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# Rue d'Ulm : Comparative Judicial Stylistics

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## OUTLINE



## TEXT

1 What is the poethic method of reading law ? It claims that the form of a judicial opinion is indistinguishable from its substance. The structure, syntax, and word choice of the judge are not mere ornament ; they in fact comprise the decision. You cannot extract the judge's manner of writing from the rule, or holding, of the decision, or if you do it is only at your peril. As Benjamin N Cardozo put it in his seminal 1925 essay called "Law and Literature":

> Form is not something added to substance as a mere protuberant adornment. The two are fused into a unity. [Cardozo, Collected Writings, 340]

2 Thus for the common law judge, there is no specific form that must be used in rendering a judgment. The choice of form, and of the words that are used, derives – inductively – from the specific situation with which the judge is faced. Everything works from the unique set of facts upwards to the relevant rules of law that controls it, and the judge's narration of the facts usually points to one or more precedents that then dictate the outcome of the case at hand. The facts lead to the operative precedent and then back down to the facts themselves, now definitively resolved.

3 Cardozo himself admired French law and mentions both the Code Napoleon and the work of French judges often in his essays. [Car-

dozo] However, would Cardozo have believed that his European colleagues, including the judge in France, shared the creative potential of her Anglophone colleague ? In an essay that had already extensively cited Duguit's work on the Code Napoleon, Cardozo liberates the common law judge, at least, to be a kind of poet :

> We find a kindred phenomenon in literature, alike in poetry and in prose. The search is for the just word, the happy phrase, that will give expression to the thought, but somehow the thought itself is transfigured by the phrase when found. There is emancipation in our very bonds. The restraints of rhyme or metre, the exigencies of period or balance, liberate at times the thought which they confine and in imprisoning release. [Cardozo, Growth of the Law, writings 225]

Would Cardozo have applied these words to French judicial making ? This paper provides an answer.

> *I.*

> *Qu'on lise les arrets de la cour de cassation : on y trouvera un style ferme et plein du a la justesse de l'expression. [Mimin]*

4 The style of French judicial opinions has not been greatly studied. On the other hand, for many years the American Law and Literature movement has confronted the relationship between the words and the structure (the architectonics) of opinions as well as their judicial conclusion. This does not imply however that "poethics" [Weisberg] is not present in French judges' opinions. A classic study by Pierre Mimin, LE STYLE DES JUGEMENTS [Mimin] focuses on "diction" ("le mot propre") as well as on juridical form, namely how to envelop the decision in a harmonious way through words, paragraphs and structure, as if the judicial decision flowed naturally from its form ; this is quite like Cardozo :

> One has only to read the Cour de Cassation's opinions to discover in them a firm and full style stemming from the aptness of their expression. [Mimin]

5 So the French decision inextricably derives from the choice of words, the construction of sentences and paragraphs, the seizing of the appropriate and controlling code section and the holding (or dispositif). Where forme and fond are well suited, the French opinion, like the one from American judges, best does its job of doing justice.

6 Mimin at once describes in great detail apt or inapt words, paragraphs (for "their simple value as literary expression") and the classic form of the decision : subject of the action, grounds, texts of the law, motives, terms, etc. The whole must confirm indomitable, impregnable and unassailable logic leading to justice. Any misplaced word, each barbarism, banality, or needless redundancy tends to destroy logic, like an off-key note will ruin a piece of music.

7 How then, given this poethics of French judicial decision, is this profound study of judges' style not better known ? Paradoxically, the explanation can be found precisely in the realm of this strong logic. The judge, a human being after all, would rather situate himself under the rubric of implacable logic than Cardozian creativity. From start to finish, the French judicial opinion advances like a war machine, as if the judge were only a soldier of the code, as if the tools of language would only serve an officer of higher rank than the judge, a master who dominates his judicial servant robbing him of all freedom of choice. The French judge sometimes seems to be less a wise poet than he is a logical machine ! This may explain why, although there is a place for the "facts" in French appellate judgements, it is sharply reduced and made deductively subservient to the code section that doubtlessly controls the situation.

