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SINCE THE ADOPTION of Section 35 of Article II, Constitution of Ohio, the history of the meaning of "injury" has been subject to a tug-of-war between the Legislature and the Supreme Court. Twice, in 1937 and in 1959, the Legislature has enacted amendments, both apparently with a view to liberalizing the scope of the term.

Until 1937, there was no constitutional or legislative definition of the term "injury". Article II, Section 35 of the Constitution provided, in part: "For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed. . . ."

The Legislature, after the adoption of Section 35, Article II, enacted Section 1465-68, General Code, which in its original terms provided that every employee, as defined by the statutes, who was injured in the course of employment, provided the same was not purposely self-inflicted, shall be paid compensation out of the State Insurance Fund for loss sustained on account of such injury in accordance with the provisions of the Workmen's Compensation Act.

Immediately upon the statute becoming effective, according to *Malone v. Industrial Commission*[1] "the Courts were confronted with the problem of determining the scope of the term 'injury' as related to employment. In the early cases decided by this Court it was determined that compensation could be awarded only for accidental and traumatic injuries. It appears that these elements of the definition of compensable injury came into the cases through the effort of the courts to distinguish an injury by accident from an injury through disease, made necessary by the fact that the latter is not compensable unless caused by a compensable hurt or injury, both kinds of disability, however, being comprehended within the general term 'injury'."

For instance, in the case of *Renkel v. Industrial Commission*,[2] the Supreme Court said:

> Though the word 'accident' is not used in our statute, nor in the Constitutional provision referred to, nor the word 'accidental' in connection with the word 'injury,' yet it seems clear that the distinction of 'injury' from 'occupational disease' as made both in the constitutional provisions and statutory enactment, warrants the conclusion that 'disease' is not included in the term 'injury' and

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1 140 Ohio St. 292, 43 N.E.2d 266 (1942).

2 109 Ohio St. 152, 156, 141 N.E. 834 (1923).

> that compensation may be awarded for incapacity by reason of disease only where it is shown that the disease was caused by or is the result or consequence of a compensable injury, such as, for instance, the development of blood poison from a wound upon the body of the employee inflicted in the course of employment.

Thus, the Supreme Court concluded:[3] "For reasons here stated, there was clearly incorporated into the definition of 'compensable injury' the limitation that the injury must be accidental and traumatic *in origin,* and arise out of the employment." (Emphasis added.)

The Court further stated in *Malone* that a composite definition deduced from the cases (decided up to that point) might be stated: "The term 'injury,' as used in the Constitution and the Workmen's Compensation Act shall comprehend a physical or traumatic injury, accidental in its origin and cause; the result of a sudden happening occurring by chance, unexpectedly, and not in the usual course of events, at a particular time." The requirement, "accidental in its origin and cause" was supported by a substantial number of cases.[4]

The Supreme Court in *Malone* examined and reviewed the opinions of several Courts of Appeals and concluded that a diversity of opinion had arisen as to the interpretation to be given to the language or phrase "accidental in its origin and cause." Some courts had construed it to include injuries accidental in character in result, while others held it to mean that injuries are accidental only when produced or caused by accidental means.[5]

A significant observation in *Malone* is that scores of compensable accidental injuries result where no accidental circumstance precedes or causes them. Examples are given as hernia caused by the strain of coughing, superinduced by the presence of usual and ever present fumes;[6] death from infection resulting from vaccination;[7] infection, following the wearing of skin off the fingers causing felons on the fin-

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[3] *Supra* note 1 at 296, 297.

[4] Industrial Commission v. Roth, 98 Ohio St. 34, 120 N.E. 172 (1918); Industrial Commission v. Cross, 104 Ohio St. 561, 136 N.E. 283 (1922); Renkel v. Industrial Commission, 109 Ohio St. 152, 141 N.E. 834 (1923); Industrial Commission v. Russell, 111 Ohio St. 692, 146 N.E. 305 (1924); Industrial Commission v. Franken, 126 Ohio St. 299, 302, 185 N.E. 199 (1933); Goodman v. Industrial Commission, 135 Ohio St. 81, 19 N.E.2d 508 (1939); Vogt v. Industrial Commission, 138 Ohio St. 233, 34 N.E.2d 197 (1941); Industrial Commission v. Polcen, 121 Ohio St. 377, 169 N.E. 305 (1929); Industrial Commission v. Palmer, 126 Ohio St. 251, 185 N.E. 66 (1933); Spicer Mfg. Co. v. Tucker, 127 Ohio St. 421, 188 N.E. 870 (1934); Gwaltney v. General Motors Corp., 137 Ohio St. 354, 30 N.E.2d 342 (1940); Cordray v. Industrial Commission, 139 Ohio St. 173, 38 N.E.2d 1017 (1942); Matczak v. Goodyear Tire & Rubber Co., 139 Ohio St. 181, 38 N.E.2d 1021 (1942); Shea v. Youngstown Sheet & Tube Co., 139 Ohio St. 407, 40 N.E.2d 669 (1942).

It should be noted that all of the foregoing cases, cited by the Supreme Court in Malone, were decided with respect to injuries which occurred before the amendment to Section 1465-68 effective July 10, 1937. (117 Ohio Laws 109.)

[5] Matczak v. The Goodyear Tire & Rubber Co., *supra* note 4.

[6] Industrial Commission v. Polcen, *supra* note 4.

