Allocating Authority Among Institutional Decision Makers in Louisiana State-Court Negligence and Strict Liability Cases

David W. Robertson

Repository Citation
David W. Robertson, Allocating Authority Among Institutional Decision Makers in Louisiana State-Court Negligence and Strict Liability Cases, 57 La. L. Rev. (1997)
Available at: https://digitalcommons.law.lsu.edu/lalrev/vol57/iss4/1

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kayla.reed@law.lsu.edu.
Allocating Authority Among Institutional Decision Makers in Louisiana State-Court Negligence and Strict Liability Cases

David W. Robertson*

TABLE OF CONTENTS

I. Introduction: Capital “N” and Little “n” ........................................... 1080
II. Judicial Review of Facts in Louisiana .................................................. 1081
   A. Introduction ....................................................................................... 1081
   B. “Tainted” Findings ........................................................................... 1083
   C. Supreme Court Review of Factual Assessments Made by Courts of Appeal ................................................................. 1083
   D. Appellate Review of Trial Courts’ Findings of Fact of the Yes/No Variety ........................................................................... 1084
   E. Appellate Review of Trial Courts’ Percentage-Fault Assignments ................................................................................................. 1084
   F. Appellate Review of Quantum Determinations .................................. 1085
   G. Trial Court Grant of JNOV in Normal (as Distinct From Bifurcated) Trials .......................................................... 1086
   H. Trial Court Grant of JNOV in Bifurcated Trials with Conflicting Findings ................................................................................... 1086
   I. Appellate Review of Decisions Involving the Grant or Denial of JNOV ......................................................................................... 1087
   J. Appellate Review of Decisions From Bifurcated Trials with Conflicting Findings .............................................................. 1090
III. Allocating Authority Among Jury, Trial Judge, and Appellate Court in Negligence Cases: Multiple Models .................................................. 1090
    A. Introduction ....................................................................................... 1090
    B. Model One: The Traditional (Keetonian) Model .............................. 1092
       1. The (Existence of) Duty Issue .......................................................... 1092
       2. The Breach (Negligence) (Substandard Conduct) Issue.................. 1095
       3. The Legal Cause (Ambit of Duty) Issue ........................................... 1096
    C. Model Two: The Cardozo Model ....................................................... 1096
    D. Model Three: The Green Model ......................................................... 1096
    E. Model Four: Holmes and Modern Travel .......................................... 1097
    F. Model Five: The Judicial Legislator .................................................... 1098
    G. Model Six: Absorbing the Breach Issue into the Duty Issue by Duty Specification .......................................................... 1100
    H. Summary and Conclusion .................................................................. 1102

Copyright 1997, by LOUISIANA LAW REVIEW.

* W. Page Keeton Chair in Tort Law, University of Texas. This article originated as a December, 1996, presentation to the Louisiana Judicial College. I am grateful to Justice Harry Lemmon and Professor Tom Galligan for suggesting the topic and pushing me to try to cope with it.
I. INTRODUCTION: CAPITAL "N" AND LITTLE "n"

Viewed from a broad jurisprudential perspective, Louisiana tort law is an amalgam of substantive and procedural rules, principles, policies, and practices that describe and purport to control the activities of citizens, lawyers, trial judges, and appellate judges. Some of these norms and practices emanate from legislative sources; others, from judicial sources; still others, from practicing lawyers' attitudes, customs, and habits. The interplay of these norms and practices is detailed, multifarious, and ever-shifting. Thus an article such as this one—purporting to delineate the allocations of authority among institutional decision makers in Louisiana tort matters—will necessarily proceed from a relatively high level of abstraction.

As this article's title indicates, one significant area of Louisiana tort law is not covered here: intentional torts. I have put intentional torts to the side principally because we do not usually think of intentional tort cases as regulated by the duty/risk analysis, which constitutes the skeletal structure of the law of negligence and I contend) of strict liability as well. It would certainly be possible to bring intentional tort cases under the duty/risk analysis. But a long

1. Several aspects of the legislature's role in Louisiana tort law are treated in the co-authored paper delivered by H. Alston Johnson and David W. Robertson to the 1995 Annual Torts Seminar of the Louisiana Judicial College, December 15, 1995. That paper was titled "Legislative 'Micromanagement' of Tort Law" and subtitled "Separation of Powers in Present-Day Louisiana: The Legislative-Judicial Dialogue on the Law of Torts." The matters treated in that paper will not be covered here. The present paper touches on another aspect of the legislature's role infra part V.E.

2. Act 1 of the First Extraordinary Session of 1996 drastically curtailed Louisiana strict liability law, seemingly leaving strict liability in place only for pile driving, dynamite, dogs, and defective products.

3. Consider the spat-upon umpire's potential lawsuit against Roberto Alomar. The plaintiff's prima facie case for liability might be analyzed in duty/risk terms somewhat as follows. (1) The duty
time ago the law formulated crisp definitions for the recurrent intentional torts, and that set of definitions has worked reasonably well as a mechanism for determining when to impose liability for intentional torts and for allocating authority among the jury, trial judge, and appellate court. Therefore it would not be a good idea to use the duty/risk vocabulary in intentional tort cases, and I have gratefully left intentional torts out of this article.

Negligence law is this article’s backbone. Discussion of the law of negligence is facilitated by noting that the term “negligence” has two meanings. “Negligence” with a capital “N,” notionally speaking, designates the field of liability, as distinct from intentional torts and strict liability. The same term with a notional lower-case “n” designates the breach (substandard conduct) element of the plaintiff’s prima facie case within the Negligence field.

II. JUDICIAL REVIEW OF FACTS IN LOUISIANA

A. Introduction

The rules governing judicial review of fact issues are numerous, and their interrelationships are complex. While their treatment is normally relegated to treatises and articles on procedure, they need to be included in this article as a central authority-allocating mechanism that typically functions with particular drama and controversy in the tort field. In the following subsections I will try to set forth, summarize, and evaluate the skein of rules and principles ostensibly limiting the authority of Louisiana trial and appellate judges to review facts.
Trial judges review facts when they determine whether to grant judgment notwithstanding the verdict (JNOV) after a jury trial. Appellate judges review facts in a variety of procedural and substantive contexts.

Any effective limitation on judicial fact review obviously constitutes a restriction on judicial authority. Restrictions on judicial authority can usefully be grouped into two classes: jurisdictional and "prudential." Jurisdictional constraints on the powers of courts emanate from constitutional or statutory provisions and are necessarily stoutly maintained. Prudential restraints, on the other hand, are the courts' own creations. They are designed for a variety of purposes including saving labor, avoiding the reality or appearance of intruding into the spheres of the legislative and executive branches of government, and showing respect for other courts and for juries. Prudential restraints are typically flexible and subject to relatively ready exception in exigent circumstances.

In Louisiana, all of the limitations on judicial fact review are prudential. Trial judges' authority to grant JNOV is unfettered by statutory or constitutional restrictions. The appellate courts—both the supreme court and the intermediate courts of appeal—have full constitutional and statutory authority to review facts as well as law.

Most experienced practitioners will caution the neophyte to think of limitations on judicial fact review as restraints on judicial authority as opposed to judicial power. The caution is wise for at least three reasons. First, each of the limitations discussed below is flexible in its phrasing and functional operation, so that a judge avowedly operating subject to a particular limitation still has a great deal of leeway respecting the degree of aggressiveness to be employed in reexamining the particular findings of fact at stake. Second, the very number of rules in play—their near-proliferation—can sometimes seem to invite courts to choose among them as circumstances seem to warrant. Third, as indicated above, prudential restraints—created by judges for essentially their own purposes—by their very nature can readily be modified, supplanted, or even ignored in exigent circumstances.

If it is correct that judicial fact review is certain to remain flexible and to some extent result-oriented regardless of the formal prudential standard ostensibly applicable, then the conceptual apparatus of fact review should be considerably simpler than it has been allowed to become. There is not much point in judges and lawyers spending time, energy, and ink mastering and communicating a

7. La. Code Civ. P. art. 1811 details a procedure for handling JNOV motions but does not address the grounds for granting or denying them.
8. La. Const. art. 5, § 5(C): "Except as otherwise provided by this constitution, the jurisdiction of the supreme court in civil cases extends to both law and facts..." Id. § 10(B): "Except as limited to questions of law by this constitution, or as provided by law in the review of administrative agency determinations, appellate jurisdiction of a court of appeal extends to law and facts." La. Code Civ. P. art. 2164: "The appellate court shall render any judgment which is just, legal, and proper upon the record on appeal..."
complicated skein of fact-review principles and rules if the reality is that judicial power is not significantly constrained by the articulated fact-review principles. * * *

I will now turn to an attempted catalog of the fact-review rules and principles currently in play in the Louisiana decisions.

B. "Tainted" Findings

The terms "tainted" and "interdicted" refer to findings of fact that resulted from a mistaken application of legal principle or a biased or prejudiced jury. Such findings are reviewed de novo.9 Unless otherwise specified, the following subsections deal with "untainted" findings.

C. Supreme Court Review of Factual Assessments Made by Courts of Appeal

Courts of appeal's factual assessments come before the supreme court in many different forms, including initial fact-findings at the intermediate appellate level, de novo fact finding by courts of appeal after determining that the findings below were manifestly erroneous or were tainted or interdicted by legal error, and determinations that the trial court's findings should stand because not manifestly erroneous. While I have not found any source spelling this out, the supreme court's behavior indicates that in all of these contexts there is no constraint on its review of the court of appeal's determination, i.e., that the standard of review here is de novo.10 Occasionally one finds supreme court language to the effect that both "lower courts were manifestly erroneous" in their findings of fact,11 but such statements probably should not be regarded as purposeful indications that the supreme court's review of the courts of appeal's performance is limited by the manifest error rule. It would be surprising if the supreme court's focus on intermediate appellate fact assessment was anything other than de novo review. The supreme court has broad discretion as to which civil cases it chooses to review, and it is the ultimate arbiter


of the array of prudential restraints that determine its behavior in the cases it does select. It would be hard to understand a desire by such a court to invent fetters upon its supervision of the appellate courts under its dominion.

D. Appellate Review of Trial Courts' Findings of Fact of the Yes/No Variety

In torts cases some fact questions are not susceptible of a yes or no answer. For example, courts must assign fault percentages to negligent actors and determine the amount of damages owed to successful plaintiffs. These kinds of "how much" findings are treated differently than the more typical "yes or no" fact issues, which present such questions as whether the defendant's conduct was substandard, whether that conduct was a cause-in-fact of the harm, whether the victim's injuries were incurred in the wreck or subsequently in the hospital, or which vehicle got to the intersection first.

When the trial court's "yes or no" findings are not tainted or interdicted by legal error, the manifest error standard prevails. This standard has many phrasings—some of them unduly elaborate—but the essence of it is that reversal is appropriate if and only if the appellate court has a definite and firm belief that a mistake was made. Once manifest error is found as to a particular matter, the appellate court proceeds to de novo fact assessment respecting that matter.

The formal standard is the same whether the fact finder was judge or jury and regardless of whether the finding entailed an intuitive appraisal of the credibility of a live witness or an analysis of documentary evidence. The manifest error rule is often said to be identical to the "clearly erroneous" standard that governs appellate review of facts found in federal bench trials. But a recent dissent by Justice Kimball is premised on the view that the state manifest error rule allows more aggressive fact review than the federal bench-trial standard.

