The Precedent Value of Conclusions of Fact in Civil Cases in England and Louisiana

David W. Robertson
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CONCLUSIONS OF FACT IN CIVIL CASES
IN ENGLAND AND LOUISIANA

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I. INTRODUCTION

The traditional distinction between a question of law and a
question of fact is easy to state: "A question of identifying
broadly formulated principles for judging the parties' conduct
can meaningfully be defined as a question of law; a question
of reconstructing acts or events which have actually taken place,
or conditions which have actually existed, can meaningfully be
defined as a question of fact." Obviously, there is a lot in the
middle. Analytically it is impossible to classify the task of
characterizing acts or events or conditions, of applying the gen-
eral to the specific, as either a law question or a fact question;
it is neither, or it is both. Thus, that defendant owes plaintiff
a duty of reasonable care is a proposition of law; that events
and conditions A through X existed is a proposition of fact;
whether these events and conditions amounted to a breach of the
duty of reasonable care is a mixed question.

Where juries are employed in civil cases, classifying such
a mixed question as a question of law or as a question of fact
is determinative of the allocation of decision on that question
to judge or jury. Because it is not analytically soluble, the char-
acterization should be done on the basis of a policy determination
that the judge or jury is the preferable decision maker. Under
a traditional jury system, such characterization was purposive
in this sense, albeit in a rough-and-ready way. Speaking of the
situation in England before the decline of the civil jury, Lord
Somervell summarized the matter thusly:

"Whether a duty of reasonable care is owed by A to B is a
question of law. In a special relationship, such as that of
employer to employee, the law may go further and define
the heads and scope of the duty. When negligence cases were

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1. Weiner, The Civil Nonjury Trial and the Law-Fact Distinction, 55 CALIF.
L. REV. 1020 (1967) See also Weiner, The Civil Jury Trial and the Law-Fact
tried with juries the judge would direct them as to the law. The question whether on the facts in that particular case there was or was not a duty to take reasonable care was a question for the jury. There was not, and could not be, complete uniformity of standard. One jury would attribute to the reasonable man a greater degree of prescience than would another.\(^2\)

Where civil trial is to a judge alone, it is still easier for the law-fact distinction to become muddy. For one thing, the distinction has lost its importance as a device for allocating the judge-jury burden, so that there is likely to be less attention paid to it. For another, "a judge naturally gives reasons for the conclusions formerly arrived at by a jury without reasons."\(^3\) But the distinction is still just as important, because it greatly affects the appellate courts' approach to the case. In most jurisdictions, the trial judge's answers to questions of law are freely reviewable, while his answers to questions of fact are entitled to special weight on appeal. Here, as with respect to the judge-jury allocation at the instance level, characterization of a particular proposition as one of law or one of fact ought to be purposive. For example, whether to accord special weight to a trial judge's conclusion that conduct $X$ amounted to negligent conduct cannot reasonably depend upon any analytical determination that the proposition is either legal or factual. It ought, therefore, to depend on a policy determination as to the relative strengths and weaknesses of trial and appellate judges. Part of that policy determination should take into account the fact that any proposition enunciated by an appellate court is susceptible of being treated as precedent for future cases. Lord Somervell pointed the danger for England: "It may sometimes be difficult to draw the line, but if the reasons given by a judge for arriving at the conclusion previously reached by a jury are to be treated as 'law' and citable, the precedent system will die from a surfeit of authorities."\(^4\)

There has been some indication of concern that in the United States generally, predominantly sticking to the civil jury system, the precedent system is nevertheless dying of a "surfeit of authorities." Professor Grant Gilmore has written that we in America have come to use our case law in a manner that shocks, for example, the English observer. The trouble is that our case-

\(^3\) Id.
\(^4\) Id.
law system has been breaking down of its own weight. "The theory of precedent depends, for its ideal operation, on the existence of a comfortable number of precedents, but not too many. There must be a substantial accumulation of the wisdom of the past before the courts can begin drawing on it for the construction of the bridge along which we move toward the future. But when the store of raw materials becomes too great, too varied, too confused, the bridge-building process turns into a random operation. When it becomes possible to cite to a court not merely two or three prior cases which bear a reasonable relationship to this case, but dozens of cases, many of them so nearly identical on their facts as to be indistinguishable, decided every which way—then what is the court to do?" The English have not yet progressed so far. They have a single system of courts, they do not report all of their appellate decisions, and they seem to be less litigious than we are. The result is that "the case on all fours—the case whose facts are indistinguishable from the facts of the case at bar—far from offering itself in a drift of carbons as it does with us, hardly exists at all." So, the English tend to use prior cases for their general principles and process of reasoning, and they end up—under their formal notions about stare decisis—with a system of precedent that is in fact more flexible than it tends to be in the United States.