[7] Spicer Mfg. Co. v. Tucker, *supra* note 4.

gers;[8] injuries resulting from exposure of the body to the forces of nature, such as freezing;[9] injuries resulting from inhaling ashes and soot while cleaning out heated boilers, resulting in quick tuberculosis;[10] injuries resulting from contact with deleterious gases;[11] death due to inhaling gases arising from heating paint in a building without ventilation.[12]

The Supreme Court went on to observe that the disability and the resulting loss is just as great to a workman whether his accident is through *accidental means* or whether it is the direct result of an accidental circumstance without any antecedent accidental means. Then evolved the *Malone* definition of injury under the terms of the statute as amended effective in 1937, "the term 'injury' . . . shall include *any* injury. . . ." In the course of the opinion,[13] the rule is stated: "the term 'injury' as used in the Workmen's Compensation Act, comprehends a physical or traumatic damage or harm, accidental in its *origin and character* in the sense of being the result of a sudden mishap occurring by chance, unexpectedly and not in the usual course of events, at a particular time and place." (Emphasis added.) It is perhaps significant that in the syllabus of *Malone,* the words "origin and" were dropped out of this definition, so that the rule of law expressed officially evolved as follows:

> The term 'injury' as used in the Constitution and in Section 1465-68, General Code (117 Ohio Laws, 109), as amended effective July 10, 1937, comprehends a physical or traumatic damage or harm, accidental in its character in the sense of being the result of a sudden mishap occurring by chance, unexpectedly and not in the usual course of events, at a particular time and place.

Malone also established the proposition that the fact that the injury was caused by the accidental result of a voluntary act did not militate against compensability. Thus: "While the decedent in this case voluntarily worked in a super-heated atmosphere, his death was not the usual and expected result but the unusual and unexpected result of such employment, and was, therefore, accidental." [14]

"Physical or traumatic injury" is also defined: "A traumatic injury is one produced by any sudden violent attack upon the tissues or organs of a living body producing a wound, tear or an abnormal condition thereon or therein." [15]

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[8] Industrial Commission v. Weimer, 124 Ohio St. 50, 176 N.E. 886 (1931).

[9] Kaiser v. Industrial Commission, 136 Ohio St. 440, 26 N.E.2d 449 (1940).

[10] Industrial Commission v. Bartholome, 128 Ohio St. 13, 190 N.E. 193 (1934).

[11] Industrial Commission v. Palmer, *supra* note 4.

[12] Industrial Commission v. Roth, *supra* note 4.

[13] Malone v. Industrial Commission, *supra* note 1 at 299, 300.

[14] *Id.* at 301.

[15] *Id.* at 302.

It was, in the view of many practitioners, reasonable to conclude following the decision in *Malone* that any organic or bodily lesion which could be shown medically to have occurred suddenly and unexpectedly and to have been the direct and proximate result of the work a workman was doing, was compensable. There is, for instance, no indication in *Malone* that the decedent was doing anything other than his usual normal work at the time of his collapse from heat exhaustion. After *Malone,* however, the decisions of the Supreme Court began to erode this concept. For instance, in *Nelson v. Industrial Commission,*[16] a workman died suddenly of cerebral hemorrhage while engaged in his usual and normal employment activities. The Supreme Court said that in order for a death to be compensable: ". . . there still must be some evidence that the death of the workman was caused or contributed to by some act which was different in kind or in exertion from the regular, ordinary work performed by the workman and those engaged in like occupation." [17]

It is noted that in *Nelson* the decedent suffered from a pre-existing impaired physical condition of cerebral thrombosis. The evidence had been that the decedent was working under a considerable strain, as far as his necessary posture and position was concerned. The holding in this case harks back to previous expressions of the Supreme Court in the case of *Industrial Commission v. Franken,*[18] wherein the statement is made: "The fact that work being done by the employee is light or heavy work has no place in the consideration of the right to recover, for what is heavy work for one man may for another be so light as to involve no hazard at all." Thus returned the concept that something unusual must be done, engaged in, or must happen, in order for the physical or traumatic damage or harm which results, to constitute a compensable injury.

A further development of the concept of a requirement of external means or force is found in the case of *Gerich v. Republic Steel Corp.,*[19] in which the decedent, a foreman, and some other employees were engaged, on a day on which the temperature varied from 4 degrees below zero to 8 degrees above zero, in pushing a cart loaded with tools and weighing approximately 900 pounds up a slight grade. The decedent fell to the ground and apparently died from a coronary occlusion. Again, the Supreme Court noted that the decedent was doing his usual work and was not putting forth any unusual exertion at the time he suffered his coronary attack, and recovery was denied.

It is perhaps of interest at this point to observe that, if a concept of

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[16] 150 Ohio St. 1, 80 N.E.2d 430 (1948).

[17] *Id.* at 13, 80 N.E.2d 403, 463.

[18] 126 Ohio St. 299, 301, 185 N.E. 199, 200 (1933).

