

## FUNCTIONS OF JUDGE AND JURY IN NEGLIGENCE CASES

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THE jury system plays an important part in the administration of accident law. This means that procedural rules and devices which allocate power between court and jury may have great bearing on the way accident law actually works. And it also means that the practical implications of many a rule of substantive law can scarcely be appreciated without an understanding of just how the rule affects that allocation of power. This has been pointed out before.<sup>1</sup> But there is a good deal of reason to believe that much of accident law is now in a period of transition from older notions based on individual blame or fault towards some form of social insurance roughly comparable to workmen's compensation. And it is in such a time of flux, when legal theory is apt to be laggard, that the jury is likely to play a particularly significant role—one which calls for frequent reexamination and re-appraisal. In trying to analyze the functions of judge and jury, let us first take up the question where in theory the law draws the line of division, then inquire into the ways in which each branch of the tribunal is sought to be kept within its theoretical sphere, and draw some conclusions as to the practical effectiveness of these means. Finally we may be able to make some generalizations about the practical implications of certain kinds of substantive rules—implications which might not be seen, if their procedural setting should be overlooked.

### THEORETICAL DIVISION OF FUNCTION

It is a commonplace today that questions of law are for the court and questions of fact for the jury,<sup>2</sup> whatever the historical vicissitudes of this notion may have been.<sup>3</sup> It is just as commonplace, at least in the profession, that this statement has never been fully true in either

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1. Notably in GREEN, *JUDGE AND JURY* (1930).
2. THAYER, *A PRELIMINARY TREATISE ON EVIDENCE* c. V. (1893).
3. See THAYER, *op. cit. supra*, at 183-9; 1 HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 317-9, 330-7, 341 (1931); Farley, *Instructions to Juries—Their Role in the Judicial Process*, 42 *YALE L. J.* 194, 195-205 (1932).

of its branches, and tells us little or nothing that is helpful.<sup>4</sup> Able analyses of the extent to which it is true and how it must be qualified have been made.<sup>5</sup> But it will be more helpful for our purpose to disregard the statement and see what jobs the tribunal as a whole has to perform in tort cases, then examine the roles which have been assigned by precedent to judge and jury respectively, in connection with performing that job. This will reveal the points at which theory is elastic, and most subject to change.

#### DETERMINATION OF FACTS

The tribunal's first job is to determine what the parties did and what the circumstances surrounding their conduct were. This we denote as the *facts* of the specific case, as distinguished from an evaluation or interpretation of those facts in terms of their legal consequences. To be sure, any such distinction (here as elsewhere in the law),<sup>6</sup> is somewhat theoretical and by no means clear-cut; but if we keep its limitations in mind and remember its rough character, the distinction will be useful enough for present purposes. The questions whether a pedestrian looked for traffic before stepping off the curb, whether at this time defendant's automobile was 50 feet or 200 feet away, whether the traffic signal was red or green, the speed of the car, the distance in which it could be stopped at that speed, whether the driver saw the pedestrian, whether he sounded a horn, and so on, may conveniently be distinguished from such questions as whether the pedestrian should have looked or should have seen the car, whether he should have proceeded with the traffic light as it was, the reasonableness of the car's speed, the adequacy of brakes which could perform as these could, whether the driver should as a reasonable man have foreseen that the pedestrian would continue into danger, and should have blown his horn.

Now the determination of what the facts of a specific case were, in the sense referred to above, may be called the determination of the very prototype of questions of fact which are to be determined by the jury; and so it is, to the extent that any question is. Yet it is at once apparent that in connection with this very process the court has im-

4. "The maxim *ad questionem facti non respondent iudices, ad questionem juris non respondent juratores* [Judges do not answer questions of fact; juries do not answer questions of law], was never true, if taken absolutely." THAYER, *op. cit. supra* note 2, at 185. See also *id.* at 248-9. See GREEN, *op. cit. supra* note 1, at 279; MORGAN & MAGUIRE, *CASES ON EVIDENCE* 415 (2d ed. 1942); CLEMENTSON, *SPECIAL VERDICTS* 4 (1905).

5. THAYER, *op. cit. supra* note 2, at c. V. See also Thayer, "Law and Fact" in *Jury Trials*, 4 HARV. L. REV. 147 (1890).

6. See, e.g., Cook, *Statements of Fact in Pleading Under the Codes*, 21 COL. L. REV. 416 (1921); CLARK, *CODE PLEADING* § 38 (2d ed. 1947); Clark & Stone, *Review of Findings of Fact*, 4 U. OF CHI. L. REV. 190 (1937).

portant roles to play, and opportunity to exercise very real control over the jury. All this stems from the basic notion, now universally accepted, that the jury is limited, in making these determinations, to the evidence produced in court and to matters so commonly known and so beyond dispute, that the principle of judicial notice is applied to them.<sup>7</sup> The notion has this consequence because it is the court that determines what evidence may be received, what the proper limits of judicial notice are,<sup>8</sup> and whether sufficient evidence has been produced to warrant the finding of any given fact.<sup>9</sup>

*The court limits what the jury may consider.* The court decides questions of the admissibility of evidence.<sup>10</sup> These are of two kinds: those involving notions of relevancy, and those involving the exclusionary rules.<sup>11</sup> Now the concept of relevancy itself is not a legal one, but one involving principles of logic of general application. That is to say, the question whether a given piece of evidence is relevant in the attempt to prove a proposition and the question of the extent of its probative value, are both referable to general principles of logical reasoning and not to any rules of law.<sup>12</sup> Nevertheless the decision of questions of relevancy invokes the function of the court in the following ways:

(1) The court determines what the propositions are which need to be

7. Originally, the jury could make their determinations upon the basis of their private knowledge as members of the community. See THAYER, *op. cit. supra* note 2, at 170; HOLDSWORTH, *op. cit. supra* note 3, at 332-6. However, the jury came to be limited to evidence produced in court. See *Rex v. Sutton*, [1816] 4 M. & S. 532. So that "our modern jury, . . . also are judicial officers, bound to act only upon evidence which is given to them under the eye of the judge." THAYER, *supra*, at 296. And see Grier, J., "A jury has no right to assume the truth of any material fact, without some evidence legally sufficient to establish it. It is, therefore, error in the court to instruct the jury that they may find a material fact, of which there is no evidence from which it may be legally inferred." *Parks v. Ross*, 11 How. 362, 373 (U.S. 1850).

Juries as well as courts are to consider matters of common knowledge without proof. See WIGMORE, *EVIDENCE* § 2570 (3d ed. 1940); THAYER, *op. cit. supra* note 2, at 280, 302.

8. WIGMORE, *op. cit. supra* note 7, at §§ 1450, 2550; THAYER, *op. cit. supra* note 2, at 296-8.

9. WIGMORE, *op. cit. supra* note 7, at § 2494.

10. WIGMORE, *op. cit. supra* note 7, at §§ 28, 2549, 2550. See also authorities cited note 20 *infra*.

11. WIGMORE, *op. cit. supra* note 7, at § 10; THAYER, *op. cit. supra* note 2, at 265, 269, 468.

12. "The law furnishes no test of relevancy. For this it tacitly refers to logic and general experience,—assuming that the principles of reasoning are known to its judges. . . ." THAYER, *op. cit. supra* note 2, at 265. See WIGMORE, *op. cit. supra* note 7, at §§ 28-9.

"Is it then really so, that this great multitude of decisions, emerging day by day, and holding that such and such evidence is or is not admissible, have so little to do with the law of evidence which they are professing to declare? Yes. The greater part of them are really reducible to mere propositions of sound reason as applied to a point of substantive law or pleading." THAYER, *op. cit. supra* note 2, at 269.

proved or which may be proved.<sup>13</sup> Thus the court limits and selects the evidence which will come before the jury for consideration. If, for example, the court rules that the novice and the experienced driver are both held to the same standard of conduct, it will exclude testimony that the defendant was just learning to drive if that evidence is offered as tending to excuse him from taking a given precaution, and if a timely and proper objection is made.<sup>14</sup> Or if a court believes that the standard of care is an objective one which takes no account of a defendant's honest but substandard misjudgment, it will not let the jury hear evidence which tends to show the defendant's good faith belief that his course of action was the wisest one.<sup>15</sup>

(2) The court determines what degree of relevance or probative value will satisfy the requirements of the law. General reasoning may reveal whether offered evidence has *any* relevancy or probative value and if so how much.<sup>16</sup> But there are infinite degrees of relevancy, and

13. THAYER, *op. cit. supra* note 2, at 269.

14. No case has been found covering the exact point (*i.e.*, the inadmissibility of evidence of an actor's incompetence for the purpose of *excusing* his negligence). See, however, *Hughey v. Lennox*, 142 Ark. 593, 598, 219 S.W. 323, 325 (1920) ("An unskillful or inexperienced driver is not to be excused from liability for injuries inflicted because of his inexperience and unskillfulness."). And compare the tacit assumption of an objective standard of care for the inexperienced which underlies such holdings as *Carlson v. Connecticut Co.*, 94 Conn. 131, 108 Atl. 531 (1919), 8 A.L.R. 569; *Denver City Tramway Co. v. Cowan*, 51 Colo. 64, 116 Pac. 136 (1911); *Fonda v. St. Paul City Ry. Co.*, 71 Minn. 438, 74 N.W. 166 (1898) (incompetence or inexperience of servant in itself no ground for master's liability to third person since master will be vicariously liable if servant was negligent *on this occasion* no matter how competent he is generally; and not liable if servant used reasonable care *on this occasion*, no matter how incompetent or inexperienced he is generally).