Part of Professor Gilmore's problem probably does not exist in Louisiana. Whatever one thinks about the over-all merits of our civilian tradition, it has given us a certain insularity in matters of private law from the cases decided in the other forty-nine states. Any "drift of carbons" that confronted a Louisiana judge would be quite likely to be entirely home-produced. But in Louisiana, as in England, the civil jury is employed relatively infrequently. In both jurisdictions this has led to concern at the appellate level about the content of the law-fact distinction. In both, there has arisen the danger of creating a body of precedent on propositions that would elsewhere amount to un-

6. For percentages of reported cases for the various English courts, see Karlen, The Court of Appeal in England, 72 Yale L.J. 266, 274-75 (1962).
8. In England about two to three percent of the civil cases tried in common law courts involve a jury. See Devlin, Trial by Jury 132 (Hamlyn Lecture, 8th series, 1968); Ward v. James, [1935] 2 W.L.R. 455, 462. The percentage in Louisiana is roughly comparable. See Sarpy, Civil Juries, Their Decline and Eventual Fall, 11 Loyola L. Rev. 243 (1962-63).
reviewable jury determinations. In England, there has been specific concern about this danger. While there has been scant discussion of the subject in the Louisiana legal literature, study of the jurisprudence reveals that appellate rulings on questions that under a jury system would be termed fact questions have to a significant extent come to be citable as precedent. Therefore, the English reluctance to generate a multiplicity of precedents could well be relevant to Louisiana lawyers, as the following discussion will seek to demonstrate.

II. THE CIVIL NONJURY TRIAL

A. England

Up to 1854, all civil cases in English common law courts were tried by a judge sitting with a jury; no other mode of trial was available. In that year the Common Law Procedure Act\(^9\) took the first step in what proved to be the near-abolition of the civil jury. Section 1 of that statute provided that “the parties to any cause may, by consent in writing, leave the decision of any issue of fact to the court, provided that the court think fit to allow such trial; and such issue of fact may thereupon be tried and determined, and damages assessed where necessary by any judge who might otherwise have presided at the trial thereof by jury.”\(^10\) In 1883 a further significant alteration in practice occurred. The rules of the supreme court were amended to set aside for special treatment six categories of cases: libel, slander, malicious prosecution, false imprisonment, seduction, and breach of promise of marriage. In those cases jury trial continued to be available as a matter of course; in all others, there had to be a special request for jury trial. The structure of the rule was such as to convey the clear impression that trial by judge alone was regarded as the usual thing, trial by jury exceptional.

World War I speeded the decline of the civil jury. Toward the end of that war, in response to the fact that jurors were no longer easily available, the Juries Act, 1918, was enacted. Section 1 provided that in the six classes of cases enumerated above, and in cases of fraud, there existed a right to a jury trial. In all other cases, whether to grant a trial by jury was at the discretion of the trial judge. The Juries Act was emergency

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10. The act also empowered the judge, on his own motion, to transmit matters of account to a referee. The Judicature Act, 1873, took matters a step further. Section 57 extended the matters transferable to a referee to include “matters requiring prolonged examination of documents or accounts or any scientific or local investigation.”
legislation and expired six months after the end of the war. It was speedily replaced by a permanent piece of legislation, the Administration of Justice Act, 1920. But there was enough objection to the permanent continuation of the restrictions on jury trial to lead Parliament, in the Supreme Court of Judicature (Consolidation) Act, 1925, to restore matters to their pre-1918 situation.

But the trend seemed irresistible. In 1933 Parliament enacted the Administration of Justice (Miscellaneous Provisions) Act, which is the governing legislation today. This Act was in substance the same as the 1920 statute, altering it only to limit the right to a jury in fraud cases to the party against whom fraud is alleged.

Thus, the present position is that in cases of fraud, the party charged has a right to a jury trial. In cases of false imprisonment, malicious prosecution, libel, slander, seduction, and breach of promise of marriage, either party may demand a jury trial. In all other cases the use of a jury is entirely within the court's discretion. In only two to three percent of the civil cases tried is a jury currently employed. About half of this percentage is made up of those cases as to which there is a right to jury trial. The other half of the two to three percent constitutes the cases in which a trial judge's discretion has been exercised in favor of trial by jury.11

A major reason for the infrequent use of the civil jury is that it is seldom requested. Apparently solicitors tend to advise their clients to avoid the jury, on the theory that with a judge, one is more likely to know where he stands, and that judicial errors are far more susceptible of appellate correction than are jury mistakes. One consequence of the infrequency of requests for juries is that judges, at least initially, are suspicious of such requests when they do occur. The initial presupposition is probably that the party seeking a jury has a weak case, or that he desires to pursue an illegitimate appeal to lay sympathy. Thus,

11. The 1933 statute received its first important judicial consideration in 1937 in Hope v. Great Western Ry. Co. [1937] 2 K.B. 130. A full Court of Appeal in that case went into the question of the extent and manner of exercise of the trial court's discretion on a request for a jury. Some of the language of Lord Wright, M.R., in that case was misunderstood, and the case came to stand for the proposition that the trial judge's decision on a jury request was unreviewable. The matter was put right in Ward v. James, [1965] 1 All E.R. 563, and the present position appears to be that, while great weight will attach to the trial judge's determination, the appellate court will reverse when convinced that he was wrong.
one consequence of the relative rarity of jury trial is that it becomes steadily more rare—the trend is self-nourishing, partly because lawyers, by and large, prefer to stay by familiar practices and procedures, to avoid the unusual.12

B. Louisiana

In Louisiana, as well, the civil jury trial is a relatively rare phenomenon. The state's procedural codes since 1805 have provided for a right to trial by jury in civil cases. But the right is rather seriously limited in the current Code of Civil Procedure,13 and it is seldom exercised.14 The reasons are not far to seek. The Louisiana Constitution provides that appeals in civil cases shall lie as to both law and fact.15 These provisions, resulting from Louisiana's history as a civilian jurisdiction,16 are generally credited with discouraging exercise of the right to a jury by parties to civil litigation.17 The theory has it that, generally speaking, a civil jury would be desired because of its greater susceptibility to an emotional appeal on the issue of liability, and perhaps because of supposed greater liberality on issues of quantum. But under a system of appellate fact review, any irrational jury determinations would be overruled. Thus juries are avoided in deference to predictability and to the judge's greater experience and training in decision making.