[19] 153 Ohio St. 463, 92 N.E.2d 393 (1950).

compensability involving only the necessity of physical or traumatic damage or harm, including internal as well as external lesions, directly and proximately caused by the work of the injured party, is to be accepted, the medical facts of life should be considered. Local and national Heart Associations each year issue press releases warning all persons over a given age (usually somewhere from 40 to 50) against shoveling snow, or in the alternative, against doing so without considerable precaution against the causing or precipitation of a coronary attack. The cogency of these press releases is supported by reference to the obituaries after any substantial snowfall, and it is the general concept of the medical profession and the general public that the deaths which occur during the shoveling of snow or immediately following the shoveling of snow are in numerous cases directly and proximately caused by that activity and that work. These attacks are certainly accidental, in the sense that they occur at a particular time and place, and cause physical or traumatic damage or harm. If a workman's duties, therefore, include strenuous exercise at sufficiently cold temperatures, it would seem to follow that his injury directly and proximately resulting therefrom should be compensable. It is usually argued, however, that a workman who is damaged or dies as a direct result of such activity is subjected to no greater hazard than the general public.[20] On the other hand, such an argument may also be made with respect to injuries received in automobile collisions, falling down steps, in railroad or airplane wrecks, and many others. Such injuries, if they occur *in the course* of employment, in the sense that they occur during the performance of some duty incident to, or connected with, the employer's work, are often held to be compensable.[21] Thus, where a workman is required, by reason of his employment, to perform strenuous exercise under circumstances in which members of the general public might or might not choose to do that work, physical or traumatic damage or harm directly and proximately resulting should be compensable.

Although each case under the Workmen's Compensation Law, as in any other field, rests primarily on its own facts, and involves a wide variation in the style and quantum of proof offered, *Nelson* and *Gerich,* insofar as expressions of basic law by the Supreme Court itself were concerned, represented erosions of, and departures from, the *Malone* rule. *Malone,* however, has never, in any direct expression by a majority of the Supreme Court, been overruled. Other cases, in point of time

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[20] Malone v. Industrial Commission, *supra* note 1 syllabus 3: "When an employee, by reason of the activities, conditions and requirements of his employment, is subject to a greater hazard than are the members of the general public, and he is accidentally injured thereby, a causal connection between the employment and his injury is established."

[21] See Eggers v. Industrial Commission, 157 Ohio St. 70, 104 N.E.2d 681 (1952).

following *Malone* have held that strain and stress primarily mental,[22] though causally related to the employment of the workman, are not compensable as they are not "injuries".

If *Malone* represented the high-water mark in liberality with respect to the definition of compensable injury, the low-water mark was reached in 1956 in *Dripps v. Industrial Commission.*[23] In this case, the workman was responsible for controlling the horizontal movement of a power-operated boom by wrapping a boom line around two spools and holding the end of the line under tension so that when the spools were turned by means of steam power from a hoist the boom moved horizontally to one side or the other. Ordinarily only one spool was required to move the boom, but for some nine weeks prior to the claimed injury, it had been necessary to use two spools and to exert greater pull on the line in order to move the boom. On the day of the claimed injury, while the workman was applying tension to the line in order to move the boom, "all of a sudden something just came down on my shoulder and clear on out to the fingers like an electric shock or something like it might have hit my crazy bone."

While expressing approval of the *Malone* case and repeating the substance of its first syllabus in the *Dripps* syllabus, the majority of the court added the following second syllabus:

> The fact that a workman is injured by exerting more effort or being subjected to a greater strain than is customary in the performance of his work is not in and of itself sufficient to entitle such workman to participate in the State Insurance Fund; and before such participation may be had it must appear that such increased effort or strain was occasioned by some sudden mishap or unusual event.

Judge Taft (now Chief Justice) wrote a concurring opinion[24] in which he expressed the view that the holding and result in *Dripps* were inconsistent with *Malone,* and therefore that *Malone* should be expressly overruled. Judge Zimmerman dissented,[25] in an opinion in which he stated:

> It seems to me that the majority opinion in its plain implications, at least, represents a return to this court's position prior to the amendment of old Section 1465-68, General Code. That statute, as amended, presently Section 4123.01, Revised Code, defines 'in-

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[22] McNees v. Cincinnati Street Ry. Co., 152 Ohio St. 269, 89 N.E.2d 138 (1949); Toth v. Standard Oil Co., 160 Ohio St. 1, 113 N.E.2d 81 (1953).

[23] 165 Ohio St. 407, 135 N.E.2d 873 (1956); See also Artis v. Goodyear Tire & Rubber Co., 165 Ohio St. 412, 135 N.E.2d 877 (1956); See Cairns, Workmen's Compensation—injury construed—overexertion not compensable when no antecedent accident caused the injury, 17 Ohio St. L.J. 546 (1956); Hartman, The Injuries Covered, 19 Ohio St. L.J. 554, 556 (1958); Schroeder, Legislative Amendments to Ohio Workmen's Compensation in 1959, 20 Ohio St. L.J. 601, 603 (1959).

[24] 165 Ohio St. 410, 135 N.E.2d 876 (1956).

[25] *Id.* at 411, 135 N.E.2d 876.

jury' as including '*any* injury received in the course of, and arising out of, the injured employee's employment.'

And further:

> Surely there was a purpose in adopting this amendment and to my mind that purpose was to broaden the term, 'injury,' to embrace injuries *accidental in character and result* as well as those produced or caused by accidental means. (Emphasis added.)

Dripps, according to many practitioners, produced an anomalous result. At the administrative level, numerous cases of back trouble, such as sprain, strain and herniated intervertebral discs, as well as many cases of muscle or ligamentous tears and sprains, were disallowed. In many instances, the injured workman could not recall a specific event, such as a slip, trip, twist or fall. Ordinarily such harm was caused by heavy lifting or other strenuous exertion in the course of employment, but most of these cases were disallowed. If, on the other hand, the workman were sophisticated enough or perhaps unscrupulous enough, he could describe a specific slip, twist, trip or fall and have his claim allowed without question. The scrupulously honest workman who could not, in good faith, remember a specific external mishap was penalized, while his fellow, just as legitimately damaged, but no more so, by the risks of his employment, was rewarded if he described a sudden external mishap.

