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Compensable Injury in Back Claims

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Introduction

THIS ARTICLE is the product of many years' uncertainty and resulting unhappiness in advising clients,—compensation insurers and their claims representatives—in their handling of back claims, and in the writer's own preparation and trial of such proceedings. No doubt this situation has been intensified by the fact that North Carolina is in the very small minority of jurisdictions limiting compensability by requiring *an accident* as a condition precedent, and yet recognizing this handicap, seeking exceptions where it could, to the accomplishment of justice at the cost of confusion.

Legal practice and observation in back claims have established a number of conclusions: They range from the uncertainty and complexity of medical knowledge to the diversity of injuries, to their causes, their disabilities, and their effects on the person. They note especially the frightening volume of litigation in all jurisdictions, the early diversities in decisions, steadily reduced by a compelling urgency for uniformity, yet continuing to a lesser degree; and yet with all we have been impressed by an apparent absence of appropriate instructional material for all concerned. In day to day activity and decision-making there has seemed to be no simple catechism for guidance.

No one would minimize any of the various works published but they have limitations in value as applied to our own concentrated subject of back claims. We value particularly Larson's *Workmen's Compensation Law* as supplemented to 1967, which we have relied upon heavily and cited constantly. But his field and approach is not limited to back claims and necessarily his text is more appropriate to research than to daily assistance in a particular back claim.

Our thought for what follows is that it may be a beginning. It is certainly not complete or final. This article will have served its purpose if it be helpful to all concerned—claimant, insurer, adjuster, counsel—in their day to day work, and in their arrival at intelligent evaluations, honest conclusions, and just settlements. Before commissions and courts, it is to be hoped that sensible uniformity will arrive with a lessening of their burdens.

For compensation insurers we have one comment: This is no apostate treatise. We believe that back claims deserve from law all the consideration which back injuries impose upon the individual. We think that such claims should be regarded liberally and that premiums should be adjusted accordingly.

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"Injury by Accident" in Back Claims

Background of the Problem

Statutory Provisions

As we all know, before the first such act in this country, Great Britain enacted a workmen's compensation law and its courts rendered opinions making important interpretations. A number of American statutes substantially copied many of the British provisions. We have no need here to make a technical analysis of any original or modified acts of parliament or of the American legislatures. We are in fact concerned only with those terms related to the accidental nature of an injury, and these as background only.

The original British formula described compensable injury as "personal injury by accident arising out of and in the course of the employment." Our particular interest here lies in the phrase "injury by accident." That a compensable injury must arise out of and in the course of employment is of course necessary and is the legal test; but if it be established that the injury be accidental, its relationship to the employment is usually of simple determination.

A majority of American statutes have adopted the British term "injury by accident"; other states, the District of Columbia, and the federal Longshoremen's Act use the phrase "accidental injury." Montana and Washington use their own wording,—"from an unexpected cause" and "a sudden and tangible happening, of a traumatic nature." Three states omit "accident" or "accidental" in the coverage clause, but use "accident" elsewhere and the courts read it into coverage. Six states have no requirement that the injury be accidental in character. None of these differences, however, has been a basic cause of the divergencies in interpretations which developed over the years, with masses of litigation and confusion confounded, from which the courts have been gradually extracting themselves, very largely without benefit of additional legislation.

Court Definitions and Approaches

The words "accident" and "accidental" are not the perpetrators of our problems, but the victims. "Accident" has no settled legal meaning or fixed dictionary definition. It has wide signification and is to be interpreted in the popular and ordinary sense. Textbooks and decisions use a variety of expressions, such as:

> Something happening without design and being unforeseen and unexpected to the person to whom it happens; happening suddenly, and often accompanied by a manifestation of force.[1]

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[1] 99 C.J.S. *Workmen's Compensation* at p. 526 (1958).

An occurrence which is neither expected, designed, nor intentionally caused by the workman.[2]

It is readily seen that the basic and indispensable ingredient of "accident" is unexpectedness, and that this factor was embodied in English decisions before enactment of any compensation statutes in this country. Under accepted rules, adoption of the English statute should have carried with it the English doctrine, and in most cases it did.

Within the framework of these statutes and these definitions there was ample court room for an interpretation and activation of workmen's compensation laws to accomplish the purposes of their adoption. But there were difficulties in the way to which some courts succumbed; and while many have made correction, some of the problems and some of the mistakes remain.

Two Very Real Medico-Legal Problems

While other types of injuries and disease present some similar questions in determining compensability, back injuries produce the ultimate in difficult issues which are both medical and legal. It is simply not possible to evaluate, much less to prepare, try, and decide, a typical back claim without adequate consideration of the medical aspects.

It is at once apparent that the way is difficult in order to determine the conditions upon which an injury is superimposed, the events which might be considered cause, and the resulting injury itself. There are other injuries, such as those to the heart, which present similar difficulties not experienced with injuries from obvious external trauma; but any person of experience in workmen's compensation has observed and must acknowledge the serious questions posed in almost every back claim,—questions for which there is often little guidance and no ready answers.