15. In *Vaughan v. Menlove*, 3 Bing. N. C. 468 (1837), it is implied that evidence as to the actor's belief or good faith that his conduct is not unreasonable is irrelevant and inadmissible. In *Hover v. Barkhoof*, 44 N.Y. 113 (1870), the court excluded testimony by the defendant highway commissioners as to their belief in the structural soundness of a bridge which collapsed. In *Missouri, K. & T. Ry. Co. v. Miller*, 8 Tex. Civ. App. 241, 27 S.W. 905 (1894), the court held that it was error to permit testimony by the plaintiff on the issue of his contributory negligence as to his belief in the safety of jumping from a moving train. "Appellee was permitted to testify, over objection, that he did not consider it unsafe to get off the train at the time and place he alighted. Appellee's opinion on this point was not competent evidence. What he thought of the dangers of the undertaking was not in issue. The question for determination was, would an ordinarily prudent person have jumped off as he did under the conditions?" *Id.* at 246, 27 S.W. at 906. See also *Gulf, C. & S.F. Ry. Co. v. Guess*, 154 S.W. 1060 (Tex. Civ. App. 1913).

16. This statement assumes that logical reasoning can be sure-footed in making such a determination, but that is a vast oversimplification of the matter. Since there is here, too, much room for doubt and argument in any given case, and since it is the court which makes the initial decision in this field too, there is here an added opportunity for judicial control in ruling on matters of relevancy.

The statement also overlooks the notion that in an ultimate philosophical sense nothing is completely irrelevant to the proposition to be proved. But that does not impair the validity of the statement for present purposes.

it is the court which determines what degree is requisite for admissibility and whether offered evidence will be so confusing or prejudicial that its probative value is outweighed.<sup>17</sup> Thus the court decides whether a restaurateur may show that his beans were eaten by many patrons without ill effects for the purpose of proving that they were not the cause in fact of plaintiff's sickness.<sup>18</sup>

The limits imposed by the concept of relevancy are not the only ones. Anglo-American law has developed the great exclusionary rules of evidence and these of course are administered by the court.<sup>19</sup> Thus the court determines whether evidence of a conversation is offered for a hearsay purpose and if so whether it comes within any exception to the hearsay rule. Moreover, it is often necessary for the court to make a finding, on conflicting evidence, as to whether a fact exists as a preliminary step in ruling on this kind of question of admissibility.<sup>20</sup>

We have noted that, in addition to the evidence produced in court, the jury may consider whatever is judicially noticeable, and that the court (at least in theory) determines the limits of what may and what must be considered under this head. Thus where there has been no evidence as to whether or not a given trolley car had a gong, it is for the court to decide whether the jury may proceed on the assumption that it did have one.<sup>21</sup> The formula for making this decision is one that gives the courts in practice a good deal of latitude.<sup>22</sup>

17. WIGMORE, *op. cit. supra* note 7, at § 28. See also MODEL CODE OF EVIDENCE Rule 303 (1942): "(1) The judge may in his discretion exclude evidence if he finds that its probative value is outweighed by the risk that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairly surprise a party who has not had reasonable ground to anticipate that such evidence would be offered." See also THAYER, *op. cit. supra* note 2, at 516.

It is true that some questions in the problem that has been called "dependent relevancy" go to the jury. If, for example, the relevancy of fact A depends on the coexistence of fact B, and if the evidence as to fact B's existence is in conflict, the jury will determine whether fact B exists and will be told to consider fact A only if this finding is in the affirmative. See Morgan, *Functions of Judge and Jury in the Determinations of Preliminary Questions of Fact*, 43 HARV. L. REV. 165, 169 (1929); Epstein and Maguire, *Preliminary Questions of Fact in Determining the Admissibility of Evidence*, 40 HARV. L. REV. 392, 419-21 (1927).

But here, too, it is the court that determines (1) whether there is enough evidence of B's existence to go to the jury and (2) whether A meets the canons of relevancy, if B's existence be assumed. Morgan, *supra*, at 169; Epstein & Maguire, *supra*, at 421.

18. *Landfield v. Albiani Lunch Co.*, 268 Mass. 528, 168 N.E. 160 (1929). See MORGAN & MAGUIRE, *op. cit. supra* note 4, at 191n. 6 for additional cases.

19. THAYER, *op. cit. supra* note 2, at 264-6; WIGMORE, *op. cit. supra* note 7, at §§ 16, 2550.

20. WIGMORE, *op. cit. supra* note 7, at § 2550; Morgan, note 17 *supra*, at 165, 166, 169, 175; Epstein & Maguire, note 17 *supra*, at 392, 412, 413.

21. *Mills v. Denver Tramway Corp.*, 155 F.2d 808 (10th Cir. 1946), noted in 60 HARV. L. REV. 299 (1946).

22. Morgan, *Judicial Notice*, 57 HARV. L. REV. 269 (1944); WIGMORE, *op. cit. supra*

The court determines the sufficiency of the evidence to show the existence of a fact.<sup>23</sup> When there is direct evidence of the existence of a fact in issue,<sup>24</sup> a jury will in most cases be authorized to find the existence of that fact. Thus if plaintiff says he looked before he stepped off the curb, or the defendant's engineer says he blew his whistle for the crossing, or a tenant testifies that he requested the landlord to make certain repairs in the premises six weeks before the accident, it is the jury's province to decide whether to believe the witness. But even here the court has retained some control. In all cases it may find a direct testimonial assertion of a fact insufficient evidence of that fact's existence where under all the circumstances the testimony is not reasonably credible.<sup>25</sup> A witness's story may be so inherently fantastic as to be incredible.<sup>26</sup> Or it may fly in the face of incontrovertible physical facts.<sup>27</sup> Perhaps the commonest instance of this is the case where a

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note 7, at § 2566; THAYER, *op. cit. supra* note 2, at 309: ". . . it is an instrument of great capacity in the hands of a competent judge; and is not nearly as much used, in the region of practice and evidence, as it should be."

23. The phrase "sufficiency of the evidence" to show negligence is often used to include the kind of questions dealt with in the next section. Thus Holmes says: "When a judge rules that there is no evidence of negligence, he does something more than is embraced in an ordinary ruling that there is no evidence of a fact. He rules that the acts or omissions proved or in question do not constitute a ground of legal liability. . . ." HOLMES, *THE COMMON LAW* 120-1 (1881). It will be noted that the term is used more narrowly here.

24. *I.e.*, one which constitutes an essential element of the proposition which one of the parties is seeking to establish as his side of one of the ultimate issues made by the pleadings in the case. WIGMORE, *op. cit. supra* note 7, at §§ 24, 25 (Wigmore prefers to call this "Testimonial Evidence." *Id.* at §§ 25, 475.).

25. See ARNOLD & JAMES, *CASES ON TRIALS, JUDGMENTS, AND APPEALS* 640-64 (1936) for illustrative cases.

26. In *Baril v. New York, N.H. & H. R. Co.*, 90 Conn. 74, 96 Atl. 164 (1915), plaintiff's testimony that he sustained a fall on defendant railroad's subway steps due to insufficient lighting was considered fantastic in the light of the testimony of nine disinterested witnesses. In *Graham v. Chicago & N. R. Co.*, 143 Iowa 604, 119 N.W. 708 (1909), where plaintiff's intestate was killed while boarding a moving train, the testimony of the deceased's companion on the second trial was so contradictory of his evidence on the first trial and so impossible and absurd as to require a directed verdict. See *Kelly v. Jones*, 290 Ill. 375, 378, 125 N.E. 334, 337 (1919), 8 A.L.R. 792, 795 ("There may be such inherent improbability in the testimony of a witness as to justify a court in disregarding his evidence even in the absence of any direct contradiction.") See also *Briney v. Illinois Central R. Co.*, 330 Ill. App. 250, 70 N.E.2d 743 (1947) (testimony of inherent improbability may be disregarded); *Bank of U.S. v. Manheim*, 264 N.Y. 45, 189 N.E. 776 (1934); *Fricke v. International Harvester Co.*, 247 Fed. 869 (8th Cir. 1917).