E. Appellate Review of Trial Courts' Percentage-Fault Assignments

The appellate court assesses the trial court's percentage-fault assignments for manifest error. If a percentage-fault assignment is manifestly too low, the court

12. Whether a finding of no negligence falls under the yes/no category as opposed to the how/much category is treated infra text and notes 20-22.
13. Lewis, 654 So. 2d at 314; Ferrell, 650 So. 2d at 745-46.
16. Lewis, 654 So. 2d at 314.
17. See, e.g., Ferrell, 650 So. 2d at 745-46. Fed. R. Civ. P. 52 articulates the standard: "Findings of fact [in actions tried without a jury or with an advisory jury], whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."
of appeal must raise it, but only to the lowest reasonable percentage. If such an assignment is manifestly too high, the court of appeal must lower it, but only to the highest reasonable percentage. A useful term for the described appellate alteration in percentage-fault assessments might be deferential correction.

It is not entirely clear whether the deferential correction approach is mandated when the manifestly erroneous finding of the trier of fact was that a party was not at fault at all. The supreme court decision describing and requiring the deferential correction approach implies that it is confined to “a ‘clearly wrong’ apportionment of fault,” suggesting that manifest error in finding no fault at all should be followed by a de novo percentage assessment. The fourth circuit has recently assumed the contrary, concluding that the “jury’s failure to find Mr. Jones [the plaintiff in a trip-and-fall case] comparatively negligent was manifestly erroneous” and that “the lowest percentage of fault a reasonable factfinder should have allocated to Mr. Jones under these circumstances was 30 percent.”

F. Appellate Review of Quantum Determinations

The appellate court reviews quantum determinations for abuse of discretion. If an abuse of discretion is found, the appellate court then performs the deferential correction operation.

It is sometimes suggested that different standards of review should obtain for different types of damages determinations, so that portions of the damages award “susceptible to mathematical calculation” would be reviewed de novo rather than under the abuse-of-discretion standard. Such an approach may well conduce to simplification in a particular case. But from the larger perspective of the need for simplification and clarification of the entire body of scope-of-review rules, the introduction of yet another rule into this already crowded field should probably not be greeted with enthusiasm.

19. Clement, 666 So. 2d at 609-11; Davis v. L.J. Earnest, Inc., 631 So. 2d 63, 68 (La. App. 2d Cir. 1994) (finding manifest error in 90% assignment and using the deferential correction rule to lower it to 75%).

20. The question is this: When the trial court concludes that a party has not been negligent at all and the court of appeal reverses that finding for manifest error, should the court of appeal then set what it considers the proper percentage of fault, or should it follow the deferential correction approach and assign only the lowest reasonable number? I.e., does review of such an issue fall under this paper’s part II.D or under part II.E? I have not found an answer to that question, but believe that it should be the former. Part of my thinking is an intuition that zero versus something is essentially a yes/no question of a qualitatively different sort from 10% versus 40%. More importantly, my choice seems slightly simpler than the alternative.

21. Clement, 666 So. 2d at 611 (emphasis added).


G. Trial Court Grant of JNOV in Normal (as Distinct from Bifurcated) Trials

When confronting a motion for JNOV, the trial judge is mandated to assess the jury’s findings under a reasonable minds standard, granting JNOV only if reasonable minds could not find as the jury has.\(^ {25} \) When this assessment yields the conclusion that the jury findings cannot be sustained, the trial judge is supposed to make appropriate findings of fact without affording any deference to the jury’s findings.\(^ {26} \)

This reasonable minds constraint on Louisiana trial judges’ authority to grant JNOV came from federal law,\(^ {27} \) where it makes sense as an emanation of the Seventh Amendment. It makes less sense in a system with no constitutional jury trial guarantee and constitutionally mandated fact review. Indeed, subsection I below will suggest that the reasonable minds constraint is functionally only precatory in the Louisiana system. It would make for a more internally consistent fact-review system if the trial judge’s JNOV determination were based on the manifest error rule rather than the reasonable minds standard.

H. Trial Court Grant of JNOV in Bifurcated Trials with Conflicting Findings

The bifurcated trial—with fact issues against one defendant tried to a jury and those against another defendant tried to the bench—has been a frequent Louisiana phenomenon. Such a trial will involve many issues of fact that are common to both cases. Not surprisingly, juries and trial judges often disagree in their assessment of such common facts. How can this recurrent problem best be handled?

Courts often say that a “proper” way for the trial judge to deal with the conflicting jury findings is to grant JNOV.\(^ {28} \) If these statements are taken to mean that the trial judge ought to grant JNOV in any case in which conflicting judge and jury findings are reached, they clash with the reasonable minds restriction normally applied to the trial court’s decision whether to grant JNOV. (The two views clash unless one is prepared to say that any jury finding that differs from the trial judge’s on the same point is ipso facto beyond the pale of reasonable minds. Anyone who

---

26. Anderson, 583 So. 2d at 833:
   Once a trial court has concluded that a JNOV is warranted because reasonable men could not differ on the fact that the award was either abusively high or abusively low, it must then determine what is the proper amount of damages to be awarded. In making this determination, the judge is not constrained . . . to raising (or lowering) the award to the lowest (or highest) point which is reasonably within the discretion afforded that court.
27. Scott, 496 So. 2d at 273: “Because [CCP art. 1811] was based on a federal rule, the decisions of the federal courts can be used for guidance.”
is prepared to say that should be at work reforming our system by getting rid of
civil juries.) The inconsistency is not removed but becomes less significant when
one accepts the demonstration in subsection I below that the reasonable minds
restriction functions as precatory insofar as appellate supervision is concerned.

I. Appellate Review of Decisions Involving the Grant or Denial of JNOV

Here, an unduly complex system of appellate review has evolved. I will
first describe it and then propose a functionally equivalent simplification.

Synthesizing the recent jurisprudence on appellate review of decisions
involving JNOV motions 29 arguably yields the following picture. (1) Ordinarily
the appellate court should conduct a de novo review of the trial judge's decision
to deny or grant a JNOV, simply asking whether the trial judge was right in
concluding that reasonable minds could (or could not) agree with the jury. But
this review seems not to occur in the bifurcated trial/conflicting findings
situation, where the trial judge's grant of JNOV to "reconcile" the conflicting
findings is evidently the recommended procedure. (2) If the trial court correctly
granted JNOV, the judge's substituted findings should then be reviewed under
the manifest error (or for quantum determinations the abuse of discretion)
standard. (3) If the trial judge correctly denied JNOV, the jury's findings should
then be reviewed under the manifest error/abuse of discretion standard. (4) If the
trial judge was wrong in granting JNOV, the jury's findings should be
"reinstated," and then reviewed under the manifest error/abuse of discretion
standard. (Some judicial language can be found suggesting that in this situation
the jury's findings are "reinstated" and left to stand without further review. The
suggestion is believed to be inadvertent, because on its face it is incompatible
with constitutionally-mandated appellate review of fact.) (5) If the trial judge
erred in denying JNOV, the appellate court should set aside the jury's findings
and then perform a de novo fact review in order to arrive at correct findings.

The complexity of the foregoing description is unfortunate. A great deal of
agreeable simplification would result from eliminating step (1). The appellate
courts should not concern themselves with whether the trial judge correctly
performed the reasonable minds operation. Instead, they should simply apply the
appropriate (usual) standard of appellate review to the findings of fact on which
the judgment below was ultimately based.

Aside from the virtues of simplification, there are two additional arguments
for eliminating step (1). First, unlike the federal restriction on which it was
loosely based, the Louisiana reasonable minds constraint on trial judges'

29. See Anderson, 583 So. 2d at 832-34; Scott, 496 So. 2d at 274; Ventress v. Union Pacific
R. Co., 666 So. 2d 1210, 1217 (La. App. 4th Cir. 1993), mod. on other grounds, 672 So. 2d 668
(1996); Dowden, 664 So. 2d at 647; Randolph, 646 So. 2d at 1024, 1026; Terro v. Casualty
Reciprocal Exchange, 631 So. 2d 651, 653-54 (La. App. 3d Cir.), writ denied, 637 So. 2d 157 (1994);
Neal v. Highlands Ins. Co., 610 So. 2d 177 (La. App. 3d Cir. 1992), writ denied, 612 So. 2d 100
authority to grant JNOV has no constitutional or other jurisdictional underpinning. It is purely prudential and was presumably devised as a way of saving labor at the trial court stage and of signaling judicial respect for the work of juries. Those purposes are well served when trial judges follow the admonition, but they do not require the additional safeguard of appellate review.

Second, under the overly complex structure described above, appellate review of the trial judge's reasonable minds determination is functionally meaningless in almost all of the situations that can arise. The diagram below is followed by a list of the theoretically possible situations that might result from an appellate court's application of the present skein of rules. Indented immediately beneath each item in the list is an argument that appellate scrutiny of the reasonable minds determination should be overtly jettisoned. Following the sense of the indented arguments will be assisted by recalling that the reasonable minds standard is more forgiving than the manifest error standard. This means that factual findings might be manifestly erroneous and still pass (i.e., be sustainable under) the reasonable minds test, and that passing the manifest error test automatically satisfies the reasonable minds test. The relationship between the two tests is more easily kept in mind with the help of the following diagram, in which the outermost box contains the entire universe of findings of fact and each inner box contains the labeled category plus all other sustainable findings.

Consider now the theoretically possible outcomes of appellate application of the present rule-structure:

(a) The trial judge was correct to deny JNOV, because reasonable minds could agree with the jury. Moreover, the jury's findings were not manifestly erroneous.

30. An application of formal logic would yield eight such possibilities. Only six are set forth below because one of the formal possibilities (trial judge wrong to deny JNOV, but jury findings not manifestly erroneous) is a null set and because two others are combined as item (f).

31. The court in Ventress, 666 So. 2d at 1217, gave a careful explanation of how (at least in legal theory) jury findings that reasonable people could agree with can nevertheless sometimes be manifestly erroneous.
The second conclusion completely encompasses the first; the first step was unnecessary.

(b) The trial judge was correct to deny JNOV, because reasonable minds could agree with the jury. However, the jury's findings were manifestly erroneous.

The first step did not affect the outcome; its only conceivable meaning was symbolic.

(c) The trial judge was correct to grant JNOV, because reasonable minds could not agree with the jury. The trial judge's post-JNOV findings were not manifestly erroneous.

Again, the first step serves no purpose; the same outcome eventuates from going directly to review of the trial judge's findings.

(d) The trial judge was correct to grant JNOV, because reasonable minds could not agree with the jury. However, the trial judge's substitute findings were manifestly erroneous.

Once again, the only determination affecting the outcome is the second.

(e) The trial judge wrongly denied JNOV, because no reasonable mind could agree with the jury. This leaves the court of appeal with no operative fact findings, and necessitates de novo fact finding at the appellate level.

De novo fact finding at the appellate level also would have followed from a determination that the jury findings were manifestly erroneous (which they must have been if no reasonable mind could have reached them).

(f) The trial judge wrongly granted JNOV, because reasonable minds could agree with the jury. The trial judge's post-JNOV findings must therefore be ignored; the jury's findings must be "reinstated" and then reviewed for manifest error.

Under the proposed simplification, the trial judge's post-JNOV findings would not be ignored, but would be reviewed for manifest error. In this situation alone, different outcomes might eventuate under the proposed simplification as opposed to the present complex structure.

