Mississippi College Law Review

Volume 15
Issue 1 *Vol. 15 Iss. 1*

Article 3

1995

Life on a Federal Island in the Civilian Sea

William E. Crawford

Follow this and additional works at: https://dc.law.mc.edu/lawreview

Part of the Law Commons

Custom Citation
15 Miss. C. L. Rev. 1 (1994-1995)

This Article is brought to you for free and open access by MC Law Digital Commons. It has been accepted for inclusion in Mississippi College Law Review by an authorized editor of MC Law Digital Commons. For more information, please contact walter@mc.edu.

LIFE ON A FEDERAL ISLAND IN THE CIVILIAN SEA

*William E. Crawford**

The Louisiana lawyer practicing both in state court and in the federal system is subject to legal schizophrenia as a normal way of life.[1] The first reason for this schizophrenia is that under civilian doctrine the basic private law of Louisiana is limited to the law declared in the Civil Code and other legislation.[2] Its interpretation by the Louisiana judiciary, no matter how often repeated, uniform, or consistent, does not constitute law under the faithfully-held doctrine of *jurisprudence constante* as specifically pronounced by the Louisiana Supreme Court,[3] in keeping with the long-standing tradition of the civilian notion of law as opposed to interpretation of the law by the judiciary.

In Louisiana there is no rule of stare decisis; instead its counterpart of *jurisprudence constante* prevails. Thus, a federal court sitting in a diversity case, in which it must apply Louisiana substantive law under the *Erie Railroad Co. v. Tompkins* rule,[4] must apply the appropriate Louisiana legislation, as distinguished from interpretations of the legislation pronounced in cases dealing with it; therefore, it is not bound to apply interpretations of that legislation found in Louisiana decisions, for those decisions do not bind the Louisiana judiciary itself in later cases.[5] Nevertheless, while the federal court is not *bound* by the jurisprudence, it would be unreasonable for the federal bench to ignore the interpretations found in Louisiana decisions unless they are manifestly inappropriate, for the very purpose of *Erie* is to instruct the federal judiciary in a diversity case to apply the applicable state law in the manner in which it would be applied in the state courts.[6] Determining the governing Louisiana interpretation pronounced through the judiciary can thus be uncertain.

Ascertaining the correct rule of law can be difficult for the additional reason that the Louisiana appellate judiciary in 1992 rendered from the courts of appeals a total of 3533 opinions,[7] and from the supreme court, 178,[8] contrasted with the Supreme Court of Mississippi which in 1992 rendered only 386 dispositions

---

* James J. Bailey Professor of Law, Louisiana State University Law Center. The research and analysis of John Felder Crawford, II, research assistant for this Article, was indispensable, particularly on the matters of *jurisprudence constante* and the federal treatment of Louisiana products liability cases.

1. The late Judge Alvin B. Rubin visited this area in his article, *Hazards of a Civilian Venturer in a Federal Court: Travel and Travail on the* Erie Railroad, 48 LA. L. REV. 1369 (1988).

2. LA. CIV. CODE ANN. art. 1 (West 1993).

3. Ardoin v. Hartford Accident & Indem. Co., 360 So. 2d 1331, 1334 (La. 1978).

4. Erie R.R. v. Tompkins, 304 U.S. 64, *cert. denied*, 305 U.S. 637 (1938).

5. Clarkco Contractors, Inc. v. Texas E. Gas Pipeline Co., A Div. of Tex. E. Transmission Corp., 615 F. Supp. 775, 778 (M.D. La. 1985).

6. *Erie*, 304 U.S. at 72-73.

7. ANNUAL REPORT OF THE JUDICIAL COUNCIL OF THE SUPREME COURT OF LOUISIANA 26 (1992). There were 2511 civil and 1022 criminal opinions from the courts of appeals in 1992. *Id.*

8. *Id.* at 23. There were 131 civil opinions from the supreme court and 47 criminal opinions. *Id.*

by signed opinion.[9] This proliferation of jurisprudence tends to diffuse any sharp and precise statements of law.