The concept developed, that if the physical or traumatic damage or harm occurred while the workman was engaged in his usual work in the usual way, it was not compensable; indeed, even if more effort than usual or effort over a greater duration was expended, it was not compensable.

In arguments before courts considering the *Dripps* rule, hypothetical illustrations of the lack of realism in such a rule were frequently used by counsel for claimants. One such example is that of a professional football fullback, who play after play hurls himself into the line, in as precisely the same manner as possible. Suddenly, and without his being able to describe any difference in his approach to the line or any unusual happening, he suffers a shoulder separation. Perhaps the *Dripps* rule would outlaw compensability for all injuries received in professional sports. Logically, practically all hernia cases caused by lifting without some unusal slipping or jerking should have been disallowed, under *Dripps.* However, numerous such administrative cases were allowed in apparent disregard of *Dripps.*

The *Dripps* rule was reaffirmed in the case of *Davis v. Goodyear Tire & Rubber Co.,*[26] a case which is principally significant for the dissent of Judge Taft, and for the statement by Judge Bell, in approving

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[26] 168 Ohio St. 482, 485, 155 N.E. 889, 891 (1959).

the *Dripps* rule that, if the court was wrong in *Dripps,* "our error should be corrected by the General Assembly and a different approach to workmen's compensation outlined in clear and unequivocal legislative expression."

Judge Taft, in dissenting, observed that on the evidence in the record, a jury could reasonably find that the workman was physically injured as a proximate result of a hazard of his employment, which was greater than that to which members of the general public are ordinarily subjected.[27] He further observed that it did not appear that there was any evidence of any accidental cause of the workman's injury or that such injury was caused by accidental means, although the evidence would support a finding that his injury was received in the course of employment and was suddenly and unexpectedly suffered; i.e., it represented an accidental result.

Judge Taft then reviewed the history of the definition of injury under the Ohio Workmen's Compensation Act and noted the conflicting lines of authority, one of which seemed to require accidental means, and the other simply to require an accidental result. After quoting the 1937 amendment which set forth the definition of injury[28] the dissenting opinion continues:

> When the origin of this language is considered, the intent of the General Assembly to reject the *Franken case* and approve the *Spicer case* becomes absolutely clear. In his opinion in the *Spicer case*, at page 423, Chief Justice Weygant, in a quotation from 28 R.C.L., 787, which he called a "helpful discussion of the term 'accident,'" had referred to the construction of the British statute by the House of Lords in *Fenton v. J. Thorley & Co.*, A.C. 1903, 443.
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> An examination of that case discloses that the British act provided for compensation for 'personal injury by accident arising out of and in the course of the employment.' It is at once apparent that the above-quoted 1937 addition to our Workmen's Compensation Act was merely a restatement of the words of the English act, with the omission of the limiting words 'by accident' after, and with the addition of the broadening word 'any' before, the word 'injury.'
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> Although it is reasonably arguable that an 'injury *by accident*' means an injury caused by accident and not merely an injury that represents an accidental result, the holding of the House of Lords was that no accidental cause or accidental means was required. The case involved a claim for compensation by a workman who was employed to turn the wheel of a machine and who ruptured himself by an act of overexertion in doing so. In the opinion of Lord MacNaghten it is said:
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> > 'Fenton was a man of ordinary health and strength. There was no evidence of any slip, or wrench, or sudden jerk. It may be taken that the injury occurred while the man was engaged in

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[27] McNees v. Cincinnati Street Ry. Co., *supra* note 22 and Malone v. Industrial Commission, *supra* note 1.

[28] Sections 1464-68 General Code (117 Ohio Laws 109).

his ordinary work, and in doing or trying to do the very thing which he meant to accomplish.

'* * *

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

'* * * It does seem to me extraordinary that anybody should suppose that when the advantage of insurance against accident at their employers' expense was being conferred on workmen, Parliament could have intended to exclude from the benefit of the act some injuries ordinarily described as 'accidents' which beyond all others merit favorable consideration in the interest of workmen and employers alike. A man injures himself by doing some stupid thing, and it is called an accident, and he gets the benefit of the insurance. It may even be his own fault and yet compensation is not to be disallowed unless the injury is attributable to 'serious and wilful misconduct' on his part. A man injures himself suddenly and unexpectedly by throwing all his might and all his strength and all his energy into his work by doing his very best and utmost for his employer, not sparing himself or taking thought of what may come upon him, and then he has to be told that his case is outside the act because he exerted himself deliberately, and there was an entire lack of the fortuitous element! I cannot think that this is right, I * * * think if such were held to be the true construction of the act, the result would not be for the good of the men, nor for the good of the employers either, in the long run. Certainly it would not conduce to honesty or thoroughness in work. It would lead men to shirk and hang back, and try to shift a burthen which might possibly prove too heavy for them onto the shoulders of their comrades.

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'* * * respondents * * * referred to several cases on policies of insurance intended to cover injuries described as arising from accidental * * * causes * * *. I do not think that these cases throw much light upon the present question. They turn on the meaning and effect of stipulations for the most part carefully framed in the interest of the insurers.'

In his opinion Lord Robertson stated:

'No one out of a law court would ever hesitate to say that this man met with an accident, and, when all is said, I think this use of the word is perfectly right.'

Judge Taft takes the view that nothing in *Nelson, Gerich* or *Toth* necessarily indicates any intention of the Supreme Court to modify the law as determined and announced in *Malone*. Continuing:[29]

* * * Obviously, we should endeavor to harmonize the several statements in a syllabus if that, as here, can reasonably be done.