It is possible that this theory has put the matter too broadly. The civil jury is not indigenous to civilian law. Civil jury trial was not introduced in Louisiana until the Practice Act of 1805, when the common law system of the territory's new owner began to have an impact on the local civil law. Apparently the

12. See Devlin, Trial by Jury 133 (Hamlyn Lecture, 8th series, 1956).
16. "The Continental tradition required that the appellate courts could, and should, review the determinations of both law and fact made by the trial court. Within four years after the admission of Louisiana to the federal union, the supreme court of the new state ruled that appellate courts could review the evidence taken at the trial and reverse the jury verdict. Abat v. Doliolle, 4 Mart. (O.S.) 316 (La. 1816). Appellate review of the facts was effectively retained. The decision, affirmed several times, was finally embodied in the Louisiana Constitution, which, consistently, does not guarantee a trial by jury in civil cases." Hubert, Trial By Jury Under the New Code of Civil Procedure, 35 Tul. L. Rev. 520 (1961).
use of the jury in civil cases never became widespread after its introduction. Thus it might be more accurate to state that the significance of appellate fact review, in light of the state’s legal history, is not that it removed the rationale for using juries, but that it merely reinforced the inertia of tradition by making the jury less attractive. This analysis implies that the desirability of a jury in a given case is largely a matter of intuition, controlled, at least in part, by prejudices transmitted from one generation of lawyers to another.

The sparing use of the civil jury has been applauded by some of the commentators as affording the Louisiana litigant a relatively speedy, efficient, and inexpensive trial. But plaintiffs in personal injury cases not infrequently demand a jury trial, and there has been some disposition to question the merits of appellate fact review in such cases. “Several attempts during the past two decades have sought unsuccessfully to amend the state constitution so as to make jury findings final on the facts. The contention seems to be that the Louisiana appellate courts are all too prone to lower the verdict.” Furthermore, the point has sometimes been made that there is considerable continuing validity to the idea that trial by jury “serves a bulwark against oppression by bureaucracy and officialdom,” and that American adherence to the institution is grounded in an “American repugnance to autocracy.”

The absence of the civil jury demonstrably robs a legal system of flexibility. Part of its philosophic appeal lies in the seemingly unavoidable difference between what Pound called “law in books and law in action.” Many scholars have pointed the salutary effects of the possibility of lay, common sense mitigation of too-rigid legal doctrine.

III. APPELLATE FACT REVIEW

A. England

Before the Act there were, broadly speaking, two forms of

18. See, e.g., Sarpy, Civil Juries, Their Decline and Eventual Fall, 11 Loyola L. Rev. 24 (1962-63).
19. Id. at 254.
21. Id.
trial in use. In addition to the peculiarly English concept of trial by jury, there was the sort of trial that took place in Chancery Court. In Chancery, review of findings of fact was virtually unlimited. In theory the instance judge sat as the deputy of the Lord Chancellor, and all his conclusions were tested de novo. As the normal Chancery proceeding involved no witnesses, only documentary evidence, all the evidence the instance judge saw was available in like form to the appellate court. When the nonjury trial, with witnesses, was introduced on the common law side, a choice had to be made between two modes of review—the common law judge could be given "the impregnability of a jury or the vulnerability of a Vice-Chancellor." As the normal Chancery proceeding involved no witnesses, only documentary evidence, all the evidence the instance judge saw was available in like form to the appellate court. When the nonjury trial, with witnesses, was introduced on the common law side, a choice had to be made between two modes of review—the common law judge could be given "the impregnability of a jury or the vulnerability of a Vice-Chancellor." In theory, the latter course was chosen, but in practice the fact that the instance common law judge saw and heard witnesses inevitably modified the theory. Even though the oral evidence was available to the appellate tribunal in the form of the judge's, and later the official shorthand, notes of the trial, the appellate courts deferred to the trial courts on matters of credibility and demeanor, and thus to a considerable extent on questions of perception, of primary fact. But there has not been any hesitancy on the part of the appellate courts to overturn a trial court on a question involving the drawing of an inference from the observable data. The rules of the Supreme Court read in part: "The Court of Appeal shall have power to draw inferences of fact and give any judgment and make any order which ought to have been made."