27. In *Scott v. Hansen*, 228 Iowa 37, 289 N.W. 710 (1940), testimony that defendant had failed to reduce his speed before striking cow was held to be contradicted by the physical facts, consisting of skid marks 354 feet long and fact that collision with cow did not break any glass except headlight or throw occupants of the car forward. *Louisville & N. R. Co. v. Chambers*, 165 Ky. 703, 178 S.W. 1041 (1915), is an amusing case. The plaintiff claimed that the impact of a derailed freight car crashing into her backyard threw her out of bed over a two foot high bed railing onto a rocker at the foot of the bed,

motorist says he looked carefully down the track just before crossing it and saw no train, but was struck at the crossing by a train which was in clear view for half a mile.<sup>23</sup> Of course it is the court which decides whether evidence is reasonably credible and the concept under discussion here could theoretically be extended so that the court's judgment was in effect substituted for the jury's. In fact, however, the courts have exercised restraint in using this notion, and if there is any trend it is probably towards even greater restraint.<sup>24</sup> There is another basis on which courts sometimes (but rarely) rule direct evidence of a fact in issue to be insufficient. That is by requiring corroboration. Thus some courts have held that an unusual jerk or jolt of a trolley, car, train, or bus, is not sufficiently proven by testimony which simply describes the jolt's severity by appropriate adjectives.<sup>25</sup>

Where the question is one of the sufficiency of circumstantial evidence to prove a fact in issue, the courts have exercised far more control although its extent is partly concealed and not, perhaps, often fully realized. This is true because the test for determining whether an inference (from circumstantial evidence) is a *rational* one is stated in terms of mathematical precision but is one which allows the very

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causing her to sustain injuries. The court held that plaintiff's testimony as to the force or impact was contradicted by the physical fact that the freight car neither touched the house nor broke any windows in the house. See also *Samulski v. Menasha Paper Co.*, 147 Wis. 285, 133 N.W. 142 (1911); *Couch's Adm'r v. Black*, 301 Ky. 24, 190 S.W.2d 681 (1945).

28. See *Kraus v. Baltimore & O. R. Co.*, 183 Md. 664, 670, 39 A.2d 795, 798 (1944) ("... when one who can see says he looked and listened but did not see or hear an object which, if he had really looked and listened, he must have seen or heard, the testimony is incredible and will not be believed by the Court.") In *Gianotta v. New York, N. H. & H. R. Co.*, 98 Conn. 743, 120 Atl. 560 (1923), the Connecticut court held that it was error to instruct the jury that there was a conflict in the evidence as to the distance plaintiff would have seen the approaching car because it disregarded the physical facts marking the line of vision.

29. In *Kuper v. Betzer*, 115 F.2d 842 (8th Cir. 1940), where plaintiff testified that he looked before entering an intersection and saw no car, but was struck almost immediately upon entering the intersection, the circuit court reversed a directed verdict for defendant, given on the ground that plaintiff's testimony was against the physical facts, stating: "This court and the trial court ordinarily must accept as true the testimony even of a veritable Munchausen in the uttermost stretches of his imagination." *Id.* at 844. See *People v. Hanisch*, 361 Ill. 465, 468, 198 N.E. 220, 221 (1935), per Jones, J.: "... it is the province of the jury, alone, to determine the weight of the evidence and the credibility of witnesses. If it were not so there would be little use for the jury system. The jury as a fact-finding body, is of such importance that an abridgement of its functions in this regard and an appropriation of them by the judge would mean the forsaking of a valued tradition in our system of jurisprudence." See also *Peri v. Los Angeles Junction Ry. Co.*, 22 Cal.2d 111, 137 P.2d 441 (1943). And cf. *Hisak v. Lehigh V. Tr. Co.*, 300 Pa. 1, 59 A.2d 900 (1948) (liberal attitude towards "physical facts" rule).

30. *Coyle v. Pittsburg Rys. Co.*, 149 Pa. Super. 281, 27 A.2d 533 (1942). I have elsewhere treated some of the recent cases on this point. James, *Accident Liability: Some Wartime Developments*, 55 YALE L. J. 365, 386-7, and notes 108-12 (1946).

greatest latitude in actual application. The test has been expressed thus: "If the plaintiff <sup>31</sup> cannot show the possibility of a conclusion of [the existence of the fact to be proved] by a clear preponderance of its likelihood . . . and excluding other probabilities just as reasonable . . . the plaintiff should not be permitted to go to the jury."<sup>32</sup> Or as it is sometimes put, where from the facts most favorable to plaintiff the non-existence of the fact to be inferred is just as probable as its existence, the conclusion that it exists is a matter of speculation, surmise, and conjecture, and a jury will not be permitted to draw it.<sup>33</sup> Thus the test purports to invoke only the processes of logical reasoning and the mathematics of probability. "Difficulty comes from the fact that anything even remotely adumbrating accurate statistical knowledge about the relative probabilities in even the most commonly recurring situations is completely lacking. Of course some generalizations would command wide, even universal, acceptance. These are the judgments of 'common sense.' But even here it is not safe to forget how often the science of the morrow makes the common sense of the day seem foolish. Moreover the area is vast wherein thoughtful men who accept today's common sense would either disagree or refuse to guess on which side of the line the greater probability lies. All that has been said has not, quite properly, prevented the law from constantly coming to conclusions about circumstantial proof. But it does mean that the authoritative language of nice and scientific precision in which such conclusions are cast is after all only the language of delusive exactness. And it does mean that throughout the field of circumstantial proof there is not a little room for considerations of policy and expediency to play a part in choosing between two very fallible and equally undemonstrable generalizations about the balance of probability."<sup>34</sup>

In some jurisdictions the supervisory power of the courts to decide whether the evidence supports a verdict is not limited by the concept of sufficiency of the evidence so far as the granting of new trials is concerned. In them the trial court may set aside a verdict which it feels is against the clear weight of the evidence even though the evidence to support the verdict cannot be rejected as utterly incredible.<sup>35</sup> Of course this rule and the more usual one could be so admin-

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31. This rule generally operates against a plaintiff because he has the burden of proof.

32. *Nash v. Raun*, 149 F.2d 885, 888 (3d Cir. 1945). *Cf.*, however, *Gutierrez v. Public Service Int. T. Co.*, 168 F.2d 678, 680 (2d Cir. 1948), suggesting that this "may be an overstatement of the quantum of proof required."

33. PROSSER, *TORTS* 292 (1941).

34. James, *supra* note 30, at 387-8.

35. *Aetna Gas. & Sur. Co. v. Yeatts*, 122 F.2d 350 (4th Cir. 1941) (with a review of the federal and English common law authorities); *Daffinrud v. United States*, 145 F.2d 724 (7th Cir. 1944); cases collected in ARNOLD & JAMES, *op. cit. supra* note 25, at 650n.16.

istered that the tests approached each other in practice. Probably, however, courts actually exercise more supervisory power over verdicts where the rule is stated in terms of "weight of the evidence."<sup>33</sup>

*The court creates presumptions and allocates the burden of proof.* We have seen how the court determines whether from facts in evidence a rational inference may be drawn of a fact to be proved, and how very much room for discretion in this process lurks behind the false precision of a phrase. But even if such a "purely logical" inference may not be drawn, the court may create a rebuttable presumption on the basis of certain facts that a fact to be proved existed. This may either permit or require a decision that the presumed fact existed, depending on the effect that the court determined the presumption to have, and, on what, if any, evidence has been introduced which tends to show the non-existence of the presumed fact.<sup>37</sup>

Moreover in all cases the court determines who has the burden of producing evidence in the first place, and at various stages in the trial<sup>38</sup> such as upon the closing of his case by either party. And it is the court which allocates the risk of non-persuasion of the jury.<sup>39</sup>

36. In the *Yeatts* and *Daffinrud* cases, *supra* note 35, there was conflicting evidence so that a verdict could not have been directed for either party. In each of them the trial court in the exercise of its discretion refused to set aside the verdict. In each of them the circuit court of appeals upheld the action of the trial court but declared that it would also have upheld the setting aside of the verdict if the trial court's discretion had dictated such a course. Cf. *Roedegir v. Phillips*, 85 F.2d 995 (4th Cir. 1936) where upon a similar conflict in the evidence, the setting aside of a verdict was upheld (the situation also presented in the cases cited in the footnote in *ARNOLD & JAMES, loc. cit. supra* note 35).