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[29] Malone v. Industrial Commission, *supra* note 1.

It follows that paragraph one of the syllabus of *Dripps v. Industrial Commission, supra* (165 Ohio St., 407), which is in substance only a restatement of paragraph one of the syllabus of the *Malone case,* is not inconsistent with the decisions and pronouncements of law made in the *Malone* and *Maynard cases.* However, the part of paragraph two of the syllabus in the *Dripps case* after the semicolon (note footnote by court omitted), and the decision and some of the statements in the *per curiam* opinion in *Artis v. Goodyear Tire & Rubber Co., supra* (165 Ohio St., 412), represent a definite *departure* from the decisions and pronouncements of law in the *Malone* and *Maynard cases,* in requiring, as a condition precedent to existence of an injury compensable under the Workmen's Compensation Act, some accidental cause of the injury or a causing thereof by accidental means.

If this case involved an ordinary question of *stare decisis,* we would be inclined to suggest that the General Assembly should *again* change the law as announced in the *Dripps* and *Artis cases.* However, the majority opinion in neither of those cases mentions either the *Malone* or the *Maynard case* or even the hereinbefore-quoted 1937 amendment of the Workmen's Compensation Act, upon which this court based its decisions in the *Malone* and the *Maynard cases.* Hence, from the standpoint of *stare decisis,* we apparently are in a position to choose between either of two irreconcilable lines of decisions. However, when we make that choice, we should make it clear that we are rejecting the line of cases that we are rejecting.

As hereinbefore pointed out, the ordinary meaning of the language used by the General Assembly in the above-quoted 1937 statutory amendment, as well as its long established prior construction by the highest judicial tribunal of the nation from whose statutes that language was adopted, requires the conclusion that an injury may be an injury within the meaning of the Workmen's Compensation Act if accidental in result though not caused by accidental means. This court definitely so held in July 1942 and again 1944. During the 14 years between our decision in the *Malone case* and our recent decisions in the *Dripps* and *Artis cases,* the General Assembly had ample opportunity to change the law as determined by those holdings but did not do so. We believe therefore that we should adhere to the law as determined and announced in the *Malone* and *Maynard cases.* To the extent that they are inconsistent therewith, this would require an overruling of the *Artis case* and of part of paragraph two of the syllabus of the *Dripps case.*

Judge Taft was joined in his dissent by Judges Zimmerman and Herbert; however the point of view that no new legislation was necessary to clarify the definition of injury did not prevail.

At the time of the decision in the *Davis* case there had been growing dissatisfaction with the *Dripps* rule on the part of labor representatives, claimants' representatives, and while by no means unanimously so, to some extent on the part of employers who certified as to the authenticity and compensability of claims of their employees, only to find that they were disallowed because the alleged injury occurred as a result of "usual work."

The Legislature was in session at the time of the decision in *Davis* (February 4, 1959) and, during the course of the legislative session, Section 4123.01, Revised Code (formerly Section 1465-68, General Code), was amended to provide a definition of "injury" as including ". . . any injury, whether caused by external accidental means or accidental in character and result . . ." [30]

The first case to reach the Supreme Court of Ohio after the amendment of the definition of "injury" of 1959 was that of *Hearing v. Wylie.*[31] While the alleged injury in *Hearing* occurred prior to the effective date of the 1959 amendment, and therefore, the former definition of injury was held to be applicable, the Supreme Court reviewed the situation with respect to the definition and undertook to state the effect of the 1959 amendment. Whether dictum or otherwise, the plain effect of the decision in *Hearing* is that the rule in *Dripps* was abrogated by the 1959 action of the General Assembly. The plaintiff was not allowed to recover in *Hearing* for the reason that it was further held[32] that a retroactive application of the definition to injuries which occurred prior to November 2, 1959 would be violative of Section 28, Article II, Constitution of Ohio.[33]

Judge Bell, in the majority opinion in *Hearing* says: [34]

> When the *Dripps case* was decided, there was in the books another line of authority represented by *Malone v. Industrial Commission,* 140 Ohio St. 292, and *Maynard v. B. F. Goodrich Co.,* 144 Ohio St. 22, to the effect that injuries accidental in character and result were compensable the same as injuries caused by external accidental means. This line of authority was not overruled by the *Dripps* decision, although this writer and one other member of the court were of the opinion that the decision in *Dripps* could not be reconciled with that line of authority.
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> Judge Zimmerman, in his dissenting opinion in *Dripps,* said that, in his opinion, the term, 'injury,' embraced injuries 'accidental in character and result as well as those produced or caused by accidental means.'
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> The *Davis case* was decided on February 4, 1959, at which time the General Assembly was in session. The *Davis* decision reaffirmed the definition of 'injury' as set out in *Dripps.* The *Malone-Maynard* rule again remained undisturbed. This writer, however, held to his conviction that *Dripps* and *Malone* were inconsistent and suggested

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[30] 121 Ohio Law 742, 745, effective November 2, 1959.

[31] 173 Ohio St. 221, 180 N.E.2d 921 (1962).

[32] *Hearing* was decided by a majority of five judges, two dissenting. Apparently the court did not consider that its holding of unconstitutionality with respect to the retroactive effect of the amendment to Section 4123.01, Revised Code, was violative of that provision of Section 2 of Article IV of the Constitution of Ohio, which prohibits a holding of unconstitutionality of a statute except upon the vote of all but one of the Judges of the Supreme Court.

[33] *Supra* note 31.

[34] *Id.* 222, 223, 180 N.E.2d 922, 923 (1962).