These difficulties and hard-to-answer questions from an early date created a fear that a considerable assortment of claims, including back and heart, would get out of control and become compensable whenever they took place within the time and space limits of employment. To prevent this some courts have sought to set up some kind of arbitrary boundary of legal concepts around the "accident" requirement within which a court might announce "injury by accident" or no, without pursuing the more arduous determination of causal relationships.

As we shall see, some of these efforts have employed false premises and inconsistent reasonings and reached wrong conclusions. But when all logical criticisms have been exhausted, the utilitarian purpose behind their efforts, wrong though they may be, cannot be disregarded. It is our purpose, not to criticize for the sake of criticism, but to seek a realistic and just doctrine and, we hope, make some constructive suggestions how

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[2] 58 Am. Jur. *Workmen's Compensation* at p. 705 (1948).

by the route of reflective interpretation past errors may be removed under existing statutory laws.[3]

Approach to the Question

The Two Concepts; Accidental vs. An Accident

In defining and arriving at the meaning of the term "injury by accident arising out of and in the course of employment," the pre-existing British opinions and the vast majority of decisions in the United States, either originally or by subsequent modification, have in summary declared that

> a compensable accident arises out of the employment when the required exertion whatever the degree of exertion and whether or not usual and ordinary, is too great for the man undertaking the work, and is the sole or a contributing cause of injury, either disabling in itself or aggravating some predisposing weakness.

In applying these conclusions, the courts have required only the following three findings:

a. That the event or mishap in question was unexpected and undesigned, therefore accidental, which may be termed the Factual Test.[4]

b. That such event in fact caused or contributed to a condition resulting in disabling injury, the Medical-Causal Test.[5]

c. That such event arose out of and in the course of employment, the Legal Test.[6]

Contra, a diminishing minority of U. S. jurisdictions have insisted that a compensable injury by accident can result only from *an accident,* an identifiable, precise and positive event, causing specific disabling injuries.

In passing upon claims under this "*an* accident" theory, these courts have created two opposite and opposing errors: *1.* In limiting themselves to the narrow confines of *an accident* they have set up unjustified conditions precedent to compensability. *2.* In seeking to free themselves from such confining limits, yet retaining the shell of their formula, they have created artificial and unworkable standards of *an accident,* in particular the unusual exertion theory.

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[3] 1A Larson, Workmen's Compensation Law § 38.81, p. 622.16 (1967).

[4] Phillips Pipe Line Co. v. Brown, 301 P.2d 689 (Okla. 1956); Ptak v. General Electric Co., 16 N.J. Super. 573, 85 A.2d 214 (1951); Industrial Commission v. Milka, 410 P.2d 181 (Colo. 1966); Mills v. Monte Christi Corp., 10 N.J. Super. 162, 76 A.2d 839 (1950).

[5] Gray's Hatchery & Poultry Farms v. Stevens, 46 Del. 191, 81 A.2d 322 (1949); Acme Material Co. v. Wheeler, 278 P.2d 234 (Okla. 1954).

[6] Hunter v. Industrial Commission, 72 Ariz. 84, 237 P.2d 813 (1951); Bender v. Salina Roofing Co., 179 Kan. 415, 295 P.2d 662 (1956); Gray's Hatchery & Poultry Farms v. Stevens, *supra* note 5.

One of the less useful of these devices has been to substitute for the judgment of the court "the common sense viewpoint of the average man." As Larson says, this is no way "to dispose of intricate and troublesome questions of law." He adds that "the average man would quickly knock out the entire tortuous field of usual-unusual exertion law, since it is not common sense to equate the merely unusual with the accidental.[7]

The Majority View: Accidental Injury

The wording and terms of workmen's compensation acts clearly require only that the basic and indispensable ingredient of the term *accident* or *accidental* be that it be unexpected. Accident means an unexpected incident or event during the course of work from which an injury flows, an incident which is an unlooked for mishap or untoward event, not expected or designed.

As a basis for such unexpectedness, the employee may be engaged in normal activities, in the ordinary performance of duties in the usual manner, without any fortuitous cause, such as a fall, mis-step or twist. It is not necessary that the cause itself be unexpected; it may be routine; but if the effect on the employee be unexpected and injurious, it is therefore accidental. An injury is accidental when either the cause or the result is unexpected.[8]

Concerning medical causation three obvious factors are involved:

a. *The pre-existing condition of the employee's back,* whether in good condition, reasonably established; or subject to a predisposing weakness. Such physical being is a measure of the personal risk contributed by the employee. Where there is no competing personal risk to overcome, then any employment contribution to the injury is adequate to establish causation. But where the employee's prior existing weakness of back creates a personal element of risk, the employment must contribute something substantial to increase the risk.[9]

b. *The exertion involved.* As the above indicates there are two measures of causative exertion. If there be no personal causal contribution in the form of pre-existing back weakness, then "*any* exertion connected with the employment and causally connected with the collapse as a matter of medical fact is adequate to satisfy the legal test of causation."

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[7] 1A Larson, *supra* note 3 at § 38.64(a), pp. 598-600 (1967).