With these cases is to be contrasted the more usual attitude expressed by the ruling and the language in *Glazer v. Rosoff*, 111 Conn. 707, 151 Atl. 165 (1930), where the court, in reversing an order setting aside a plaintiff's verdict in an action for breach of promise to marry, said: "Where there is testimony sufficient to support a verdict, a trial court is not at liberty to substitute its own judgment that it is incredible, for the contrary conclusion of the jury, unless that conclusion is one which could not have been reasonably reached or is not legally permissible." *Id.* at 708-9, 151 Atl. at 165. See also *Edgerton v. Norfolk So. Bus Corp.*, 187 Va. 692, 47 S.E.2d 409 (1948), cases reprinted and cited *ARNOLD & JAMES, op. cit. supra*, 640-64.

The contrasting attitudes are neatly illustrated in the majority and dissenting opinions in *Berkowitz v. Consol. Gas Co.*, 134 App. Div. 389, 119 N.Y. Supp. 100 (1st Dep't 1909).

37. *THAYER, op. cit. supra* note 2, at c. VIII; *WIGMORE, op. cit. supra* note 7, at §§ 2487, 2491; *CLARK, CASES ON PLEADING AND PROCEDURE* 288-99 (1940), especially, note at 297; *Bohlen, The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof*, 68 U. OF PA. L. REV. 307 (1920).

38. *THAYER, op. cit. supra* note 2, at c. IX; *WIGMORE, op. cit. supra* note 7, at § 2487.

39. We have already seen how this affects questions involving the sufficiency of the evidence.

Matters of presumptions and burden of proof affect not only the decisions of whether a fact existed but also the legal evaluation of that fact, as we shall presently see.

## DETERMINATION OF LEGAL CONSEQUENCES

The other main job confronting the tribunal as a whole in accident cases is to evaluate the conduct of the parties, in the light of the circumstances, in terms of its legal consequences. At one end of this function the exclusive role of the court is clear. It alone determines what the broad rules of substantive law are, and which ones may be applicable to the case at hand. Thus the court decides whether the case is one where liability is absolute or whether it depends on negligence; what, if any, effect contributory negligence will have; how liability will be affected if injury is produced through the intervention of some unforeseeable factor; that negligence consists in conduct involving an unreasonable risk of harm, and the like. But each case also involves a more specific evaluation of the conduct in the concrete situation with which it deals; a determination of specific standards of conduct for the parties under the circumstances of the actual case. It must be decided, for instance, whether *this* driver should have been proceeding more slowly at this intersection, whether he should have blown his horn, whether he should have anticipated that a pedestrian on the sidewalk would continue on to the crosswalk. Now it is perfectly clear that rules of law could be so formulated and so administered as to exclude the jury from making these evaluations. A court could decide, for instance, that under a given set of circumstances a motorist must blow his horn;<sup>40</sup> that under a different set of circumstances he need not do so. Under such a pair of rules, the theoretical function of the jury would be only to decide which set of circumstances existed in the case before them,<sup>41</sup> and whether the horn was blown; the question whether it should have been blown being decided by the court. On the other hand it would be perfectly possible so to formulate the rule that the jury is to decide not only what the circumstances and the conduct were but also whether the horn should have been blown.

On the whole the rules of accident law are so formulated as to give the jury considerable scope in deciding what the parties should have done, in each specific case, as well as what they did do. The cardinal concept is that of the reasonably prudent man under the circumstances: what he would have observed; what dangers he would have perceived; what he would have done, and the like. And as a rule the jury is called upon to determine such questions under broad directions as to what evidence and what kinds of factors they ought to consider in making such decisions.<sup>42</sup> Here again, however (as in the

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40. *Demonde v. Targett*, 97 Conn. 59, 115 Atl. 470 (1921).

41. For the sake of simplicity it is assumed that the evidence would require a finding of one or the other set of circumstances covered by the rule, and that the evidence is in conflict.

42. Elsewhere in the law rules which are phrased in terms of what is reasonable are sometimes administered in such a way as to exclude the jury from deciding what the

case of what testimonial evidence a jury may believe), the courts set outer limits. A jury will not be permitted to require a party to take a precaution which is clearly unreasonable.<sup>43</sup> Nor may it excuse a party from taking a precaution which all reasonable men would clearly take under the circumstances.<sup>44</sup> Thus, for example, the jury may not require a train to stop before passing over each grade crossing in the country.<sup>45</sup> On the other hand a pedestrian may not be excused from looking at some point when he is about to cross a busy thoroughfare.<sup>46</sup> Since it is the courts which determine what is clearly or undoubtedly reasonable under this rule of limitation, they could so administer it as to leave little or nothing for the jury to decide in this sphere. But here again (also as in the case of what testimonial evidence a jury may believe), the courts have exercised restraint in invoking this limitation, and the trend is probably on the whole towards even greater liberality.<sup>47</sup>

Within these limitations (of what reasonable men could find to be reasonable conduct or its opposite), courts sometimes go further in

parties ought to do, *e.g.*, what is a "reasonable time" for the presentment of a negotiable instrument has been specifically defined by the law. *Nuzum v. Sheppard*, 87 W. Va. 243, 104 S.E. 587 (1920), 11 A.L.R. 1024. See THAYER, *op. cit. supra* note 2, at 213.

43. Thus the Pennsylvania court held that a bank holdup was not sufficiently foreseeable to warrant a jury in concluding that the bank should train its tellers to meet the exigency. *Noll v. Marian*, 347 Pa. 213, 32 A.2d 18 (1943); 18 TEMP. L.Q. 290 (1944). If there is no sufficient reason to anticipate the occurrence of an event, the court may hold as a matter of law that it would be unreasonable for the jury to require precautionary measures. *Pennsylvania R. R. v. Cook*, 180 Md. 633, 26 A.2d 384 (1942) (passenger pulled signal to start train); *Frace v. Long Beach City High School Dist.*, 58 Cal. App.2d 566, 137 P.2d 60 (1943) (janitor gave key of place where chemicals were stored to student who stole some which exploded).

44. Thus, in *McCreery v. Westmoreland Farm Bureau Coop. Ass'n*, 357 Pa. 567, 55 A.2d 399 (1947), the Pennsylvania court granted a compulsory non-suit where plaintiff failed to take reasonable precautions in approaching obviously dangerous machinery. In *Flury v. Central Publishing House*, 118 Ohio St. 154, 160 N.E. 679 (1928), the court directed a verdict for the defendant on the ground that plaintiff did not take reasonable precautions before stepping into pitch dark elevator shaft. See also *Libbey Glass Co. v. Gronau*, 116 Ohio St. 404, 156 N.E. 500 (1927).

45. See *Washington v. Yazoo & M. V. R. Co.*, 11 La. App. 635, 124 So. 631 (1929); *Grinestaff v. N.Y. Cent. R.R.*, 253 Ill. App. 162, 174 (1929). Cf. *Jones v. Pennsylvania Ry. Co.*, 61 A.2d 691 (Del. Super. 1948).

46. *Boaze v. Windridge & Handy Inc.*, 70 App. D.C. 24, 102 F.2d 628 (1939). In *Boyd v. Maruski*, 321 Mich. 71, 32 N.W.2d 53 (1948), the plaintiff, who was crossing an intersection with the light in his favor was held contributorily negligent as a matter of law for failing to make any further observation of oncoming traffic. In *Cannolly v. Zajt*, 55 Cal. App.2d 383, 130 P.2d 752 (1942), the court distinguishes between the situation where the plaintiff fails to look at all (contributory negligence as a matter of law) and where plaintiff looks but either fails to see or misjudges speed or distance (contributory negligence a question for the jury). See also *Martin v. Harrison*, 186 P.2d 534 (Sup. Ct., Ore. 1947).

47. "Nevertheless, the tendency today is definitely away from the application of fixed judicial standards in those cases." *Nixon, Changing Rules of Liability in Automobile Accident Litigation*, 3 LAW & CONTEMP. PROB. 476, 479 (1936). See also note 52 *infra*.

setting specific standards for the parties in a given case. Where they do, they may derive the standard from any one or more of a number of sources such as from their own notions of what is proper and reasonable; from a prescription of the legislature; from what is customary in a trade, business or profession; from the opinion of experts, and the like. Thus a court may decide that when coal is piled by an open coal hole in a sidewalk in Boston, no further warning of the situation need be given.<sup>48</sup> It may hold that the jury is not free to exonerate the failure to take a precaution required by statute.<sup>49</sup> It may refuse to let a jury hold a manufacturer or a railroad to the taking of precautions not generally adopted by the industry.<sup>50</sup> It may rule that a case of malpractice may not be maintained against a doctor unless there is expert medical testimony as to what doctors should do under the circumstances of the case.<sup>51</sup> The adoption of any such rule enlarges the function of the court and narrows that of the jury. Here again the tendency has been away from fixed standards and towards enlarging the sphere of the jury.<sup>52</sup>

It should be noted here that matters of presumption and burden of proof may affect the evaluation of conduct as well as the ascertainment

48. *Lorenzo v. Wirth*, 170 Mass. 596, 49 N.E. 1010 (1898). See also *McCreery v. Westmoreland Farm Bureau Coop. Ass'n*, 357 Pa. 567, 55 A.2d 399 (1947), a similar situation where ground grain was piled over the rotating blades of grinding machinery in which plaintiff injured his hand.