> that, if the court was wrong in *Dripps,* 'our error should be corrected by the General Assembly and a different approach to workmen's compensation outlined in clear and unequivocal legislative expression.'
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> Although some doubt may be entertained that the expression is 'clear and unequivocal,' the General Assembly, within a matter of a few months after the *Davis* decision, amended Section 4123.01, Revised Code, and defined 'injury' as including 'any injury, whether caused by external accidental means or accidental in character and result.' The conclusion is inescapable to a majority of this court that the General Assembly intended to define 'injury' in the terms of the *Malone* rule and in the terms of Judge Zimmerman's dissent in *Dripps.* The legislative branch of the government exercised a prerogative delegated to it, and the judiciary is obliged to respect that prerogative.

It will be remembered that Judge Zimmerman's dissent in *Dripps* introduced for the first time a distinction between injuries accidental in "character and result" and "those produced or caused by accidental means," and expressed the view that both types of injuries were intended to be compensable under the Ohio Workmen's Compensation Act.

It is, of course, obvious that the General Assembly has picked up Judge Zimmerman's language, and, in the disjunctive, has indicated that *either* injuries caused by external accidental means *or* those accidental in character and result are, from and after November 2, 1959, compensable.

Thus, it is reasonable to assume that the cardinal principles of compensable injury remain those expressed in *Malone,* with the exception that the "sudden mishap," if such be regarded as something sudden and unexpected happening external to the physical being of the workman himself need no longer be shown. A further observation with respect to *Hearing* is warranted. While the statement of the case by the court[35] recites that, on April 11, 1955, Hearing allegedly "sustained an injury while attempting to lift a hundred-pound section of beef from a stationwagon to his shoulder, the sudden jerk of lifting said beef causing sharp pain across the abdomen resulting from [in] a ruptured appendix," the actual record of evidence in *Hearing* does not support the allegation of "sudden jerk," but does support the inference that the sharp pain across the abdomen occurred at a particular identifiable time and place. Hearing died, less than two weeks following the injury, from a ruptured appendix. The only unusual circumstance actually shown was that Hearing was driving a stationwagon on the day in question rather than the truck he usually drove, and, inferentially, may have had to lift the side of beef further than he would have had to, had he been driving the truck. There was certainly no evidence that Hearing was engaged in anything other than his "usual work." Thus, the factual pattern is

[35] Hearing v. Wylie, *supra* note 31 at 221.

virtually identical to that in *Dripps,* wherein the physical and traumatic damage or harm to the workman did occur at a particular time and place, but was likewise the result of his "usual work" done in the usual way.

Since the decision in *Hearing,* there has been some show of reluctance on the part of the Industrial Commission, some employers, and defense counsel, to agree that an injury caused by usual work, without any sudden external mishap, is compensable. However, there has been growing acceptance in the courts, and in one instance worthy of note, *Hamilton v. Keller, Admr.,*[36] a judgment for the plaintiff in a snow-shoveling case, wherein the shoveling of snow was a part of the regular duties of the employee (although, of course, performed only when snow was there to shovel) was affirmed by a Court of Appeals.[37] In that case, tried to the Common Pleas Court of Allen County without a jury, the court made the following findings of fact and conclusions of law:

Findings of Fact

(1) That on or about December 27, 1961, employer, Hanco Oil Company, was an employer of labor amenable to and had complied with the Workmen's Compensation Law of Ohio;

(2) That on or about December 27, 1961, Charles Hamilton, deceased, was an employee of said employer, working regularly at his employment as a gasoline and oil products service station manager in Lima, Allen County, Ohio;

(3) That on or about December 27, 1961, while in the usual course of his employment, decedent, Charles Hamilton, was subjected to a greater hazard than members of the general public, in that his employment directly and proximately caused him to work in outside exposure, exposed to subfreezing temperatures, and to engage in vigorous exercise, while exposed to such subfreezing temperatures, such exercise consisting of the shoveling of a substantial quantity of snow over a period of several hours;

(4) That the conditions and nature of the environment of the work of said decedent, together with the vigorous exercise to which he was subjected, constituting a hazard greater than that to which the members of the general public were subjected, directly and proximately caused him to suffer a myocardial infarction, which directly and proximately caused his death on December 27, 1961;

(5) That said myocardial infarction, being a sudden, unexpected happening, not in the usual course of events, directly and proximately produced by the conditions, environment and nature of the employment of the decedent, was an injury, accidental in character and result, which directly and proximately caused the death of said decedent;

(6) That Ida Hamilton, and her daughter, were, at the time of the death of decedent, wholly dependent upon him for support.

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[36] 11 Ohio App.2d 121 (1967).

[37] *Id.* at 121. See also Stull v. Keller, 11 Ohio Misc. 45, 228 N.E. 2d ___ (1967).