[8] Bryant Stave & Heading Co. v. White, 227 Ark. 147, 296 S.W.2d 436 (1956); Industrial Commission v. Milka, *supra* note 4; Gray v. Employers Mutual Liability Ins. Co., 64 So.2d 650 (Fla. 1953); Ptak v. General Electric Co., *supra* note 4; Traino v. Murray Corp. of America, 189 Pa. Super. 423, 150 A.2d 368 (1959); Barber v. Fleming-Raugh, Inc., 208 Pa. Super. 230, 222 A.2d 423 (1966); Central Motor Express, Inc. v. Burney, 214 Tenn. 118, 377 S.W.2d 947 (1964); Purity Biscuit Co. v. Industrial Commission, 115 Utah 1, 201 P.2d 961 (1949); Virginia Electric & Power Co. v. Quann, 197 Va. 9, 87 S.E.2d 624 (1955).

[9] 1A Larson, *op. cit. supra* note 3 at § 38.83, p. 622.21.

On the other hand, "if there is some personal causal contribution in the form of (back weakness), the employment contribution must take the form of an exertion greater than that of nonemployment life. This is similar to the New York wear and tear rule. Note that the comparison is not with this employee's usual exertion in his employment but with the exertions of normal nonemployment life of this or any other person." [10]

c. *The resulting injury and its causation.* These, of course, are the two culminating medical aspects of a back claim: the examination and diagnosis, and the expert medical opinion on causation. It will be noted that they rest upon two prior sets of facts, to both of which the medical expert should have access: The medical-activity record of the claimant's back and the exertion record of the claimant's back immediately leading up to the event of claim. Based on all these facts and medical conditions the burden is on the claimant to show that medically the particular exertion contributed causally to the injury.

Upon this record as presented by all counsel must depend the results of the medical-causal test, and the acceptance or rejection of claim for injury by accident of the claimant's back.

Whether the disabling mishap arose out of, and in the course of, employment is frequently, perhaps usually, a simple question of fact. On occasions, however, some factors become important, such as (a) the time and place of the cause of the resulting injury and the relation of both to conditions of employment; and (b) the type of resulting injury, specific, generalized, or aggravating. The relationships will be considered in their proper place in the discussion following on the elements involved in injury by accident.

In any event, "in determining whether an accident arose out of and in the course of, the employment, each case must be decided with respect to its own attendant circumstances and not by resort to some formula." [11]

Elements Involved in Injury by Accident

The two questions before us in brief are: Was there an accidental occurrence in employment, and if so, did it contribute to disabling injury? These must be answered whether the attitude of the court be liberally or strictly disposed toward compensability. In reaching such decision various factors may become pertinent, and they are now considered.

It will be noted that we are little concerned with what may be called accidents in fact which result (1) from external physical trauma, such as a blow, cut, shot, collision, etc. or (2) from facts indicating trauma such as falling, slipping, twisting, or some unusual or awkward angle or po-

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[10] *Ibid.*

[11] 99 C.J.S. *supra* note 1 at § 208, § 209 and § 214 (1958).

sition. These very facts meet the most stringent demand of any statute or court rule and require no presentation here.

Exertion in Relation to Claim

Excepting of course those few courts which have continued to follow the unusual exertion rule, the majority of jurisdictions in applying the doctrine of causal relationship have more and more minimized both the amount of exertion required to be involved, and its degree or relationship in respect to usualness of the claimant's work activities. From the decisions these conclusions may be made: [12]

1. Considering both the amount of exertion and the usualness, as a matter of common knowledge, heavy physical labor, which the work of the claimant normally requires and which ordinarily results in no ill effects, may on occasion result in disabling injury without the intervention of unusual physical effort.[13]

2. Without regard to amount of exertion, "A large majority of jurisdictions now hold that when usual exertion leads to something actually breaking, herniating or letting go, with an obvious sudden mechanical or structural change in the body, the injury is accidental." [14]

3. Where the resulting injury is not an overt breakage, such as herniation of the disc, but is a more generalized condition,—a sprain, a strain, an aggravation of a pre-existing back condition, or simply disabling pain,—occasioned by usual exertion, "a substantial but somewhat less one-sided majority" hold such injury accidental. This distinction, however, between "breakage" and generalized failures is being progressively abandoned.[15]

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[12] Sheppard v. Mich. Nat'l. Bank, 348 Mich. 577, 83 N.W.2d 614 (1957); Mills v. Monte Christi Corp., *supra* note 4; Neylon v. Ford Motor Co., 13 N.J. Super. 56, 80 A.2d 235 (1951); Sorace v. General Electric Co., 5 App. Div. 2d 711, 168 N.Y.S.2d 770 (1957); Phillips Pipe Line Co. v. Brown, *supra* note 4; Rush Implement Co. v. Vaughn, 386 P.2d 177 (Okla. 1963); Purity Biscuit Co. v. Industrial Commission, *supra* note 8; Virginia Electric & Power Co. v. Quann, *supra* note 8; Boeing Co. v. Fine, 65 Wash. 2d 157, 396 P.2d 145 (1964); Wisc. Appleton Co. v. Industrial Commission, 269 Wisc. 312, 69 N.W.2d 433 (1955); Bryant Stave & Heading Co. v. White, *supra* note 8; Garofola v. Yale & Towne Mfg. Co., 131 Conn. 572, 41 A.2d 451 (1945); Gray v. Employers Mutual Liability Ins. Co., *supra* note 8; Duff Hotel Co. v. Ficara, 150 Fla. 442, 7 So.2d 790 (1942); Howard v. Dept. of Public Safety, 187 So.2d 889 (Fla. 1966); Harding v. Idaho Dept. Store, 80 Idaho 156, 326 P.2d 992 (1958); McManus' Case, 328 Mass. 171, 102 N.E.2d 401 (1951).