Another source of schizophrenia-inducing difference in the two systems lies in the procedural area. Louisiana has a fact-pleading system of procedure, as opposed to the notice pleading procedure of the federal system. Even more significant is the Louisiana system of appellate review of fact. The Louisiana appellate judiciary has the constitutional authority to reverse the findings of a jury on the facts and to render a contrary judgment on the spot, from the appellate bench.[10] A Louisiana appellate court thus has the authority to review the transcript on appeal from a case in which the jury found that the defendant was not negligent; determine that the jury was clearly wrong in its finding; enter its own finding that negligence did occur; if there is evidence in the trial record to support it, make a finding of the damages and quantum to which the plaintiff is entitled; and then render judgment accordingly against the defendant from the appellate bench, without remand and without a further right of appeal.

This procedure is possible only because there is no constitutional right to a civil jury trial in Louisiana.[11] The Seventh Amendment guarantees a civil jury trial under the United States Constitution in the federal system, ensuring that a defendant winning his case before a jury in federal court – if the jury charges contained no error and if sufficient evidence supported the jury verdict – can feel comfortable that the case is over as to factual issues. This same federal guarantee of a civil jury trial controls summary judgment practice and dispositions by federal judges on motions for directed verdicts, motions for JNOV, rulings on questions of evidence before the jury, and any other handling of findings or rulings on factual issues, for factual issues must be left to the jury, not determined by the court.[12]

In this same vein, the traditional proximate cause issue in Louisiana is known as the duty/risk analysis. Under the leading Louisiana case, this analysis is a question for the court, not the jury.[13] If a federal judge were to determine a proximate cause issue by invoking the duty/risk analysis, he would violate the parties' Seventh Amendment rights. Thus, the lawyer in Louisiana's state court system must prepare his trial and his appellate argument in terms of duty/risk, while in the federal system he must follow the traditional proximate cause analysis found in the other states.

---

9. ANNUAL REPORT FOR THE SUPREME COURT OF MISSISSIPPI 27 (1992).

10. LA. CONST. of 1974, art. V, § 5(C).

11. Melancon v. McKeithen, 345 F. Supp. 1025, 1045 (E.D. La.), *aff'd*, 409 U.S. 943 (1972), *and aff'd*, 409 U.S. 1098 (1973).

12. *See, e.g.*, FED. R. CIV. P. 50.

13. "Regardless if stated in terms of proximate cause, legal cause, or duty, the scope of the duty inquiry is ultimately a question of policy as to whether the particular risk falls within the scope of the duty." Roberts v. Benoit, 605 So. 2d 1032, 1044 (La. 1991).

I. Determining the *Erie* Rule of Law in Louisiana

The most recent *Erie* mandate on a federal court is that it should seek the correct statement of law in the same fashion that the highest court of the state (in which the federal court sits) would search, evaluate, and pronounce it.[14] The *Erie* mandate may then subdivide into two significantly different intellectual endeavors: the *Erie* evaluation;[15] and, on the other hand, the *Erie* guess.[16]

A. The Erie *Evaluation*

The *Erie* mandate as followed in common law states by the federal courts is correctly summed up by the following statement: "A federal court sitting in diversity jurisdiction and called upon in that role to apply state law is absolutely bound by a current interpretation of that law formulated by the state's highest tribunal."[17]

Clarkco Contractors, Inc. v. Texas Eastern Gas Pipeline Co., A Division of Texas Eastern Transmission Corp.[18] is an excellent illustration of the *Erie* evaluation process by a federal judge sitting in Louisiana. The issue before the district court was whether to apply a contractual stipulation of a choice of law provision, or to decline to apply the stipulation on the ground that to do so would contravene a strong public policy rule of Louisiana.[19] Following the *Erie* mandate, the court attempted to determine whether Louisiana had departed from the *lex loci delicti* rule in tort cases.[20] After a detailed consideration of the relevant cases and jurisprudence, the court referred to the opinion of the Louisiana Supreme Court in the leading case, *Jagers v. Royal Indemnity Co.*;[21] but it then followed the observation of the Fifth Circuit, that "*Jagers* is far from clear,"[22] and concluded that one could not rely on *Jagers* to say that Louisiana had departed from the *lex loci delicti* rule—that Louisiana had firmly adopted the interest analysis considered in *Jagers*.[23]

At this point, the judge, referring to *jurisprudence constante*, observed that Louisiana civilian tradition did not require him to find *Jagers* controlling: "[I]n a civilian jurisdiction such as Louisiana, it is risky business to rely overly much upon extensions of judicial decisions as stating the applicable law, particularly where, as here, Article 10 of the Civil Code provides a statutory basis for the law . . . ."[24]

---

14. Charles A. Wright, The Law of Federal Courts § 58, at 373 (4th ed. 1983).

15. Clarkco Contractors, Inc. v. Texas E. Gas Pipeline Co., A Div. of Tex. E. Transmission Corp., 615 F. Supp. 775, 776 (M.D. La. 1985).