Thus, with regard to issues of primary fact, the trial judge is in much the same invulnerable position as a jury. But as to matters of inference, of conclusions based upon the primary facts, his findings are much more vulnerable than would be those of a jury. A jury verdict consists in a few words which

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26. The Rules of Court stated that "all appeals to the Court of Appeal shall be by way of rehearing."
27. Ord. 58, r. 4.
28. The traditional interpretation of the extent of the Court of Appeal's powers of review of trial judges was stated by Viscount Cove, L.C., in Mersey Docks and Harbour Board v. Procter [1923] A.C. 253, 258: "The procedure on an appeal from a judge sitting without a jury is not governed by the rules applicable to a motion for a new trial upon a verdict of a jury. In such a case it is the duty of the Court of Appeal to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases when the credibility of witnesses comes into question, but with full liberty to draw its own inference from the facts proved or admitted to and decide accordingly." Notwithstanding the clarity of this language, it has not always been fully settled that the trial judge's inferences are fully reviewable. Despite the wording of the appropriate rules of court to the effect that appeals are by way of rehearing,
dispose of issues of primary and secondary fact alike. As to issues of primary fact—frequently involving credibility questions—the jury is at its best; perhaps it is superior to a trial judge in this respect. But on questions of secondary fact, involving the deriving of inference, the trial judge ought to be a superior tribunal to the jury. "It is curious, therefore, that the alternative mode of trial [trial by judge alone, with thorough appellate review of secondary facts] should select as the focal point for review that part of the trial judge's work at which he is at his best as compared with the jury, and treat his finding on primary facts as having almost the same untouchability as that of a jury. But that it should be so is dictated by the fact that both modes are modes of oral trial; whoever hears the witnesses, whether it be judge or jury, must be conceded the advantage. The point, however, emphasizes what is lost by giving to the jury a supremacy over the secondary facts which the trial judge, in this matter their superior in assessment, is denied; and it illustrates too what is lacking in the alternative mode. No way has been found of gaining the superiority of a jury as judges of the primary facts without being saddled with their inferiority as judges of the secondary." and that the Court of Appeal has full power to draw its own inferences, a number of dicta in both the Court of Appeal and the House of Lords in recent years seemed to suggest that the decision of a trial judge should be "equivalent to a verdict of a jury on a question of fact." See Bolton v. Stone, [1951] A.C. 850-62. The conflict between this view and the view expressed by Viscount Cove in the Mersey Docks case was reconciled in favor of the latter by the House of Lords in Benmax v. Austin Motor Co., [1955] 2 W.L.R. 418. In that case the trial judge decided that appellant's letters patent were valid, basing this conclusion upon a finding of fact that the invention in question was new. In the House of Lords, appellant argued that the Court of Appeal should have regarded itself as bound by the trial court's findings of fact, but the Lords concluded that no such limitation exists. Viscount Simonds said that "some confusion may have arisen from the failure to distinguish between the finding of a specific fact and finding of fact which is really an inference from facts specifically found, or, as it has sometimes been said, between the perception and evaluation of facts." Id. at 420. On questions of inference, the Court of Appeal is in as good position as the trial judge to reach conclusions. It ought to give weight to his opinion, but cannot shirk the responsibility of re-examining his inferences. 29. See Develin, Trial by Jury 132, 140 (Hamlyn Lecture, 8th series, 1956). Appellate treatment of quantum findings illustrates the difference between judge and jury inferences. The traditional formulations of the tests for review sound much alike. It is said that the Court of Appeal will not interfere with a jury's assessment of damages unless it is "out of all proportion to the circumstances of the case." Where a judge has determined quantum, his finding will be disturbed "only if it is a wholly erroneous estimate of the damage suffered." The two formulations, however, mean very different things in practice. Appellate courts seek to keep judicial awards uniform, whereas jury awards are generally treated as inviolate. One reason for the difference in treatment is the fact that jury actions in general have no effect on future cases—one of the strengths of the jury. Another is the fact that it is impossible to tell what factors a jury verdict has been based upon. Despite these considerations, however, the Court of Appeal in Ward v. James, [1965] 1 All E.R. 563, indicated
B. Louisiana

Enough has been said to indicate that in Louisiana appellate fact review and civil non-jury trial are interwoven facts of a legal system. One facet feeds the other. If appellate courts freely review facts, juries are employed sparingly. If juries are not employed, there will likely be less respect for findings of fact on appeal. Substantive effects ensue. In light of this, it is important to note that in theory the Louisiana appellate courts review facts with something less than complete fullness and freedom. Rather than always substituting their judgment for that of the trial court on a factual question, the appellate courts have consistently said that they will overturn a factual determination only if it is "manifestly erroneous." It is possible to disagree about how much less than complete freedom of review is effected, and about how much it ought to be, but it seems clear that the manifest error doctrine is some kind of a limitation. The stated rule of the jurisprudence is that the manifest error standards control fact review whether the trier has been judge or jury. The manifest error rule is quite flexible, and it might be supposed that its application would vary, perhaps limiting the extent of review more closely in jury than in judge-tried cases. But to the extent that the jurisprudence indicates that the scope of review might be different for jury-found factual determinations, it suggests that jury findings of fact are at least as readily overturned as are judge-tried facts.

That appellate review can be quite extensive on questions of perception or primary fact, as well as on questions of inference, is illustrated by Brown v. Louisiana Ry. & Nav. Co. In an ac-

32. For divergent views of two appellate judges on this question see Tate, Further Observations on Appellate Review of Facts in Louisiana Civil Cases, 22 LA. L. Rev. 605 (1962); Hardy, The Manifest Error Rule, 21 LA. L. Rev. 749 (1962).
35. 147 La. 829, 86 So. 281 (1920).
tion for damages for the death of a two-year-old child struck by a train, the Supreme Court overturned the verdict of a jury in plaintiff's behalf despite the fact that the governing issue was purely factual:

"The question of liability of the defendant depends entirely upon the question of fact whether the time and distance were sufficient for the engineer to stop his train and prevent the accident when the child appeared upon the track and within view of the engineer."36

There is some inference-drawing to be done in resolving such a question, but it would seem to turn primarily on perceptions, and one would think such matters peculiarly suitable for jury determination. Yet the jury's decision was overturned:

"The verdict of the jury in this case is not altogether persuasive, by reason of the meagerness of the amount of compensation allowed for the loss and suffering endured by the plaintiffs. The allowance of only $900 as compensation for the loss and suffering endured by the parents suggests very strongly that the jurors themselves were doubtful whether any compensation should be allowed."37

The stated grounds for reversing a jury finding based mainly on questions of primary fact is unpersuasive.38 Trial courts exist, and there must be reasons for them. Any traditional list of reasons would include the exercise of primary responsibility for making findings as to what happened. The trial court sees and hears the witnesses and is generally closer to the ground.39 If 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,"40 it is difficult to see what purposes they could serve.