[13] Garofola v. Yale & Towne Mfg. Co., *supra* note 12; Rivero v. Leaveau, 45 So. 2d 418 (La. App. 1950); Virginia Electric & Power Co. v. Quann, *supra* note 8.

[14] 1A Larson, *op. cit. supra* note 3 at § 38.20, p. 521; see especially Larson notes 27 through 30, pp. 525-530 for further discussion and annotations.

[15] 1A Larson, *op. cit. supra* note 3 at § 38.30, p. 540; see especially Larson notes 63 through 65, pp. 563-566.

Timing of Cause and Injury

Before considering their legal effects, it will simplify matters to list the several timings and relationships possible between causal events and resulting injury. They are:

1. *As to duration of cause,* (a) this may be sudden, an accident caused by external trauma or by falling, twisting, etc.; or (b) the cause may be gradual, such as a succession of slight injuries, not individually disabling, but cumulatively so over a period of time varying from hours to days, weeks, months, and longer.

2. *As to onset of injury,* two timings may be important: (a) In relationship to cause, the injury may result immediately, or there may be a time interval, which again may vary considerably. (b) In the latter case, when there is a time interval, the disabling effect of the injury may or may not occur during the hours of active work.

In reading the decisions and in evaluating the evidence to determine injury by accident, it will be helpful to keep in mind these five related timings and the fact that a combination of three of them will apply in each instance.

This question of timing may be important for a number of reasons other than causal relationship, such as statutes applicable, insurance coverage, notice, and wage basis. With these we are not concerned.

If we were left to consider only the accidental nature of an event and its causal relationship to disabling injury, the task of decision would be simpler. But the courts have interposed two allied factors which have created confusion. The first of course is the requirement (by a small minority) that the injury must have been caused by an *accident,* and the second, nearly as demanding, that the injury must be traceable, within reasonable limits, to a definite time, place, and occasion or cause.[16]

The distinction between these two rules, though not always made clear, may be said to be that the "*an* accident" rule limits the accidental nature of the event to cause, and the "definiteness" requirement is satisfied with definiteness either in cause or result.

Eliminating the accident-cause-only rule considered later, we find that most jurisdictions take a practical approach, emphasize the causal relationship and find accidental injury "if either the cause is reasonably limited in time or the result materializes at an identifiable point." [17]

The facts in each case will control, and no precise formulas are possible, other than these generalizations:

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[16] 1A Larson, *op. cit. supra* note 3 at § 37.20, p. 513-514.

[17] *Id.* at § 39.00, p. 622.43.

1. *Suddenness of cause.*

In judging on suddenness of cause alone the courts have gone far beyond the instantaneous or even briefness in point of time, particularly where the cause is identifiable and definite, and they have carried the permissible duration far beyond a few hours or days, to weeks or even months in some instances.[18]

With cause accepted as definite and a causal relationship in evidence, the time requirement is satisfied whether the onset of injury be immediate or after an interval of time, or whether the disability be sudden or gradual.

2. *Gradual cause from repeated events.*

A cause may be gradual, yet consist of a series of more or less separate incidents, such as repeated liftings, twistings, jarrings, or strains.

Under such circumstances, if the onset of disability is sudden the time requirement is satisfied. In some cases, courts have accepted the onset of pain, though not actually disabling.

But if the onset of disability also be gradual, instead of accepting the situation as "gradual cause—gradual result," many courts have adopted and used the repeated-impact theory, and hold each impact as a separate, though minor accident, leading to ultimate disability.[19]

3. *Gradually developing cause.*

If the cause be gradual but without repeated impacts, and yet the disabling injury has a reasonably definite beginning, once again the time requirement is satisfied.

But next and finally we have a gradually developing cause followed by a gradually developing injury, where neither cause nor result is sudden or reasonably definite in point of time. Under such circumstances, the court has but one alternative: It may deny altogether the definite time requirement, and accept as sufficient expert medical testimony on causation; or the court may deny an injury by accident.[20]

Injuries Resulting

Our next area of concern is the injury which has resulted from the causing events. Such injury may be held to fall within one of three categories. We comment only briefly and non-medically.

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[18] *Id.* at § 39.20, p. 622.59.

[19] *Id.* at § 39.10, p. 622.43-.44, § 39.40, p. 622.60-.63, and § 39.50, p. 622.62.

[20] *Id.* at § 39.40, p. 622.60; the following cases are illustrative generally on the subject of timing of cause and injury: Argonaut Ins. Co. v. Industrial Accident Commission, 231 Cal. App. 2d 111, 41 Cal. Rptr. 628 (1964); Forseen v. Tire Retread Co., 271 Minn. 399, 136 N.W.2d 75 (1965); Transcon Lines v. Curtis, 402 P.2d 269 (Okla. 1965); Brown Shoe Co. v. Reed, 209 Tenn. 106, 350 S.W.2d 65 (1961); Central Motor Express, Inc. v. Burney, 214 Tenn. 118, 377 S.W.2d 947 (1964); Purity Biscuit Co. v. Industrial Commission, 115 Utah 1, 201 P.2d 961 (1949).

