theories has been apparent in New York, and courts of that state have progressed since the *Jeffreyes* case wherein compensation was denied for failure to find a sufficiently definite time of cause of injury.[97] That there need not be an instantaneous injury to have an accident was seen in *Reichard v. H. H. Franklin Mfg. Co.*,[98] wherein an award was made for death due to monoxide poisoning aggravating endocarditis, one particular day being picked as the time of the accident though the effect the gas had in producing death came from frequently repeated exposures. Recognizing that often an otherwise protracted-type deterioration might culminate in a distinct fixed in time structural change,[99] the courts held that heart failures as the result of overwork and protracted strain over the following times were compensable: long hours seven days a week for nine or ten months;[100] a month of routine work that was not as light as a previous month;[101] and an unusually arduous week.[102] The continual lifting and turning in *Pioli v. Crouse-Hinds*[103] made for a result that constituted accidental injury, and this test of suddenness of result was still satisfied in *Nielson v. Michael Stern & Co.*[104] In that case compensation was awarded for the amputation of an arm after rupture of the interosseous artery which was allegedly caused by repeated bumping against a steam iron, the last burn occurring at least four weeks prior to the rupture. The time-definiteness requirement failed, however, to be met by the five months of prolonged tension in *Lesnik*, and as neither cause nor result was found sudden there was only gradual deterioration and injury.[105]

96. Id. § 39.10. On the strength of these reasons most jurisdictions have at some time awarded compensation for conditions that have developed not instantaneously but gradually, and culminated in disability from silicosis and other dust diseases, dermatitis, nephritis, asthma, lead poisoning, bruises, back injury, dupuytrens contraction, deafness, bronchitis, bursitis, encephalitis, tenosynovitis, eye injury, cancer, snow blindness, atrophy and herniated disc.

97. See also Woodruff v. R. H. Howes Constr. Co., 228 N.Y. 276, 127 N.E. 270 (1920) (frog felon caused by bruising of hand as a result of continued use of screwdriver held not compensable); Wright v. Used Car Exch., 221 App. Div. 154, 223 N.Y. Supp. 245 (3d Dep't 1927) (gradual contraction of dermatitis from constant contact with sulfuric acid while working with batteries held not compensable since not attributable to any single contact with the acid).

98. 223 App. Div. 797, 228 N.Y. Supp. 17 (3d Dep't), aff'd, 249 N.Y. 525, 164 N.E. 570 (1928).

99. 1 Larson § 39.30, at 578.

100. Furtado v. American Export Airlines, Inc., 274 App. Div. 954, 83 N.Y.S.2d 664 (3d Dep't 1948), leave to appeal denied, 298 N.Y. 933 (1949).

101. Carlin v. Colgate Aircraft Corp., 276 App. Div. 881, 93 N.Y.S.2d 791 (3d Dep't 1949), aff'd mem., 301 N.Y. 754, 95 N.E.2d 626 (1950).

102. Masse v. Robinson Co., 301 N.Y. 34, 92 N.E.2d 56 (1950).

103. 281 App. Div. 737, 117 N.Y.S.2d 734 (3d Dep't 1952).

104. 282 App. Div. 793, 122 N.Y.S.2d 472 (3d Dep't 1953).

105. The court in that case felt that the situation before it was similar to an occupa-

Actually, poisonings, dust or fume diseases and irritations which are tested for accidental quality are the same kinds of injury or disease which are contracted gradually in the normal course of an occupation, and are considered occupational diseases, the problem diminishing in those states where there is full occupational disease coverage.[106]

CONCLUSION

The qualification of "accidental" which so limited personal injury that the occurrence had to be an unexpected mishap, traceable within reasonable limits to a definite time, place and occasion, made difficult the finding of an accident where the injury was not caused by an external and separate event or extraordinary circumstance in the work, but rather was itself the unexpected event resulting merely from usual work performed in a usual manner under usual circumstances or from protracted exposure or strain. It greatly precluded a sensible application of the Workmen's Compensation Act.

While Workmen's Compensation should not indiscriminately resolve difficult questions in favor of a claimant on the theory that his position is the same as that of a beneficiary of a personal insurance policy or of a comprehensive social security system,[107] there exist no sound reasons why in a progressive state disabling personal injuries which are produced, accelerated or intensified by employment should not be compensable regardless of lack of unusual circumstances.[108] Workmen's Compensation should be broadly and liberally construed in favor of the employee,[109] for it is designed as insurance against a particular

tional disease, but could not be treated as such as the legislature had not included it under occupational disease coverage. When the facts warrant the courts try to find a compensable accidental occurrence by the use of the repeated impact theory. But see Kobinski v. George Weston, Ltd., 302 N.Y. 432, 99 N.E.2d 227 (1951) (frequent bending, stooping and lifting held no series of traumatic injuries in the absence of unusual strain).