49. *Martin v. Herzog*, 228 N.Y. 164, 126 N.E. 814 (1920) ("We think the unexcused omission of the statutory signals is more than *some* evidence of negligence. It is negligence in itself.") Sometimes a statutory precaution is insisted on although practically impossible of fulfillment. *Andrew v. White Line Bus Corp.*, 115 Conn. 464, 161 Atl. 792 (1932). Sometimes the court has insisted on the statutory precaution although it would render conditions more dangerous. See *Conrad v. Springfield Consol. Ry. Co.*, 240 Ill. 12, 88 N.E. 180 (1909). See also Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317 (1914); Lowndes, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361 (1932); Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453 (1933); HARPER, *LAW OF TORTS* § 78 (1933); PROSSER, *op. cit. supra* note 33, at § 39.

50. *Baltimore & Ohio R. R. v. Groeger*, 266 U.S. 521 (1925); *McClaren v. G. S. Robins Co.*, 349 Mo. 653, 162 S.W.2d 856 (1942); *Kilbride v. Carbon Dioxide & Magnesia Co.*, 201 Pa. 552, 51 Atl. 347 (1902); *Lehigh & Wilkesbarre Coal Co. v. Hayes*, 128 Pa. 294, 18 Atl. 387 (1889); *Schell v. Miller N. B. Storage Co.*, 157 Pa. Super. 101, 42 A.2d 180 (1945). See PROSSER, *op. cit. supra* note 33, at § 37.

51. See *Boyce v. Brown*, 51 Ariz. 416, 77 P.2d 455 (1938); *Saltzer v. Reckard*, 319 Pa. 708, 179 Atl. 449 (1935); WIGMORE, *op. cit. supra* note 7, at § 2090; SHULMAN & JAMES, *CASES AND MATERIALS ON TORTS* 223n.6 (1942); Swan, *California Law of Malpractice*, 33 CALIF. L. REV. 248 (1945); Note, 10 TEMP. L. Q. 220 (1936), Note, 22 VA. L. REV. 470 (1936).

52. Of course the situations dealt with in this paragraph merge imperceptibly with those treated in the paragraph next preceding it and the article cited in note 47 *supra* is equally applicable here.

The writer has elsewhere tried at some length to indicate the trend in recent cases away from fixed standards in all the particulars noted in this paragraph (save in mal-

of what conduct was. Thus a presumption that there was negligence in the setting of a fire by a locomotive spark covers an assumption of some (here unspecified) standard of care in equipment and operation of the train as well as an assumption of substandard conduct in this case. And in evaluating known conduct as reasonable or the opposite, a jury should find against the party having the risk of non-persuasion if their minds are in equipoise as to whether that conduct is reasonable.<sup>53</sup>

#### HOW THE DIVISION OF FUNCTIONS IS IMPLEMENTED; EFFECTIVENESS OF VARIOUS DEVICES

So much for the theoretical allocation of function to judge or jury. Let us next examine the means by which the law seeks to implement this theory and the effectiveness of these means.

In any given case, some one of these rules, or a combination of them, may so operate that the jury has no theoretical function to perform. Thus it may happen that in one case the only reasonable claim of negligence is failure to blow a horn but that there is no credible evidence of such a failure. In a grade-crossing case the physical facts may demonstrate that if the plaintiff had taken any reasonable precaution there would have been no collision.<sup>54</sup> Or there might be evidence that the decedent, whose body was found along the right of way, was struck by a train which was going too fast, but no basis for an inference that the excess speed had any connection whatever with the death.<sup>55</sup> In such cases the law has ample means to withdraw the case effectively from the jury. The court may direct a verdict, or grant a nonsuit, or order a new trial if an improper verdict is brought in.

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practice cases). James, *Accident Liability: Some Wartime Developments*, 55 *YALE L. J.* 365, 374-80 (1946). Some highlights in the general trend are the overruling of *Baltimore & Ohio R.R. v. Goodman*, 275 U.S. 66 (1927) by *Pokora v. Wabash R.R.*, 292 U.S. 93 (1934); see also Note, 43 *HARV. L. REV.* 926 (1930); the almost complete repudiation of trade custom as authoritatively setting the standard of care, *Maize v. Atlantic Ref. Co.*, 352 Pa. 51, 41 A.2d 850 (1945); the modifications of the rigors of *Martin v. Herzog*, note 49 *supra*, *Tedla v. Ellman*, 280 N.Y. 124, 19 N.E.2d 987 (1939), discussed in Note, 34 *ILL. L. REV.* 229 (1940); Note, 17 *N. Y. U. L. Q. REV.* 143 (1940); Note, 18 *TEX. L. REV.* 102 (1940); and an apparent softening of the "range of vision" rule. See *SHULMAN & JAMES, op. cit. supra* note 51, at 626-9. This trend is also exemplified in cases arising under the Federal Employers' Liability Act. See, e.g., *Wilkerson v. McCarthy*, 69 *Sup. Ct.* 413 (U.S. 1949).

53. *WIGMORE, op. cit. supra* note 7, at §2485; *THAYER, op. cit. supra* note 2, at c. IX, 355-6.

54. *Baltimore & Ohio R. Co. v. Joseph*, 112 F.2d 518 (6th Cir. 1940); *O'Neill v. Reading Co.*, 296 Pa. 319, 145 Atl. 840 (1929).

55. *Reza v. International-Great Northern R. Co.*, 277 S.W. 182 (Tex. Civ. App. 1925). See also *Friddle v. Southern Pac. Co.*, 126 Cal. App. 383, 14 P.2d 563 (1932); *Henry v. Boston & M. R.R.*, 128 Me. 366, 134 Atl. 193 (1926); *Pittsburgh C. C. & St. L. Ry. Co. v. Nichols*, 78 Ind. App. 361, 130 N.E. 546 (1921).

Difficulty is encountered, however, in cases where, under the theoretical rules, there is at least one issue for the jury, but where these rules operate to exclude one or more *other* issues from them. This situation is much more common than withdrawal of the whole case. And the difficulty lies in this: if the jury is given the power to decide the case, it is impossible actually to prevent them from deciding it on any basis whatever which appeals to their own minds, tastes, prejudices, or emotions. The effectiveness of the various devices designed to keep the jury within the bounds of their theoretical function in cases where there is some issue within their province must therefore be considered in the light of the fact that the jury may decide the case on bases which they have been expressly told to disregard.<sup>56</sup>

*The rules of evidence; judicial notice.* It might be thought simply that whatever is excluded from evidence does not get before the jury for their consideration. In many cases that is true. Where it is, this device is an effective one. Where, for instance, a line of testimony about the safe use of a similar appliance in another factory is offered in the absence of the jury, and excluded, the jury may never know about that line of testimony at all. But often this is not the situation for any one or more of the following reasons:

(1) The jury may in several ways know of the fact though it is excluded from evidence. It may be apparent in court, as would be the approximate age of a party, or the fact that he is a foreigner unaccustomed to the ways of this country; its offer in evidence may be made in the presence of the jury; it may be privately known to one or more jurors.

(2) Under the principle of multiple admissibility, the fact may be before the jury for a limited purpose, but not for the purpose in connection with which its use is sought to be prevented.<sup>57</sup>

(3) The jury may, independently of what is produced in evidence, proceed on their own assumptions about law or fact (whether or not they are correct assumptions) although the thing assumed is not a proper subject of judicial notice.

*Instructions to the jury.* Where there is *some* issue for the jury, the

56. Farley, *Instructions to Juries*, 42 YALE L. J. 194, 218 (1933). GREEN, *op. cit. supra* note 1, at 351-3. This inability to control the jury results partly from the general form in which their verdict is cast which "is as inscrutable and essentially mysterious as the judgment which issued from the ancient oracle of Delphi." Sunderland, *Verdicts, General and Special*, 29 YALE L. J. 253, 258 (1919).

See remarks to the jury by Story, Cir. J., in *U.S. v. Battiste*, Fed. Cas. § 14, 545 (Cir. Ct. D. Mass. 1835).