1. *Breakage.* This title extends beyond actual breaking or even simple fracture. Its subject is not limited to bones, but extends to any part of the back subject to breaking, tearing, letting go, herniation or rupture, each with an obvious mechanical or structural change in the body. The herniated or slipped disc is a breakage. Likewise, there is no difference whether the breakdown occurs internally or externally. "If strain causes a broken wrist, nobody questions the accidental nature of the injury. If instead of the wrist it is an artery that breaks, the occurrence is just as clearly an accident." [21]

In considering the effects of usual conditions of employment in relation to disabling injury, most jurisdictions vary their findings of compensable accidental injury according to the definiteness of harm produced.[22]

A large majority of jurisdictions now hold that when usual exertion leads to something actually breaking, herniating, or letting go, with an obvious sudden mechanical or structural change in the body, the injury is accidental.[23]

Since a so-called *slipped intervertebral disc* is a herniation or rupture, a breaking apart, it is not surprising to find that a heavy preponderance of jurisdictions affords compensation for this type of injury without exacting proof of unusual exertion or mishap as a cause.[24]

Admittedly the "breakage" factor can facilitate justification of awards, as by the device of treating internal injuries on the same terms as external.[25]

2. *General (indefinite?) back injury.* Here we have any injury or condition in the back which cannot be included under "breakage." Such injuries are sufficiently indicated by the terms referring to them in the decisions, such as: Back strain, back sprain, sacroiliac sprain, lumbosacral strain, or even less technically back injury or twisted back. They can vary widely, and as Larson points out "neither as a matter of medical theory nor as a matter of common sense can a line be drawn between internal failures which consist of something breaking, and those which are 'generalized.' . . . If one looks close enough in the 'generalized' cases, one will probably find some kind of disintegration or 'breaking.' " [26]

But let us assume that a distinction is possible and proper between such injuries as a breaking or rupture and a sprain or a strain. The

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[21] Virginia Electric & Power Co. v. Quann, *supra* note 8.

[22] 1A Larson, *op. cit. supra* note 3 at § 38.10, p. 521.

[23] *Id.* at § 38.20, p. 521.

[24] *Id.* at § 38.20, p. 525. See also annotations and discussions of disc cases in Larson notes 27 through 30, pp. 525-530.

[25] 1A Larson, *op. cit. supra* at § 38.72, p. 622.13.

[26] *Id.* at § 38.73, p. 622.14.

causing events are fixed, and so too is the fact of a disability which constitutes the claim. The sole question is this: If the usual exertion rule is applicable to a breakage injury, classifying it as an injury by accident, how can it be said that the same disability caused by the same usual exertion is not injury by accident solely because the physical results are not identifiable as breakage?

The courts have responded to the obvious and generally found no distinction between breakage and generalized conditions, except where the resulting injury has indeed been indefinite and difficult to define or localize. The same small minority which follows the unusual exertion rule generally also requires it here.[27]

3. *Aggravation of Injuries.* This term, of course, presumes the existence of a predisposing weakness, infirmity, or condition which a new event expands or extends. Such injury, if by accident, is compensable.[28]

"The aggravation, acceleration, or lighting up of a pre-existing or latent infirmity or weakened physical condition by an accidental personal injury within the compensation act may constitute a disability of such character as to entitle the injured employee to compensation even though the accident would not have produced the same effect in, or caused injury to, a perfectly normal, healthy individual." [29]

"Every workman brings with him to his employment certain infirmities; and while the employer is not the insurer of the health of his employees, he takes them as he finds them, and assumes the risk of having a weakened condition aggravated by some injury which might not hurt or bother a perfectly normal, healthy person." [30]

In determining compensability of injury by aggravation, two questions of proof arise: In some instances it is a close question whether there was a pre-existing weakness, and if so this has to be a question of medical fact.[31] And if determined to exist a predisposing weakness may well create difficulty in the proof of causation.[32]

Our immediate question is whether the usual exertion rule applies to the aggravation of pre-existing injuries. The answer is that it does. "If the strain of claimant's usual exertions causes collapse from heart weakness, back weakness, hernia, and the like, the injury is held accidental." [33] The fact that an employee is predisposed to an injury brought on by a not unusual exertion is no ground for denial of an award.

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[27] *Id.* at § 38.30, pp. 563-566; see especially Larson notes 63 through 65.

[28] 1A Larson, *op. cit. supra* at § 38.10, p. 519.

[29] 99 C.J.S., *supra* note 1 at § 170.

[30] *Ibid.*; Bryant Stave & Heading Co. v. White, *supra* note 8; Argonaut Insurance Co. v. Industrial Accident Commission, 231 Cal. App. 2d 111, 41 Cal. Rptr. 628 (1964).

[31] 1A Larson, *op. cit. supra* note 3 at § 38.83, p. 622.25-26.

[32] *Id.* at § 38.82, p. 622.18-19.

[33] *Id.* at § 38.00, p. 519; 99 C.J.S. *supra* note 1 at § 171.