16. Thompson v. Johns-Manville Sales Corp., 714 F.2d 581, 582 (5th Cir. 1983), *cert. denied*, 465 U.S. 1102 (1984).

17. Daigle v. Maine Medical Ctr., Inc., 14 F.3d 684, 689 (1st Cir. 1994).

18. 615 F. Supp. 775 (M.D. La. 1985).

19. *Id.* at 776.

20. *Id.* at 777. *Lex loci delicti* refers to the "place of the wrong." Black's Law Dictionary 911 (6th ed. 1990).

21. 276 So. 2d 309 (La. 1973).

22. Lee v. Hunt, 631 F.2d 1171, 1175 (5th Cir. 1980), *cert. denied*, 454 U.S. 834 (1981).

23. Clarkco Contractors, Inc. v. Texas E. Gas Pipeline Co., A Div. of Tex. E. Transmission Corp., 615 F. Supp. 775, 777 (M.D. La. 1985).

24. *Id.* at 778 (footnote omitted).

Footnote two of the *Clarkco* opinion articulates so fully and with such great relevance the entire *Erie* evaluation process under *jurisprudence constante* that it is set forth herein in full.[25] Whether an *Erie* search under the rule of stare decisis[26] would yield a different-sounding discussion is beyond the shore of this civilian sea.

The essence of the theory of *jurisprudence constante*, as recognized by the judge in *Clarkco*, is that judicial precedent is established by a judge on the basis of general rules of law provided by legislators for the decision of those disputes, and is not based on the general rules of law extracted from judicial precedent.[27] The accumulated precedents gain significance because the words of the legislation, as consistently spoken by judges in their decisions, are attributed to the legislator, and the meaning of the rule of law enacted by the legislator is taken from the specific meaning given to it by judges.[28] Further, the judge analyzes those judicial decisions to determine whether or not they comprise a general rule of law consistent with the needs of the pending case.[29] If what he finds does not fit the needs of the case, then he may disregard the law as spoken by the judges and "return to the words of the general rule of law spoken by the legislator, under the theory that judges are bound to apply the law as given to them by the legislature and not as paraphrased by other judges."[30]

The Louisiana Supreme Court, explaining the doctrine, said in part:

> In Louisiana, courts are not bound by the doctrine of *stare decisis*, but there is a recognition in this State of the doctrine of *jurisprudence constante*. Unlike *stare decisis*, this latter doctrine does not contemplate adherence to a principle of law announced and applied on a single occasion in the past.
>
> However, when, by repeated decisions in a long line of cases, a rule of law has been accepted and applied by the courts, these adjudications assume the dignity of

---

25. Footnote two states:

> For example, *Johnson v. St. Paul Mercury Ins[urance] Co.*, while distaining [sic] the doctrine of *stare decisis* did recognize the doctrine of *jurisprudence constante*. After citing a long line of Louisiana cases stretching over a seventy year period applying the *lex loci delicti* doctrine as the "established rule," the court noted: "Fundamental and elementary principles recognize that certainty and constancy of the law are indispensable to orderly social intercourse, a sound economic climate and a stable government." [*Johnson*,] 236 So.2d [sic] at 218. Exactly three years later *Johnson* was expressly overruled by *Jagers v. Royal Indemnity Co.*
>
> > Louisiana looks first to statutory law. . . . "In deciding the issue before us the lower courts did not follow the process of referring first to the code and other legislative sources but treated language from a judicial opinion as the primary source of law. This is an indication that the position of the decided case as an illustration of past experience and the theory of the individualization of decision have not been properly understood by our jurists in many instances."
>
> [Ardoin v. Hartford Accident & Indem. Co.,] 360 So.2d [sic] [1331,] 1334 [(La. 1978)]. Louisiana has no legislative conflict of laws rule in tort cases. It may be important to bear in mind that the Restatement (Second) Conflicts of Laws (1969) has not been adopted by the Louisiana Legislature as a part of the Civil Code; Article 10 is a part of the Code.

Clarkco Contractors, 615 F. Supp. at 778 n.2 (citations omitted) (emphasis added).