8 Is this not a paradox ? Mimin insists on a freedom of choice that seems in the end to deny that very freedom. The intractable formal logic of the French opinion dictates a form to the judge, whereas the Anglophone judge, who reasons unlike his French colleague, may (if he wishes) seize his own purely inductive logic to establish her own structural guidelines. He writes in almost total freedom, the same as the poet's, free to create a narrative based on the point of *fact* [Minim, 372] which is often elaborated in a manner unheard of and perhaps unacceptable to the French judge.

9 Yet, there is a strong counter flow, a more liberated and life-centered one, in French thought about judicial writing. So such French legal

stylists as Francois Gény (admired by Cardozo throughout his essays – see Cardozo Writings, 28,111,123,136,156,163-4,168,225-6,266 –) [see also Chazal] have urged French judges to be far more fact-infused and far *freer* in choice of form than they appear to be ; he and André Tunc have asked for a more "realistic" jurisprudence, one which will be influenced by "the complex and ineluctably changing movement of social life" [Gény, 195].

10 So where today most see the inflexible nature of French judicial form, which seems to rob the judge of the creative potential so dear not only to Cardozo but to judges going back to King Solomon, French thought itself locates an alternative, an emphasis on "social life" that of course can only emerge in a judicial decision *through an emphasis on the facts of each new case* !

11 We now compare two decisions in order to elaborate better the poethic or non-poethic aspect of judicial methods in France and America. I have chosen two rather ordinary opinions both of which deal with traffic accidents. The first comes from the Cour de cassation in October 1995 ; the second from the Court of Appeals in Louisiana in 2003. Both decisions reverse the opinion of the lower court judge. Where does the poethic method stand in close readings of these two documents ? How well does form serve function and how alert to "life" are the appellate judges in these two cases ?

# I. *Owens v. Brown* [Louisiana Court of Appeals, 2003]

12 The automobile accident which is the subject of this appeal happened at a location where the width of Village Lane narrowed from what would be two lanes into one. Plantiff, Brittni Owens, was in the inside lane behind defendant, Joann Brown, who was in the outside lane. The Owens vehicle struck Brown's vehicle on the driver's side door. Owens filed suit against Brown and Brown's insurer, State Farm Mutual Automobile Insurance Company. The trial court ruled that Owens was 100% at fault. For the reasons set forth below, we reverse and render judgment based on principles of comparative fault.

## A. Facts

13 The accident occurred on October 9, 2001, on Village Lane in Bossier City, Louisiana. Airline Drive is a heavily traveled thoroughfare running north and south. Brittni Owens turned off Airline Drive onto Village Lane heading west to the Outback Steak House where she was employed. At the Airline Drive intersection, Village Lane is divided by a grass median with its westbound and eastbound lanes wide enough to accommodate two vehicles ; however, there are no center line markings. Within a short distance, approximately 50 yeards, the median ends and the westbound roadway tapers into one lane. At this point there is one lane for eastbound traffic and one lane for westbound traffic. This transition zone where the road tapers into one lane has no signs, markings, or warning devices. Because there is no center line marking two lanes, it is difficult to tell which lane drops off and which continues.

14 On the date of the accident, Joann Brown drove out of the parking lot of the Bossier Federal Credit Union at the north corner of Airline and village Lane. Brown turned onto Village Lane heading west along the outside curb and proceeded at a slow speed. At the point where the street begins to merge into one lane are five drive-through lanes at the rear of the credit union building. Brown was looking at these lanes to insure that traffic did not flow out in front of her.

15 According to Owens, just before the accident Brown's vehicle was stoopped in the outside lane near the point where that lane ends. Owens stated that she could see the brake lights of Brown's vehicle and that Brown was looking down as if doing paperwork. Owens states that she concluded that Brown would not pull over, but kept looking at Brown's face to see if Brown would look : "That way I would know whether to slow down or not. And she never did [look]." Owens continued to drive on and so did Brown. Owens testified that she slammed on her brakes, but her vehicle struck Brown's vehicle on the driver's side door. Owens speculated that Brown intended to make a U-turn at the end of the median.

