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Revisiting the Patterns of Negligence: Some Ramblings Inspired by Robertson

Thomas C. Galligan, Jr.

Basically what is at stake in a negligence case is whether society should hold the particular defendant before the court liable to the particular plaintiff before the court for the particular damages suffered given the particular manner in which those damages arose. One way for society to make this decision would simply be to ask the relevant decision-maker: based on all you know and feel—should this plaintiff recover from this defendant and, if so, how much? The obvious drawback of this visceral approach is that it is arbitrary, standardless, lacks predictive force, and doesn't look a lot like what we usually call law. Moreover this simple, "gut" check, question does *not* tell us *who* decides: judge, jury, or administrator?

Perhaps in an effort to avoid the pitfalls of arbitrary decision-making, we have developed the so-called "law" of negligence. It is about that "law" which Professor Robertson has so eloquently written.¹ According to this "law," the tort of negligence (with a capital N) consists of five elements: duty, breach, cause-in-fact, proximate (or legal) cause, and damages. On this I believe we can all agree. What we cannot seem to agree upon is where one element begins and another ends. Nor can we seem to agree upon *who* decides *what* element *when*. One would think such basic concepts long ago would have been settled in stone. But they have not and attempts to set rules in stone quickly have led to crumbling stone.

In his article, Professor Robertson notes negligence is "multifarious and malleable." He aptly calls it "fluid." Still, Professor Robertson has made a spirited and persuasive argument for a particular "model" of negligence. His "Keetonian" model is what I have elsewhere² called the "traditional" approach to negligence. Under that model, the judge decides the duty question, normally at a broad categorical level, then the jury decides breach, cause-in-fact, proximate (or legal) cause, and damages. Professor Robertson opines that the traditional "Keetonian" model for deciding negligence cases more than any other approach satisfies the following evaluative criteria: flexibility, firmness, respect, judicial wisdom, and labor-saving. Robertson argues that the "Keetonian" model is pro-

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1. David W. Robertson, *Allocating Authority Among Institutional Decision Makers in Louisiana State-Court Negligence and Strict Liability Cases*, 57 La. L. Rev. 1079 (1997).

2. See, e.g., Thomas C. Galligan, Jr., *Hill v. Lundin & Associates Revisited: Duty Risked to Death?* 5-10 (Law Center Publications Inst. of the LSU Law Center 1993) [hereinafter Galligan]; Thomas C. Galligan, Jr., *A Primer on the Patterns of Negligence*, 53 La. L. Rev. 1509, 1510 (1993). See also Frank L. Maraist & Thomas C. Galligan, Jr., *Louisiana Tort Law*, ch. 3 (1996).

democratic in its allocation of critical decision making power to juries. Professor Robertson also points out that the "Keetonian" model appropriately gives great deference to trial court decisions. Thus, under the "Keetonian" model, some real power is in the trenches, not just in the high command. In the pages that follow I intend to analyze a few of the questions Robertson's typically outstanding piece raises for me. My short piece is not so much a response to Robertson as it is a series of ramblings inspired by Robertson. Organizationally, I will more or less proceed to discuss the currently critical elements of negligence: duty, breach and proximate (legal) cause.³ Lastly I will discuss a procedural proposal Professor Robertson has made in his piece.

I. DUTY

Ironically, the toughest step may well be the first: duty. As Professor Robertson notes, duty is usually not a practical problem in litigation; he says duty is "purely formal in the mine run of cases and presents no significant difficulty."⁴ Unless there is some broad per se⁵ no duty rule, such as the no duty to act rule or the economic harm rule,⁶ one has a duty to avoid foreseeable injury to another.

Thus, broadly put, duty is a meaningless concept in most cases. Consequently, to say that duty is an issue for the judge to decide is to give the judge no real power. Although the judge has the power to decide whether the case is subject to a broad, per se, no duty rule, that is about it. Of course, if there is a broad, per se, no duty rule, then the judge may dismiss the plaintiff's claim based on that broad rule. This is no doubt why Robertson says the statement "defendant has no duty" is reserved "for situations controlled by rules of law of enough breadth and clarity to permit the trial judge in most cases raising the problem to dismiss the complaint or award summary judgment for defendant on the basis of the rule."⁷ No doubt the judge also has the power to decide that no reasonable person could decide that defendant's (mis)conduct posed a foreseeable risk of harm to another. But, this is only the judge's basic power to direct a verdict;⁸ more on this later.

3. There are significant legal issues relating to cause-to-fact, but not for us and not for now. As Robertson notes, none of the common models of negligence differ in their treatment of cause-in-fact. The issues are the same under each model. So we will save those issues for another day. The same is true of damages.