26. "To abide by, or adhere to, decided cases." BLACK'S LAW DICTIONARY 1406 (6th ed. 1990).

27. JULIO C. CUETO-RUA, JUDICIAL METHODS OF INTERPRETATION OF THE LAW 70 (1981).

28. *Id.* at 74.

29. *Id.* at 76.

30. *Id.* at 77.

jurisprudence constante; and the rule of law upon which they are based is entitled to great weight in subsequent decisions.[31]

It is thus submitted that the federal judges sitting in Louisiana are not bound by the recent pronouncements in *Gauthier v. O'Brien*[32] and *Touchard v. Williams*,[33] each of which is a single Louisiana Supreme Court pronouncement as to the meaning or interpretation of Article 2324 of the Civil Code, which regulates solidary liability among joint tortfeasors.[34] On the face of those opinions, compared to the legislators' words they interpret, there is room to differ seriously with whether the cases are correct interpretations of the law. According to all of the foregoing exposition of the doctrine of *jurisprudence constante*, a federal judge sitting in Louisiana under the mandate of *Erie*, with the corollary doctrine of *jurisprudence constante*, is not bound to follow those decisions. The keystone of this proposition is that the *Erie* mandate directs a federal judge to incorporate the doctrine of *jurisprudence constante* into his divining of the Louisiana substantive law applicable to the case before him,[35] an evaluation process that must go beyond the most recent Louisiana Supreme Court opinion.

B. *The* Erie *Guess*

In *Thompson v. Johns-Manville Sales Corp.*,[36] the court in a diversity case had the following issue: "This Louisiana diversity appeal requires us to determine whether the law of that state would dispense with proof of causation against some of [the] multiple defendants in an asbestosis case."[37] The court found that Louisiana had not adopted such a dispensation of proof in any reported case, that the theories advanced by the plaintiff represented radical departures from traditional theories of tort liability, and that the only support for the plaintiff's claim as to Louisiana law was a supposed tendency of Louisiana courts to expand the liability of manufacturers, which the court found insufficient to make such an expansion of Louisiana doctrine.[38] The court therefore declined to adopt the theory as the law of Louisiana.[39]

The dissent criticized the majority for making an "*Erie* guess," saying that the majority was predicting what the Louisiana courts would do, and that such a case of first impression should be determined by a certification of the question to the Louisiana Supreme Court.[40]

---

31. Johnson v. St. Paul Mercury Ins. Co., 236 So. 2d 216, 218 (La. 1970), *overruled by* Jagers v. Royal Indem. Co., 276 So. 2d 309 (La. 1973).

32. 618 So. 2d 825 (La. 1993) (interpreting revised Article 2324 of the Civil Code).

33. 617 So. 2d 885 (La. 1993) (interpreting revised Article 2324 of the Civil Code).

34. LA. CIV. CODE ANN. art. 2324 (West 1979 & Supp. 1994).

35. Clarkco Contractors, Inc. v. Texas E. Gas Pipeline Co., A Div. of Tex. E. Transmission Corp., 615 F. Supp. 775, 778 (M.D. La. 1985).

36. 714 F.2d 581 (5th Cir. 1983), *cert. denied*, 465 U.S. 1102 (1984).

37. *Thompson*, 714 F.2d at 581.

38. *Id.* at 583.

39. *Id.*

40. *Id.* (Goldberg, J., dissenting).

In discussions of the doctrine of *jurisprudence constante*, frequent reference is made to the fact that legislation (which includes the Civil Code and other statutes) is the primary source of law. There should be no hiatus, no question on which the law does not speak, because of Article 4 of the Civil Code, which provides that when there is no applicable rule in the legislation, the court must proceed according to equity – resorting to "justice, reason, and prevailing usages."[41]

If the theory and doctrine of judicial application of law operates as the Louisiana Supreme Court has stated and as commentators have frequently written, it is submitted that the majority in *Thompson* was completely correct in deciding the case on its own legal analysis because it was simply obeying the mandate of *Erie* and the civilian process in Louisiana, particularly in view of the positive directive in Article 4 of the Civil Code. Thus, if there are no cases, then the court must itself go to the legislative source, and if there is no legislative source specifically applicable, then the Civil Code commands that the court resort to "equity."[42] Can it be said that there is no applicable rule of Louisiana law on a question simply because there is no appellate court opinion pronouncing a rule? The Civil Code is a positive statement to the contrary. A federal judge sitting in Louisiana should never consider himself to be making a guess, for he is only applying the law as the civilian system commands the judge to do. He is likewise, as a federal judge, commanded to follow the state civilian theory, which, it is submitted, is inherent in the mandate of *Erie* as applied to Louisiana.