57. For an explanation of the principle of multiple admissibility see WIGMORE, *op. cit. supra* note 7, at §§ 13, 250. See, e.g., *Fleming v. Flick*, 140 Cal. App. 14, 35 P.2d 210 (1934), where the court held that evidence addressed to a valid issue in the case was admissible although it incidentally disclosed the interest of an insurance company in the litigation.

law places principal reliance upon the court's instructions to keep the jury within their theoretical bounds. It seeks in this way to guard against the jury's improper use of facts which come under their observation, or of assumptions which are theoretically unwarranted. Thus it may tell the jury (if this is its ruling on the law) to disregard the age of the defendant, or his ignorance of this country's ways, in determining the standard of conduct to which they find he should conform. Or if a prior statement of a witness is admitted for the sole purpose of impeaching him because of its inconsistency with his present testimony, the jury will be told that they may consider it only for such a purpose and not as evidence that the facts were as represented in the prior statement.<sup>58</sup>

The function of instructions is, of course, much broader than this. Primarily it is to tell the jury what the substantive law is and how the jury should "apply" it to the facts of the particular case. It will outline the elements of legal liability, explain the concept of burden of proof (in the sense of risk of non-persuasion), and describe the respective functions of judge and jury. It will "withdraw" from the jury any issue upon which the party having the burden of proof has failed to produce sufficient evidence to call for the jury's consideration (*i.e.*, tell them not to consider this issue). It will lay down the general standard for evaluating conduct and tell the jury whether or not they are at liberty to conclude that it is met by any given combination of facts which may be found from the evidence. Thus the jury may be told that if (from conflicting evidence) they find the facts to be A, B, and C, they must then determine whether or not that constitutes reasonable care under the circumstances; but if they find the facts to be A, Y, and Z, they must conclude that the party concerned was negligent (or the reverse). In the first half of this instruction the court is leaving the evaluation of conduct to the jury; in the second half, it is itself setting a specific standard and, through a "binding instruction," "withdrawing" the question of evaluation of other conduct from the jury.

Now it should be clear in all these situations that *the instruction is an effective device only to the extent that it is actually followed by the jury*. Moreover there is in many jurisdictions no real way (save through the jurors' own consciences) to make a jury follow instructions.<sup>59</sup>

58. For example in an auto-bus collision case, where a witness' trial testimony was to the effect that the bus was at fault, a prior statement by that witness that the automobile was at fault was admitted only for the purpose of impeaching the credibility of the witness, and the jury was so admonished. *Ken-Ton Coach Lines v. Siler*, 303 Ky. 263, 197 S.W.2d 406 (1946). See also *Dowell, Inc. v. Jowers*, 166 F.2d 214 (5th Cir. 1948); *Wildrick v. Raney*, 170 Ark. 1194, 282 S.W. 17 (1926); *Kinkel v. Veget*, 354 Pa. 279, 47 A.2d 195 (1946). See WIGMORE, *op. cit. supra* note 7, at §1018.

59. If instructions or other rulings are erroneous, or the verdict is unsupported by a sufficiency of the credible evidence, a new trial may be granted. But in many states a new

The question then arises whether juries, having the *power* to decide cases in violation of instructions, actually do so in a significant number of instances. A scientific answer to this question probably cannot be had. There is, however, good reason to believe that instructions are not particularly effective in getting the jury to perform their theoretical function and in keeping them within the bounds charted out for them by the rules of law.<sup>60</sup> As Dean Green says:

"The functions of neither judge nor jury can be performed accurately through the general charge and verdict, nor can any workable check on them be devised whereby litigants can be assured that the law has been properly administered to their disputes. The instructions of a judge to a jury normally relate to the law applicable to the possible findings of facts, stated hypothetically, which are supported by the evidence. In any but the simplest cases, they are long and involved, phrased in terms of the nicest distinctions, capable of being understood only by lawyers, and, more frequently than not, inaccurate. No one seriously claims that they are under-

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trial may not be granted, in the absence of such a situation, merely because the trial court *believed* that the jury failed to follow a perfectly proper set of instructions (*e.g.*, where the jury might have found for the plaintiff under the evidence and instructions on one ground but where the court believes—on the basis of intuition, or the like—that the jury did find for the plaintiff on grounds which were properly "withdrawn" from their consideration by the charge). See, for example, the language of Parker Wood, J., in *Hawkinson v. Oesdean*, 61 Cal. A.2d 712, 713, 143 P.2d 967 (1943): "It is possible to determine whether a verdict is contrary to an instruction *only* when the evidence on a point covered by the instruction is without conflict and fails to show a set of facts which, under the instruction, would warrant the verdict reached. Where the evidence on the point is conflicting, but sufficient to support a finding of fact which, under the instruction, warrants the verdict, it must be presumed that the jury did make such a finding and hence its verdict is not contrary to the instruction. . . ." In Arizona, the court has no power to grant a new trial in negligence cases where the jury ignores instructions, although it has power to grant a new trial in other types of cases. *Dennis v. Stukey*, 37 Ariz. 510, 295 Pac. 971 (1931). Although it has been said that a judge has unfettered power to grant a new trial where he believes that the jury ignored the charge, a study of the cases reveals that on the face of the record it was apparent that the jury violated the law of the case as laid down in the court's instructions. See, *e.g.*, *Corey v. Smith & Pollock, Inc.*, 43 N.Y. Supp.2d 250 (Sup. Ct. 1943) (finding for plaintiff but failure to award substantial damages as charged); *Salter v. Turner*, 24 Ala. App. 67, 130 So. 163 (1930) (jury verdict amounted to five times damages instructed); *Jones v. Pennsylvania R. Co.*, 289 Pa. 424, 137 Atl. 796 (1927) (verdict held that defendant not negligent but granted plaintiff damages for injuries anyway).

The situation may be different in those states where the trial court has real discretion to set aside a verdict rendered upon conflicting evidence. *Franklin v. McGranahan*, 119 Kan. 786, 241 Pac. 113 (1925) (implies that in the judgment of the court the jury has failed to give proper weight to the instructions).

60. This does not mean that the jury may not often be very much influenced by the judge's charge. Even if they do not follow or appreciate the legal rules, it is entirely possible that they may be very much influenced by the general tone of the charge, by comments upon the evidence, by an impression of "which side" the judge is on, and the like.

stood by juries or that they assist a jury in reaching a verdict. For the most part they are ritual."<sup>61</sup>

Of course the law has made some efforts to enhance the moral sanction behind instructions. Jurors are everywhere put under oath.<sup>62</sup> And the use of cautionary or hortatory instructions is common. Perhaps the most effective devices, however, are those involving some form of special verdict or interrogatories to which the jury must respond. The special verdict, at common law, was a statement by the jury of their finding upon the facts, leaving for the judge the applications of the law to those facts. To be valid it had to be a "complete finding of all the material facts, disputed and undisputed (and not merely of evidence or conclusions)."<sup>63</sup> It developed in England largely as a means of escape from the rigors of attain, and it became settled there that it was the jury's option to bring in a special verdict; that it could not be compelled by the court (though this outcome was not reached without a struggle).<sup>64</sup> In most American jurisdictions, on the other hand, the judge may require a special verdict.<sup>65</sup> But in both countries the cumbersome technicalities with which such verdicts became encrusted prevented their widespread use.<sup>66</sup>

Another development, largely American, was the special interrogatory which the judge could compel the jury to answer when they

61. GREEN, *op. cit. supra* note 1, at 351.

62. See for example the Connecticut oath for jurors in civil cases. "You solemnly swear that you will well and truly try the issue or issues, now to be given you in charge, between the plaintiff and the defendant (or plaintiffs and defendants), according to the evidence given you in court, and the laws of this state, and accordingly a true verdict give; your own counsel, and your fellows', you will duly observe and keep; you will speak nothing, to any one, of the business or matters you have in hand, but among yourselves, nor will you suffer any one to speak to you about the same, but in court; and, when you are agreed upon any verdict, you will keep it secret until you deliver it up in court; so help you God." CONN. GEN. STAT. (1949) § 3576.

63. GREEN, *op. cit. supra* note 1, at 353; CLEMENTSON, *op. cit. supra* note 4, at c. 1; Morgan, *A Brief History of Special Verdicts and Special Interrogatories*, 32 YALE L. J. 575 (1923); Sunderland, *Verdicts, General and Special*, 29 YALE L. J. 253, 265 (1920); Note, 15 TEX. L. REV. 396 (1937).

64. GREEN, *op. cit. supra* note 1, at 353; THAYER, *op. cit. supra* note 2, at 217.

Theoretically, at least, a jury could be attained for a wrong, *i.e.*, simply mistaken, verdict. The special verdict ruled out the chance of error from mistake in applying the law which may lurk behind a general verdict. Morgan, *supra* note 63; CLEMENTSON, *op. cit. supra* note 4 at 4, 5; see incident described in THAYER, *op. cit. supra* note 2, at 144-5.

65. CLEMENTSON, *op. cit. supra* note 4, at 8; GREEN, *op. cit. supra* note 1, at 353; Sunderland, note 63 *supra*, at 253, 258.