Conclusions of Law

The Court concludes, with respect to the law applicable to the facts in the instant case, as follows:

(1) That the myocardial infarction suffered by decedent was an injury in character and result, within the meaning of Section 4123.01, as amended effective in November 1959, and as interpreted in the case of *Hearing vs. Wylie,* 173 Ohio St. 221;

(2) That, therefore, the death of decedent, being directly and proximately caused by an injury, in character and result, is compensable under the Workmen's Compensation Act of Ohio, and that the widow, Ida Hamilton, and her daughter, are entitled, as dependents of said decedent, to participate in the benefits of the Workmen's Compensation Act of Ohio, and that they are entitled to their costs herein including attorney's fees, as provided by Section 4123.519, Revised Code.[38]

In affirming the Common Pleas Court in *Hamilton v. Keller, Admr.,*[39] the Court of Appeals based its reasoning, in large part, on the "greater hazard" theory, derived from *Malone.* The court still gives lip service to the conclusions it reaches from *Gerich* and *Nelson* that "notwithstanding that the injury may come within the general rule expressed in *Malone,* an injury which occurs in the regular course of nature from the usual and normal activities of the employment is not compensable." Thus, the Court of Appeals in *Hamilton,* based upon this statement alone, would probably not regard as compensable a hernia which occurred from normal employment-connected lifting, or a back sprain, back strain or herniated intervertebral disc which occurred in the same manner. This, it might be argued, ignores the fact that heavy lifting, in and of itself, may constitute a "greater hazard" than that to which the general public is exposed, and that the Legislature in its 1959 amendment intended that physical harm which resulted from such greater hazards should be compensable. In *Hamilton,* the Court of Appeals undertakes to set forth the rules of compensability as follows: (1) the injury . . . must . . . be in the course of the injured employee's employment, (2) arise out of the injured employee's employment, (3) be physical or traumatic damage or harm accidental in character and result, in that in connection with an intentional act on the part of a workman something unforeseen, unexpected, and unusual occurs which produces the injury or from which the injury results, *or* be physical or traumatic damage or harm produced or caused by external accidental means, and (4) be other than an injury which may occur in the regular course of nature from the usual and normal activities of the employment. The court expresses subordinate rules: (1) when an employee, by reason of the activities, conditions and requirements of his employ-

[38] Note: The author served as co-counsel for plaintiff in this case.

[39] Hamilton v. Keller Adm., *supra* note 36 at 121.

ment, is subjected to a greater hazard than are the members of the general public, and he is accidentally injured thereby, a causal connection between the employment and his injury is established; (2) a claimant seeking compensation for the death of his decedent is required to show, *inter alia,* that the injury complained of was the proximate cause of the death; (3) in the event of disability or death resulting from heart injury or heart attack due to extraordinary conditions in the employment, or due to over-exertion in performing the duties of the employment, the test of compensability (and proximate cause) is whether the unusual exertion precipitated the death or disability so as to bring it about at a time substantially earlier than it would have occurred normally; and (4) questions of proximate cause relating to the compensability of injuries are normally for the trier of fact.[40]

When the findings of fact and conclusions of law by the trial court in *Hamilton* are observed, it will be seen that the Court of Appeals strained to reconcile a favorable finding for the plaintiff with the cases decided prior to the 1959 amendment, particularly *Nelson* and *Gerich.* On the other hand, it may be logically argued that such strain need not be exerted in view of the conclusion by the Supreme Court in *Hearing* that the General Assembly, in 1959, intended to adopt as its definition of "injury" the rule in *Malone,* and in the dissent of Judge Zimmerman in *Dripps.* This view is strongly supported by a well researched and considered opinion of Judge Putman of the Common Pleas Court of Stark County in *Stull v. Keller.*[41] The court prepared a syllabus which summarizes his findings as follows:

> 1. A workman whose regular duties consist of, and who suffers a back injury (herniated disc) as a result of, lifting 50 pound sacks of dry powder to the platform where he is standing from the floor 3 feet below is eligible for Workmen's Compensation notwithstanding the fact that the injury occurs while he is doing the same job in the same way he has done it the past 13 years and notwithstanding the fact that there is no unusual or unexpected event or occurrence other than the injury itself.
>
> 2. The phrase 'accidental in character and result' contained in the 1959 amendment to the statutory definition of 'injury' (Section 4123.01 C, Revised Code) in the Workmen's Compensation Act is without independent meaning, adds no element to the requirements for compensability, and refers solely to the relationship which the injury must bear to the employment already stated in and required by the words 'received in the course of, and arising out of the employment.'
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> 3. The concept 'doing the same or usual job in the same or usual way' is totally without significance in Ohio Workmen's Compensation Law except to serve as a shorthand expression of the

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[40] *Id.* at 129, 130.

[41] *Supra* note 37.

judicial conclusion that an injury was not received in the course of, and arising out of the employment but resulted from natural or other causes not related to the employment and merely occurred coincidentally while the worker was at work.

Tracing the history of concepts of injury under Workmen's Compensation and similar laws, Judge Putman goes back to the struggles of English Courts with the same problem,[42] starting with a case where a butcher's helper sued his master for injuries arising out of the negligence of a fellow-servant. Judge Putman reviews the opinion:

> In that case, Lord Abinger said:
>
> 'It is admitted that there is no precedent for the present action by a servant against a master. We are therefore to decide the question upon general principles, and in doing so we are at liberty to look at the consequences of a decision one way or the other.
>
> 'If the master be liable to the servant in this action, the principle of that liability will be found to carry us to an alarming extent * * *.
>
> 'The inconvenience, not to say the absurdity of these consequences, afford a sufficient argument against the application of this principle to the present case.'
>
> Professor Willard Hurst of the University of Wisconsin Law School starts with this case and uses the evolution of this struggle through the 'safe place statutes' to Workmen's Compensation insurance to teach beginning students the nature of common law courts and the legislative process.