4. David W. Robertson et al., *Cases and Materials on Torts* 195 (1989).

5. David P. Leonard, *The Good Samaritan Rule as a Procedural Device: It is Worth Saving?*, 19 U.C. Davis L. Rev. 807, 808 (1986).

6. See Maraist & Galligan, *supra* note 2, at §§ 5-7 and 5-9.

7. Robertson et al., *supra* note 4, at 161. The trial judge decides whether the case is governed by the relevant rule.

8. This basic power is no doubt what Cardozo meant in *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928), when he said duty is an issue for the fact finder where reasonable minds could disagree.

Focusing for a moment on the allocation of decision-making responsibility between trial and appellate courts, presumably the final decision to overrule or modify one of the broad *no duty* rules would be a question for the appellate court rather than the trial court.⁹ That is, if one is serious about testing a broad *no duty* rule, the appellate court is where that test takes place. However, the relevant lawyers probably must and certainly should raise the issue initially at the trial court level.

Moving from the broad to the specific, Robertson notes that there is a tendency for judges to specify duty so narrowly that the judge may usurp the jury's power to decide breach. At least it would be a usurpation under the "Keetonian" model. Alternatively, as the Louisiana Supreme Court seems to have done in *Pitre v. Louisiana Tech University*,¹⁰ a court might decide that because a defendant acted reasonably vis-a-vis a given risk, the defendant owed no duty to guard against a particular risk. As Robertson points out, a *no duty* decision based on no "unreasonable risk" may essentially transform a breach issue (reasonable care) into a duty (or no duty) issue. The most interesting aspect of this transformation is its reallocation of decision-making power from jury (breach) to judge (duty).

So one may analyze duty broadly or narrowly; however, another way to examine or explain duty is in terms of "relation." One may ask: was there a sufficient "relationship" between the plaintiff and defendant to require the defendant to exercise reasonable care on plaintiff's behalf? This is a more personally oriented perspective for analysis. In Hohfeldian terms, one person's duty is correlative to another person's right.¹¹ To steal a page from Aristotle and Professor Ernest J. Weinrib, the relationship is characterized by the bipolarity between plaintiff and defendant.¹² In some cases, this means a real, live personal relationship *between* people—the type of relationship we think of when one says to another: "Let's talk about our relationship." For instance, while one normally does *not* have an obligation to act, one may have a duty to act if there is a special (personal) relationship between the defendant non-actor *and* the victim *or* a special (personal) relationship between the defendant non-actor *and* the person who done the plaintiff wrong, i.e., the harm causing actor him or herself.¹³ Or, in *no duty to act* cases, a defendant may assume a duty by undertaking to help, thereby creating a sufficiently personal relationship with the plaintiff.

9. Cf. *Lejeune v. Rayne Branch Hospital*, 556 So. 2d 559 (La. 1990) (Louisiana Supreme Court reversed over 100 years of jurisprudence denying bystander emotional distress claims; however, both the trial court and court of appeal had refused to follow that jurisprudence thereby foreshadowing the supreme court's decision).

10. 673 So. 2d 585 (La. 1996).

11. Wesley N. Hohfeld, *Fundamental Legal Conceptions* 65 (Oceana ed. 1978).

12. See Ernest J. Weinrib, *The Idea of Private Law* 63-66 (1995).

13. Thomas C. Galligan, Jr., *Aiding and Altruism: A Mythopsycholegal Analysis*, 27 U. Mich. J. L. Ref. 439, 449-59 (1994).

The relational requirement may be satisfied or analyzed not in terms of real, personal relationships but in reference to the risk posed by defendant's conduct.¹⁴ That is, as noted at the outset of this little discussion on duty, the court might ask: did the risk posed by defendant's conduct include a risk of foreseeable harm to this plaintiff before the court or to the class of persons to which *this* plaintiff belongs? If so, then usually a court will decide there is a sufficient relationship between the defendant and plaintiff to justify holding that defendant owed a duty to plaintiff. This is what Cardozo must have meant in *Palsgraf* when he said: "[R]isk imports relation."¹⁵ There, because pushing a man from behind did not pose a risk of harm to a woman on the other end of a railroad platform, the Long Island Railway owed no duty to Mrs. Palsgraf. Because the conduct at issue posed no risk to Helen Palsgraf the railroad had no duty triggering relationship to Mrs. Palsgraf. This was true despite the fact that, as the prospective passenger of a common carrier, Mrs. Palsgraf had a business "relationship" with the defendant railroad. Of course, as noted above, if courts define risk narrowly using risk to define relation and hence duty may turn breach questions for the jury into duty questions for the judge.