C. Current Practice with Certification of Questions

Louisiana Revised Statutes section 13:72.1 provides that the Supreme Court or the circuit courts of appeals of the United States may certify questions to the Louisiana Supreme Court, "which certificate the supreme court of this state may, by written opinion, answer."[43] Rule XII of the Louisiana Supreme Court Rules implements the foregoing statutory provision, but adds an interesting sentence: "This court may, in its discretion, decline to answer the questions certified to it."[44]

The certification of questions has been used heavily in Louisiana. Electronic research shows that from April 19, 1963, through July 22, 1994, a total of eighty-nine questions were certified from federal court.[45] The questions ranged across the spectrum of legal issues.[46] By contrast, the Fifth Circuit has certified to the Mississippi Supreme Court from November 30, 1964, through October 19, 1992, only forty-one questions.[47] A substantial number of major pronouncements by the Louisiana Supreme Court – fundamental to different areas of the law, though with

---

41. "When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages." LA. CIV. CODE ANN. art. 4 (West 1993).

42. *Id.*

43. LA. REV. STAT. ANN. § 13:72.1 (West 1983).

44. LA. SUP. CT. R. XII.

45. Search of WESTLAW, CTA5 database (July 26, 1994).

46. *Id.*

47. *Id.*

a heavy concentration in the torts area[48]—have been in response to the certified question procedure.

It is difficult to find a sharp distinction among the cases that the Fifth Circuit chooses to answer for itself, such as *Thompson*,[49] as opposed to those in which it certifies the question, such as *Halphen v. Johns-Manville Sales Corp.*[50] Two very significant Fifth Circuit opinions, both authored by the late Judge Alvin Rubin, ruled on the retroactivity vel non of the Louisiana Products Liability Act, without certifying that question.[51] It is an interesting comparison of judicial techniques to see the exhaustive analysis and research devoted to the questions by Judge Rubin, as opposed to the terse decree of nonretroactivity by the Louisiana Supreme Court.[52] The principles underlying the doctrine of *jurisprudence constante* might well say that it is the federal rule on that question that should be followed, rather than the Louisiana Supreme Court opinion.

The high court of Maryland responded to a certified question from a federal district court in that state.[53] The federal court found the opinion to be unusable, so that it decided the case using its own legal analysis.[54]

II. Appellate Review of Fact vs. Seventh Amendment Guarantee of Jury Trial

Louisiana's constitutional grant of jurisdiction over the facts as well as the law[55] is perhaps a more profound difference between practice in state court and practice in federal court than is the difference between civil law and common law. As foreshadowed in the introductory paragraphs of this Article, the Louisiana appellate judiciary has the authority not only to reverse the finding of a jury on the facts, but to pronounce a final judgment from the appellate bench, without remand.[56] A defendant thus cast in judgment has no effective right of appeal. He does have the right to apply for writs from the Louisiana Supreme Court, but of the 1477 applications filed in civil cases in 1993, only 245 were granted.[57] Jurisdiction of the facts (and the corollary power to determine them) is not a theoretical or academic power in the hands of the Louisiana appellate judiciary. As of July 1994,

---

48. Murray v. Ramada Inns, Inc., 521 So. 2d 1123 (La. 1988); Halphen v. Johns-Manville Sales Corp., 484 So. 2d 110 (La. 1986); Bell v. Jet Wheel Blast, Div. of Ervin Indus., 462 So. 2d 166 (La. 1985); Olsen v. Shell Oil Co., 365 So. 2d 1285 (La. 1978).

49. Thompson v. Johns-Manville Sales Corp., 714 F.2d 581 (5th Cir. 1983), *cert. denied*, 465 U.S. 1102 (1984).

50. 484 So. 2d 110 (La. 1986).

51. Miles v. Olin Corp., 922 F.2d 1221 (5th Cir. 1991); Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167 (5th Cir. 1990), *cert. denied*, 114 S. Ct. 171 (1993).

52. Gilboy v. American Tobacco Co., 582 So. 2d 1263 (La. 1991).

53. Kelley v. R.G. Indus., Inc., 497 A.2d 1143 (Md. 1985). *See also* Delahanty v. Hinckley, 845 F.2d 1069, 1071 (D.C. Cir. 1988) ("Indeed, *Kelley's* theoretical underpinnings are somewhat unclear.").