IV. APPELLATE FACT CONCLUSIONS AS PRECEDENT
A. England

The modern English resolution of the question of the extent

36. Id. at 830, 86 So. at 281.
37. Id. at 833, 86 So. at 281.
38. The record reveals that plaintiffs were Negroes. The Supreme Court opinion does not advert to that fact, but the jury may be presumed to have been aware of it.
40. See note 37 supra.
of appellate fact review has been lauded as "highly satisfactory." But attention has also been directed to the "possibly undesirable consequences of the decision." It has been realized that "encouraging Courts of Appeal to review a trial judge's evaluation of facts" has enhanced the risk that "the evaluation of facts will be treated as a binding decision of law for the future."

An aspect of the specter of a multiplicity of common sense propositions of fact becoming elevated to the status of precedent was raised and attempted to be laid in *Qualcast (Wolverhampton) Ltd. v. Haynes*. While handling a ladle of molten metal, plaintiff, an experienced foundry worker, was injured when the ladle slipped, splashing the metal on to his foot. He was not wearing protective spats—which would have prevented the injury—although he knew that his employers kept a stock of them available for the asking. He had not been ordered or advised to wear them. The county court judge considered that plaintiff was sufficiently experienced that no warning was necessary. But he felt himself bound by authority to decide otherwise: "Now, if I were not bound by authority I should decide that the plaintiff was so experienced that he needed no warning and that what he did was with the full knowledge of the risks involved, and that there was no negligence on the part of the defendants. But I feel in view of the authority cited to me that such a decision would be wrong and I feel compelled to come to a different conclusion."

The Court of Appeal sustained the county court judgment. All three of the judges—Evershed, M.R., Parker, L.C.J., and Sellers, L.J.—based their judgments primarily on the theory that the trial court's conclusion as to defendant's culpable negligence was "in the end a conclusion of fact." As such, they were unwilling to review it.

On appeal to the House of Lords held, reversed. The appeal should have been allowed. As to the Court of Appeal's reluctance to review the county court's inference of fact—secondary fact—that defendant's negligence was responsible for the injury—Lord Denning was especially critical. "By the time the case reached

43. *Id.*
44. [1959] A.C. 743, 754.
46. *Id.* at 445.
the Court of Appeal, the primary facts were all ascertained, and the only issue was what was the proper conclusion from these facts." On a question of secondary fact, the Court of Appeal should reverse the judge if convinced he was wrong. Besides, the Court of Appeal erred in regarding the county court's conclusion that he was bound by the authorities to find negligence as a question of fact. "The judge's conclusion is not a conclusion of fact but a conclusion of law reached on an erroneous assumption that he was bound by a series of inapplicable authorities." Several of the Lords had cogent observations to make about the county court's view that the authorities bound him to find, against his better judgment, that the defendant had been negligent. Lord Keith stated: "The learned judge has misdirected himself. The cases referred to... differed in material respects from the facts of the present case. In the sphere of negligence where circumstances are so infinite in their variety it is rarely, if ever, that one case can be a binding authority for another." Lord Somervell said that errors like that of the county court judge were but part of

"[T]he effect on the precedent system of the virtual abolition of juries in negligence actions.... [A] jury's decision did not become part of our law citable as precedent.... Now that negligence cases are mostly tried without juries, the distinction between the functions of judge and jury is blurred. A judge naturally gives reasons for the conclusion formerly arrived at by a jury without reasons. It may sometimes be difficult to draw the line, but if the reasons given by a judge for arriving at the conclusion previously reached by a jury are to be treated as 'law' and citable, the precedent system will die from a surfeit of authorities.... I have come to the conclusion that the learned judge's first impulse was the right conclusion on the facts as he found them and for the reason which he gives. I will not elaborate these reasons or someone might cite my observations as part of the law of negligence."