A slightly different way to think of duty is in terms of "Thou Shalt Not." So put, the duty issue focuses on *conduct*, not just relation. This is, in part, how Justice Andrews considered the matter in his *Palgraf* dissent.¹⁶ For instance, "Thou Shalt Not" drive too fast. One's duty is to *not* engage in the proscribed conduct, i.e. one's duty is *not* to drive too fast. According to Justice Andrews, if one engages in the proscribed conduct and hurts another the violator owes a duty to the victim. Relation is only involved after the fact.¹⁷ One has a legally sufficient relationship with those one hurts *because* the actor violated his *duty not* to engage in the proscribed *conduct*. Importantly, one of the reasons to proscribe the conduct is its riskiness. One might initially look at violation of statute cases as "Thou Shalt Not"/conduct cases. If you violate the law, i.e., engage in the statutorily proscribed conduct, you are liable. However, violation of statute cases are *not* simple "Thou Shalt Not" cases.¹⁸ That is, violation of statute, in and of itself, does *not* result in liability unless the plaintiff was in the class of persons the legislature supposedly intended to protect and the class of risks was within the risks which the legislation sought to avoid in enacting the statute. The class of persons requirement adds a relational requirement and the class of risks requirement adds a risk requirement to the conduct focus of the statute. While criminal statutes prohibit certain conduct, their violation may not be the basis of civil liability unless the relational overlay and the risk overlay are present.

I have gone on too long about duty. But, as you will see, I am not yet done with the subject. Many of you readers will no doubt find that I have not provided

14. This is the focus from which I began my discussion of duty.

15. *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 100 (N.Y. 1928).

16. *Id.* at 101 (Andrews, J., dissenting).

17. Unless one views the relation as arising between one community member and the rest of the community.

18. Arguably, there is no such thing as a simple "Thou Shalt Not" case.

much (if any) lucent analysis. For that I do not apologize. That is just the way duty is and I have *not* even started talking about what I call duty/risk.¹⁹

II. BREACH

Turning to breach; breach is the essence of what we think of as negligence with a small "n." N(n)egligence is the failure to exercise reasonable care. It is at "breach" that the jury decides whether the defendant did, in fact, exercise reasonable care. Because breach is the conceptual core of negligence it is the first element of negligence most tort teachers teach. What constitutes reasonable care varies with the circumstances and, traditionally, presents a question for the jury. If reasonable care was a question of law we would have what Professor Robertson calls a "surfeit of authorities." And we cannot realistically have a rule of law for conduct for every hour of every day on every street corner in the state. We would be crushed by judicial decision. Like Sampson, we would pull the temple down on ourselves, with or without hair.

Perhaps another reason we ask juries to decide breach is because we lawyers are ashamed to say we don't know how to explain what's reasonable or unreasonable under the circumstances. Consequently, the law asks a jury to make that decision because a jury does not have to explain itself. Professor Henderson has opined that asking the jury to decide what's reasonable (and thereby not calling for reasoned explanation) is one of the ways "Negligence" preserved some little respect for itself as what we usually call law.²⁰ Negligence "Law" saved face by letting the jury decide breach. Allowing the jury to decide an issue we can't "reason" about lets us say (pretend) negligence is "Law" just as much as obligations or property.

Perhaps in an effort to deal with the indeterminate nature of unreasonableness; perhaps as a reflection of the omnipresence of economic analysis, courts and commentators have turned more and more frequently to cost/benefit or risk/utility "formulas" to determine reasonability. The most popular of these tests is the Learned Hand Formula. One is negligent under Judge Hand's famous formula if the burden of avoiding an injury beforehand (B) is less than the beforehand probability of the injury's occurrence (P) times the anticipated gravity of the injury if it does occur (L). Algebraically put, one is negligent if $B < P \times L$. In Professor Robertson's paper, he sets forth the Hand formula as the appropriate vehicle for determining breach. I slightly disagree.

First, note that while Robertson would have courts employ the Hand formula to decide breach the formula need *not* be so limited. The formula can swallow up all of the elements of negligence and, unlike Jonah, those elements need not necessarily reappear. That is, one may have a duty to protect against only those

19. For a more coherent analysis, see Weinrib, *supra* note 12, at 145-70.

20. James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 Ind. L.J. 467 (1976).

risks for which $B < P \times L$. This is the import of the court's approach to duty in *Pitre v. Louisiana Tech University*.²¹ Additionally, one may only be a legal cause of those injuries for which $B < P \times L$. Finally, only those damages for which $B < P \times L$ might be recoverable. If economic efficiency is the core concern of negligence, cause-in-fact may actually be unnecessary. We can encourage efficiency whether the person to be deterred caused any injury or not.

Moreover, if the Hand formula "replaces" the traditional elements of negligence one key question is who decides whether $B < P \times L$. If it is a jury issue, then the judge will have little to do in negligence cases. If $B < P \times L$ is for judges to decide, then the allocation of decision making responsibility will be radically affected, by taking the breach question away from the jury. Professor Robertson does *not* propose to allow the Hand formula to swallow the other elements of negligence. Robertson views the formula as the way to make the breach determination. And, notably, Robertson entrusts the Hand formula to the jury's decision-making hands. However, I must still note some concern.