16 Brown testified that just prior to the accident, she had left the parking lot of the credit union and was westbound along the curb closest to the credit union (farthest from the median). She stated that she

was probably driving four or five miles an hour and was looking toward her right in the direction of the credit union drive-through exits to make sure that no cars were coming out of the drive-through onto Village Lane. Brown denied stopping her vehicle prior to the accident. Although she was moving slowly, she denied making any sudden movement to turn or merge into the left lane. She also denied intending to make any kind of U-turn. According to Brown's testimony, she saw Owens' vehicle in her side mirror "seconds before the impact", and knew she was going to be hit. Brown stated that at the time of impact, she was "more in the middle of the road", merging into the one-lane area. Brown admitted that she did not look in her rearview mirror at that poing. Brown confirmed that Owens' vehicle struck the driver's door.

## B. Discussion

17 The trier of fact is owed great deference in its allocation of fault and may not be reversed unless clearly wrong. Clement v. Frey, 95-1119, 95-1163 (La.01/16/96), 666 So.2d 607 ; De Los Reyes v. USAA Casualty Insurance Co., 28,491 (La. App.2d Cir.06/26/96), 677 So.2d 668. Like the assessment of damages, fault allocation is a factural determination and the trier of fact, unlike the appellate court, has the benefit of viewing firsthand the witnesses and evidence. Clement, *supra.* Only after making the finding that the record supports that the lower court abused its great discretion can the appellate court disturb the award, and then only to the extent of lowering it (or raising it) to the highest (or lowest) point which is reasonably within the discretion afforted that court. Clement, *supra* ; Hill v. Moreouse Parish Police Jury, 95-1100 (La.01/16/96), 666 So.2d 612 ; Coco v. Winston Industries, Inc., 341 So.2d 332 (La. 1977).

18 The trial court applied only the presumption that a motorist in a rear-end collision has breached the duty of not following too closely. In this case, Owens was driving the following vehicle. Although seeing Brown's vehicle and Brown's inattention, she continued on, believing in her right to do so. The trial court was right in finding that Owens was at fault.

19 On the other hand, Brown admitted that her attention was not focused on the traffic on Village Lane immediately prior to the acci-

dent. She did not look to her left or in her rearview mirror, but continued on at the location where the roadway narrowed to a single lane. As she moved forward, she did not see Owens' vehicle. Under these factual circumstances, we conclude that Brown cannot be free of fault. We conclude that Brown breached the statutory duty to be an attentive driver and that this was a cause of the accident.

20 Having found that Brown was negligent and that her negligence was a legal cause of the accident, we are required to attribute fault to her in accordance with the legal principles set forth above. Finding that 50% is the lowest point which is reasonably within the discretion afforded to the trial court, we allocate 50% fault to Brown and reduce Owens' fault to 50%.

21 Owens' special damages were stipulated to be $4,850.17, including medical costs and property damage. Owens had pain in her back, nect, and wrist primarily during the first month following the accident. She saw a chiropractor for two months. Her pain was better during the second month ; she was having no problems at the time of trial. However, she testified that for about six weeks after the accident she could not lift anything at her job as a waitress.

22 As previously noted, Owens' special damages were stipulated to $4,850.17. To those damages, we add general damages in the $2,500 ; both damage awards, of course, are subject to a 50% reduction for the fault apportioned to Owens.

## C. Conclusion

23 For the reasons set forth above, the judgment of the trial court is reversed, and judgment is hereby rendered awarding Owens $4,850.17 in special damages and $2,500 in general damages, both awards subject to reduction by the 50% fault assessed to Owens. Costs are assessed to defendants-appellees.