48. Id. at 755.
49. Id.
50. Id. at 757. Lord Denning's observations were in similar vein. He said that the question of what reasonable care demanded of this employer in these circumstances was clearly a question of fact. The solution of this question may be assisted by taking into account "any proposition of good sense that is relevant in the circumstances." But these propositions of good sense must not be treated as propositions of law. In a case like the present, the employer "ought, I should have thought, to provide protective footwear. But in saying so I speak as a jurymen. I should have thought that the employer ought to advise and encourage the man to wear protective footwear. But again I speak as juryman and not as
The *Qualcast* case constituted a vigorous attempt by the House of Lords to take prophylactic action against the "surfeit of authority" that will result from continued and increased treatment of proposition of fact as citable. That the attempt was not completely successful is indicative of the complexity and difficulty of the problem. The observation of Lords, Keith, Somervell, and Denning, are all framed in terms of the danger of elevating propositions of fact, of good sense, into propositions of law. All are cognizant of the fact that the line between law and fact may be exceedingly difficult to draw. At the same time, the Lords seem to succumb to the tendency to regard the law-fact distinction as qualitative, and as sufficiently rigid to permit making the determination of whether a particular proposition is citable on the basis of which category it falls into. Probably the reverse formulation is more helpful. It is not very useful to say that "proposition X is a proposition of law, and therefore is citable as authority." The division between "law" and "fact" was originally drawn when there was a jury in the cases decided at the instance level. The substance of the distinction turned upon the procedure, in the sense that questions left for decision by a jury were regarded as questions of fact; other questions were treated as questions of law. The fact of the matter is that removal of the jury has taken much of the substance out of the law-fact distinction. A purposive classification is therefore entirely fitting and proper.

The county court's mistake was by no mean inexplicable:

"He was presented with a number of cases in which judges on the high court had given reasons for coming to their conclusions of fact. And those reasons seemed to him to be so expressed as to be rulings in points of law. This is not the first time this sort of thing has happened. Take accidents on the road. In several cases Scrutton, L.J. said that 'if a person rides in the dark he must ride at such a pace that he can pull up within the limits of his vision.' That was treated as a proposition of law until the Court of Appeal firmly ruled that it was not. So also with accidents in factories. I myself once said that an employer, by his foreman must 'do his best to keep [the men] up to the mark'. Someone shortly afterward sought to treat me as having laid down a new proposition of law, but the Court of Appeal corrected the error. Such cases all serve to bear out the warning which has been given in this House before: 'We ought to beware of allowing tests or guides which have been suggested by the court in one set of circumstances to be applied to other surroundings' and this by degree to turn that which is at bottom a question of fact into a proposition of law. That is what has happened in the cases under the Workman's Compensation Act, and it led to a 'wagonload of cases'. Let not the same thing happen to the common law, lest we be crushed under the weight of our own reports." (Id. at 771.)
B. Louisiana

Theoretically the civilian tradition involves, along with appellate fact review, the absence of the principle of *stare decisis*. It is relatively easy to find in the Louisiana jurisprudence statements to the following effect: “Our common-law brothers have the rule of stare decisis. Such does not prevail in Louisiana. Each case must stand or fall on its own facts.”

Such statements are not to be taken at face value, frequently not even within the context of the case where made. Consider, for example, *McKellar v. Mason*. The 64-year-old Mason shot plaintiff with a twenty-gauge shotgun as plaintiff, a 14-year-old boy, was leaving Mason’s yard after an unsuccessful attempt to steal pigeons. The decision turned on whether Mason’s conduct was reasonable in the circumstances. An important consideration was Mason’s testimony that he fired out of fear for his and his wife’s safety, rather than in order to protect his property. The appellate court had substantial doubts about the complete truthfulness of Mason’s testimony about his motivation, implying that Mason, and the defendants in four similar cases, “have been the beneficiaries of excellent legal advice prior to making any admissions which could be construed to be prejudicial.” Nevertheless, the court of appeal agreed with the trial court in resolving those doubts in defendant’s favor. The major persuasive factor was the four similar decisions, all of which had gone for defendant. It is true, said the court, that “in determining what is reasonable conduct there is no fixed rule.” That is true because “there are principally standards and degrees of negligence for the reason that no judge is so gifted with foresight that he can anticipate every possible factual event and prescribe the proper rule for each.” This truth is reinforced by the fact that “the doctrine of stare decisis, that is, the case being the philosophical key to the solution of all problems, has no application in Louisiana.”

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51. *Lee v. Jones*, 224 La. 231, 248, 69 So.2d 26, 32 (1953). The quoted statement derives added force from having been made in response to a contention that refusal to follow an earlier decision would upset a rule of property law. *See also McKellar v. Mason*, 159 So.2d 700, 703 (La. App. 4th Cir. 1964).
52. 159 So.2d 700 (La. App. 4th Cir. 1964).
53. *Id.* at 704.
54. *Id.* at 703.
55. *Id.*
56. *Id.* at 704.
ever, and notwithstanding the recognition that "the facts in this case are somewhat less favorable to the defendant than in the [four] cited cases" the court of appeal ended up following them, stating: "It is only a matter of degree, and the legal principles involved are nonetheless the same."

In a thorough-going civilian system, without *stare decisis*, appellate pronouncements on fact questions would no more become binding than would other appellate pronouncements, so that the problem treated by the House of Lords in the *Qualcast* case could hardly arise. But in point of fact, Louisiana has in all significant respects aligned herself with the common law tradition respecting the effect of precedent. While there has been scant discussion of the subject in the Louisiana legal literature, study of the jurisprudence reveals that the *Qualcast* problem has arisen here. Appellate rulings on fact questions do get treated as precedent. Particularly in the field of negligence there has developed an extensive body of case law stating that certain sets of primary fact will lead to certain inferences of secondary fact; many of these conclusions would be unreviewable jury determinations—propositions of common sense—in other jurisdictions. If there is danger that the American system of jurisprudence is slowly sinking under a "surfeit of authorities," then surely it would be alarming to discover that the Louisiana jurisprudence is more cluttered than most.