The refinement at situation (f) does not seem to justify the complexity of the present structure. A more sensible rule would treat the reasonable minds restriction as a principle binding on trial judges but irrelevant at the appellate level. Better yet, the standard applied by the trial judge to the jury findings should be the manifest error rule. Under either trial-court standard, the appellate court would simply proceed to review the findings on which the judgment below was based under the manifest error/abuse of discretion standard.
J. Appellate Review of Decisions From Bifurcated Trials with Conflicting Findings

When the trial judge concludes a bifurcated trial by "reconciling" the conflicting findings through a grant of JNOV, the matter is treated on appeal under the rules for decisions involving JNOV motions. When such a reconciliation does not occur, the court of appeal is effectively confronted with two judgments. Here there is disagreement on the appropriate standard of review. Authority can be found for each of three propositions: (a) There should be de novo fact review. (b) The appellate court should choose the more reasonable of the conflicting findings. (c) The findings that were more properly in the judge's bailiwick should be reviewed for manifest error (and the judge's other findings ignored); those that were more properly in the jury's bailiwick should be reviewed for manifest error (and the jury's other findings ignored).

Here again, the urge for simplification weighs in powerfully. The de novo response is much simpler than the others. An additional argument for it is that the trial judge has cast doubt on the jury's findings by reaching his or her own conflicting findings, while at the same time not showing enough confidence in the bench findings to lead on to the JNOV technique. In that situation and without stretching the point very far, the findings below might be seen to have been "tainted" by the facial inconsistency.

III. ALLOCATING AUTHORITY AMONG JURY, TRIAL JUDGE, AND APPELLATE COURT IN NEGLIGENCE CASES: MULTIPLE MODELS

A. Introduction

There can be no hard and fast line between the jury's and the trial judge's functions, nor between those of the trial and appellate courts. The law of

35. Hasha, 651 So. 2d at 869; Ourso, 630 So. 2d at 969 (Saunders, J., dissenting); American Casualty Co. v. Illinois Central Gulf R. Co., 601 So. 2d 712 (La. App. 5th Cir.), writ denied, 604 So. 2d 1005 (1992).
36. Stapleton v. Great Lakes Chemical Corp., 616 So. 2d 1311 (La. App. 2d Cir.), "approved" in relevant part, 627 So. 2d 1358, 1362 (1993)—in which the trial judge was wrong to conduct a bifurcated trial—presented a different situation. There, the trial judge’s findings were properly ignored and the jury’s properly subjected to manifest error review.
negligence (and of the Louisiana versions of strict liability\textsuperscript{37}) is simply too multifarious and malleable for that. The fluid nature of tort law's allocation of decision-making authority is perhaps especially noteworthy in Louisiana, where: (1) juries are used less frequently than in other states and trial judges often serve as triers of fact; (2) bench trial findings of fact and jury findings of fact are treated (at least formally) under identical standards of appellate review; and (3) appellate fact review is potentially (under the relatively relaxed manifest error constraint and its cousins) little more restricted than review of questions of law.

However, there are settled practices and traditions that do and should limit the authority of juries, trial judges, and appellate judges. Moving too far from those traditions—whether the party favored is plaintiff or defendant—unsettles lawyers' and citizens' expectations for stable law administration and invites disrespect for the legal and judicial systems.\textsuperscript{38} Thus, it would be useful to describe and validate a traditional model and thereafter to try to insist upon consistent adherence to it.\textsuperscript{39}

In an effort to begin that task, six models (some of them with variations) for allocating decision-making authority in negligence cases are set forth in the following subsections. These models are identical in several crucial respects. All of them share the widely-accepted viewpoint that the plaintiff's prima facie case in a negligence-law cause of action is properly treated under a duty/risk analysis embracing five elements:\textsuperscript{40} duty, breach, cause in fact, legal cause,\textsuperscript{41} and damages. All of the models treat the fault of the victim as an affirmative defense entailing a separate analysis rather than as a part of the plaintiff's prima facie case.\textsuperscript{42} And the models do not differ in their treatment of the cause-in-fact and damages issues.\textsuperscript{43}

\textsuperscript{37} See supra note 2.
\textsuperscript{38} Departures from settled traditions, if pronounced enough, may be thought by some observers to violate constitutional rights. See 65 U.S.L.W. 3317 (U.S. Oct. 22, 1996) (setting forth a petition for certiorari to the United States Supreme Court, No. 96-452, seeking review of Pitre v. Louisiana Tech University, 673 So. 2d 585 (La.), cert. denied, 117 S. Ct. 509 (1996)).
\textsuperscript{39} Here one has modest aspirations. The quintessential plasticity of negligence law counsels against large ambitions for a neat and unvarying conceptual structure. The unlikelihood of ever achieving such certainty is suggested by the example of Justice Cardozo, who was quick to absorb a major part of the legal cause issue into the duty issue in Palgraf v. Long Island R. Co., 162 N.E. 99 (N.Y. 1928) (see infra note 68), but strongly opposed the effective absorption of the breach issue into the duty issue in Pokora v. Wabash Ry. Co., 292 U.S. 98, 54 S. Ct. 580 (1934) (see infra note 75).
\textsuperscript{40} See David W. Robertson et al., Cases and Materials on Torts 83-84, 136, 160-63 (1989); Thomas C. Galligan, Jr., "Hill v. Lundin & Associates" Revisited: Duty Risked To Death? 10-11 (LSU Law Center 1993); Pitre, 673 So. 2d at 589-90.
\textsuperscript{41} "Legal cause" is the emerging term—a significant improvement—for what used to be called "proximate cause." See Fowler v. Roberts, 556 So. 2d 1, 5 & n.5 (La. 1989). Cf. W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 42, at 273 (5th ed. 1984).
\textsuperscript{42} But see infra part V.G.
The models do differ in their treatment of the interaction of the duty, breach, and legal cause elements of the duty/risk analysis. The following presentations focus only on those elements.

B. Model One: The Traditional (Keetonian) Model

1. The (Existence of) Duty Issue

The duty element in the five-part formulation of the negligence-law cause of action has been called an "unnecessary fifth wheel on the coach, incapable of sound analysis and possibly productive of injustice." The duty concept came into tort law as a more-or-less accidental corollary of the "privity of contract" doctrine associated with the 1842 English decision in Winterbottom v. Wright, in which the court phrased its conclusion—that an injured coachman had no action against the entity whose negligent repair of the coach caused it to collapse while in use—in terms of both the absence of contractual privity between victim and defendant and the (consequent) absence of a recognizable "duty." "[T]he formula that [negligence-law] liability followed generally [but only] from harm caused by breach of a duty of care gained currency only after 1880, stimulated in part by the theoretical writings of Oliver Wendell Holmes, Jr." Leon Green once called the emergence of the idea that the plaintiff must always establish that a duty of care was owed "probably the strangest chapter in all tort law."

The relationship of the duty issue to the other issues in the five-part formulation of the negligence-law cause of action "is a problem that has produced 'a vast amount of legal literature' without leading to an agreed scholarly analysis." But consensus seems to be emerging that the,

44. Much of the political, ideological, and legal tension generated by the choices among these models stems from different views as to the usefulness of civil (as opposed to criminal-case) juries. For that reason the presentations in this section posit the jury as the trier of fact. But the analytical features of the models do not differ when trial is to the bench. When a bench-trial judge is wearing her trier-of-fact hat, she is supposed to attend to the same currents of intuition, empathy, and love of democracy that mythologically elevate the typical jury. See also infra note 66 and infra parts IV and VI.

45. We are here concerned with what are sometimes called "ordinary negligence" cases as distinguished from cases in which liability is sought to be predicated upon defendant's violation of a statute. Potts v. Fidelity Fruit & Produce Co., 301 S.E.2d 903, 904 (Ga. App. 1983). But the models can accommodate statutory violation cases with only slight modification. See infra part V.E.


49. Id. at 1328.

50. Green, supra note 5, at 66.

issue of existence of duty, which came into the negligence law in a somewhat accidental way, is purely formal in the mine run of cases and presents no significant difficulty. This is because Anglo-American negligence law firmly incorporates the assumption that anyone engaging in any activity that has the potential of causing physical harm to others owes a duty to use reasonable care to avoid causing such harm.  

In England, the courts have been intermittently articulate about the fundamental principle:

[W]henever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

The Louisiana Supreme Court has more recently written:

The time has come when we can and should say that each person owes a duty to take reasonable care to avoid acts or omissions which he can reasonably foresee would be likely to injure a present or future member of society unless there is some justification or valid explanation for its exclusion.

The referenced possibility that there may be some "justification or valid explanation for [the] exclusion" of a duty of reasonable care signals the existence of rules of law that protect certain types of defendants from full exposure to negligence law's normal requirements or that treat certain types of interests as entitled to lesser protection than is afforded to the interest in protection from physical harm to one's person and tangible property.

Clarity of analysis in negligence-law cases is greatly furthered if the duty issue is kept separate from other issues in the case by firmly tying the duty issue to such categorical rules of law. On the problem of separating the duty issue from the breach and legal cause issues, I have elsewhere written:

As is often the case with tort puzzles, a view through the prism of trial court procedure points toward a solution. Careful speakers will reserve the formulation, "defendant had no duty," for situations controlled by rules of law of enough breadth and clarity to permit the trial judge in

52. Robertson, supra note 40, at 195 (emphasis in original). See also Fazzolari, 734 P.2d at 1328-29 & n.3.
most cases raising the problem to dismiss the [petition or] complaint or award summary judgment for defendant on the basis of the rule.\textsuperscript{55}

Keeping the duty issue separated from the others in the suggested manner serves clarity, an end that is valuable for its own sake. It also helps preserve the traditional judge/jury allocation in negligence-law cases. When courts begin phrasing particularistic, fact-sensitive and nuanced no-liability determinations in “no duty” terms, they “tend[] to turn into an apparent rule of law what may be only a determination concerning foreseeability in the [particular] circumstances of [the particular] case.”\textsuperscript{56}

The foregoing discussion brings us to this summary: affirmative conduct\textsuperscript{57} producing physical injury\textsuperscript{58} entails the existence of a duty of reasonable care unless the defendant enjoys some special categorical protection. By “categorical protection” is meant a “rule of law of enough breadth and clarity to permit the trial judge in most cases raising the problem to dismiss the [petition] or award summary judgment for defendant on the basis of the rule.”\textsuperscript{59} Examples of such “no-duty” rules include rules of law limiting landowners’ responsibilities for premises defects,\textsuperscript{60} rules of law to the effect that no one has a cause of action for prenatal injury to an embryo or fetus unless the child survives birth,\textsuperscript{61} restrictions on recovery for economic loss unaccompanied by physical injury to person or property,\textsuperscript{62} and limits on liability for emotional harm.\textsuperscript{63}

\textsuperscript{55} Robertson, supra note 40, at 161.

\textsuperscript{56} Fazzolari, 734 P.2d at 1335.

\textsuperscript{57} The “affirmative conduct” phrase is necessary to signal the rule that one is ordinarily free to do nothing, even when acting might help a fellow human being. Anglo-American tort law reflects the distinction between affirmative conduct and inaction by using the terms misfeasance or malfeasance to signify affirmative wrongful conduct and nonfeasance to signify a morally questionable (but normally non-actionable) failure to act. For a no-duty-to-act case, see Mayo v. Audubon Indem. Ins. Co., 666 So. 2d 1290 (La. App. 2d Cir. 1996).