REVERSED AND RENDERED

BROWN, C.J. [end of appellate decision]

# II. *Soulard v. Barry*, Cour de Cassation, 1995

24 *A car was driving slowly in a highway rest-stop when a person who had placed himself onto the body of this car had a fatal fall. An appeals court which accomodates the request for compensation by eligible claimants of this victim by holding that he had not committed an inexcusable fault while at the same time noting that the victim had clung to the roof of the moving car and that he had fallen on his own, without the action of the brake does not consider the legal consequences of its findings.*

October 25 1995 Reversed

25 As to the sole issue :

Considering Article 3, paragraph 1, of the July 5, 1985 law :

Whereas it follows from this text that the victims of a traffic accident, other than drivers may find themselves charged with their own fault if that is either unexcused or the exclusive cause of the accident.

26 Whereas according to the disputed judgment that M. Soulard was driving his car slowly in a highway rest-stop when M. Barry who had placed himself on the body of this car fell ; that M. Barry having died, his eligible claimants requested reparation for their injury, that in order to accomodate this request the appeal court held that M. Barry had not committed an indefensible fault :

27 That in ruling thusly while noting that the victim had clung to the roof of the moving car and that he had fallen on his own without the action of the brake, the appeals court which did not consider the consequences resulting from its dissent, has violated the aforementioned text :

FOR THESE REASONS :

28 REVERSES, in all its provisions, the judgment rendered on June 8, 1993, between the parties, by the Bordeaux appeals court ; consequently, restores the case and the parties to where they were before that judgment and remands to the Toulouse court of appeals for proceedings consistent with this judgment.

29 [End of French decision, although of course there is the elaboration by the juge rapporteur of each such decision, as well as by the avocat general and the scholars : these elements are not considered here.]

30 ANALYSIS. Owens v. Brown, Ct, of Appeals of Louisiana (864 So 2d 640, 2003). For the American appeals court, judgment begins with "life" – with the facts of the case. Here, two motorists trabeling slowly in the saem direction collided, and the one who was injured sued for damages but lost in the lower court. That court found that her negligence was 100% responsible for her own injury. On appeal – and this is typical of American appellate courts, unlike those in France – the facts of the day of the accident and of the collision itself are rehearsed in great detail and *prior* to any call upon legal authority. Without the most thorough narration of the facts, five paragraphs totalling 59 lines or about 40% of the opinion, the legal issues in the case cannot even be articulated ! The facts lead up to the code or the precedents, not the reverse. The method is *inductive*. The judge is trained, like all common lawyers, to begin with the facts, which are assumed to be unique in each case.

31 (Parenthetically let me observe that during a brief and fascinating time in my own professional life, I worked as a lawyer in Paris at Cabinet Coudert Freres on the Champs Elysees. I noticed that European clients traveled to the office from many countries and from great distances. These clients could surely afford any lawyer they wanted, including some excellent continentally trained lawyers much closer to home. What were they looking for that made them travel so far to an American lawfirm or (even if they were already in France) pay the very high fees of American trained lawyers. The answer is that, like the Court in Owens v Brown, American lawyers focus on the facts of each new case before they even think about the code, precedents or the law at all ! People crave this when they have their own problems. It is the common law approach, for better or worse ; now we return to Owens vs Brown.)

32 Louisiana is the only American jurisdiction to use a code for almost all legal areas, including the one both of the cases I treat here involve, namely Torts. Despite the state's Code civil heritage, however, its courts as we are seeing employ the common law fact-saturated approach to decision making. The ratio of fact to law in Owens is more

heavily weighted to facts even than the converse ratio to law that we will find in Soulard v. Barry. Before the legal authority is even mentioned (in the third-to-last paragraph), the focus on defendant Brown's negligent inattention to Owens' vehicle (in the fourth-to-last paragraph) climaxes the Court's rehearsal of the facts and inevitably leads to a decision where both parties are found to be at fault and hence where Brown must pay part of Owens' damages. As we will see in Soulard, the statutory law has pride of place and seems to dominate the facts, if not numerically than certainly structurally.