**SELECTED NEGLIGENCE DECISIONS**

Once the primary facts are determined, their characterization—negligence, or reasonable care—is a mixed question, neither purely legal nor purely factual. Not surprisingly, the Louisiana appellate courts have differed in their assessments of the nature of that question. In a railway crossing collision case, the First Circuit Court of Appeal stated: "It is fundamental that the question of negligence... is purely a question of fact to be

57. *Id.* at 703.
58. *Id.*
59. Discussed note 44 *supra*.
60. See Comment, 7 Tul. L. Rev. 100 (1932); McKellar v. Mason, 159 So.2d 700 (La. App. 4th Cir. 1964).
determined in the light of the circumstances of each individual case." The context in which that statement occurred made clear that the court was talking about characterizing established facts, not about finding primary facts. That puts the statement in diametric opposition to the Louisiana Supreme Court's declaration that "whether certain omissions or commissions, in a given state of facts, constitute negligence is a question of law." Neither statement was made lightly. The Supreme Court's assertion that the characterization of particular conduct as negligence vel non is a question of law was made in a decision reversing the trial court and the court of appeal on that issue. The First Circuit statement that the question of negligence is factual was made in order to meet defendant's citation of a line of cases that seemed to say that failure to stop, look, and listen at a railway crossing is contributory negligence; the court stated that those cases were acceptably decided in the light of their individual circumstances, but that the negligence question is "purely" factual.

Disagreement among the appellate courts on the nature of the negligence question would not matter so much if the following statement, which seems to appear in virtually identical form

64. The court may have hedged slightly in other language. First admitting that it was never intended that writs of review should issue "in cases presenting only questions of fact." Chief Justice O'Neill went on to point out that "our finding of the facts of this case is in harmony with that of the district court and of the Court of Appeal. When we speak of the facts of the case, we mean the facts that were proved or admitted, not the deductions or conclusions as to whether the truck driver and his helper were negligent."
65. The court based its conclusion that defendants' employees had been negligent on the analogy of four cases establishing "the rule [that] the duty that automobile drivers owe to children in the streets is very strict." Id. at 657, 175 So. at 447.
66. McFarland v. Illinois Central R.R., 112 So.2d 845, 853 (La. App. 1st Cir. 1960). But having said that, the court proceeded to consider American Jurisprudence, C.J.S., and seven cases (which in turn considered eleven cases) in support of its conclusion that the crossing in question amounted to a "dangerous trap." That decisions on these "pure" questions of fact do tend to become precedent is shown by the treatment accorded the McFarland decision in a later First Circuit railway crossing case, Gray v. Illinois Central R.R., 132 So.2d 61 (La. App. 1st Cir. 1961). There plaintiff's car was not hit by the engine of the train; he ran into the twenty-first car. The court adverted to the McFarland statement that negligence has to be determined on the particular facts of each case, spent several paragraphs distinguishing McFarland on the facts, concluding with the statement: "Learned counsel for plaintiff has cited no case or authority in which the dangerous trap doctrine has been applied to a situation wherein a motorist collided with a train under circumstances similar to those in the case at bar." 132 So.2d at 64.
In many Louisiana negligence decisions, could be taken at face value:

"In determining what is negligent conduct, we have remarked on several occasions that there is no fixed rule; the facts and environmental characteristics of each case must be considered and treated individually in conformity with the true civil law concept. Judicially we are tending more and more towards an appreciation of the truth that, in the last analysis, there are few absolute rules of negligence; there are principally standards and degrees of negligence for the reason that no one is so gifted with foresight that he or she could anticipate every possible human event and prescribe the proper rule for each."  

Despite the reference to "the true civil law concept," the quoted language is a cogent statement of the philosophy of common law negligence. It explains why the question of what a reasonable man would have done under the circumstances is traditionally a jury question. In Louisiana, the statement does not mean what it seems to say. Whether a judge or jury has found the fact of negligence, the determination is freely reviewable. More importantly, the appellate courts will sometimes assess the correctness of the instant tribunal's determination on that question in terms of pronouncements in other appellate decisions. In the very case from which the above quotation was taken, the actual disposition of the case was made on the basis of a rule of "law" that trains need not slow down in the fog. Why that kind of prescriptions. The appellate courts of Louisiana resist the rigors rule of law would appeal to a judge who realized that the negligence inquiry is supposed to be highly particularized is difficult to comprehend. 


68. "The law applicable to the facts are revealed herein and is found 'by the trial court appears to be well settled. The courts have recognized that fog and rain prevent a locomotive's operators from having good visibility of the tracks ahead, the same is the existence of a curve; and judges have rationalized on innumerable occasions that a railroad company is not required to slow its train during rain or foggy weather. [citing three cases]." (Emphasis added.) American Employers Ins. Co. v. Missouri Pac. R.R., 11 So.2d 380, 382 (La. App. Orl. Cir. 1959).  