In the application of this general rule, some courts consider proof of cause strictly and Pennsylvania requires that the employee must show unusual strain to establish aggravation to be injury by accident.[34]

As a matter of fact, in cases of aggravation courts generally assert some modification of the usual exertion rule by recognizing that the employee with a pre-existing weakness has contributed a personal element to the risk, and by requiring that the employment contribute something substantial to increase that risk and offset the contribution of personal exposure. In the absence of a traumatic accident, the contribution to injury by employment must take the form of exertion, which though not unusual is greater than that of non-employment life of the employee or of any other employee.[35]

Unexpectedness

As we have seen, unexpectedness is the basic ingredient of accident and the unexpectedness of an event meets the statutory requirement of injury by accident. The question is, to what event *must* or *may* this unexpectedness apply. Those courts which require "*an* accident" as a condition precedent to compensable injury, have limited unexpectedness to cause alone, but as said so well in the case of *Bryant Stave and Heading Co. v. White,*[36]

> In reference to the term "accidental injury" it seems apparent that the adjective "accidental" refers to and modifies the noun "injury," and does not refer to the cause of the injury. There is no statutory requirement that the cause of the injury itself must have also been an accident. What the statute says is that the injury itself must have been accidental, that is, unforeseen and unexpected. . . . In short, an injury is accidental when either the cause or result is unexpected or accidental, although the work being done is usual or ordinary.

In a decision which repudiates and makes convincing argument against the *an accident* requirement, the Utah court says that what the statute means is that the injury must be accidental, not that it be caused by a separate accidental event.[37]

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[34] 1A Larson, *op. cit. supra* at § 38.82, p. 622.18.

[35] *Id.* at § 38.83, pp. 622.21-22, 25. The following citations of cases supporting aggravation from usual exertion: Harding v. Idaho Dept. Store, *supra* note 12; Rivero v. Leaveau, 45 So. 2d 418 (La. App. 1950); Sheppard v. Mich. Nat'l Bank, *supra* note 12; Ptak v. General Electric Co., *supra* note 8; Acme Material Co. v. Wheeler, *supra* note 5.

[36] 227 Ark. 147, 296 S.W.2d 436 (1956); see also Gray v. Employers Mutual Liability Ins. Co., *supra* note 8; Howard v. Dept. of Public Safety, 187 So. 2d 889 (Fla. 1966); Terminal Oil Mill Co. v. Younger, 188 Okla. 316, 108 P.2d 542 (1940); Traino v. Murray Corp. of America, *supra* note 8; Barber v. Fleming-Raugh Inc., *supra* note 8; Virginia Electric & Power Co. v. Quann, *supra* note 8.

[37] Purity Biscuit Co. v. Industrial Commission, *supra* note 8.

An injury is by accident either if the cause was of an accidental character or if the effect was the unexpected result of routine performance of the claimant's duties.[38]

. . . If in the act which precedes the injury, something unforeseen, unexpected, or unusual, occurs which produces the injury, then the injury has resulted through accidental means.[39]

The Two Rules to Establish Injury by Accident: (1) Causation in Fact; (2) Causation by Event

Differences in Theories and Approach

No matter what approach is made, what consideration is given to elements involved, or what rule is followed, the aim and end of every enquiry must be an answer to the question, "Proximate cause?" No court has found any problem in deciding with a simple traumatic accident as a cause of compensable injury. But it is the happening of a disabling injury in the absence of traumatic accident which has brought on tragic masses of litigation, countless searchings of the judicial mind, and divergent conclusions, which have remained with us, in spite of a growing majority for the Usual Exertion Rule.

Every claim starts with a given state of facts: An employee at work devoting some amount of energy and encountering some disabling injury. The Commission or court must decide if this injury was by accident within the terms of the compensation act. Accepting the premise that there was no simple accident in fact, no external trauma, no blow, no fall, no twisting,—what approach, what theory, what logic can be applied to produce the answer? To arrive at that answer, each group has provided itself with a question as a yardstick and guide:

For the Usual Exertion Rule, "Were the particular events and exertion applied to the particular body of the employee at the time sufficient in fact to cause or contribute to the injury complained of?"

For the Unusual Exertion Rule, "Were the particular events and exertion at the time so different from the usual events and exertions of the employee in his work as to justify their classification as an accident?"

From the decisions we formulate and present our statement of the two rules, as follows:

Causation In Fact: Usual Exertion Rule

An unexpected and undesigned injury received by an employee while engaged in the ordinary performance of his duties in the usual manner is an injury by accident and compensable if it be established that the exertion in employment, no matter how slight, caused or contributed

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[38] 1A Larson, *op. cit. supra* note 3 at § 38.00, p. 519.

[39] 99 C.J.S. *supra* note 1 at § 171, see note 79 at p. 592.

to the injury, and no matter the employee's predisposition to attack; neither unusual exertion nor unusual event increasing the exposure is required.

Causation By Event: Unusual Exertion Rule

To establish a compensable injury by accident there must be an accident followed by a disabling injury from such accident.

In the absence of a traumatic accident, courts applying this rule require that there be unusual exertion occurring in some event or condition of work in contrast to normal duties of the employee, and usually associated in some degree with elements of force or violence.