\textsuperscript{58} Emotional injuries and purely economic injuries involving no physical harm to the plaintiff’s person or tangible property receive a lesser degree of legal protection. See, e.g., Evans Vending Service v. Raymond, 666 So. 2d 334 (La. App. 1st Cir. 1995), writs denied, 667 So. 2d 333, 671 So. 2d 325 (1996).

\textsuperscript{59} Robertson, supra note 40, at 161.

\textsuperscript{60} Louisiana no longer limits land occupier liability via the formal limited-duty structure that grew up around the invitee-licensee-trespasser categories of victims. Cates v. Beauregard Electric Coop., Inc., 328 So. 2d 367 (La.), cert. denied, 429 U.S. 833, 97 S. Ct. 97 (1976). But the victim’s de facto status still figures heavily into the courts’ assessment of the landowner’s responsibility. See, e.g., Oster v. Department of Transp. and Dev., 582 So. 2d 1285 (La. 1991); Entrevia v. Hood, 427 So. 2d 1146 (La. 1983).

\textsuperscript{61} See Keeton, supra note 41, § 55, at 367-68.

\textsuperscript{62} See, e.g., State ex rel. Guste v. M/V Testbank, 752 F.2d 1019 (5th Cir. 1985) (en banc), cert. denied, 477 U.S. 903, 106 S. Ct. 3271 (1986). The extent to which Louisiana law incorporates such restrictions is unclear. See generally 9 to 5 Fashions, Inc. v. Spurney, 538 So. 2d 228 (La. 1989); David W. Robertson, Recovery in Louisiana Tort Law for Intangible Economic Loss: Negligence Actions and the Tort of Intentional Interference with Contractual Relations, 46 La. L. Rev. 737 (1986).

Whether a duty exists is a question of law for the trial judge, reviewable de novo by the appellate court.

2. The Breach (Negligence) (Substandard Conduct) Issue

Determining whether the defendant violated the duty of reasonable care involves asking whether the seriousness of expectable injury risked by the defendant’s conduct multiplied by the probability of such injury’s occurrence outweighs the burden of taking adequate precautions against it. The inquiry can be rendered symbolically or quasi-algebraically as $B < PL?$, with “$B$” representing the burden of adequate precautions, “$P$” the probability of injury, and “$L$” the injury. If the plaintiff can show by a preponderance of the evidence that $B < PL$, then the defendant’s conduct was negligent. The $B < PL?$ inquiry is made from the ex ante standpoint of a hypothetical person of ordinary prudence (“POP”) (who shares the defendant’s superior attributes as well as the defendant’s physical shortcomings but is otherwise objectified) in the shoes of the defendant. The breach question is for the jury unless reasonable minds could not differ. The jury’s decision may be assisted by evidence as to customary practices in the defendant’s profession, trade, or industry and by expert opinion testimony, but is ultimately an expression of the jury’s normative preferences.

---

64. See Meany v. Meany, 639 So. 2d 229, 234 (La. 1994); Allien v. Louisiana Power & Light Co., 202 So. 2d 704, 710-12 (La. App. 3d Cir.), writ denied, 204 So. 2d 574 (La. 1967).

65. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (L. Hand, J., for the court). The particular factual focus of the B and PL elements of Learned Hand’s “formula” depend upon what the plaintiff’s lawyer’s has elected to prove. For example, in Grace & Co. v. City of Los Angeles, 168 F. Supp. 344 (S.D. Cal. 1958), aff’d 278 F.2d 771 (9th Cir. 1960), the defendant’s underground water pipe ruptured and flooded a cargo shed in which plaintiff’s property was stored. The defendant knew that its pipes were old and subject to sudden leaks because the soil in the area was conducive to corrosion. The shed was on a short branch water line, connected to a pipeline serving the entire waterfront that might have been several miles long. If the plaintiff’s lawyer elected to confine the attack to the short branch line, the burden of digging up the pipe and checking for weak spots would probably not have been regarded as prohibitively high, but the probability of a rupture in that short segment of water line would have been quite low. So the plaintiff’s lawyer elected to show that the probability of a leak somewhere in the entire water line would have been quite high. The point of this story is simply to illustrate the intuitively obvious but occasionally neglected requirement that the same factual focus must be maintained on both sides of the B-PL balance.

66. The application of general norms to particular situations is part of the jury’s traditional role. Issues like the breach element in the negligence-law cause of action are sometimes called “mixed question[s]” of law and fact. David W. Robertson, The Precedent Value of Conclusions of Fact in Civil Cases in England and Louisiana, 29 La. L. Rev. 78, 93 (1968) [hereinafter Precedent Value]. Deciding whether an actor’s conduct was substandard (negligent) involves both primary fact finding—determining what the defendant did or failed to do—and norm-applying—assessing whether a reasonable person would have done better. Thus, “mixed questions” of law and fact can also be called “particular norm-applying” questions. In the Anglo-American tort system, both primary fact finding and particular norm-applying have been regarded as business for the trier of fact. See
3. The Legal Cause (Ambit of Duty) Issue

Whether the plaintiff's class of persons, the type of harm sustained, and the manner in which the harm came about fell within the scope of protection of the duty violated by the defendant is typically submitted to the jury under a general instruction inquiring whether the plaintiff's injury or something similar was a reasonably foreseeable consequence of the defendant's negligent conduct. The jury gets this question unless reasonable minds could not differ about the answer.

C. Model Two: The Cardozo Model

Model Two is the same as Model One except that the "class of persons" portion of the legal cause inquiry is here subsumed under the rubric of duty and becomes a question of law for the judge.

D. Model Three: The Green Model

Leon Green urged that all of the inquiries that Model One treats as legal cause should be subsumed under the rubric of duty and made questions of law for the judge's determination.

Precedent Value, at 88 ("[i]f a jury and trial judge cannot be trusted to make a decision depending 'entirely upon the question of fact whether the time and distance were sufficient for the engineer to stop his train and prevent the accident,' it is difficult to see what purposes they could serve") (internal quotation from Brown v. Louisiana R.R. & Nav. Co., 147 La. 829, 830, 86 So. 281 (1920)) (emphasis in original).

Res ipsa loquitur does not belong in the illustrative listing of occasional assistance to the jury in its breach determination. Res ipsa loquitur is a rule of evidence or procedure to the effect that the mere occurrence of an accident (of a certain type) may generate a permissive inference of negligence sufficient to take the case to the jury in the absence of adequate exculpatory evidence presented on behalf of the defendant. In a system treating the res ipsa doctrine sensibly, jurors never hear of it.

For example, see Texas Pattern Jury Charge 2.04 (1987), which lumps cause in fact and legal cause under a broad "proximate cause" rubric as follows: "'Proximate cause' means that cause, which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event."

See Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928) (holding that the defendant owed no duty to an unforeseeable plaintiff); Pitre v. Opelousas Gen. Hosp., 530 So. 2d 1151, 1155-58 (La. 1988) (treating the question of whether the plaintiff's fell within the scope of protection of defendant's duty as part of the duty issue and the question of whether the type of harm incurred fell within that scope as the legal cause issue).

Dean Green devoted a major portion of his long and vigorous life of scholarship to the advocacy of his model. See, e.g., the following works: Green, supra note 5; Leon Green, Duties, Risks, Causation Doctrines, 41 Tex. L. Rev. 42 (1962); Leon Green, The Causal Relation Issue in Negligence Law, 60 Mich. L. Rev. 543 (1962); Leon Green, Foreseeability in Negligence Law, 61 Colum. L. Rev. 1401 (1961).
E. Model Four: Holmes and Modern Travel

Aside from a prudent sensitivity to the vagaries of life, nothing stands in the way of courts' laying down specific rules of conduct to govern recurrent situations. Such rules become part of the breach issue; it will be useful to term them breach specification. Once they are authoritatively articulated, these rules alter the trial judge's and jury's approach to the breach issue, which is no longer determined by general reference to the B, PL and POP conceptions. Instead, it is determined by testing the actor's conduct against the list of factors.

Model Four consists of Model One with the breach specification technique substituted for the technique described above at Part IV.B.2. Additional models could be formulated by engrafting the breach specification technique onto Model Two and Model Three. For simplicity's sake, we will think of these as hybrids that might have been named Models Four-A and Four-B. These need not be discussed here, but it is well to realize that we are dealing with a potential proliferation of approaches.

Model Four shifts authority from the jury to the trial judge, who will not leave the jury free to make the B & PL? and POP evaluations freely, but will instead instruct them to apply the factors. It also shifts authority from the trial court to the appellate court, which will be inclined to use the factors as a framework for relatively detailed discussion and review of the trial court's conclusion on the breach issue. But such shifts of authority do not necessarily afford an independent basis for objecting to Model Four, provided the factors are not sprung on the trial court after the fact in such a way as to effectively redetermine the entire case at the appellate level.

A principled basis for objecting to Model Four does arise when the breach specification gets too specific. The nationally famous instance of this mistake was the United States Supreme Court's decision in Baltimore & Ohio R. Co. v.

70. See, e.g., Mathieu v. Imperial Toy Corp., 646 So. 2d 318, 322-23 (La. 1994) (setting forth seven factors for determining the reasonableness of police officers' conduct in approaching or arresting a subject); Watson v. State Farm Fire & Casualty Ins. Co., 469 So. 2d 967, 974 (La. 1985) (looking to the Uniform Comparative Fault Act as the source for a six-factor approach to assessing and comparing the parties' percentages of fault); Giordano v. Rheem Mfg. Co., 643 So. 2d 492, 496 (La. App. 3d Cir. 1994) (announcing a rule that in the absence of a gas or electric company's actual or constructive knowledge of defects in a private wiring or piping system or appliances, the power company's responsibility for the uses of its product stops at its meter, and using that rule to uphold summary judgment for the defendant gas company).

71. See also infra notes 77 and 80.

72. See Mathieu, 646 So. 2d at 323-26 (using the articulated factors to conclude that the trial court's conclusion that police officers were negligent was manifestly erroneous). But cf. Campbell v. Department of Transp. & Dev., 648 So. 2d 898 (La. 1995) (reviewing percentage-fault assignments without mentioning the factors set forth in Watson, 469 So. 2d at 967).

73. Both of the decisions discussed in the text immediately below were decided before Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817 (1938). Under Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), the Supreme Court felt itself empowered to declare nationwide tort rules binding on all federal courts.
Goodman, in which Justice Holmes announced for the Court that motorists are negligent as a matter of law in traversing railroad grade crossings without stopping, looking, listening, and if necessary getting out of the vehicle to reconnoiter. The punch line of the Holmes opinion was this:

It is true . . . that the question of due care very generally is left to the jury.
But we are dealing with a standard of conduct, and when the standard is clear it should be laid down once for all by the Courts. 74

Holmes’s markedly rustic view of railroad and automobile travel—and his sense of the proper role of the nation’s highest court in laying down detailed motor vehicle traffic codes—had to be gently overruled less than a decade later in Pokora v. Wabash R.R. Co., where Justice Cardozo wrote for the Court:

Standards of prudent conduct are declared at times by courts, but they are taken over from the facts of life. To get out of a vehicle and reconnoitre is an uncommon precaution, as everyday experience informs us. Besides being uncommon, it is very likely to be futile, and sometimes even dangerous. . . . Illustrations such as these bear witness to the need for caution in framing standards of behavior that amount to rules of law. The need is the more urgent when there is no background of experience out of which the standards have emerged. They are then, not the natural flowerings of behavior in its customary forms, but rules artificially developed, and imposed from without. . . . The opinion in Goodman’s Case has been a source of confusion in the federal courts to the extent that it imposes a standard for application by the judge, and has had only wavering support in the courts of the states. We limit it accordingly. 75

From today’s vantage point, Cardozo’s view seems obviously right and Holmes’s almost ludicrous. Model Four does not work very well unless the breach specification is wise, modest, and sufficiently flexible to permit the trial judge and jury to try to provide the individualized justice that tort law purports to afford.