The Hand formula provides an economic definition of negligence. It is designed to encourage efficient investments in safety. One must invest in safety up to the point where the marginal benefit of the last unit (dollar) invested in safety equals its marginal cost. If the marginal cost of an additional investment in safety exceeded the marginal benefit, a rational person would *not* make that additional investment in safety; she would *not* be getting what she paid for. But, as long as the marginal benefit from investing in safety exceeds the marginal cost, a rational person should keep investing in safety.

Critically, *the* value served by the Hand formula is economic efficiency. If that *is* to be the core moral basis of negligence, are juries the proper decision makers? Are jurors likely to be able to engage in the type of cost/benefit analysis that may be required, including consideration of such concepts as: opportunity costs, transaction costs, risk calculations, and more? Robertson apparently assumes they can.

More basically, when we say people must behave reasonably to avoid injury to another, are economic values the only ones with which we are concerned? I do not think so.²² If I can steal a line from Joseph Campbell, there is not a lot of economic sense to the pyramids of Egypt or the cathedrals of Europe. Maybe we Americans at the end of the 20th Century have abandoned such lofty non-economic goals, replacing them with temporarily profitable strip malls. I hope not.

As I have argued elsewhere,²³ reasonable people (particularly reasonable entities) certainly may consider economic efficiency when acting, at least in some instances.²⁴ However, intuitively, I believe people consider other, non-economic

21. 673 So. 2d 585 (La. 1996).

22. Thomas C. Galligan, Jr., *The Tragedy in Torts*, 5 Cornell J. of Law and Public Policy 139 (1996).

23. *Id.* at 151-52.

24. Professor Weinrib argues that deterrence (efficiency) *cannot* coherently explain the private law of negligence. Weinrib, *supra* note 12, at 43.

factors as well and I prefer to trust my intuition on this one. Indeed people may even reject efficiency in certain cases. Arguably that is what the famous Ford Pinto punitive damages case, *Grimshaw v. Ford Motor Co.*,²⁵ was all about.

Feminist tort scholarship²⁶ and corrective justice tort theories²⁷ reflect dissatisfaction with translating reasonable care into efficient investments in safety. As such, perhaps the Hand formula should only be a factor in determining breach, *not the* only or defining factor.

Switching gears slightly to once again consider who decides what, the breach "element" was, as Professor Robertson notes, a famous battlefield in the history of tort law. Justice Oliver Wendell Holmes, Jr. felt that:

A judge who has long sat at *nisi prius* ought gradually to acquire a fund of experience which enables him to represent the common sense of the community in ordinary instances far better than an average jury. He should be able to lead and to instruct them in detail, even where he thinks it desirable, on the whole, to take their opinion. Furthermore the sphere in which he is able to rule without taking their opinion at all should be continually growing.

It has often been said, that negligence is pure matter of fact, or that, after the court has declared the evidence to be such that negligence *may* be inferred from it, the jury are always to decide whether the inference shall be drawn. But it is believed that the courts, when they lay down this broad proposition, are thinking of cases where the conduct to be passed upon is not proved directly, and the main or only question is what that conduct was, not standard shall be applied to it after it is established.²⁸

As noted,²⁹ Holmes believed that the judge over time would grow more experienced in applying the appropriate standard of care. The judge would then only ask the jury to decide facts. The judge's "applications" of the standard of care would, in essence, be legal conclusions.

Anyone who has just finished his or her first semester of torts will remember Holmes' stop, look, listen and get out of the vehicle at a railroad grade crossing rule. That is, when a driver came upon a grade crossing it was his obligation to stop, look and listen. If stopping, looking, and listening were inconclusive, in relation to the safety of continuing, the driver had a duty to get out of his truck to check the tracks. The failure to do so was negligence, usually contributory negligence.³⁰

25. 174 Cal. Rptr. 348 (1981).

26. Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. Legal Educ. 3 (1988).

27. Weinrib, *supra* note 12, at 3-6, 43.

28. Oliver Wendell Holmes, *The Common Law* 99 (M. Howe ed. 1963).

29. The next three paragraphs originally appeared in Galligan, *supra* note 2, at 41-42.

30. *Baltimore & Ohio Ry. v. Goodman*, 275 U.S. 66, 48 S. Ct. 24 (1927).

