

# Appellate review of Mixed Questions of Law and Fact: Due Deference to the Fact Finder

Edward J. Walters, Jr.<sup>1</sup>  
Darrel J. Papillion<sup>2</sup>

Louisiana's system of appellate review, which permits appellate courts to review both legal and factual determinations of trial courts in civil cases<sup>3</sup> has led to more than a little confusion as lawyers and judges have struggled to apply the correct standard of review in individual cases. Application of the correct standard of review has not proved exceedingly difficult in cases involving purely factual or purely legal questions. Indeed, the law in this state is settled that the appropriate standard of review for purely legal questions is *de novo* review, while the appropriate standard of review for pure questions of fact is the manifest error standard.<sup>4</sup>

Under the *de novo*, or A anew,@ standard, the appellate court is not required to give deference to the rulings of the trial court. Rather, it is free to disregard the rulings of the trial court and perform its own analysis of the legal issue presented. When the finding of the trial court is factual, however, the fact finder=s decision cannot be disturbed on appeal unless the

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<sup>1</sup> Partner, Moore, Walters & Thompson, P. L. C., Baton Rouge, Louisiana and Adjunct Professor of Law, LSU Law Center. .

<sup>2</sup> Associate, Moore, Walters & Thompson, P. L. C., Baton Rouge, Louisiana.

<sup>3</sup> La. Const. Art. V, Sec. 5(C).

<sup>4</sup> *Arceneaux v. Domingue*, 365 So.2d 1330 (La. 1978).

decision of the fact finder, whether judge or jury, is manifestly erroneous or clearly wrong.<sup>5</sup>

A classic problem arises in the appellate review of those cases in which the fact finder finds an unreasonably dangerous condition or an unreasonable risk of harm. In other words, when a judge or jury concludes, for example, that a condition existing on a defendant's premises presented an unreasonable risk of harm, what is the appropriate standard of review for the appellate court to apply when reviewing the decision? Does the court of appeal review the decision *de novo*, or does the manifest error standard apply? These questions cannot be answered without a brief discussion of Louisiana's duty/risk analysis.

### **Questions of Law, Questions of Fact**

To recover in a negligence case the plaintiff must prove five elements: (1) the defendant had a duty to conform his conduct to a specific standard (the duty element); (2) the defendant's conduct failed to conform to the appropriate standard (the breach element); (3) the defendant's substandard conduct was a cause-in-fact of the plaintiff's injuries (the cause in fact element); (4) the defendant's substandard conduct was a legal cause of the plaintiff's injuries (the scope of liability or scope of protection element) and (5) actual damages (the damages element)<sup>6</sup> The broad question, of whether one owes a duty, is a legal question for the judge to decide, while the other four elements are questions for the fact finder - the judge or jury<sup>7</sup> As noted above, pure

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<sup>5</sup> *Id.*

<sup>6</sup> *Boykin v. Louisiana Transit Co.*, 707 So.2d 1225, 1230 (La. 1999).

<sup>7</sup> *Fowler v. Roberts*, 556 So.2d 1, 4-5 (La. 1989).

questions of law are subject to *de novo* review, while pure fact questions are subject to the manifest error standard.

### **Mixed Questions of Law and Fact**

What happens when a fact finder, analyzing the five elements necessary for a finding of negligence, concludes that a party's negligence created an unreasonably dangerous condition or an unreasonable risk of harm? Courts have consistently held that the question of whether something presents an unreasonable risk of harm or an unreasonably dangerous condition is a mixed question of law and fact<sup>8</sup> Because a mixed question contains both legal and factual elements, appellate courts are often at a loss regarding the appropriate standard to apply. Courts have difficulty because the legal elements in the mixed question seem to call for *de novo* review, while the factual elements seem to require application of the manifest error standard. This difficulty has led courts to apply, at various times, both standards of review to mixed law and fact questions<sup>9</sup> and some courts have avoided the question altogether<sup>10</sup>

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<sup>8</sup> *Tillman v. Johnson*, 612 So.2d 70 (La. 1993).

<sup>9</sup> *See generally, Ford v. Beam Radiator, Inc.*, 708 So.2d 1158 (La. App. 1st Cir. 1998); *Grissette v. Thomas*, 704 So.2d 1215 (La. App. 1st Cir. 1998); *Doane v. Wal-Mart Discount Stores, Inc.*, 697 So.2d 309 (La. App. 4th Cir. 1997); *Nichols v. Wal-Mart Stores, Inc.*, 698 So.2d 53 (La. App. 3d Cir. 1996); *Migues v. City of Lake Charles*, 682 So.2d 946 (La. App. 3d Cir. 1996); *Phipps v. Amtrak*, 666 So.2d 341 (La. App. 1st Cir. 1995).