106. 1 Larson § 39.60. For specific enumeration of compensable occupational diseases see N.Y. Workmen's Comp. Law § 3(2).

107. Larson, The Nature and Origin of Workmen's Compensation, 37 Cornell L.Q. 206, 234 (1952).

108. Riesenfeld, Forty Years of American Workmen's Compensation, 7 NACCA L.J. 15, 30-31 (1951). An accident should be construed as arising out of the employment when the required exertion is too great for the man undertaking the work, whatever the degree of exertion or condition of health. The usual nature of the effort involved should be significant only as evidence of the occurrence. See Clark, Reviews of Leading Current Cases, 20 NACCA L.J. 32, 40 (1957). The only possible reason that might be offered against such a liberal compensation view is that it might eventually hurt the interests of those it seeks to protect by narrowing the opportunity for employment as employers might refuse to risk employment for those with previous heart and other similar disease histories. See N.Y. Workmen's Comp. Law § 15(8) for a second injury fund provision that alleviates the prior handicap problem and equalizes opportunity of employment for those with missing limbs by bearing the portion of the ultimate disability assignable to the pre-existing defect. It is submitted that it is not certain that this idea could be extended by the legislature to situations such as heart ailments where the pre-existing condition is quite vague so that such persons would no longer be poor compensation risks.

109. Heitz v. Ruppert, 218 N.Y. 148, 112 N.E. 750 (1916).

hazard of modern life—loss or reduction of the capacity to earn—and to require proof of unusualness and overexertion to establish causal relationship in the guise of the statutory requirement of "accidental injury" would deny relief to many deserving claimants, as the disabling result is the same whether the work is ordinary or unusual.[110]

That Workmen's Compensation is an industrial injury statute is generally accepted as the legislative intent,[111] and industry should not escape liability for work that in fact causes the injury. Liability should be dependent on a relationship to the job in a liberal and humane fashion, and if the cumulative deleterious effects of the employment are a contributing cause to the disability, compensation should be awarded. It is said that such an interpretation by the courts will impose society's obligations upon employers and make the employer an insurer of the life and health of his employee, but this is not accurate for such a liberal interpretation by the courts will only lay upon employers their proper burden, causal connection with the work always being necessary to recovery.[112]

Moreover, there is indeed a paradox when the expected disease caused by the employment is compensable by virtue of legislative designation as occupational disease, while unexpected disease equally caused by employment is without compensation. The proper solution here is legislation defining accidental injury as including any disease arising out of and in the course of employment, thereby putting both on an equal basis.[113] Here also, the requirement of causal connection with the employment will preclude indiscriminate awards for common diseases to which everyone is subject,[114] and prevent Workmen's Compensation from becoming general insurance for all disability. As occupational disease coverage broadens, the accident concept should also expand, for where the characteristic harmful conditions of a particular industry result in a kind of disability not unexpected, and the development of which usually gradual and imperceptible over an extended period is compensable, it is incongruous today to deny recovery for an industrial injury not falling within the definition of occupational disease which is also gradual in the onset and consequences.[115] If the judiciary cannot fill that gap in the worker's protection against economic difficulties as in the *Lesnik* case, it is the task of the legislature[116] to recognize the modern trend and give expression to it.

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110. 53 Colum. L. Rev. 130, 132 (1953). See also Riesenfeld, Forty Years of American Workmen's Compensation, 35 Minn. L. Rev. 525, 529 (1951), which points out that it is designed to protect a segment of the population against substandard living conditions brought about by a typical hazard of modern society.

111. 4 Schneider, Workmen's Compensation § 1328 (perm. ed. 1945).

112. For a good discussion and evaluation of this point see Levitan, The Liability Phase of the Cardiac Problem, 41 Marq. L. Rev. 347 (1958).

113. 1 Larson § 40.60.

114. Any fear of false claims is refuted by this requirement as it is a difficult matter to establish a connection with the work in many types of disease cases. See 1 Larson § 8.50.

115. 1 Larson § 39.60. See Lesnik v. National Carloading Corp., 285 App. Div. 649, 140 N.Y.S.2d 907 (3d Dep't 1955), aff'd mem., 309 N.Y. 958, 132 N.E.2d 326 (1956).

116. The legislature has recognized the need of the worker to a certain extent as witnessed by its enactment of disability benefit provisions. N.Y. Workmen's Comp. Law §