The first year tort student will also recall that in *Pokora v. Wabash Railway Co.*³¹ Justice Cordozo gently repudiated Holmes' "rule of law," noting that in the vast array of grade crossing cases a rule that a truck driver had an obligation to stop, look, listen, and possibly get out at every grade crossing was contrary to common sense. To Cardozo, it was preferable to say that the truck driver must exercise reasonable care when approaching a grade crossing and reasonable care was to be decided by the fact finder on a case by case basis, not defined by a decision in a previous case. No two cases were exactly alike. To Cardozo, the "standard of care" question remains a mixed question of fact and law for the jury. "Rules of law" were to be frowned upon. Thus we see two great jurists' views on breach. Looking back most of us would say Cardozo "won" and Holmes "lost." Juries generally, the hornbook tells us, set and apply the standard of care of the reasonable person under the circumstances.³²

Now, the Louisiana appellate courts have resurrected the Holmes/Cardozo debate.³³ In *Green v. City of Thibodaux*,³⁴ *Phipps v. Amtrak*,³⁵ and *Dixon v. Schwegman Giant Supermarkets*,³⁶ several panels of the first circuit court of appeal have held that the appellate court should review de novo, as a question of law, a finding that a thing or conduct poses an unreasonable risk of harm. De novo review contrasts with the more deferential manifest error standard applicable to appellate review of fact findings and, traditionally, to mixed questions of fact and law, like breach. Under *Green* and its progeny, appellate courts review reasonableness decisions de novo as issues of law, not deferentially as questions of fact or as mixed questions of law and fact. In an opinion by Judge Thibodeaux, a panel of the third circuit in *Migues v. City of Lake Charles*³⁷ has now agreed with *Green*.³⁸

The source of these recent developments may be the concurring opinions of Justice Lemmon³⁹ and Justice Ortique,⁴⁰ joined by Justice Kimball, in *Ambrose v. New Orleans Police Department Ambulance Service*.⁴¹ In *Ambrose*, the court held that the jury was manifestly erroneous in finding the defendant "grossly

31. 292 U.S. 98, 54 S. Ct. 580 (1934).

32. Cf. *Helling v. Carey*, 519 P.2d 981 (1974).

33. For a pre-*Green* discussion of some related problems, see Galligan, *supra* note 2, at 40-64.

34. 671 So. 2d 399 (La. App. 1st Cir. 1995), *writ denied*, 668 So. 2d 366 (1996) ("Result is correct.").

35. 666 So. 2d 341 (La. App. 1st Cir.), *writ denied*, 668 So. 2d 368 (1996) ("The result is correct.").

36. 673 So. 2d 696 (La. App. 1st Cir. 1996). See also *Delaune v. Medical Center of Baton Rouge, Inc.*, 683 So. 2d 859 (La. App. 1st Cir. 1996).

37. 682 So. 2d 946 (La. App. 3d Cir. 1996).

38. I thank my colleague Frank Maraist for discussing the "*Green*" issues with me and enlightening me. The errors that follow in my discussion of *Green* and its progeny are all mine.

39. *Ambrose v. New Orleans Police Dep't Ambulance Serv.*, 639 So. 2d 216, 223 (La. 1994) (Lemmon, J., concurring).

40. *Id.* (Ortique, J., concurring).

41. 639 So. 2d 216 (La. 1994).

negligent," the applicable standard of care in the case.⁴² The fact the standard was gross negligence should not have affected the analysis because application of that standard was a breach issue, whether the applicable standard was negligence (reasonable person), strict liability (unreasonable risk of harm), gross negligence, etc. However, perhaps because Louisiana courts and juries have had less experience with gross negligence than negligence more aggressive appellate review was justified where gross negligence was at issue but *not* negligence. In any event, the concurring judges in *Ambrose* agreed that the manifest error standard applied to pure questions of fact but argued that the issue of whether the evidence was sufficient to establish gross negligence was a legal issue subject to *de novo* review.

Since *Ambrose* the supreme court has not cleared up the confusion. It denied writs in *Green* and *Phipps* with the respective notations: "Result is correct" and "The result is correct." More recently in *Boyle v. Board of Supervisors, LSU*,⁴³ the supreme court, in an opinion by Justice pro tem Ian Claiborne (a District Judge sitting on the Louisiana Supreme Court as Justice pro tem) held the trial court erroneously found a one-half inch crack in a sidewalk at LSU was unreasonably dangerous. The court did not categorically state what was the applicable standard of review, concluding that under either the "manifest error" standard or *Green de novo* review, the trial court had erred.

In *Green* and its progeny the relevant courts of appeal have held that pure factual determinations are reviewable under the deferential manifest error standard but that the determination of reasonableness is reviewable *de novo* as a question of law. As Professor Robertson has noted, these cases signal a shift of power away from the trial court and to the appellate court. However, they also may signify a power shift from jury to trial judge. The reason for this is quite simple. If what constitutes an unreasonable risk of harm or unreasonable conduct is a question of law on appeal, then logic counsels that the issue would also be a question of law for the trial court. Essentially, breach would become a question for the judge. This is quite a shift. It is reminiscent of what Holmes said about the trial judge developing experience in what's reasonable and what's not. However, as I said above, Holmes lost; at least he lost once, but now perhaps his approach is being reborn with great vitality.