F. Model Five: The Judicial Legislator

The Louisiana Supreme Court has sometimes stated that judges should decide the breach issue on the basis of broad considerations of “justice and social utility” viewed “from the same standpoint as would a legislator regulating the matter.” 76

75. 292 U.S. 98, 104-06, 54 S. Ct. 580, 582-83 (1934).
76. Entrevia v. Hood, 427 So. 2d 1146, 1149 (La. 1983) (recommending the judicial legislator approach to the breach issue—the “unreasonable risk” issue—in strict liability cases brought under La. Civ. Code art. 2317); Oster v. Department of Transp. & Dev., 582 So. 2d 1285, 1288-89 (La. 1991) (indicating that the approach described in Entrevia is also appropriate for the breach issue in negligence cases). It is interesting to note that the Entrevia opinion found significant support for the
Model Five consists of Model One with the judicial legislator technique substituted for the technique described above at Part III.B.2.77

The context of the Louisiana Supreme Court opinions announcing the judicial legislator technique has indicated that the envisaged judicial legislator is the appellate court. But trial judges must also have been meant to follow the approach, for it would be a very odd system that determined breach by one set of criteria in the trial court and a different set on appeal. (Under such a system—with the trial court and the appellate court not even on the same page, so to speak—no lawyer would have any decent idea of how to try her case, and the appellate court would inevitably be presented with a record that furnished at best an incomplete basis on which to perform the judicial legislator operation.) And presumably trial judges are deemed possessed of the same vision and wisdom as their appellate colleagues.

All of the foregoing considerations argue strongly for the application of the judicial legislator technique to determine the breach issue at the trial level in any case in which the appellate court is going to use that technique to review the breach issue. Yet the judicial legislator technique contemplates a leisurely detachment and depth of philosophical study that seem somewhat incompatible with the daily hubbub associated with trial court work.78 The supreme court has never explained how a busy trial judge is supposed to find the time to follow the indicated approach, nor how the approach is meant to work when the trial judge is sitting with a jury. Nor has the court given any clear expression of the appropriate standard of appellate review when a trial court has arrived at a breach or no-breach decision after following the suggested judicio-legislative path.79
G. Model Six: Absorbing the Breach Inquiry into the Duty Issue by Duty Specification

It is easy enough to phrase a no-breach decision as a no-duty decision. When that technique, which I will term duty specification, is engrafted onto Model One, the result is Model Six. The duty specification technique can be illustrated by a hypothetical case in which the victim has been electrocuted through coming into contact with an electric company’s uninsulated high-voltage line. A judge who believes that the company’s responsibility under the circumstances was satisfied by positioning the wire a suitable distance above the ground might say “the defendant had no duty to insulate the wire” as readily as she might say “under the circumstances the defendant’s duty of reasonable care was not violated by the absence of insulation.” Each form of words effectively communicates the judge’s conclusion.

However, the second formulation—putting the result in terms of the breach issue—is a more accurate reflection of the normal judge-jury allocation in cases of this kind. The power company enjoys no categorical protection from responsibility for its wires; its responsibility depends upon the kind of nuanced case-by-case inquiry that is at the heart of the breach issue. From that point of view, when a judge articulates such a conclusion in no-duty terms, she has engaged in a shift away from the traditional practice.

Courts in Louisiana occasionally indulge in the indicated shift, effectively bringing the breach issue into the realm of duty and thereby removing it from the

80. The approach described here as Model Six, like Models Four and Five above, could be engrafted onto any of the first three models. See supra notes 71 and 77. Again, we will not pause to discuss all of the hybrids, except to note in passing that the model that would result from engrafting Model Six onto Model Three (Model Six-B) would radically reduce the jury’s traditional role, leaving no work for the jury except primary fact-finding and determining the cause in fact and damages issues.

81. Robertson, supra note 40, at 161-63, states that the instanced “duty” articulation “should be avoided” and goes on to explain: “[In] Clinton v. Commonwealth Edison Co., 36 Ill.App.3d 1064, 344 N.E.2d 509 (1976), . . . [p]laintiff’s son came into contact with an uninsulated high-voltage power line that defendant (the power company) maintained above the plaintiff’s property. The trial judge directed a verdict for defendant on concluding that plaintiff failed to prove maintaining an uninsulated line was unreasonable under the circumstances shown. This was clearly a no-negligence, rather than a no-duty, determination. But directed verdicts on the negligence issue, while by no means rare, are not routine. Perhaps for that reason, in affirming the trial judge’s disposition the Illinois appellate court presented the issue as one of duty. First referring to the well-settled proposition that ‘the determination of the existence of a legal duty is a question of law,’ the court then stated that the question in the case at hand was whether ‘defendants had a legal duty to insulate the wire over the Clintons’ property.’ Expressing the problem in the case as a duty issue made it seem more or less automatically a question for the judge to answer, with no role for the jury. Whereas, had the court said that the issue was whether it was less than reasonable care under the circumstances for defendant to maintain an uninsulated line, that formulation would have tended to make the question seem to be one for the jury to answer. None of this suggests that the Clinton result was wrong; but the court’s use of a duty label for a negligence issue made the result seem foreordained, whereas in reality it was a very close case.” See also supra text accompanying note 56.
bailiwick of the trier of fact. The leading example is probably Pitre v. Louisiana Tech University. A residential student at Tech was hurt in a sledding accident on an icy campus hill when he collided with a parking lot light pole. The trial judge held that the defendant owed no duty to the young man and did not reach any of the other issues. Reversing, the court of appeal concluded that the university owed a duty of reasonable care to its residential students and then proceeded to determine the breach, cause in fact, and legal cause issues in the plaintiff’s favor. In an opinion by Justice Victory, the supreme court reversed the court of appeal, using the B < PL? inquiry as a basis for concluding that "Tech had no duty under the facts of this case." As indicated above, the B < PL? inquiry is at the heart of the breach determination and has not traditionally been used to discuss existence-of-duty issues. Concurred, Justice Lemmon (joined by Justice Kimball) noted this unusual feature of the majority opinion and concluded that the proper explanation of the result in Pitre was no-breach rather than no-duty:

Here, the defendant had a duty to act reasonably in view of the foreseeable risks of danger to students resulting from the winter storm. As noted by the majority, the defendant did act reasonably under the circumstances.

Neither segment of the Pitre court indicated that the manifest error rule had any role to play. For Justice Victory, the issue was duty, a legal issue reviewable de novo. For Justice Lemmon, the issue was breach, a fact issue; but the Lemmon concurring opinion evidently rests on the view that when the supreme court reviews fact assessments made by courts of appeal, as distinguished from trial courts, the appropriate standard of review is de novo rather than manifest error.

82. See, e.g., Donaldson v. Sanders, 661 So. 2d 1010, 1014 (La. App. 3d Cir. 1995), writ granted, 668 So. 2d 363 (1996), in which the Third Circuit phrased the question of whether a nurse had been negligent in failing to inform the treating physician of the patient’s condition as whether she “was required to contact [the] treating physician” and termed that question “a legal issue” and “a question of law.”
83. 673 So. 2d 585 (La.), cert. denied, 117 S. Ct. 509 (1996).
84. Id.
85. Pitre, 673 So. 2d at 590-93. The Pitre court broke the B (burden of precautions) ingredient out into “the intended benefit of the thing” and “the cost of prevention”; it called the PL (probability X loss) ingredient “potential for harm.” Id. at 590. This phrasing is but one of many prevalent versions of the B < PL? vocabulary. See, e.g., Allien v. Louisiana Power & Light Co., 202 So. 2d 704, 710-12 (La. App. 3d Cir.), writ refused, 251 La. 392, 204 So. 2d 574 (1967). The semantical differences are of no moment; in all versions the threat posed by the harm-producing activity or thing is weighed against the costs of giving up the activity or thing or of correcting its dangerous aspects, whichever is cheaper. The vocabulary of “costs” and “cheaper” should not permitted to obscure the essentially unquantifiable nature of the B < PL? inquiry. It is risk-utility evaluation of a meditative and discursive kind, not mathematics.
86. See supra part III.B.2.
87. Pitre, 673 So. 2d at 596.
88. See supra part II.C. An alternative explanation of Justice Lemmon’s omission of any manifest error discussion is suggested infra note 102.
H. Summary and Conclusion

The first three models have strong and deep jurisprudential support. Model Four has a thinner but arguably respectable pedigree. At least until relatively recently, the authorities favoring or exemplifying the fifth and sixth models have been comparatively scattered. These observations do not mean that the fifth and sixth models are necessarily inferior to the first four. But in the next section I will offer arguments that Model One is preferable to any of the others.

I will also argue that it is important for the courts to select a single model and then try to stick to it. This is my principal point: it is probably more important for the courts to demonstrate consistency in their analytical approach than it is for them to select the "right" approach. We can have a reasoned debate about which approach to select, but there is very little to be said for vacillating among the models to the extent that lawyers are significantly uncertain as to how to try their cases.

IV. CHOOSING AMONG THE MODELS: THE CASE FOR MODEL ONE

Widely differing perspectives on the appropriate conceptual structure for negligence and strict liability cases are likely to be found among the various participants and observers of the process. Observers and participants—including legislators, appellate judges, trial judges, practicing lawyers, litigants, academicians, and informed citizens—will vary in their ideological and political views and in their preferences for theoretical as opposed to practical vantage points. Moreover, for each observer, perspectives and preferences are likely to vary significantly from decade to decade as social, economic, and political changes bring unexpectedly differing pressures to bear on the litigation process. Plainly no single voice will be very significant. On matters as subtle and complex and those under consideration in this article, progress comes (if it does come) from the gradual accretion of tradition—curbed and culled by a kind of Darwinian mechanism.

89. See infra note 93.
90. But see supra note 39.
91. Not so long ago a highly-regarded British jurist seemed to despair of achieving consistency respecting negligence law's conceptual structure. Addressing in particular the difficulties of distinguishing between the duty and legal causation issues, Lord Denning wrote as follows: "The more I think about these cases, the more difficult I find it to put each into its proper pigeon hole. Sometimes I say: 'There was no duty.' In others I say: 'The damage was too remote (i.e., the defendant's conduct was not a legal cause of the injury)." So much so that I think the time has come to discard these tests which proved so elusive. It seems to me better to consider the particular relationship in hand, and see whether or not, as a matter of policy, [the loss sued for] should be recoverable, or not." Spartan Steel and Alloys Ltd. v. Martin and Co. (Contractors) Ltd., [1973] 1 Q.B. 27, 37. Such conceptual nihilism might be acceptable in a unified bench-trial system like England's, but would be wholly unacceptable in any American jurisdiction. See David W. Robertson, Liability in Negligence for Nervous Shock, 57 Modern L. Rev. 649, 650-52 (1994).
whereby undue novelty is quickly repudiated and whereby undue partisanship and undue complexity cannot long survive—moving toward working consensus.