69. A similar discrepancy between the court's statements as to the effects of precedent and the actual resolution of the case in which the statement was made is seen in Peltier v. Thibodaux, 175 La. 1026, 144 So. 903 (1932), wherein the question was the appropriate sum for attorney's fees. The Supreme Court said that "while precedent would be followed if any existed, the decisions really set
Automobile cases have provided a particularly fertile ground for the creation of narrow and specific precedents. A fascinating complex of decisions revolve around the question of liability when, at night or under circumstances of reduced visibility, a moving vehicle collides with a stationary vehicle. In these cases, negligence, traditionally a broad and flexible concept permitting appropriate recognition of the unique circumstances of each case, has become a compendium of specific and relatively inflexible of this crystallization by indulging in a variety of skillful techniques for avoiding outcomes seen as unjust, but the result is frequently less than elegant. At issue in *Ardoin v. Southern Farm Bureau Cas. Ins. Co.*, for example, was a collision between a 12,000 pound gasoline tank truck driven by Elwood Reed and a stationary gravel truck that Marion Hoffpauir had parked partly on the highway while changing a flat tire. The court of appeal and the trial court agreed that Hoffpauir had been negligent, but differed about Reed. The reasoning of the appellate court was unnecessarily tortured. The factual conclusion that Reed had been guilty of contributory negligence could have been supported in the following way, without more:

"The fact that plaintiff's truck was being driven with a heavy load at a speed of 35 or 40 miles per hour, that visibility was extremely limited because of a dense fog, and that the driver of plaintiff's truck saw the Hoffpauir vehicle in ample time to stop but did not do so, convinces us that Reed was negligent, either in operating his truck at an excessive rate of speed under the existing atmospheric conditions or in failing to bring his truck under control after observing an obstacle in the road ahead of him."71

This statement, standing alone, would have been entirely supportable as an exercise of the appellate court's constitutional duty of reviewing the facts found by the trial court. But in addition, the court of appeal: (1) Cited ten and quoted from six cases in support of the proposition that it is negligent to drive

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70. 133 So.2d 129 (La. App. 3d Cir. 1961).
71. Id. at 133.
in excess of the speed at which the vehicle can be stopped within the limits of visibility. (2) Distinguished two cases exonerating drivers who had struck stationary vehicles at night on the theory that in those cases the stationary vehicles were on curves and thus not illuminable by the approaching headlights. (3) Granted a rehearing, in the course of which two more cases were adduced in support of the proposition that it is unreasonable to travel at excessive speeds under conditions of reduced visibility.

The spectacle of a court straining for precedent for the proposition that unreasonable speed is unreasonable is unedifying. 72 Another of the cases in the same line of jurisprudence involved in Ardoin is equally illustrative of the problem. In Vowell v. Manufacturers Cas. Ins. Co., 73 the Louisiana Supreme Court stated:

“Our rule that a motorist traveling on the public highway after dark or during other abnormal condition which prevents him seeing ahead, except imperfectly, and for a short time and distance, must guard against striking objects in the road with which he may be suddenly confronted, constitutes an exception to the general rule that a motorist may assume that the road is safe for travel even at night. But that exception to the general rule is itself subject to the exception that a motorist traveling by night is not charged with the duty of guarding against striking an unexpected or unusual obstruction, which he had no reason to anticipate he would encounter on the highway.” 74

The quoted language can be paraphrased as follows: General rule: Even at night, a motorist may assume (i.e., it is not unreasonable in assuming) that the road is safe for travel. Exception: Even so, he must (i.e., will be unreasonable if he does not) look out for objects with which he may suddenly be confronted. Exception to exception: But he need not look out for objects that

72. Cf. Tucker v. Travelers Ins. Co., 160 So.2d 440, 442 (La. App. 2d Cir. 1964), wherein 8 cases, LA. CIV. CODE art. 2315, and a passage from C.J.S. were in effect cited in support of the proposition that negligence is the absence of reasonable care, and an additional case was cited for the proposition that “a defendant cannot be required to guard against an event which could not reasonably have been anticipated by a person of ordinary intelligence and prudence.”

73. 229 La. 798, 86 So.2d 909 (1958).

74. Id. at 808, 86 So.2d at 913.
he has no reason to anticipate. *Upshot:* A motorist at night must look out for sudden confrontations with objects that he has reason to anticipate. Fairly obviously, all that has been asserted is that the reasonable man foresees certain dangers, others he does not. Which ones are foreseeable is a question that has to be answered by common sense, on the basis of the circumstances in each case. It cannot be nailed down by specific rules, no matter how detailed. The volume of litigation that has resulted from the relatively common-place occurrence of low-visibility collision between moving vehicle and stationary object is eloquent testimonial to the futility of the attempt to create a case-law code that answers all the questions. Whether the appellate courts behave as though they believe it, their statement is true; in the last analysis, there are few absolute rules of negligence.

V. CONCLUSION

The House of Lords' effort in *Qualcast* to guard against the undue multiplication of narrow and specific rules of decisional law may not prove to be entirely successful, but explicit judicial attention to the problem is a healthy example. The Louisiana appellate courts have been skillful in working within the framework of an unnecessarily crystallized system of negligence law to achieve justice in the individual case. But the rigorous thinking and acuteness of judicial technique demanded by the task of coping with too many precedents could be more beneficially employed. To the extent that attention must be focused on manipulation of the precedents it is inevitably diverted from other considerations. The essential learning of the American realist tradition is that the same precision and rigor that operation within a mechanistic jurisprudence demanded can and should be employed in identifying, isolating, and weighing the policy issues presented by appellate cases. Civilian Louisiana, with its potential freedom from the narrow and technical *stare decisis* of the common law, could well become the United States'
leading refutation of Jonathan Swift: "It is a maxim among these lawyers that whatever has been done before may legally be done again; and therefore they take special care to record all the decisions formerly made against common justice and the general reason of makind. These, under the name of precedents, they produce as authorities."