Does the jury have no role to play under this "*Green*" approach to breach? I believe the jury would only decide pure questions of fact. The jury would decide whether a driver was going over sixty-five at the time of an accident or whether the sidewalk or curb on which plaintiff fell was cracked and the jury would apparently decide what preventive efforts the defendant undertook. However, after the jury made those particular factual decisions, it would be up to the judge to "add up" all the facts to see whether they totalled breach or not.

Making breach a question of law for the judge shifts power from the jury to the trial judge and from the trial court to the appellate court *and* it means

42. La. R.S. 40:1235(A)(1) (1992 and Supp. 1997).

43. 685 So. 2d. 1080 (La. 1997).

more work for both trial and appellate judges. Let's start with the increased work for trial judges. If juries only decide factual questions, someone has to decide *what* factual questions to ask. Presumably, somebody also has to write those questions down in a form that calls for yes or no answers, unless we opt to give juries essay questions. Assuming the system will continue to use yes or no answers, trial judges have to decide what to ask and then how to ask those questions. Even if judges require lawyers to present special verdict forms, containing requested factual questions, one can anticipate frequent disagreement over the content, wording, and style of the questions. Trial judges will have more work to do in drafting verdict forms. I think it would be much more work.

Why will appellate courts have more work? On appeal, courts review legal questions de novo (anew). If "breach" is a question of law, breach determinations will be reviewed de novo. That is the holding of *Green, Phipps, Dixon, and Miguez*. Review de novo provides no deference to the trial court's decision. It is a second shot at convincing another, different decision maker to hold in one's favor. And, one gets to almost start over with the second decision maker. At least one starts over with the "legal" conclusions to be drawn from the relevant factual findings. Of course, the second shot is not free. There are lawyer's fees and court costs and more. But, it is still a second shot. And, there are all sorts of systematic costs associated with the appeal that the parties need not pay, such as the cost to build, maintain, heat and cool the courthouse, and the value of the *time* of appellate judges and their staffs spent reviewing records in negligence cases to decide whether the trial judge or jury added up the factors correctly. Because the parties need not bear these costs, they will not take them into account in deciding whether to appeal. Society (you and I) will pay part of the costs of the appellate process.

Professor Robertson has opined that the "*Green*," breach as law, trend is undesirable because, although it promises uniformity, it does *not* provide meaningfully uniform results. He also argues that trial courts (judges and juries?) have a "superior vantage point" for making the "nuanced and situation sensitive" determinations involved; a judicial legislation approach is generally undesirable; and, quite simply, if breach decisions are for the court, why not leave everything to the court? I believe much of Robertson's objection to *Green* and its progeny arises out of his preference for having juries make *most* of the critical decisions in tort cases.

I do not necessarily disagree with what Professor Robertson (I'm waffling) says about *Green* and its progeny. However, whether he persuades us or not, *Green* and its progeny are significant. They are significant because they represent a revival of Holmes' views. As such, the nation should watch carefully as *Green* plays itself out in Louisiana's courts. The nation should watch not simply out of a historic or intellectual interest in Oliver Wendell Holmes, Jr., but rather because *Green* encourages us to ask ourselves: what *should* juries be deciding in negligence cases? Should juries decide important policy matters weighing on the allocation of scarce resources such as: deterrence, risk spreading, and the economic administration of justice? Or, should juries only

make pure factual determinations? Alternatively, might juries play some role where what is at the heart of the case is a basic issue of common fairness? Courts might decide broad policy matters and juries might be left to decide only pure factual issues *and* basic questions of fairness. While this view is logically appealing to the trained legal mind, it has analytical and philosophical drawbacks. For instance, where do pure questions of fairness stop and important societal policy questions begin? Moreover, what about a case where the societal policies at stake (detering wrongful conduct, compensating the victims of such conduct, doing it all in compliance with legislative will and precedent and more) conflict? What if consideration of these important social policies leaves no clear answer? Do we then allow juries to resolve the difficult decision? Or, do we treat the resolution of that difficult decision as a legal question for the court? Neither legal institutions nor society have come up with clear, consistent answers.