Despite the great obstacles to the search for consensus and the likelihood of continuing ferment and disagreement, it might be possible to come to some provisional agreement on the criteria that an approach or model for deciding negligence and strict liability cases ought to satisfy. Perhaps a useful perspective from which to conduct that discussion would be that of a lawyer-litigator with no particular axe to grind who is also a conscientious citizen with an interest in furthering the efficient and responsive workings of the judicial branch. From that point of view, it would seem that tort courts ought to want an approach meeting the following criteria. It will be convenient in the ensuing discussion to refer to these criteria by the indicated (italicized) short-hand designations.

(1) **Flexibility.** The selected model should be sufficiently flexible to enable trial and appellate judges to strive to do justice between the parties without feeling straight-jacketed.

(2) **Firmness.** At the same time, it should be sufficiently firm to engender confidence in law administration and predictability of outcome in recurrent situations.

(3) **Respect.** The selected model should afford decent respect to the trier of fact.

(4) **Judicial Wisdom.** At the same time, it should not cede broad policy-making authority to the trier of fact.

(5) **Labor-Saving.** The selected model should neither require nor permit appellate courts to rethink everything that happened in the trial court. We should avoid having to do everything twice and some things three or four times.

If only because they are very general and abstract, the foregoing criteria should be relatively uncontroversial. They furnish arguments for rejecting several of the models presented above in Part II.

Model Six (duty specification) excellently serves the flexibility and judicial wisdom criteria but seems to fail the others. Model Six arguably fails the firmness criterion because it seems to come into play at the appellate level only now and again, giving the lawyers who tried the case no realistic way to anticipate the shift and deal with it in their trial-court presentations. It seems to fail the respect criterion because the trier of fact's breach determination somewhat unaccountably turns into a duty determination and comes in for de novo review. And it runs into trouble with the labor saving criterion to the extent that it requires the appellate court to start from scratch in evaluating the defendant's conduct.

For similar reasons, Model Five also satisfies the flexibility and judicial wisdom criteria but seems to struggle against all of the others. Model Four
arguably satisfies all of the criteria except the first, but at least in its extreme (Holmesian) version it exemplifies such rigidity as to constitute an outright insult to the flexibility criterion.

Choosing among the remaining models, Models One through Three, is not easily done. All of these approaches seem to satisfy the five criteria posited above, perhaps helping to explain why the Louisiana courts have vacillated among them.93 Such vacillations are perhaps unavoidable. But too much high-visibility variation creates the danger of giving the informed public an unfortunate impression: either that justice is occasionally administered on an ad hoc or ex post facto basis, or that the judiciary's conceptual apparatus is in disarray. If possible, a single model should be chosen and adhered to.

I argue that Model One is best,94 and advance three interrelated arguments in support of this position. (a) Model One gives more authority to the trier of fact than the others. This is a virtue for those who believe that fact-finding and specific norm-applying95 should be done by decision makers close to the human beings involved and close to the basic ground of the events giving rise to the litigation, as distinct from decision makers functioning at a time and place remote from the original events and insulated from contact with the actual human beings whose well-being is at stake. This preference might be described as one for "warm" or "empathetic" fact-finding and norm-applying as opposed to reflective, relatively abstracted or detached, and perhaps more philosophical and scholarly fact-finding and norm-applying. (b) By giving more authority to the trier of fact (whether judge or jury), Model One distributes power nearer to the people and thus incorporates a pro-democracy bias. (c) Model One gives less work to the appellate courts than any of the others, thereby potentially reducing the number of appeals and enabling the appellate courts to concentrate their abilities and energies on the broader legal, economic, and social implications of the cases brought to them.


94. In my view Model One can usefully be combined with a careful version of Model Four whereby wise and suitably flexible factors for determining the breach issue in particular recurrent factual contexts are specified and used in a consistent and principled way.

95. See supra note 66.
As stated at the beginning of this section, different observers will differ as to how much authority should reside with the trier of fact. My own belief that triers of fact should have more authority than Models Five and Six afford them is not generated by love or reverence for juries; at bottom it is rather a simple preference for leaving greater authority at the trial-court level. A detailed accounting for this preference would amount to a civics treatise that has no place here. Instead, let me close this section by invoking Dean Green:

The trial judge [should be] the most important officer of government. There is no statesmanship so valuable as that of the trial judge who has the capacity for doing business without making that an end in itself. Nevertheless, our court systems tend more and more to magnify the appellate judge and to belittle the trial judge. . . . [Such a shift of power] is not an unnatural development in any hierarchy. . . . It may be an inevitable product of the American genius for organization and the concentration of power. Whatever its ultimate explanation, the shift of power from the trial court and jury to the appellate court—from the local community to a centralized court system—may well deaden the administration of the law, just as . . . other concentrations of power have produced conformity in other facets of our lives.96

A homelier version of Dean Green's eloquence would simply urge that appellate courts should respect the trial judge's superior vantage point for particularizing the general norms that constitute our law. A last word from Dean Green: "In the trial court the case is pulsing with life; by the time it reaches the appellate court, much of its life has leaked out or evaporated."97

V. SELECTED DIFFICULTIES WITH THE APPLICATION AND OPERATION OF THE DUTY/RISK ANALYSIS

A. Introduction

From the viewpoint expressed in Parts III and IV above, courts' departures from Model One, and particularly their occasional preference for Model Five or Model Six, constitute perhaps the most significant set of current difficulties with applying and operating the duty/risk analysis. Some of the matters treated in the following subsections could have been formulated as debatable departures from Model One. Others exemplify analytical problems of a different sort. They are

96. The quoted statements of Dean Green come from Green, supra note 5, at 81-82, and from Leon Green, Jury Trial and Mr. Justice Black, 65 Yale L.J. 482, 487 (1956). The immediate source of the quotation is David W. Robertson, The Legal Philosophy of Leon Green, 56 Tex. L. Rev. 393, 432-33 (1978) [hereinafter Green's Philosophy]. The first half of Green's Philosophy summarizes Dean Green's career and legal philosophy. The second half constructs a series of philosophical and judicial-reform essays using Dean Green's words as a kind of montage/homage.

97. Green, supra note 96, at 486.
grouped in this section without regard to their amenability to treatment under the model-selection heuristic device because they are current, controversial, and susceptible of being intelligently debated regardless of the contending analysts' preferences for an authority-allocating model.


Evidently beginning with Green v. City of Thibodaux,99 several intermediate appellate decisions have held or stated that a trial court's determination that particular conduct was or was not negligent—or that a particular condition of a thing did or did not present an unreasonable risk of harm—should be reviewed de novo rather than taking the protection of the manifest error rule.100 These courts have given three arguments on behalf of this new view: (a) that uniform results are desirable and cannot be achieved without full appellate review; (b) that trial courts have no particular advantage in applying generalized norms to particular situations; and (c) that on the face of things, the judicial legislator approach to the breach issue is lawmaking and not fact finding, such that only de novo review is appropriate.101

The Green position is still a minority viewpoint and in my opinion ought not to prevail in the marketplace of law-administration ideas.102 None of the three reasons the courts have ventured for the new position is convincing. (a) The hope for uniform results—rules—deeming particular acts, omissions, or things substan-

---

98. Qualcast (Wolverhampton) Ltd. v. Haynes, [1959] A.C. 743, 758 (Lord Somervell, stating that turning common-sense propositions of fact—e.g., that a particular worker was negligent in not availing himself of readily-available protective equipment—into propositions of law and hence into precedents would, unless checked, soon cause the "precedent system [to] die from a surfeit of authorities").


101. The first two reasons are set forth in Chief Judge Lottinger's opinion for the court in Green, 671 So. 2d at 403. The third is found in Judge Gonzales's opinion for the court in Phipps, 666 So. 2d at 344.

102. In Boyle v. Board of Supervisors, 685 So. 2d 1080, 1081 (La. 1997), the court declined to endorse or reject Green. Some might argue that the Green position was foreshadowed in the concurring opinions of Justices Ortigue (joined by Kimball) and Lemmon in Ambrose v. New Orleans Police Dep't Ambulance Serv., 639 So. 2d 216, 223-24 (La. 1994). These concurrences posited that the question of whether there is sufficient evidence to reach the jury on the breach issue is a question of law; they might (but in my view should not) be read to suggest that the breach issue itself—the norm-application portion—is also a question of law.
andard vel non seems a modern echo of Justice Holmes's ill-fated Goodman decision.\textsuperscript{103} Such rules are fraught with the risk of undue rigidity, and many of them would soon prove wrong. It bears emphasis that de novo review of an issue entails labeling the issue one of law, and that labeling the issue one of law entails the necessity of future courts' honoring the issue's resolution as a binding precedent.\textsuperscript{104} Why should a court of appeal want to bind future courts to the view that an inch-and-a-half depression in a sidewalk or curb does not constitute a defect?\textsuperscript{105} A body of jurisprudence incorporating such binding propositions would soon choke on "a surfeit of authorities."\textsuperscript{106} (b) I think the trial court does have a superior vantage point for making the kind of nuanced and situation-sensitive determination epitomized by the breach issue. If we might have Green on Green: "In the trial court the case is pulsing with life; by the time it reaches the appellate court, much of its life has leaked out or evaporated."\textsuperscript{107} (c) As argued above,\textsuperscript{108} the judicial legislator approach is itself something of an anomaly and ought not be permitted to generate such powerful implications.

Moreover, I would offer two further arguments against the Green v. City of Thibodaux rule.\textsuperscript{109} First, the law seems settled that in jury-tried cases the unreasonable risk issue—whether in negligence or strict liability actions—is for the jury unless reasonable minds could not differ.\textsuperscript{110} Adoption of the Green rule would require either that that practice be changed—a change for which no reasons have been offered—or that appellate courts review jury determinations de novo, a practice that would entail both internal inconsistency within the legal system and a symbolic disrespect for the institution of the jury and the citizens who serve that institution.

Second, the breach issue is typically the most hotly contested and vigorously tried issue in a tort case. This is especially true in strict liability actions (products liability and liability under the former article 2317 regime).\textsuperscript{111} If the trier of fact's decision on that issue is to be reviewed de novo, it is difficult to see why we should not have de novo review on the cause in fact, legal cause, and existence-of-compensable-damages issues as well. And if we are to have de novo review on all

\begin{itemize}
\item \textsuperscript{103} See supra part III.E.
\item \textsuperscript{104} Cf. Robertson, supra note 66.
\item \textsuperscript{105} See Green, 671 So. 2d at 401 ("the difference in level between the sidewalk and the curb was no greater than an inch and a half at its worst point"); id. at 403 ("[t]o require that this particular curb be maintained to a standard sufficient to protect this pedestrian . . . would place too great a burden upon the City. . . . The trial judge's determination that the curb in question posed an unreasonable risk of harm . . . was legally wrong.").
\item \textsuperscript{106} Qualcast (Wolverhampton) Ltd. v. Haynes, [1959] A.C. 743, 758. See supra note 98.
\item \textsuperscript{107} Green, supra note 96, at 486.
\item \textsuperscript{108} See supra part III.F.
\item \textsuperscript{109} My arguments may be viewed as an elaboration of Judge Shortess's dissent in Green, 671 So. 2d at 404.
\item \textsuperscript{110} See, e.g., Gonzales v. Acadiana Fast Foods, 670 So. 2d 457 (La. App. 3d Cir.), writ denied, 671 So. 2d 920 (1996).
\item \textsuperscript{111} See supra note 2.
\end{itemize}
of these issues, it becomes hard to understand why we should have trials at all. It would seem more consonant with the *Green* view—at least when that view is carried to its logical implications—to dispense with trials as such and merely hold hearings at which the erstwhile trial judge (or some other ministerial arm of the appellate court) would preside over the formation of a record on the basis of which the appellate court would then pronounce its judgment. Any overt proposal for such a system would be quickly rejected as radically novel. Yet *Green* seems to me to point strongly in that direction.