54. *Kelley*, 497 A.2d at 1161-62.

55. "Except as otherwise provided by this constitution, the jurisdiction of the supreme court in civil cases extends to both law and facts." La. Const. of 1974, art. V, § 5(C). The provision for the Louisiana courts of appeals is essentially the same. *Id.* § 10(B).

56. Wright v. Paramount-Richards Theatres, Inc., 198 F.2d 303, 306 (5th Cir. 1952).

57. Annual Report of the Judicial Council of the Supreme Court of Louisiana 23 (1993).

electronic research showed that among the courts of appeals and the supreme court since 1983, jury verdicts were reversed on the facts in approximately 173 cases.[58] The jury was reversed on quantum in approximately 116 cases.[59] This is not to say that in all those cases final judgments contrary to the jury verdict were rendered on the spot from the appellate bench.

The federal courts have long been aware of this difference in jurisdiction over facts:

> As to the sufficiency of the evidence on the issues of negligence and contributory negligence, we are governed by the standard developed in *Boeing Co. v. Shipman*. Louisiana appellate courts, on the other hand, have the right and the duty to review both the law and the facts in civil cases. "As a consequence of that situation, in civil cases federal courts evaluating decisions of Louisiana state courts as precedents have the difficult task of separating the decisions of the Louisiana courts on the law from their review of the facts."[60]

The practice in the courts of Louisiana was set forth in *Wright v. Paramount-Richards Theatres, Inc.*:[61]

> In the state of Louisiana, the principles of the common law are not recognized; neither do the principles of the civil law of Rome furnish the basis of their jurisprudence. They have a system peculiar to themselves, adopted by their statutes, which embodies much of the civil law, some of the principles of the common law, and, in a few instances, the statutory provisions of other states. This system may be called the civil law of Louisiana, and is peculiar to that state.
>
> Continuing to describe the Louisiana practice, Mr. Justice McLean said[:] "The facts found by the jury are examined by the appellate court, and its judgment is given on the facts, without the intervention of a jury."
>
> In Louisiana state courts, the right to trial by jury guaranteed by the Seventh Amendment of the United States Constitution does not exist. The Louisiana Code of Practice of 1870 provides for jury trials in certain civil cases; but appellate courts have the right and duty to review both the law and the facts in all civil cases.
>
> Federal courts are forbidden by the Seventh Amendment to re-examine any fact tried by a jury otherwise than according to the rules of the common law, while Louisiana state courts can review the facts in all civil cases. As a consequence of that situation, in civil jury cases federal courts evaluating decisions of Louisiana state courts as precedents have the difficult task of separating the decisions of the Louisiana courts on the law from their review of facts.[62]

---

58. Electronic data (on file with the *Mississippi College Law Review*).

59. Electronic data (on file with the *Mississippi College Law Review*).

60. Miskell v. Southern Food Co., 439 F.2d 790, 792 (5th Cir. 1971) (citations omitted) (emphasis added) (quoting *Wright*, 198 F.2d at 306).

61. 198 F.2d 303 (5th Cir. 1952).

62. *Id.* at 306 (quoting Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 450, 451 (1830)).

A recent case illustrating the exercise of this authority is *Hines v. Remington Arms Co.*[63] The plaintiff was severely injured when his rifle accidentally fired into a gun powder canister.[64] The rifle was used purely for competition shooting and had a very sensitive trigger which allegedly discharged when the bullet was chambered, without any deliberate pulling of the trigger itself.[65] The facts were that the plaintiff fired the rifle with the muzzle six to eight inches from the cardboard canister of powder.[66] The claim against Remington was dismissed at an early stage,[67] and the case proceeded against the manufacturer of the powder and against the maker of the rifle.[68] The jury found both defendants not liable because neither the rifle nor the gun powder was defective.[69] The court of appeals reversed the jury verdict and found the maker of the rifle liable under the per se liability theory for an unreasonably dangerous product,[70] and found the powder manufacturer liable for failure to warn as to safe storage of the gun powder.[71] The court of appeals awarded a judgment of $2,000,000 in general damages to the victim himself and then awarded $50,000 to his wife for her loss of consortium.[72] Attorney's fees were awarded under Louisiana Civil Code Article 2545 in the amount of twenty-five percent of the total judgment against the maker of the rifle.[73] All told, the judgment awarded was in the sum of $2,458,128.92, not including the consortium award of $50,000.[74] At the same time, the court fixed the allocation of fault at thirty-four percent to the plaintiff, and thirty-three percent to each of the defendants.[75] This was all determined from the appellate bench, without remand;[76] there was no effective appeal from this judgment.