Perhaps, harkening back to Leon Green and Wex Malone, the idea in negligence cases is for the court to have the first crack at decision by asking itself: does the defendant's duty extend to protect the plaintiff against the risk which arose in *this* case? That is, perhaps the court makes a preliminary legal decision considering the relevant social policies, including fairness, in the particular case. If the judge thinks the plaintiff should *not* be denied recovery, the plaintiff can then get to the jury. If the plaintiff *is* entitled to proceed to the jury, (if the court decides there is a duty in the particular case and that a reasonable person could conclude that the duty is breached), then, perhaps, by asking the jury whether or not the defendant exercised reasonable care or the product or thing was reasonable or unreasonable we are opening the door to allow the jury to consider all possible social policies (both general and case specific) when making its breach determinations. But, we ask the jury to consider all the possible social policies only after a court, in the first instance, has considered those same social policies and decided that it is not inappropriate for the jury to be allowed to make its determination.

These are grand concerns. These questions have been prevalent in American tort law for at least the last one hundred years. While the clear answer that had emerged in the middle of this century was that juries (or judges as fact finders) determined reasonableness, there is growing doubt in the great state of Louisiana. As noted, our growing doubt calls us back to the views of Oliver Wendell Holmes, Jr. A reallocation of decision-making responsibility on questions of reasonableness portends a radical reduction of the jury's power in tort cases. Only time will tell whether this radical shift will come about or if we will adhere to the Cardozoian view that fact finders decide what is negligent, not courts. Whatever the answer, the growing storm in Louisiana is certainly one more indication of the inevitable and inherent flexibility of the torts process, where even the allocation of decision making responsibility may vary from case to case and from court to court.

Professor Robertson aptly notes the difficulty inherent in the torts process if lawyers don't know how judges will decide cases. That is, too much flexibility may mean too much uncertainty. But isn't some uncertainty limited by the

lawyers' experience with an individual judge's approach to negligence and the ability to find out about how particular judges decide tort cases? I am not necessarily disagreeing with Robertson but I am not sure variety creates impossible, unworkable inconsistency and unpredictability. Some may say negligence is a gut check fairness decision pretending to be law. If that's true, or possibly true, the wide variety of relevant circumstances should encourage flexible approaches. Robertson even recognizes the possibility for breach specification as law in certain, limited circumstances. But, he believes *Green* goes too far. Louisiana Supreme Court tort watchers await further development.

III. PROXIMATE CAUSE, LEGAL CAUSE, DUTY/RISK, ETC.

Now, let us turn to the battlefield which has claimed more intellectual lives in tort law than any other: proximate (or legal) cause. Assume the defendant (for now) owed a duty to the plaintiff, failed to exercise reasonable care, and caused injury to the plaintiff; *should* the law hold defendant liable for the particular injuries which occurred in the particular manner in which they occurred? This is the basic proximate cause problem and, traditionally (and in Robertson's "Keetonian" model), it is a problem for the jury. So, how have juries made this proximate cause decision? Judges have instructed juries to consider how direct the causal relation between the defendant's actions and plaintiff's injuries. Judges have instructed juries to consider how foreseeable the injuries were to defendant. Judges have instructed juries about intervening and superseding causes. Judges tell juries about the effects of peculiar weaknesses (i.e., thin skulls). In reviewing jury decisions, courts analyze time, place, and policy. Quite simply, when one considers proximate cause, one looks at *all* the relevant factors, including all the policies of tort law: deterrence, compensation, risk spreading, fairness, et al.⁴⁴

One wonders if, in fact, *all* factors are relevant, then don't the things juries look at when considering proximate cause overlap with the things they look at when considering breach. To quote Pete Townsend: "you better; you better; you bet." One wonders whether we need two separate elements (breach *and* proximate cause) as opposed to one, especially if the jury decides *both* elements. Maybe it is because law has got to have some minimum number of serious elements and if there aren't enough elements to be respectable it's embarrassing. Again, to steal a page from Professor Henderson, maybe the only way to get people to think there is *law* here is to make it look more like law. Too few elements (articulated criteria upon which to base decision) don't look like law. So, adding elements, even if they overlap makes negligence look more like law, i.e. it makes negligence look more like the mail box rule or the rule against perpetuities (pardon my common law bias).

Less cynically, even though breach and proximate cause overlap it still may be appropriate to ask the second question—proximate cause. Asking a separate, but

44. *But see* Weinrib, *supra* note 12, at 225, noting jury determinations undertaken in "good faith" are not political.

related question, may impress upon the jury that just because someone failed to exercise reasonable care does *not* always mean that same someone ought to be held liable. As such, proximate cause is a way to make sure the jury says to itself, after deciding defendant failed to exercise reasonable care and caused injury to plaintiff, is it fair/right/moral, etc., to hold this unreasonable person liable in this case, even if we may have already taken at least a look at this same fairness stuff when we (the jury) considered foreseeability and other factors in deciding breach. As such, proximate cause is a sort of check on liability after the jury decides breach and cause-in-fact. This gets me around to my next point and it's a biggie (for me).