**C. Application of the Duty/Risk Analysis to Strict Liability Cases**

I have found no overt discussion of whether the duty/risk analysis applies to strict liability cases. A large number of authorities can be found implying that it does apply. Perhaps a significant number could be found implying that it does not apply. The affirmative side has the better of this silent debate. The only significant difference between a strict liability case and a negligence case is the makeup and articulation of the breach issue. The other issues are identical as between strict liability and negligence, and the duty/risk analysis is a useful and time-tested way of keeping them separated and keeping them straight.

**D. Treating Intentional Tort Cases as Though They Involved Only Negligence**

A standard definition of negligence is conduct that is unacceptable because it creates an unreasonably high risk of harm. Virtually all intentional torts fall comfortably under that broad conceptual umbrella.

Plaintiffs' counsel sometimes have an incentive to pursue intentional torts under the rubric of negligence. This incentive is present when the tortfeasor's liability insurance carrier disavows coverage of intentional torts and (in some systems) because of particularities of immunity provisions and statutes of

---

112. *Id.*


Whether the tactic of labeling a claim that is "naturally" an intentional tort claim as negligence can succeed in avoiding the perceived difficulty (presented by the fact that the alleged tort is also an intentional one) depends upon the meaning and purpose of the particular intentional-tort limitation at stake. This paper does not address these issues.

The concern here is not with deliberate efforts by counsel to treat intentional torts as negligence, but with occasional cases in which the plaintiff's presentation of the intentional tort case under the rubric of negligence seems inexplicable and thus perhaps inadvertent. In Mathieu v. Imperial Toy Corporation, the Louisiana Supreme Court recently decided an intentional shooting case under a negligence-law analysis and without mentioning that intentional shootings, however justified they may turn out to have been, are batteries. Presumably the court accepted the parties' characterization of the case as suitable for disposition under the framework of negligence law and without reference to any light that the law of intentional torts might have shed.

Similar instances can be found throughout the jurisprudence. It does not appear that Mathieu or any of the other cases would have necessarily turned out any differently under an intentional tort analysis. But intentional tort doctrine often provides a sharper and more controlled focus on both tortfeasor fault and victim fault than the (by comparison) more discursive apparatus of negligence law. Particularly now that it has been made clear that percentage-fault reduction of the victim's recovery is not appropriate in cases against intentional tortfeasors, courts should arguably be more vigilant to treat intentional torts as such, despite counsel's failure to refer to the appropriate doctrinal apparatus.

E. The Effect of Violating a Statute

At one time Louisiana had a garden-variety negligence per se doctrine whereby a defendant's violation of a traffic or similar statute designed to protect the

---

117. See, e.g., Ghassemieh v. Schafer, 447 A.2d 84 (Md. App. 1982) (allowing a claim against a thirteen-year-old student for injuries caused by pulling a chair from beneath a teacher to be brought as a negligence claim—covered by a three-year statute of limitations—despite the fact that the one-year statute of limitations on battery had expired).
118. 646 So. 2d 318 (La. 1994). Saying that shootings are batteries does not mean that shooters will always be liable. The shooter may have a consent or privilege defense. See supra notes 3 and 4.
120. Under Veezy v. Elmwood Plantation Assoc., Ltd., 650 So. 2d 712 (La. 1994), some intentional tort victims could have percentage-fault assessed against them. As amended by Act 3 of the First Extraordinary Session of 1996, the Civil Code now seems to preclude docking the intentional-tort plaintiff for his or her percentage fault. La. Civ. Code art. 2323(C).
121. The seminal negligence per se case in the United States is Martin v. Herzog, 126 N.E. 814 (N.Y. 1920) (opinion for the court by Cardozo, J.).
plaintiff's class of persons against the general type of harm suffered by the plaintiff\textsuperscript{122} would count as "negligence per se" to supply the element of breach without the need for any reference to the normal B \textless{} PL? inquiry.\textsuperscript{123} But nowadays the rule is said to be as follows:

The doctrine of negligence per se has been rejected in Louisiana.

However, statutory violations provide guidelines for civil liability.\textsuperscript{124}

Using statutes as "guidelines," courts seem almost always to conclude that breaching the statute is equivalent to breaching the duty of reasonable care. But "guidelines" is a less firm and predictable approach than negligence per se. So the questions arise: when, how, and why was the doctrine of negligence per se "rejected"?

The "rejection" characterization most recently appeared in Galloway v. State, in which the supreme court proceeded in typical fashion by first stating that negligence per se is gone and then going on to impose liability on the basis of the statutory violation.\textsuperscript{125} The "rejection" view can be traced (moving in inverse chronological order) to Faucheux v. Terrebonne Consolidated Gov't,\textsuperscript{126} Boyer v. Johnson,\textsuperscript{127} Weber v. Phoenix Assurance Co.,\textsuperscript{128} and Laird v. Travelers Ins.

\textsuperscript{122} The negligence per se doctrine addresses statutes that prohibit or prescribe particular conduct but that do not themselves make any provision for tort consequences. Under this doctrine, courts in tort cases can and should use such statutes as a means of specifying the standard of care owed by the defendant, provided the statute was designed to protect the general class of persons to which the plaintiff belongs against the general type of harm sustained. Gorris v. Scott, (1874) 9 Ex. 125; Potts v. Fidelity Fruit & Produce Co., 301 S.E.2d 903 (Ga. App. 1983).


\textsuperscript{124} Galloway v. State Dept. of Transp., 654 So. 2d 1345, 1347 (La. 1995) (citations omitted).

\textsuperscript{125} Id.

\textsuperscript{126} 615 So. 2d 289, 293-93 (La. 1993): "The terminology 'negligence per se' has been rejected in Louisiana. The violation of a statute or regulation does not automatically, in and of itself, impose civil liability. Civil responsibility is imposed only if the act in violation of the statute is the legal cause of damage to another." (citations omitted).

\textsuperscript{127} 360 So. 2d 1164, 1168-69 (La. 1978): "We do not intend to revive the doctrine of "negligence per se." A violation of a criminal statute does not automatically create liability in a particular civil case, because the statute may have been designed to protect someone other than the plaintiff, or to protect the plaintiff from some evil other than the injury for which recovery is sought. . . . In this sense, criminal statutes can be said to be mere guidelines for the court. . . . Yet, where a criminal statute imposes a duty designed to protect a particular person from a particular type of injury, one who has so injured such a person by a breach of the prescribed duty cannot evade civil liability by persuading the court to disregard the clear legislative prohibition as if it were a mere discretionary "guideline."

\textsuperscript{128} 273 So. 2d 30, 33 (La. 1973): We granted this writ [because we] were apprehensive that the appellate court had held the plaintiff contributorily negligent merely because of a finding of a cause-in-fact and a statutory violation without a determination of legal cause. We have rejected the concept that a violation of a penal statute automatically constitutes negligence, and we have
Close examination of each of these cases reveals that the court's rejection of the "negligence per se" terminology was intended only to signal that a statutory violation does not have tort consequences against a defendant unless the plaintiff's class of persons and the general type of harm suffered were within the intended ambit of protection of the statute.

But the standard version of the negligence per se doctrine in Anglo-American law also insists that the plaintiff's class of persons and the general type of harm suffered be within the statute's ambit of protection. Putting that thought another way: under no version of the negligence per se doctrine does the statutory violation count against the defendant unless the statute-violating conduct was a legal cause of the harm in suit. One does not need to reject the concept of negligence per se to achieve that result; it comes with the territory.

From the foregoing point of view, rejecting the vocabulary of negligence per se to achieve the imposition of a legal causation limit in statutory violation cases is throwing out the baby with the bath. It might be said that Louisiana jurists have occasionally thought that common-law negligence per se meant "negligence with a capital N." But all the negligence per se doctrine has ever meant is "negligence with a lower-case n," viz., breach. In functional effect, Louisiana still has a standard version of the negligence per se doctrine. But by repeatedly saying that it does not—that statutes are "guidelines" rather than rules—appellate courts occasionally mislead counsel and lower courts, so that unfocused presentation of cases at the trial level is sometimes fostered, and unnecessary appeals ensue.

F. Repairmen

In Ladue v. Chevron, U.S.A., Inc., Judge Rubin asserted his "belie[f] that the Louisiana Supreme Court would hold that [a] platform owner owed no duty under [La. Civ. Code arts. 2317 and 2322] to an independent-contractor repairman injured by the very condition he was hired to repair." Judge Rubin thought that there should be a "rule of law [that] would encourage the

repeatedly held that a criminal violation would lead to civil responsibility only if that act is the legal cause of damage to another. To decide whether the violation of the criminal statute by Laird imposes civil liability upon him . . ., we must determine whether his act was a cause-in-fact of the accident, what was the nature of the duty imposed upon him, what risks were encompassed within that duty, and whether under the combination of these considerations he should be declared negligent.

I would put both the class-of-persons and the type-of-harm inquiry under the legal cause concept. I think the cases in supra notes 128 and 129 agree with this approach. Galligan, supra note 40, at 12, uses a slightly different analysis, whereby the class-of-persons issue falls under duty and the type-of-harm issue under legal cause. Galligan's approach exemplifies Model Two, supra part III.C; mine exemplifies Model One, supra part III.B.

920 F.2d 272, 272-73 (5th Cir. 1991).
owner to repair the platform (by precluding liability) when repairmen are injured by the very condition they are hired to repair."

In the recent case of Celestine v. Union Oil Co. of California, the supreme court disagreed with Judge Rubin, holding that a "per se rule that an owner may never be held strictly liable to a repairman injured while repairing the alleged defect [would be] unworkable and contrary to the fact intensive nature of the definition of 'unreasonable risk.'” The repairman/plaintiff in Celestine nevertheless lost his case because “he possessed the skills and knowledge of a specialized repairman [and] knew the defect was present.” The tenor of the Celestine opinion—which emphasizes "the fact that an injured person was a repairman hired to fix the defect is a relevant factor in assessing whether the defect posed an unreasonable risk of harm"—is that repairmen are going to have a very hard time proving that the defect they were hired to repair was an unreasonable risk because repairmen should be able to look out for themselves. A sampling of recent repairman cases suggests that repairman-plaintiffs usually lose on that basis. In fact, I have found no recent case in which a repairman-plaintiff prevailed.

If it should turn out to be true that repairman-plaintiffs are virtually invariably defeated by the perception that their status and expertise prevents their proving the unreasonable risk element, then it is arguable that we would be better off with a rule of law so stating. If the law in operation actually precludes defective-condition liability to repairmen, we might reasonably prefer to have the courts announce it so that fruitless litigation by repairmen can be stopped at the beginning of the lawsuit—or even earlier, when plaintiffs’ lawyers begin to get the message—rather than (as now seems so often to happen) at the very end.