### **Exit the fact finder - *Green and Boyle***

The now-overruled Louisiana appellate court decision of *Green v. City of Thibodaux*<sup>11</sup> watershed on this subject, highlighted the problem faced by appellate courts attempting to review mixed questions of law and fact. The plaintiff in *Green* brought a personal injury action against the City of Thibodaux for personal injuries she sustained when she fell from a cracked curb while watching a Mardi Gras parade. The trial judge ruled in Mrs. Green's favor, holding that the condition of the city's curb presented an unreasonable risk of harm. On appeal, the court faced the issue of whether an unreasonably dangerous condition was a mixed question of law and fact and, if so, the appropriate standard of appellate review in such cases. The First Circuit stated that the manifest error standard creates no problem provided said application is limited to the facts,<sup>12</sup> but held that the final legal determination of whether something creates an unreasonable risk of harm should not be protected on appellate review by the manifest error standard<sup>13</sup>. The *Green* court noted that examples of the types of factual findings to be given due deference in that particular case might include the location of the alleged defect, the size of the crack, and perhaps the manner in which the crack contributed to the plaintiff's fall, but after all such findings of fact are made, the *Green* court reasoned that the application of those facts to

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<sup>10</sup> ***Boyle v. Board of Supervisors, 685 So. 2d 1080 (La. 1997).***

<sup>11</sup> **671 So. 2d 399 (La. App. 1st Cir. 1995).**

<sup>12</sup> ***Id.* at 403.**

<sup>13</sup> ***Id.***

the legal determination of whether the crack creates an unreasonable risk of harm to others should not be protected by the manifest error rule.<sup>14</sup> The court further reasoned that trial courts are no more qualified than appellate courts to *apply* the facts to an accepted legal standard and that application of the manifest error standard to the Aultimate legal conclusion@ would enhance the possibility of disparate results because trial courts are less capable of assuring uniform results than appellate courts<sup>15</sup> The *Green* court then went on to decide the issue *de novo* and held that the crack in the curb in that case did not present an unreasonable risk of harm.

Judge Melvin Shortess, in a well-written dissent, highlighted a number of problems in the majority=s analysis, not the least of which was that in *Oster v. State*<sup>16</sup> the Louisiana Supreme Court held that the unreasonable risk of harm question is not a simple rule of law that can be applied mechanically to the facts of a case<sup>17</sup> Judge Shortess argued that the majority should have applied the manifest error standard to affirm the trier of fact=s conclusion that the curb was unreasonably dangerous. The dissent also recognized that an affirmation of the trial court=s

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> **582 So. 2d 1285 (La. 1989).**

<sup>17</sup> *Id.* at 1289, quoting *Landry v. State*, **495 So. 2d 1284 (La. 1986).**

decision would have allowed the court to address what he saw as the case's key issue - Ms. Green's comparative fault<sup>18</sup>

*Boyle v. Board of Supervisor*<sup>19</sup> presented the Louisiana Supreme Court with an opportunity to address the issue of the correct standard of review to apply to mixed questions of law and fact. Unfortunately, the Court pretermitted the standard of review question by holding that, regardless of the standard applied, the trial court's findings in that case were manifestly erroneous. *Boyle*, like *Green*, arose out of a trip-and-fall accident. Mrs. Boyle, an LSU student who tripped and fell on an LSU sidewalk, asserted a cause of action against the LSU Board of Supervisors (LSU) on grounds that her fall was caused by a depression in the sidewalk that rendered it unreasonably dangerous. The trial court ruled in Mrs. Boyle's favor, finding that the depression in the sidewalk was unreasonably dangerous, that it caused Mrs. Boyle's injuries, and that LSU had constructive knowledge of the defect. On appeal, the First Circuit found no manifest error and affirmed the trial court ruling.

In the Louisiana Supreme Court, LSU argued that the First Circuit misapplied the manifest error standard of review when it agreed with the trial court that a depression in the

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<sup>18</sup> **This point is interesting because while the *Green* court seemed very concerned about whether Ms. Green had acted as a reasonably prudent person, its decision to reverse the trial court's finding on the condition of the curb rendered moot the issue of Ms. Green's comparative fault issue, something the majority opinion suggests it found important.**

<sup>19</sup> **685 So.2d 1080 (La. 1997).**

sidewalk created an unreasonably dangerous condition. LSU argued that whether something is unreasonably dangerous is a legal question not protected by the manifest error standard. Citing *Green*, LSU also argued that while the trial court's findings of fact as to the condition of the sidewalk should be accorded the benefit of the manifest error rule, the application of those factual findings to the final legal determination of whether a condition presents an unreasonably dangerous condition or unreasonable risk of harm should not be subject to the manifest error standard.