Reconciling of the two rules will be promoted by removing the fiction of "*an* accident." Where there is accident in fact, no forum has a problem. The usual exertion group says that no accident is necessary, only that the injury be accidental, that is unexpected, and that the only question is causation in fact. The unusual exertion group insists in principle that there must be *an* accident, but when the facts do not produce the makings of *an* accident, they say that whatever is unusual is accidental and meets the requirement of *an* accident. Without arguing the point, it is simply not true that the merely unusual need be either unexpected or unintended. But even assuming that some unusual exertion, occurrence or condition did constitute *an* accident, there remains a great fallacy to this position: The unusual exertion theorists, in accepting *an* accident as their premise and guide, have, if not to its exclusion, at least down graded causative relationship between the events and the injury. In point of fact, causation is both the basic problem and the solution.[40]

The Unusual Exertion Rule

The reasoning processes and steps by which the courts have reached the unusual exertion rule to be applied to compensability seem to have been about as follows:

a. There must be an accident preceding disabling injury.

b. In the absence of traumatic accident unusualness will be accepted as constituting *an accident*—unusualness in amount of exertion involved in an interruption of work routine or the introduction of unusual conditions likely to result in unexpected consequences.

c. Such unusualness should ordinarily involve some facts associated with force or violence, but not always so.

d. The norm of exertion with which to compare the unusual precipitating exertion is the claimant employee's usual exertion under normal events and conditions of employment.

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[40] 1A Larson, *op. cit. supra* note 3 at § 38.83, p. 622.20-41.

e. If the court finds by reason of such unusualness that an accident has occurred and further finds that a disabling injury has resulted, the court holds that the injury is compensable.

f. If the court finds that an accident has not occurred, the enquiry ends, and there is no enquiry into injury or into causation of such injury; nor is there any finding as to injury or its cause, although the record may contain uncontradicted evidence of disabling injury and expert testimony that it was caused by the exertion and events which the court has found not to constitute *an accident.*

This rule is based upon certain fallacies in fact and in logic. We list without comment.

a. The rule is based upon the incorrect assumption that whatever is unusual is accidental. The unusual may be intentionally done and not accidental, which must be unexpected.[41]

b. The rule is based upon the incorrect assumption that the accidental character of an injury can be found only in cause, not in result.[42]

This conflicts with interpretations of the 1897 English compensation law in effect before the first U. S. act was passed.[43]

c. The amount of exertion alone, judged by any norm of comparison, is not a true yardstick to measure cause of injury.[44]

d. In any event the norm of exertion of the employee's own activity is not the correct basis of comparison.[45]

In addition to being based upon wrong principles, this rule in its application develops difficulties and produces injustices. Again we list these defects without comment.

a. The rule is impractical and unworkable. It assumes a usual or normal quantum of exertion in every occupation, "which is questionable at best, and certainly difficult to apply." [46]

b. The history of the rule establishes that it has greatly increased litigation in the effort to determine the illusory difference between the usual and the unusual exertion or strain.[47]

c. The effect of the rule in those cases where compensation for a disabling injury is denied because no accident is found is to recast upon the employee the old common law defense of assumption of risk.[48]

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[41] *Id.* at § 38.62, p. 590.

[42] *Id.* at § 38.61, p. 588.

[43] Purity Biscuit Co. v. Industrial Commission, *supra* note 8.

[44] *Ibid.*

[45] 1A Larson, *op. cit. supra* note 3 at § 38.83, p. 622.25.

[46] *Id.* at § 38.63, p. 592.

[47] Bryant Stave & Heading Co. v. White, *supra* note 8.

[48] *Ibid.*

d. Elimination of the accidental result interpretation as injury by accident is a deprivation of compensation to which an employee is rightfully due.[49]

While the English compensation act preceded those in the United States and there were English decisions for a guide toward the principles of the usual exertion rule, several elements were involved which contributed toward a division of the American decisions, not always clean-cut, but in general most following the English precedents and a few developing new thoughts which culminated in the unusual exertion rule, or in its direction. As Larson indicates plainly and as many courts bitterly complain there developed in many jurisdictions vast masses of litigation which caused Justice Smith to say in the *Sheppard* case[50]: "We continue to pursue our melancholy way in these compensation cases, the Court dividing and re-dividing with monotonous regularity as the egregious errors of the past continue to war with the humanitarian objectives of the act we must construe."

We are not disposed to be critical. The various statutes were new to the early decisions. As we have seen the acts varied to some extents. Some courts felt an urgent need to keep judicial control over compensation claims. And, of course, those courts which adopted *"an accident*—unusual exertion position" did so sincerely and honestly.

Gradually, however, their fallacies and defects became apparent and one by one American courts reversed their positions and fell in line with the usual exertion rule.[51]

A small minority following the unusual exertion rule remains. It is to be hoped that the able courts in these states will find some ready road from their present positions. Some at least have indicated that they are committed to such position on two grounds (1) the principle of *stare decisis,* and (2) assumption that the legislature by its silence over the years has given approval and consent to these decisions.

We feel that there is deeply pertinent at this point the concern felt by Justice Smith in the *Sheppard* case.[52] This opinion should be read in full but we limit ourselves to the following extracts which begin with the quotation from Cardozo in his "Nature of Judicial Process": "I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment. We have had to do this sometimes in the field of constitutional law. Perhaps we should do so oftener in fields of private law where consider-

[49] 1A Larson, *op. cit. supra* note 3 at § 38.61, p. 588.