66. "At bottom the special verdict represents a valuable idea, but as put into operation it has no vitality. . . . Had its development been normal it should have superseded the general verdict centuries ago." GREEN, *op. cit. supra* note 1, at 353-4; Sunderland, note 63 *supra*, at 262.

brought in a general verdict.<sup>67</sup> Still a third device, which has received much praise, has grown up in three American states.<sup>68</sup> Dean Green has described this as a "simplified special verdict";<sup>69</sup> it involves the use of a limited number of simple interrogatories covering all the material issues in the case.

All of these devices are calculated to put psychological pressure on the jury to make them perform (and stay within) their theoretical function. They focus attention on the questions which the jury is supposed to decide and make them at least record a decision on those questions. It is still entirely within the jury's power to come to a conclusion on an improper basis, and then to answer the interrogatories (or state the facts) in the way they know they must to support their verdict, even though such answers do not represent their honest conclusions as to the facts. Thus if the only possible ground of railroad negligence in a crossing case is failure to blow the whistle, a jury which was determined to hold the defendant could state that they found such failure, when in fact they were convinced that the whistle was blown. Nevertheless it is probably harder for people generally to do that sort of thing than it is for them to bring in a general plaintiff's verdict in the face of an instruction (which they may not have understood) requiring an implied but unrecorded and unexpressed finding to the same effect. Then of course there is always the chance that the jury may not perceive the legal effect of any given answer, so that even though they are perfectly willing to fit their answers to meet the end they want, their purpose may be defeated through a mixture of ignorance and unguarded honesty.<sup>70</sup>

There is another aspect of the part instructions play in the present jury system. They furnish the most prolific source of error and reversal by appellate courts.<sup>71</sup> Dean Green has developed the thesis that, partly as an antidote to the relaxation of trial court control of juries under the influence of American democratic notions, the power of

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67. GREEN, *op. cit. supra* note 1, at 354-5; Wicker, *Special Interrogatories in Civil Cases*, 35 YALE L. J. 296 (1925); CLEMENTSON, *op. cit. supra* note 63, cc. II, III; Morgan, *supra* note 63. See *Walker v. New Mexico & S.P. R. Co.*, 165 U.S. 593 (1897).

68. The three states are North Carolina, Texas and Wisconsin. See GREEN, *op. cit. supra* note 1, at 355.

69. GREEN, *op. cit. supra* note 1, at 357. "The method is more like that of special interrogatories on all material issues without the requirement of a general verdict." See also Staton, *The Special Verdict as an Aid to the Jury*, 13 J. AM. JUD. Soc'y 176, 179 (1930). For a criticism of the "special issue" verdict in Texas, see Weatherly, *Our Civil Jury Trials*, 9 TEX. B. J. 428 (1946).

70. Wicker, *supra* note 67, at 306; Sunderland, *supra* note 63, at 262.

71. GREEN, *op. cit. supra* note 1, at 351. "There are a number of other devices by which appellate courts have wrested control from trial judges and juries, but were they all abolished, it is probable that the errors of misdirection, non-direction and failure to observe directions would be sufficient to assure them such control." Farley, *supra* note 56, at 202.

appellate courts over both jury and trial court has grown apace.<sup>72</sup> It does seem to be true, at least, that there are so many possible pitfalls for a trial judge in giving instructions to the jury, and at the same time so many procedural rules by which appellate courts can avoid reversal, that there exists here a good deal of room within which such courts are relatively free to exercise control over jury verdicts, within their discretion.

#### APPRAISAL OF THE JURY'S ROLE IN PRESENT DAY ACCIDENT LAW

Clearly a number of devices are available either to expand or contract the jury's function in accident cases. It remains to consider the role that the jury does and probably will play in this field—what its greatest possibilities of usefulness here are. Such considerations will have great bearing on the present and probable future attitude of the courts towards the questions that arise at the various points where the chance for flexibility exists.

One role that the jury is supposed to play in the present system is to bring the common sense wisdom of the layman to bear on the problems of finding facts.<sup>73</sup> Their ability as a fact finding body has been both highly praised and seriously challenged. Holmes said that in his experience he had not found the jury "specially inspired for the discovery of truth."<sup>74</sup> Becker speaks of trial by jury as a method of determining facts as "antiquated, unscientific, and inherently absurd—so much so that no lawyer, judge, scholar, prescription clerk, cook, or mechanic in a garage would ever think for a moment of employing that method for determining the facts in any situation that concerned him."<sup>75</sup> On the other hand, Chalmers finds it a "far better tribunal than a judge for dealing with questions of fact."<sup>76</sup> Another author considers it the "[b]est, safest and most satisfactory fact finding body there is."<sup>77</sup>

The jury is also, within limits, supposed to bring the common sense wisdom of the layman to bear on the problem of evaluating conduct.

72. GREEN, *op. cit. supra* note 1, at c. 14.

73. HOLDSWORTH, *op. cit. supra* note 3, at 348.

74. HOLMES, COLLECTED LEGAL PAPERS 237 (1921).

75. BECKER, FREEDOM AND RESPONSIBILITY IN THE AMERICAN WAY OF LIFE 82 (1945). ". . . the real task of the jury is to guess, with such aid as it can, by questions, induce the judge to give, which set of attorneys has been the most adroit in confusing the witnesses and clouding the issues." BECKER, *op. cit. supra*, at 81. See also remarks of Frank, J., dissenting in *U.S. v. Rubenstein*, 151 F.2d 915, 923 (2d Cir. 1945); *U.S. v. Antonelli Fireworks*, 155 F.2d 631, 658 *et seq.* (2d Cir. 1946); but see also *Arnstein v. Porter*, 154 F.2d 464, 479 (2d Cir. 1946) ("I am not one to condemn jury trials . . . since I think it has a place among other quite finite methods of fact finding.").

A psychologist who conducted experiments to determine the efficiency of the jury as a fact-finding body came to the conclusion that it was inferior even to the common court witness. See Marston, *Is the Jury Ever Right?* 9 FLA. L. J. 554 (1935).

76. Chalmers, *The County Court System*, 3 LAW Q. REV. 1, 10 (1887).

77. Hyde, *Fact Finding by Special Verdict*, 24 J. AM. JUD. Soc'y 144, 145 (1941).

The extent to which the jury should set the specific standard of conduct for the circumstances of the case before them has also been the subject of dispute. Holmes, for example, felt that such standards ought increasingly to be fixed by the court so that men should know in advance to the greatest possible extent just what they are supposed to do in any given set of circumstances.<sup>78</sup> This goal could not be attained if in every case the setting of the standard is left to "the featureless generality of a general verdict."<sup>79</sup> But the law has, on the whole, rejected Holmes' view (in this regard) either because of the supposed desirability of the lay judgment on these matters, or because of the strength of the considerations about to be mentioned.<sup>80</sup>

The two roles just discussed are the only ones which strict legal theory assigns to the jury under the present body of accident law. Both roles are (under that theory) supposed to be played so as to determine "fault" in each case. Those who whole-heartedly accept the present system of liability will, therefore, seek to perfect devices for controlling the jury so as to keep it within these functions. There is, however, another role which the jury is actually playing. Holmes has described it thus: "They will introduce into their verdict a certain amount—a very large amount so far as I have observed—of popular prejudice, and thus keep the administration of the law in accord with the wishes and feelings of the community."<sup>81</sup> Probably this role assumes greatest importance when, in any field, the substantive law does not by and large correspond with prevailing (though often inarticulate) popular notions of what the law ought to be in that field. This is often true of periods of transition or impending transition, as in the days when the rules rigorously limiting a master's liability to his servant for work injuries persisted on the surface in spite of the growing undercurrent of popular feeling that culminated in the workmen's compensation acts, with their adoption of the principle of absolute liability and social insurance.<sup>82</sup> Dean Green has described the part played by the jury in this period:

"There is only one bright spot. Whenever a case for any reason broke through legal theory and reached the jury it was almost invariably decided against the master and for the servant. And what

One should also read Blackstone's famous panegyric of the jury system. 3 BL. COMM. \*379. A modern statement which has had some currency in judicial opinions appears in *Aaron v. Strausser*, 59 A.2d 910, 912 (Sup. Ct., Pa. 1948).

78. HOLMES, *THE COMMON LAW* 110-2 (1881). See also Holmes' opinions in *Lorenzo v. Wirth*, 170 Mass. 596, 49 N.E. 1010 (1898), and *Baltimore and Ohio R. R. Co. v. Goodman*, 275 U.S. 66 (1927).