A second example of Louisiana courts' authority over factual issues is set out in *Weatherford v. Commercial Union Insurance Co.*[77] A priest was driving his car and saw the eight-year-old victim riding in the same direction on his new bicycle.[78] As Father Termini rounded a curve, the victim suddenly turned his bicycle to the right, directly into the path of Termini's vehicle.[79] The jury found he was not negligent.[80] The court of appeals reviewed the record and stated:

---

63. 630 So. 2d 809 (La. Ct. App. 1993).
64. *Id.* at 812.
65. *Id.* at 813.
66. *Id.* at 812.
67. *Id.* at 813.
68. *Id.*
69. *Id.* at 812.
70. *Id.* at 814.
71. *Id.* at 817.
72. *Id.*
73. *Id.* at 819.
74. *Id.* at 817.
75. *Id.*
76. *Id.* at 820.
77. 637 So. 2d 1208 (La. Ct. App. 1994).
78. *Id.* at 1209.
79. *Id.*
80. *Id.* at 1210.

> However, under the facts and circumstances here presented, we are convinced that the jury manifestly erred in its determination. Considering the high degree of care that is required of a motorist when he sees a young child on the road, neither the jurisprudence nor the evidence supports the jury's determination that Father Termini was not negligent in the manner in which he operated his vehicle shortly prior to and at the time of the accident.[81]

A third example is *Beckham v. St. Paul Fire & Marine Insurance Co.*[82] This case was tried to the court without a jury.[83] The judge found the defendant surgeon not liable, concluding that he had not committed medical malpractice.[84] The court of appeals reversed the judgment, found the defendant negligent,[85] and from the appellate bench awarded a judgment of $144,221.17 with interest and costs.[86]

It is typical in these cases that the reversal of the jury verdict is not based upon an error in the charge to the jury. In fact, the Louisiana Supreme Court has admonished the courts of appeals that, if in reviewing a record the court discovers an error in the charge, they are to formulate a correct charge for themselves, read the transcript, and render judgment accordingly, without remand, taking cognizance of the correct statement of law.[87] The significance of a clear statement of the law is thus much diminished in the Louisiana system of appellate review of fact.[88]

On the other hand, an accurate statement of the law is sacramental if the case is being tried in a federal court under the Seventh Amendment guarantee of a jury trial. If on review by the federal court of appeals a substantial error was found in the jury charge, the verdict, whether for the plaintiff or for the defendant, would be set aside and the case remanded for trial under the correct charge.[89] Electronic research has shown that this reversal of jury verdicts is virtually nonexistent in the Fifth Circuit Court of Appeals. In the last compilation of figures, over a period of seventy-five years, until 1987 when the review was last accomplished, only thirteen cases had been reversed on the facts.[90] Contrary to the Louisiana system, in none of those cases could the federal circuit court of appeals render a final judgment against a defendant from the appellate bench.

A. Duty/Risk vs. Proximate Cause

The judicially-adopted and certified mode of analysis for actions *ex delicto* is described as the duty/risk analysis. The significant difference between the duty/risk analysis and the traditional proximate cause analysis (as set forth by Justice

---

81. *Id.*
82. 614 So. 2d 760 (La. Ct. App. 1993).
83. *Id.* at 763.
84. *Id.*
85. *Id.* at 767.
86. *Id.* at 772.
87. *See* Gonzales v. Xerox Corp., 320 So. 2d 163, 165 (La. 1975).
88. Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 443 (1830).
89. WRIGHT, *supra* note 14, § 94, at 630.
90. William E. Crawford, *Should Louisiana Retain Civil Appellate Review of Facts?*, 35 LA. B.J. 245, 250 (1987).