Then, in discussing the history of the Workmen's Compensation Law in Ohio, Judge Putman says:[43]

> Opinions and law review articles laboriously have dealt with injuries clearly attributable to the economic cost of production as a matter of causal fact but which were declared uncompensable by courts because of the *particular* way in which the *hazard of the employment has operated to injure.* (20 Ohio State Law Journal 601.) Also see the collection of cases in the opinion of Hart, J., in *Gerich v. Republic Steel* (1950), 153 Ohio St. 463, 41 O. O. 468.
>
> As the ghost of Lord Abinger rode down through the decades, phrases such as 'result of an external and accidental means,' 'sudden mishap,' and 'unusual event' have been added by the courts to pervert the spirit of the constitutional authorization and legislative definitions so as to disallow claims directly caused in fact by the job while the worker was on the job. (*Dripps v. Industrial Commission* (1956), 165 Ohio St. 407, 60 O. O. 55.)

The court makes the observation, as a conclusion from Judge Bell's majority opinion in *Dripps,* that "*Dripps* is repealed and Judge Zimmerman's position is 'codified'." The Court continues:[44]

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[42] Priestley v. Fowler, 150 English Reports 1030, 3 MW1, Court of Exchequer (1838).

[43] Stull v. Keller, *supra* note 37.

[44] *Id.* at 50.

Having examined the meaning of Judge Zimmerman's dissent in the *Dripps case,* let us now examine the problem of back injuries by heavy lifting since the case of *Malone v. Industrial Commission* (1942), 140 Ohio St. 292, 23 O. O. 496. We do this because Judge Bell in *Hearing v. Wylie* said that the Legislature in 1959 intended to adopt the Malone rule as well as the rule in Judge Zimmerman's dissent in the *Dripps case.*

We find a clear-cut answer in the case of injury by heavy lifting. Such lifting injuries are compensable since and because of the 'Malone rule' according to the express opinion and holding of the Supreme Court in *Maynard v. B. F. Goodrich Co.* (1944), 144 Ohio St. 22, 28 O. O. 558, which says:

> 'The statute does not expressly require the injury to be accidental. Neither is it expressly required therein that there be a causal connection between the injury and the employment. Yet there is the express provision that the injury must be received in the course of and arise out of the employment. This essential can not exist without such causal connection, and, in turn, causal connection can not exist unless the injury is accidental in character and result.'

The court in the *Maynard case* dealt with a heavy lifting injury which it said was now compensable since and because of the 'Malone rule' although such lifting cases were not compensable before the *Malone case.*[45] (See *Industrial Commission v. Franken* (1933), 126 Ohio St. 299, and *Maczak v. Goodyear Rubber Co.* (1942), 139 Ohio St. 181, 22 O. O. 157.)

The *Maynard case* says all that is required to be shown is that the injury is 'accidental in character and result' and goes on to explain that such phrase is nothing more than an expression of the causal connection implied by the statutory provision that the injury must be 'received in the course of, and arising out of the employment.'

In cases where the job requires frequent and regular heavy lifting, an exclusion from compensability because the injuries were received while doing the usual work in the usual way or without any unusual event or occurrence, would be particularly vicious. This particular 'usual work' has a great capacity to produce a generally accepted injury when done in the usual way.

And further:[46]

The Legislature did *two* things in 1959. It not only amended the definition of 'injury' using the words of Judge Zimmerman's dissent in *Dripps* but in addition thereto it added *for the first time* a liberal construction section.

Section 4123.95, Revised Code, is:

> 'Liberal construction. Sections 4123.01 to 4123.94, inclusive, of the Revised Code shall be liberally construed in favor of employees and the dependents of deceased employees.'

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[45] See Industrial Commission v. Franken, *supra* note 4; Matczak v. Goodyear Tire & Rubber Co., *supra* note 4.

[46] Stull v. Keller, *supra* note 37.

One might regard this as the final nail in Lord Abinger's coffin. Yet the administrative agency would once again raise Lord Abinger's ghost and harass another claimant whose back is broken directly in the service of his employer.

The curious thing about the administrator's position is that had a machine been doing this job and broken at this stage of the operation no one would claim it was not a properly chargeable expense of production.

A human back used to save the expense of a machine for thirteen years is, when it breaks, somehow regarded with less favor than a machine.

Such injuries to employees are an economic cost of production. They always have been and they always will be.

Stull's disability is one which was undisputedly caused by the work and not one which merely appeared coincidentally while the workman was at his place of employment.

Yet the administrator asserts 'something unusual must happen.' To this, an inquiring mind must respond 'Why?' If the worker's back breaks while working in place of a machine and because of the workload, what more need be shown?

If a fellow worker watching this phenomenon slipped on a banana peel, his resultant injuries would,—one may gather—be compensated without opposition.

The point of this decision is that artificial rules based not upon causation but someone's subjective appraisal of the entertainment value of the surrounding circumstances are no more than remnants of 'judge-made' policy which subsidized industry at the expense of the workman in 19th Century England.

This governmental policy is dead!

The modern rule evolved is that costs of production should be borne by the consumer of the goods produced.

The *Stull* decision has been allowed to become final without a ruling by a Court of Appeals. Perhaps no firm conclusions can be drawn, therefore, as to whether *Stull* is law in Ohio; however, it stands as the most forthright and head-on consideration of the legislative intent, expressed both in 1937 and in 1959 with respect to a definition of injury. It is to be hoped that the courts of Ohio will, in the future, review the consistent legislative intent, together with the reluctant acceptance, and sometimes outright rejection of a liberal definition of the term "injury" and conclude that, at last, in 1959, the General Assembly meant what it said and intended to provide that any injury, directly causally related to employment, and occurring at a specific time and place should be compensable, irrespective of whether or not it was preceded by any sudden mishap external to the physical being of the workman. A frank recognition of this rule by the courts will go far to provide uniform justice for workmen who suddenly break down from the strenuous "normal" conditions and environments of their employment.