G. Fault of the Victim as the Sole Legal Cause of the Injury

It continues to be debatable whether barring a victim's recovery on the basis that her fault was the sole legal cause of her harm is consistent with a "pure" comparative fault regime, such as that mandated by Louisiana Civil Code

132. Id. at 277-78. Judge Rubin did not refer to it, but the maritime law's "primary duty" doctrine would have provided a rough analogy to a "repairman exception." See Thomas J. Schoenbaum, Admiralty and Maritime Law § 4-24 (2d ed. 1994).
133. 652 So. 2d 1299, 1304 (La. 1995).
134. Id. at 1305.
135. Id.
137. The repairman-plaintiff succeeded in getting past the summary judgment stage in Carter v. Exide Corp., 661 So. 2d 698 (La. App. 2d Cir. 1993).
138. "Pure" comparative fault means that victim fault even as great as 99.99% will yield a recovery of some damages provided the prima facie case against the defendant is made. It is
Those who argue that the "victim-as-sole-legal-cause" approach is illicit maintain that it reintroduces the discredited contributory negligence doctrine into the law by the back door (making it even harsher by forcing the plaintiff to negate her fault whereas the old contributory negligence doctrine put the burden on the defendant). Those who favor the "sole cause" approach argue that judicial authority to invoke it flows from the premises and conceptual structure of the duty/risk analysis.

The Louisiana case law has not settled this debate. Nor has the matter been put to rest at the national level. A few years ago the "sole cause" technique irresistibly tempted the Louisiana Third Circuit in *Shafer v. State*, in which a highway defect that the court said would have been actionable on behalf of most motorists imposed no liability to a motorist who, as a former highway construction worker, should have known about and been able to guard against the defect. The "sole cause" technique also captivated the United States Supreme Court in the recent maritime case, *Exxon Company, U.S.A. v. Sofec, Inc.*, in which those responsible for a faulty mooring system escaped liability despite their own (arguendo) conceded culpability because of the perceived extraordinary negligence of the master of the plaintiff vessel that ran aground as a result of the mooring's failure.

Neither the Louisiana Third Circuit decision nor the United States Supreme Court decision contains any focused discussion of the tension between the pure comparative fault rule—which says that even a 99%-at-fault victim should recover 1% of his damages—and the "sole legal cause rule"—which says that sometimes the plaintiff's negligence can be so extraordinary or grotesque (despite being less than 100%) that it will defeat recovery. The technique in question thus persists as an occasional and not-fully-articulated exception to the general principle of pure comparative fault regimes whereby victim fault cannot itself bar recovery.

Contrasted with "modified" comparative fault whereby victim fault above a certain level—usually 49% or 50%—cuts off the plaintiff's right to recover. See Robertson, supra note 40, at 362-64.

143. 590 So. 2d 639 (La. App. 3 d Cir. 1991).
144. 116 S. Ct. 1813 (1996). The word "arguendo" in the text is necessary because the Sofec plaintiff never got to try the issue of the defendant's fault. The trial judge bifurcated the trial in such a way that the issue of victim fault was tried to the bench first, preceding and in isolation from all of the other potential issues in the case. This unusual trial methodology was upheld by the Ninth Circuit and by the Supreme Court.
VI. CONCLUSION: THE PIT AND THE PENDULUM

Tort law is always in motion. It is the legal system's response to miscellaneous mishaps caused by life on earth and is bound to shift with changes in local, national, and global societies and the relations among them. For most first-year law students, this quintessential malleability makes torts both the most fascinating and the most frustrating subject in the curriculum. As a teacher of beginning law students, I have come to believe that fascination can be maximized, frustration minimized, and focus and analytical powers sharpened by placing myself and the students firmly in the best vantage point for talking and thinking about Anglo-American tort law: that of a trial judge sitting with a jury. I try to insist that all of our discussions proceed from that vantage point unless a self-conscious change of perspective has been announced and defended.

In making that choice of pedagogical perspective, I have consciously and with great trepidation chosen a vantage point that is different from the habitual stance of two of my greatest heroes. In the world of torts scholarship, there are many whose insight and industry I have come to admire, and there are three giants in the front row: Wex Malone, Leon Green, and Page Keeton. Keeton's torts work was of a lawyerly and pragmatic nature, suitable for sorting out tough practical problems and an excellent model for the (hoped-for) long haul of life as a result-oriented and clarity-seeking student, teacher, and practitioner. Malone and Green were also excellent lawyers, but for the most part their scholarship was at a higher level of abstraction than Keeton's.

I have often tried to identify the perspective or vantage point from which Malone and Green made their wise and penetrating observations about torts problems. With diffidence, I believe that Dean Green habitually spoke from a level approximately horizontal with that of God. He felt that he saw farther and more clearly than most other earthly beings, and that most people could be persuaded to see things his way if he could just get them alone and sweep the cobwebs from their eyes. From that perspective, Green found burning reasons to care about the old demon of "proximate cause"—which for him was an undefined bit of "legal theology" (his favorite pejorative term) or word magic whereby unprincipled limitation-of-liability decisions could be achieved at will or whim by untrammelled judges. But for some reason Dean Green did not seem to care very much about whether duty issues were phrased generally, or whether they were phrased in such a way as to absorb much of the traditional breach issue (as in Model Six above). Green had inconsistent things to say about that judicial technique. At times he seemed to approve it, at times to condemn it, and at times to be unconcerned.

146. *See* id. at 30-31, 57, 184-85.
147. *See* id. at 26-27, 29-30, 57.
Professor Malone's habitual perspective was not quite so lofty. I believe he
looked at the torts process through the imagined eyes of a supreme court justice.
From that vantage point, Malone strove mightily for wise and humane principles
of law. He was seemingly unconcerned with whether such principles would
allow cases to be resolved at the trial stage or would instead frequently call for
resolution at the highest judicial levels. He discussed specific decisions from
the standpoint of the deciding appellate justices, paying little or no attention to
the input that the lawyers and trial judges may have had in the matter. From
his high-court vantage point, Malone had no problem with judges' making duty
formulations ever more specific and fact-intrusive, thereby absorbing what others
would have preferred to be treated as legal cause and breach matters and hence
grist for the fact-oriented mill of the trial court. Malone's eye was on the
output of the entire legal system, which for him meant the substantive product
eemanating from the top of the structure. He was not much worried about any
putative need for clear rules—rules that might avoid some ultimately doomed
lawsuits—or about avoiding appeals.

From the trial judge's vantage point, it is much easier to be worried about
discovering ultimately doomed lawsuits and about avoiding appeals. Heuristi-
cally speaking, the trial judge's seat is the best in the house. Here is where the
rubber meets the road, where the fray hits the fan, where the law of the case first
gets made, where the real roll-up-your-sleeves work gets done. The situation
of the trial judge elicits ready empathy with the parties; with the lawyers who must
advise clients as to whether to proceed (or vigorously defend) and then determine
how to try the case; with the jurors who must ultimately make the tough factual
calls; and with the appellate judges who may be called upon to review the trial
court's product. Everything immediately relevant is in sight. All of the other
participants' practical and theoretical concerns are relevant and graspable.

In this section of the paper I am conceptualizing the trial judge's situation
as the pit, somewhat in the sense of shop floor. My dictionary gives twelve
meanings for the noun "pit." Eight of them are useful here:

(1) The section directly in front of the stage of a theater, in which the
musicians sit.

148. See Wex S. Malone and Leah Guerry, Studies in Louisiana Torts Law 238, 296, 302, 462,
465, 632-33, 646-47 (1970) [hereinafter Studies]; Wex S. Malone, Ruminations on Dixie Drive It
(1970) [hereinafter Ruminations].

149. See Malone, Studies, supra note 148, at 401, 423, 476, 632-33, 646-47, 663-68.

150. See id. at 268, 269, 418, 422, 479, 686; Malone, Ruminations, supra note 148, at 387-88.


151. See, e.g., Malone, Studies, supra note 148, at 802 (an excerpt from the annual torts survey
at 25 La. L. Rev. 49 (1964), in which Professor Malone criticized as having been wholly unnecessary
legislation protecting "good samaritans" from liability. Malone argued that such actors always
escaped liability in litigation against them in any event. He gave no weight to the evident desirability
of avoiding suits against physicians and others who voluntarily administer emergency aid).

(2) The section of an exchange where trading in a specific commodity is carried on.
(3) An enclosed space, often one dug in the ground, in which animals, such as dogs or gamecocks, are placed for fighting.
(4) A relatively deep hole in the ground, either natural, as a pothole or sinkhole, or man-made, as a mine shaft.
(5) A trap consisting of a concealed hole in the ground; pitfall.
(6) Any hidden danger or unexpected trouble.
(7) An abysmal or despairing condition.
(8) Hell.

For those of us who are not trial judges, pondering these definitions at the appropriate length may help to engender the proper mixture of awe, respect, fear, and pity.

The pendulum conceptualized in this section is the magisterial movement of appellate-authored tort law. Here is how Leon Green (in full God-like mode) pictured that movement:

Our goals [are] peace, happiness, health, justice, economic welfare, law and order here on earth and in heaven hereafter. [But] our more practiced and negative virtues [are] war, power, greed, deceit, waste, riotous living, sex, hate and death. This does not mean that there will be breeds of full-fledged saints and dedicated sinners at one another’s throats, but that everyone will take turns as saint and sinner at many points in time. Creation and destruction will continue to go hand in hand as they have done from the beginning, and thus the schizophrenic balance of love and fury will be maintained.153

From a more mundane perspective, tort law’s pendulum movement results from the eternal and irreconcilable tension between the quest for certainty or control and the essential need for flexibility.

Over the past several decades the appellate judiciary in Louisiana has seemed to move the law toward flexibility and away from the achievement of control by jettisoning, disparaging, or resisting the adoption of such rules as the trespasser-licensee-invitee structure of land occupier liability law,154 the assured clear distance rule of traffic liability law,155 the repairman exception,156 and

---

153. Robertson, supra note 96, at 437 (quoting and blending Green’s articles, Must the Litigation Profession Undergo a Spiritual Rebirth?, 16 Ind. L.J. 15, 28 (1940), and No-Fault: A Perspective, 1975 B.Y.U. L. Rev. 79, 80).
154. See supra note 60.
155. Ledbetter v. State, 502 So. 2d 1383, 1387 n.5 (La. 1987) (“the doctrine of assured clear distance has been rejected by this court in Craker v. Allstate Insurance Co., 259 La. 578, 250 So.2d 746 (1971)”).
156. See supra part V.F.
the doctrine of negligence per se.\textsuperscript{157} At the same time the appellate judiciary has moved toward a different kind of control by selectively absorbing the legal cause and breach issues into the duty issue,\textsuperscript{158} by occasionally applying the judicial legislator approach to the determination of breach,\textsuperscript{159} and by treating breach determinations for appellate review purposes as though they were determinations of law.\textsuperscript{160}

Viewed from the trial-court pit, there is tension or even a paradoxical relationship between the two movements: one movement seems to favor flexibility; the other, control. But stepping briefly from the pit and over to the viewing point of student of government, one sees the paradox disappear and the tension seem to resolve: both movements serve the perhaps inexorable\textsuperscript{161} flow of authority from trial to appellate court. Lawyers in their offices and trial judges in the pit can identify, validate, and apply clear rules with confidence against undue second-guessing. But it usually seems to take an appellate court to put the finishing touches on a flexible or general principle. From this point of view, the plea of this article might be summarized: give the advantages of the view from the pit their full due; only then may the schizophrenic balance of trial-court and appellate authority be maintained.

\textsuperscript{157} See supra part V.E.
\textsuperscript{158} See supra parts III.D and III.G.
\textsuperscript{159} See supra part III.F.
\textsuperscript{160} See supra part V.B.
\textsuperscript{161} See supra text accompanying note 102.