*Boyle* is an interesting case in that while the Louisiana Supreme Court pretermitted the standard of review issue, it essentially performed the same Application of law to fact@ analysis used in *Green* to find that the LSU sidewalk was not unreasonably dangerous. The *Boyle* court reversed the trial court decision that the sidewalk presented an unreasonably dangerous condition because, considering the utility factors articulated in *Entrevia v. Hoo*<sup>20</sup> and *Langlois v. Allied Chemical Corporation*<sup>21</sup> the court concluded that a defect the size of the one Mrs. Boyle tripped over did not present an unreasonable risk of harm, and, regardless of the standard applied, the trial court was manifestly erroneous in its conclusion. The role of the fact finder was never discussed.

#### **Enter the fact finder - *Reed v. Wal-Mart Stores***

The Louisiana Supreme Court finally addressed the issue of the appropriate standard of review for mixed questions of law and fact in *Reed v. Wal-Mart Stores*<sup>22</sup> The plaintiff in *Reed*

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<sup>20</sup> **427 So. 2d 1146 (La. 1983).**

<sup>21</sup> **258 La. 1067, 249 So. 2d 133 (1971).**

<sup>22</sup> **708 So. 2d 362 (La. 1998).**

fell in a Wal-Mart parking lot, breaking her arm. She asserted a cause of action against Wal-Mart, alleging that one of the expansion joints in the parking lot created a dangerous walking surface. The trial court agreed and awarded damages in plaintiff's favor. The decision was affirmed by the Louisiana Third Circuit Court of Appeal<sup>23</sup>

The *Reed* court addressed the proper standard of reviewing, and what is encompassed within, a finding that a defect presents an unreasonable risk of harm. The court noted that while it had not previously articulated the proper standard for reviewing a determination that a condition presented an unreasonable risk of harm, it had addressed the issue in several prior cases<sup>24</sup> The Court noted that it had also recognized that the concept of defining an unreasonable risk of harm requires a balancing of the risk and utility of the condition and is not a simple rule of law which can be applied mechanically to the facts of a given case<sup>25</sup> This is in direct contrast to the First Circuit's 1995 decision in *Green*, in which that court expressly stated that a trial court was no better qualified than an appellate court to apply the law to a given set of facts<sup>26</sup> In *Reed*, the Louisiana Supreme Court made clear that the concepts of Anunreasonable risk of

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<sup>23</sup> 692 So.2d 49 (La. App. 3d Cir. 1997).

<sup>24</sup> *Id.* at 364, citing *Tillman v. Johnson*, 612 So.2d 70 (La. 1993); *Oster v. Dept. of Transp. & Dev.*, 582 So.2d 1285 (La. 1991); *Landry v. State*, 495 So.2d 1284 (La. 1986); *Entrevia v. Hood*, 427 So.2d 1146 (La. 1983).

<sup>25</sup> *Oster*, 582 So.2d 1288.

<sup>26</sup> 671 So.2d at 403.

harm@ or Unreasonably dangerous condition@ are not fixed legal concepts, rather Abecause of the plethora of factual questions and other considerations involved, these issues must be resolved on a case-by-case basis.<sup>27</sup>

The *Reed* court clarified the unreasonably dangerous/unreasonable risk of harm inquiry by recognizing that the trier of fact must decide whether the social value of the hazard outweighs, and thus justifies, its potential harm to others, and the reviewing court must then evaluate the fact finder=s analysis under the manifest error standard of review.

### **Some thoughts on *Reed* and where to go from here**

In *Reed*, the Louisiana Supreme Court corrected what had been a troublesome inquiry for courts of appeal facing mixed questions of fact and law. Until *Green* and its progeny, the law in this state had been settled that the question of whether a defendant owed a duty was a question for the judge<sup>28</sup> subject to *de novo* review on appeal. The remaining four elements of the duty/risk inquiry - breach, cause in fact, scope of the risk, and damages - were questions for the fact finder<sup>29</sup> The *Reed* decision clarifies this and also makes clear that while the four non-judge questions - breach, cause in fact, scope of the risk, and damages - may contain some questions of law, the fact finder=s findings on those questions shall be subject to the manifest error standard of review on appeal. In so doing, the Louisiana Supreme Court has recognized the essential authority of the fact finder to decide these important questions and, as importantly, recognized

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<sup>27</sup> **708 So. 2d at 364.**

<sup>28</sup> ***Fowler v. Roberts*, 556 So. 2d 1 (La. 1989); *Roberts v. Benoit*, 605 So. 2d 1032 (La. 1991).**

<sup>29</sup> ***Id.***

that the fact finder's decision on these issues should be treated with deference on appeal. The message of *Reed*, a case decided within the context of an unreasonably dangerous condition question, is that in deciding cases that implicate mixed questions of law and fact and, by consequence, the Louisiana duty/risk analysis, appellate courts are bound to review mixed questions of law and fact using the manifest error standard and must avoid *de novo* review of those questions on appeal. Indeed, in view of the decision in *Reed*, it would appear that all mixed questions of law and fact, including such questions as course and scope of employment, whether one is a statutory employer, and the scope of defendant's duty should be subject to the manifest error standard on appeal,