33 The liberty of narration, together with the common law norm of the fusion between form and substance [Cardozo, 340], create in Anglophone jurisprudencea decision that can be judged as either weak or strong :

> The strength that is born of form and the feebleness that is born of the lack of form are in truth qualities of the substance. [Cardozo, *ibid.*]

34 In Owens v. Brown, this fusion is embodied in such fact-infused phrases as "… heading west to Outback Steak House where she was employed…". This innocuous phrase precisely exemplifies Gény's "social life", and it is there to remind us that the injured plaintiff was going to work, a suitable and necessary thing to do, when the accident took place.

35 To the contrary, we never find out what the other driver – who won the case altogether in the court below but now is being made to pay a big part of the damages – might have been going. We do know that she was indifferent to her surroundings at the moment of impact, unmotivated one might say by the real world around her :

> She [Brown]… was looking to her right in the direction of the credit union drive through exits to make sure no cars were coming out… Brown admitted that she did not look in her rear-view mirror at that point. Brown confirmed that Owens' vehicle struck the driver's door.

36 The narrative form of the fact recitation here – Owens' context of good citizen heading to work compared to Brown's somewhat idle failure to check for cars behind her – establishes the justice of the

decision that although Owens hit Brown, Brown must pay half of the costs of Owens' injuries.

Soulard v. Barry, Cour de Cassation, 1995.

37 One can only imagine what an American appellate judge might have made, from "life," of the barely described factual circus in this case. But the French court gives us just enough to whet our appetite, to evoke perhaps from each reader his or her own imaginary rendition of what happened. Apparently the deceased (Barry) whose family has sued for damages climbed aboard the defendant's vehicle – perhaps while it was already slowly moving – and then fell to his death without the driver's suddenly applying the brakes or doing anything else to alter the dangerous situation.

38 Barred by the ineluctable demands of French judicial form to go any further before citing a controlling law, the Cour de Cassation moves quickly to the operative statute, where it seems comfortable – Article 3, paragraph 1 of the Law of July 5, 1985. Code controls facts, instead of the reverse for the Anglophone judge.

39 Yet the facts re-appear in the decision, as though the Cour de cassation were yearning for an opportunity to make them mesh with its legal decision ; there is even a key phrase that is directly analagous to the heavily elaborated section in Owens v Brown where Owens's generally respectable comportment is contrasted with Brown's indifference to her surroundings as the factual prelude that formally leads to a decision against Brown.

> Whereas according to the disputed judgment that M. Soulard was driving, his car slowly in a highway rest-stop when M. Barry who had placed himself on the body of this car fell…

40 A bit of Gény's "social life" emerges in the seemingly unnecessary factual allusion to the "highway rest-stop" [sur une aire de stationnement] ; it is the "Outback Steak House where she worked" detail of this French decision, but it is not fully woven into a larger picture. Whereas American judicial form both permits and encourages the judge-as-story-teller, thus permitting the Louisiana court to contrast plaintiff and defendant, the French court can only evoke a respectable defendant just needing to take a break from driving and actually

goes on to say nothing about why the decedent decided to climb on the slowly moving vehicle of M. Soulard.

41 The Cour de Cassation leaves, wilfully, the reader in the dark. There is no attempt to make the outcome appear just through an effective use of form. Yet there is just the hint of Gény's "social life", enough to whet the appetite but go no further.

42 My judgment on the French judgment would have been Cardozo's : the feebleness that is born of the lack of form [Cardozo, 340] predominates here. It is not redeemed by an outmoded and inflexible formal paragraph-by-paragraph structure.

# Conclusion

43 The French judge, inspired by Cardozo, Gény, Tunc and Mimin, needs to be liberated into the living world in which – and on which – judgments operate. Readers should be in touch, without having to reach out to non-judicial elaboration, with every factual aspect of the case the judges deem worthy of incorporating into the structure of their opinion.

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