Andrews in his dissent to *Palsgraf v. Long Island Railroad Co.*[91]) is that, under the duty/risk analysis, the issue of whether the harm to the plaintiff was foreseeable to the defendant is treated as a question of policy or law, rather than one of fact. The question is asked whether the risk of the injury that occurred fell within the ambit of the duty incumbent upon the defendant. The leading case on this point holds that the decision is one of policy.[92] The case does not go so far as to say that it is a question of law, but it is well-recognized that questions of policy are for the court, while questions of fact are for the jury. Thus, in federal court under the civil jury trial guarantee, a proximate cause issue in the traditional sense must be accorded to the jury because what constitutes a question of fact under the Seventh Amendment is determined through historic standards – i.e., the questions of fact described in the Seventh Amendment are those so classified at the time the Amendment was adopted in 1791.[93] The earliest torts treatises all classify the proximate cause issue as a question of fact for the jury. It could therefore make a significant difference in the outcome of a case involving a substantial proximate cause question as to whether the parties found themselves in federal court or in state court, in the hands of the jury or in the hands of the judge.

B. Precedential Value of Appellate Fact Finding

Particularly in the area of products liability, Louisiana appellate courts have found products to be defective upon reviewing all of the evidence. For *Erie* purposes, is this a rule of substantive law as to a given product, or is it a finding of fact, as a matter of law? Several opinions can be construed to be a pronouncement of substantive law. There are several escalator cases in Louisiana in which children injured their feet by having them caught between the moving stairs and the sidewall of the escalator. The leading case stated: "The inescapable conclusion is that escalators, for all their utility, are unreasonably dangerous to small children. . . . Although not unreasonably dangerous 'per se', escalators are unreasonably dangerous to small children, making their manufacturers and custodians strictly liable for escalator injuries to those children."[94]

The obvious implication brought forth an application for rehearing which was denied per curiam:

---

91. 162 N.E. 99 (N.Y. 1928).

92. Roberts v. Benoit, 605 So. 2d 1032, 1044 (La. 1991). See also the full analysis of the problem by David W. Robertson, *The Precedent Value of Conclusions of Fact in Civil Cases in England and Louisiana*, 29 LA. L. REV. 78, 93 (1968).

93. WRIGHT, *supra* note 14, § 92, at 609.

94. Brown v. Sears, Roebuck & Co., 514 So. 2d 439, 444 (La. 1987).

> It is not our intention to hold that all escalators are unreasonably dangerous to small children. We merely found that the escalator in this case was unreasonably dangerous because of a failure to provide an adequate warning of a danger inherent in the use of the escalator which was not within the knowledge of or obvious to the ordinary user. This is an independent finding by this court and not an affirmance of the trial court's directed verdict which was flawed by an error of law.[95]

A similar situation, found in *Antley v. Yamaha Motor Corp., U.S.A.*[96] and *Laing v. American Honda Motor Co.*,[97] involved three-wheeler all terrain vehicles, in which those vehicles were found as a matter of law to be unreasonably dangerous per se under Louisiana products liability law.

While the problem has not been confronted in a case, the question is raised whether the Louisiana Court of Appeals has declared as a substantive matter that escalators are unreasonably dangerous for small children (but for the rehearing per curiam); and has it been declared as a matter of substantive law that all three-wheeler all terrain vehicles are actionably defective under products liability law? If that is the effect of the holding, how would it affect the *Erie* rule in a diversity case in federal court involving one of those products? It follows that one would have to prove only that the accident was caused by a three-wheeler. The question of defectiveness would have been predetermined by the Louisiana appellate opinion already so holding as a matter of substantive law.

III. CONCLUSION

The *Erie* mandate to the federal courts sitting in Louisiana in diversity cases includes the civilian doctrine of *jurisprudence constante*. The federal judge is not bound by the last statement of the law pronounced by the appellate courts of Louisiana, because the doctrine of stare decisis is not found in Louisiana. In the absence of jurisprudence on a question, under the Louisiana substantive law found in the Civil Code, the federal court is free to go to Louisiana legislation and any other sources of law to answer the question before it as though it were a Louisiana court; thus, certification seems unnecessary.

In the federal courts sitting in Louisiana, the Seventh Amendment guarantee of a jury trial prevails over the Louisiana appellate review of fact when questions of fact are involved. Whether an issue is a question of fact is for the federal court to decide, and is not governed by the practice of the Louisiana appellate judiciary to answer questions of fact as matters of law.

---

95. Brown v. Sears, Roebuck & Co., 516 So. 2d 1154, 1154 (La. 1988).
96. 539 So. 2d 696 (La. Ct. App. 1989).
97. 628 So. 2d 196 (La. Ct. App. 1993).