If breach and proximate cause overlap, and if proximate cause is a check on a "too" quick liability determination, *then* why does the jury decide *both* things? And here we see the great gear shift provided by the duty/risk approach. The duty/risk approach, as contemplated by Leon Green and Wex Malone, collapsed the duty and proximate cause elements into a single duty/risk question: should this defendant be liable to this plaintiff for these injuries which occurred in this manner? Before I go on, let me pick a little bone with Robertson. Although I think recent, common parlance may be on his side, Professor Robertson uses the term duty/risk to refer to negligence, not a particular approach to negligence. I use duty/risk to refer to Robertson's Model Three where "legal cause . . . [is] subsumed under the rubric of duty and made questions of law for the judge's determination." I would prefer to limit the term "duty/risk" to that negligence approach or model which collapses the duty and proximate (legal) cause questions into one element for the judge.

In arguing for the "Keetonian" model, Professor Robertson eloquently notes some drawbacks to Green's duty/risk model. Green's model transfers power from jury to trial judge and from trial judge to appellate judge. These are some of the same problems with *Green* and its progeny. However, I am not convinced that power shift is always *inappropriate*. If breach and proximate cause *do* overlap, in part, why have the jury decide both? That is, could it be that duty/risk provides two "looks" at the problem by two different decision makers rather than just one? I noted this idea above as I concluded my comments on *Green*.⁴⁵ Only after the judge decides that the jury should decide the case does the jury get to decide breach. Put thusly, only after the judge has decided that none of the relevant policies of tort law should prevent recovery does the jury have the option of allowing or denying recovery. One difference between Robertson's views of the judge's role under the "Keetonian" model and the judge's role under the duty/risk model is in how the judge looks at the policies at stake. Under duty/risk, the policy analysis/application is not conducted just in broad categories of cases, but rather in the particular case before the court. Under duty/risk, only after deciding that there may be a particular duty to guard against a particular risk does the jury get the opportunity to decide whether the defendant was negligent—i.e. whether the plaintiff can recover. Under this model, the duty/risk question represents more of a "check" on the jury's decision than anything else. In the spirit of flexibility, I am

45. There's even overlap in this little paper about negligence.

not quite willing to abandon this approach to deciding negligence cases. In short, I am not convinced consistency of approach, (by using the "Keetonian" model), is a higher value than flexibility, especially when what we are talking about is the allocation of liability for unplanned, unexpected events, i.e., accidents. Perhaps it is best to ride easy in the harness⁴⁶ when analyzing or deciding negligence cases.

IV. THE ROBERTSON PROCEDURAL PROPOSAL

Before concluding, let me point to what I see as some irony in a proposal Professor Robertson has made in the first part of his paper. Quite appropriately, Professor Robertson claims Louisiana law would be simpler and more internally consistent if trial judges would grant j.n.o.v.s when a jury's finding on a relevant issue was manifestly erroneous. This standard would apply to jury decisions on negligence (assuming juries still decide the negligence issue after *Green*, etc.). The Robertson proposal would jettison the "reasonable juror" standard now applicable to j.n.o.v.s. That standard has no constitutional relevance in Louisiana. Instead the manifest error standard, the standard by which factual (and therefore jury) decisions are reviewed on appeal in Louisiana, would govern j.n.o.v.s. Presumably, under Robertson's proposal the manifest error standard also would apply to directed verdicts: a directed verdict would be appropriate where a finding for the non-moving party would be manifestly erroneous.

I applaud Robertson's proposal. It is innovative, sensible, and simpler than what we do now which, as Professor Robertson shows us in the first part of his paper, is quite confusing. However, the proposal presumably would lead to more directed verdicts and j.n.o.v.s because the manifest error rule is less forgiving of juries than the "no reasonable juror" standard. As such, the trial judge would have a *more* active role in negligence cases. Power would move from the jury to the trial judge. This move is somewhat inconsistent with the "Keetonian" model which Robertson supports; after all one of the attributes of the "Keetonian" model is its preservation of power for the jury. However, the inconsistency is not caused by Robertson's proposal and his adherence to the "Keetonian" model, but rather by the manifest error rule itself and appellate review of facts thereunder. That is, because Louisiana appellate courts review factual conclusions, Robertson's proposal, while it increases the power of the trial judge, would make for more logical consistency.

Perhaps the Robertson proposal, as a response to appellate review of fact, represents a procedural middle ground between Greenian duty/risk and Keetonian proximate cause. As such, why not keep the middle ground (the Robertson approach) and the extremes: duty/risk and legal cause? After all, negligence like a cat has had many lives (or models) and, there's more than one way to skin a cat. When dealing with something as amorphous as negligence, flexibility seems to me to be a most attractive virtue.

46. See Robert Fagles, *The Odyssey—Translator's Postscript* 490 (1996). Fagles attributes the riding easy in the harness phrase to Robert Frost who uttered it in reference to democracy.