79. HOLMES, *op. cit. supra* note 78, at 111.

80. See notes 47 and 52 *supra*.

81. HOLMES, *COLLECTED LEGAL PAPERS* 237 (1921).

82. GREEN, *op. cit. supra* note 1, at 122-3.

is more, the judges, both trial and appellate, found themselves so enmeshed in their theories that their only retreat in many cases was found in passing the matter to the jury. The superstructure of theory broke under its own weight. Verdicts were too constant and too overwhelming to be withstood except in the most haphazard fashion. And the jury probably rendered the most important of its scanty service to legal science in civil cases at this juncture. Seemingly, juries saw only the parties before them, and placed the risk where they thought it could best be borne. The judges had been interested in principles; juries were interested in doing justice between the parties. The judges evolved a nice scheme for determining responsibility, the juries gave verdicts which wrecked the scheme. Juries held their ground here until legal theory could catch up with the new order of things which had emerged under the very eyes of the judges without most of them noticing it."<sup>83</sup>

There is much reason to believe that we are today in a very nearly parallel period in most of the rest of accident law, a conclusion which the facts next to be noticed tend to fortify.

No appraisal of the jury's role in the present situation can be complete without pointing out that the great majority of jury verdicts in accident cases today are in favor of the plaintiff. Thus in 1947 plaintiffs in New York State won 60% to 66% of the jury verdicts.<sup>84</sup> In the Massachusetts Superior Court, the plaintiff was successful in 73.5% of the cases tried to the jury.<sup>85</sup> This is especially significant when it is realized that defendants try especially hard to settle cases where they regard liability as clear.<sup>86</sup>

*Practical Implications of the foregoing.* A rule in favor of the admissibility of evidence by and large helps plaintiffs, though in any given

83. *Ibid.*

84. The figures for New York were as follows:

Ist Appellate Dept.	65 %
IInd Appellate Dept.	66.2%
IIIrd Appellate Dept.	60. %
IVth Appellate Dept.	63.7%
Average of 4 departments	64.3%

14 ANN. REP. OF THE JUDICIAL COUNCIL Table 6, 94-9 (1948).

85. *Twenty-third Report of the Judicial Council of Massachusetts*, 32 MASS. LAW Q. No. 4, p. 84 (1947). Other authorities have estimated the number of jury verdicts for plaintiffs between two-thirds and three-fourths. Nixon, *Changing Rules of Liability in Automobile Accident Litigation*, 3 LAW AND CONTEMP. PROB. 476n. 1 (1936); CLARK & SHULMAN, LAW ADMINISTRATION IN CONNECTICUT 213 (1937); REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS, COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES (1932). Dean Green was not exaggerating greatly when he wrote, "[j]ury verdicts are little short of unanimity for the injured party." GREEN, *op. cit. supra* note 1, at 139.

86. This may be slightly offset by the occasional situation where a plaintiff's lawyer insists on trying a clear liability case, in the face of a reasonable offer, in order to enhance his prestige as a trial lawyer by the expected victory.

case its application may help a defendant prove his own due care, or the contributory negligence of plaintiff. This is because it is the plaintiff who has the need of producing a sufficiency of evidence on most issues,<sup>87</sup> and it is he who receives the greatest benefit from getting to the jury upon them.<sup>88</sup> Some courts, for instance, admit an appropriate company rule in evidence as tending to show the standard of care which its employees should observe towards the public.<sup>89</sup> Such a rule may be used in one case to show the company's negligence (where it is coupled with evidence that the rule was violated), in another to show the company's due care (where it is coupled with evidence that the rule was observed). In the first type of situation the rule helps a plaintiff to make out a jury question, by opening up one more possibility of showing negligence. In the second type of situation, the rule does not help defendant to keep the case from the jury,<sup>90</sup> but merely affords him some evidence of due care which the jury may weigh. Since, therefore, juries apparently tend to resolve doubts in favor of liability, the ruling in the first case does the plaintiff more good than the ruling in the second case does him harm.<sup>91</sup> What has just been said would be generally true whether the ruling concerned a matter of relevancy, or one of the exclusionary rules.

A ruling which relaxes the requirements of sufficiency of proof tends on the whole to extend liability since it will mean fewer directed verdicts against the party having the burden of proof and this is usually the plaintiff. This scarcely needs elaboration, and is well understood in the profession. Included here are presumptions and such doctrines as *res ipsa loquitur*.<sup>92</sup>

87. Since he has the burden of proof on most issues.

88. Since most decisions at the hands of the jury are in his favor.

89. See *Stevens v. Boston Elevated R. Co.*, 184 Mass. 476, 69 N.E. 338 (1903) (evidence admitted of railroad company's rules as to ringing of gong to show that motor-man's failure to ring gong was negligence); *McNeil v. New York, N.H. & H. R. Co.*, 282 Mass. 575, 185 N.E. 471 (1933) (violation of company rules designed to promote the safety of passengers admitted as evidence of trainmen's negligence towards passenger). For collections of cases, see WIGMORE, *op. cit. supra* note 7, at § 282n. 2; SHULMAN AND JAMES, *CASES ON TORTS* 222 (1942).

90. It is assumed that the ruling is one in favor of admissibility only and does not make the rule or custom *conclusive* as to the proper standard of conduct.

91. Of course a particular class of evidence might, because of its special nature, work pretty consistently in favor of defendants. See, *e.g.*, *Palmer v. Hoffman*, 318 U.S. 109 (1943) (deceased railroad engineer's report to the defendant railroad as to the cause of the litigated accident was excluded from evidence). But what is said here, we believe is true of most kinds of evidence.

92. And any rule which would cut down the scope of *res ipsa loquitur* so as to get more light on facts which are relevant only to an outworn theory of liability would take us farther away from the objective of compensation for accident victims. See proposal of Frankfurter, J., in *Johnson v. United States*, 333 U.S. 46 (1948); Note, 58 *YALE L.J.* 183 (1948).

A ruling by which the court sets the specific standard of conduct to be applied to the case at hand tends to restrict liability. This is true whether the standard is derived from judicial notions of what is reasonable, from statute, from trade practice, or any other source. Sometimes they have been applied as maximum standards, so that one who has taken certain defined precautions cannot be found negligent. But even when they operate as minimum standards so that a party who has not met them is negligent as a matter of law, they generally work in favor of defendants, by taking the issue of contributory negligence away from the jury. As Nixon says:

“ . . . for plaintiff's counsel, already enjoying the favor of the jury, the need to obtain a directed verdict based upon a proved deviation from a specific standard is less important than for a defendant's counsel who will strive to wrest the case from the jury by seeking a directed verdict based on the plaintiff's failure to observe such a standard.”<sup>93</sup>

What has just been said may be summarized as follows:

Any rule of substantive law or procedure which enlarges the jury's theoretical sphere tends to extend liability, and conversely any rule which restricts the jury's sphere, tends to restrict liability. Rules of the latter kind, however, are effective in restricting liability only when they result in a withdrawal of the whole case from the jury, and are not particularly effective when they are reflected only by language in the charge.

Any procedural device which effectively keeps the jury within their theoretical sphere tends to restrict liability and to prevent the jury from performing their possible role of keeping the actual operation of the law more responsive to human needs than an archaic substantive law would permit if it were carried out in letter and spirit.<sup>94</sup> It is not

93. Nixon, *supra* note 85, at 476.

94. The arguments for and against the use of such devices have been well summarized in the following passages:

“ . . . [T]he vice of the jury system is not so much that it is a jury but in the way it is used. We have been demanding too much of it. With a modified form of special verdict, together with power in the trial judge adequately to supervise the selecting of a jury, and a general restoration of the common law power of advising the jury on the facts . . . little else would be needed to reach the high water mark of jury trial.” GREEN, *op. cit. supra* note 1, at 374. See also Frank, *The Case for the Special Verdict*, 32 J. AM. JUR. SOC'Y 142 (1949).

“The judges often compelled special verdicts. It was the old law that a jury, if it chose to run the risk of a mistake, and so of the punishment by attain, always might find a general verdict. But the judges exerted pressure to secure special verdicts; sometimes they ordered them, and enforced the instruction by threats, by punishing the jury, and by giving a new trial. As matter of history, we know that the jury, on the whole, successfully stood out against these attempts; and that in most cases their right was

contended here that the jury should play such a role. It is suggested, however, that accident law is in a period of transition wherein the jury's catalytic function in hastening legal change will occupy a central position.

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acknowledged. But now it is remarkable how judges and legislatures in this country are unconsciously travelling back towards the old result of controlling the jury, by requiring special verdicts and answers to specific questions. Logic and neatness of legal theory have always called loud, at least in recent centuries, for special verdicts, so that the true significance of ascertained facts might be ascertained and declared by the one tribunal fitted to do this finally and with authority. But considerations of policy have called louder for leaving to the jury a freer hand. The working out of the jury system has never been shaped merely by legal or theoretical considerations. That body always represented the people, and came to stand as the guardian of their liberties; so that whether the court or the jury should decide a point could not be settled on merely legal grounds; it was a question deeply tinged with political considerations." THAYER, *op. cit. supra* note 2, at 217-8 (1898).