[50] 348 Mich. 577, 83 N.W. 2d 614 (1957).

[51] Bryant Stave & Heading Co. v. White, *supra* note 8; Gray v. Employers Mutual Liability Ins. Co., *supra* note 8; Sheppard v. Mich. Nat'l Bank, *supra* note 15.

[52] 348 Mich. 577, 83 N.W.2d 614 (1957).

ations of social utility are not so aggresive and insistent. * * * Change of this character should not be left to the legislature. If judges have woefully misinterpreted the mores of their day, or if the mores of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors." Justice Smith then quotes the following classic condensation of this principle: "When an error of this magnitude, and which moves in so wide an orbit competes with truth in the struggle of existence, the maxim for a supreme court,—supreme in the majesty of duty as well as in the majesty of power,—is not *stare decisis,* but *fiat justitia ruat caelum* (let justice be done though the heavens fall)."

The Usual Exertion Rule.

One of the attributes of the usual exertion rule is its directness and its simplicity. This is accomplished by its insistence, not only on causation as the sole question, but on proof of causation in fact and not by judicial formula for the judging of events and comparisons. Unfettered by any search for some norm of exertion over past period employment and its comparison with present events to declare an accident or not, the usual exertion court is required only to determine whether the particular exertion involved did affect injuriously the particular body involved.

While pertaining to an unsuccessful claim for death from heart attack, a good statement of this need for medical-factual causal connection has been supplied by the Supreme Court of Georgia:

> It 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, 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.[53]

The evidentiary requirements may be summed up from an Oklahoma decision,

> Evidential steps necessary to show the factum of an accidental injury from strain are:
>
> (a) lay testimony as to the nature of labor performed by the workman when injured;
>
> (b) expert opinion that the exertion attendant upon such physical activity as shown was sufficient in degree to, and did produce,

[53] Hoffman v. Nat'l. Sur. Corp., 91 Ga. App. 414, 85 S.E.2d 784 (1955).

> the strain which resulted in the workman's disability. (I)t is then immaterial that disability . . . manifested itself fully at a time subsequent to the occurrence of the injury.[54]

As we have noted, the unusual exertion rule attempts to establish a standard of exertion of the claimant employee, in fact is required to come up with so-called norm, which it then applies to the events before injury to determine if there be sufficient unusualness to classify the event *an* accident. It is not within our bounds of logic to see the relationship between previous exertions not involved in injury and the independent exertions and conditions directly involved in the present injury; certainly we do not see any causal relationship. It seems a fair statement to suggest that the effort to find such a relationship points up the court's emphasis on and preoccupation with the details of events, rather than cause of injury. We are forced to conclude that under any theory the employee's own usual activity is not a proper norm for comparison.

Where a *well employee* receives an injury without obvious traumatic accident, and without personal contribution, any exertion connected with the employment and causally related to the injury as a medical fact is adequate to satisfy the legal test of causation. There being no competing personal risk to overcome, any employment contribution is adequate to establish compensable accident, even to putting the employee in the place where injury from a neutral force occurred. The accidental requirement is satisfied by the unexpectedness of the injury.

For claimants without weakness there should be no comparison at all, only an answer to the question, "Did the exertion in employment in fact cause or contribute to the injury?" This might appropriately be called the actual risk test.[55]

If the employee has some preexisting weakened condition to be affected by the exertion in employment, the exertion in employment must be greater than in nonemployment life; the comparison is not with the employee's usual exertion in employment, but with the exertion of normal nonemployment life of this or any other person.[56]

Conclusion

As the writing of this article is completed, the October 16, 1967 issue of Newsweek is published, reviewing (page 59) a clinical congress of the American College of Surgeons on "My Aching Back." The story, succinct but informative, emphasizes the universality of our back's burden, summarizes some treatments, conservative and surgical, and finds "that a sure-fire way to straighten out the great American backache is not yet

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[54] Farmers Coop. Assn. v. Madden, 356 P.2d 741 (Okla. 1960).

[55] 1A Larson, *op. cit. supra* note 3 at § 38.83, p. 622.21-22.

[56] *Ibid.*

at hand." "On any day, nearly 6.5 million U.S. men and women are in bed with low-back trouble, a toll that costs industry some 8.5 million work days a year and insurance companies millions of dollars in doctor bills and workmen's compensation." This is but a sidelight on the importance of our problem.

We hope that this summary will make available to all concerned a reasonably adequate statement on all aspects of back claims as they involve claimant, insurer, and counsel for both. We are especially hopeful that there be a greater knowledge of each claim as a whole, intelligent investigation, development of the back's history, medical inquiry and opinion, and negotiation or a hearing which presents all sides fairly and adequately.

We especially emphasize that the mere fact that a jurisdiction that follows the usual exertion rule does not solve all problems. It does simplify them and keeps one's purpose and line of thought clearer, holding them in the direction of proximate cause; but by no means are all claims compensable and it is essential that all along the line parties on both sides understand and develop the elements involved and judge them with intelligent application of principles to the facts.