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Criminal Procedure and the 1966 Code: The Applicability of Articles 765 and 768 to Non-Jury Trials

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CRIMINAL PROCEDURE AND THE 1966 CODE: THE APPLICABILITY OF ARTICLES 765 AND 768 TO NON-JURY TRIALS

Two important rights of the defendant recognized by the 1966 Code of Criminal Procedure are embodied in article 765(4), requiring an opening statement by the state,[1] and in article 768, requiring the state to give written notice to the defendant of its intention to introduce in evidence a confession or inculpatory statement.[2] In a recent case, the Louisiana supreme court held that neither is required in non-jury trials.[3] One must recognize that articles 765(4) and 768 are concerned with two separate problems and must, therefore, be treated as such. However, the state's opening statement serves to fix the time by which notice must be given as required by article 768.[4] The purpose of this Comment is to examine the 1928 and 1966 Codes of Criminal Procedure, and the accompanying jurisprudence, in order to determine if article 765(4) and article 768 should be applicable to non-jury as well as jury trials.

The State's Opening Statement and the 1928 Code

Under the 1928 Code of Criminal Procedure, as clarified in R.S. 15:0.2, the courts were not forbidden from resorting to common law, but could do so only when the Code provided no express law in a particular situation.[5] For this reason, the Code itself must first be examined. Article 333 provided the express law relative to the state's opening statement:

> "The jury having been empaneled and the indictment read, the trial shall proceed in the following order: *The reading of the plea to the jury; the opening statement of the district attorney* explaining the nature of the charge and

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1. LA. CODE CRIM. P. art. 765: "The normal order of trial shall be as follows: . . . (4) The opening statements of the state and of the defendant . . . ."

2. LA. CODE CRIM. P. art. 768: "If the state intends to introduce a confession or inculpatory statement in evidence, it shall so advise the defendant in writing prior to beginning the state's opening statement. If it fails to do so, a confession or inculpatory statement shall not be admissible in evidence."

3. State v. Himel, 260 La. 949, 257 So.2d 670 (1972).

4. *See* note 29 and accompanying text *infra*.

5. R.S. 15:0.2 (1950) (repealed 1966). "In matters of criminal procedure where there is no express law the common law rules of procedure shall avail."

the evidence by which he expects to establish the same . . . ."[6] (Emphasis added.)

This would indicate that an opening statement by the state would not be required in non-jury trials. In *State v. Florane*,[7] the prosecuting attorney attempted to introduce in evidence a confession over the defense counsel's objection that no opening statement had been made. Although the jurisprudence had determined that a confession not mentioned in the state's opening statement could not be introduced in evidence,[8] the supreme court held in *Florane* that "[i]t is only in cases where the trial is before a jury that the district attorney is required to make an opening statement."[9] This decision was followed by the supreme court in numerous cases and was still authoritative when the 1966 Code of Criminal Procedure was enacted.[10] The reasoning of *Florane* was summarized in a later case:

> "This result was reached because Title 15, Section 333 of the Revised Statutes setting forth the 'Steps in trial' was limited to jury trials and no codal direction existed relating to non-jury trials. The procedure for bench trials was, then, left largely to the trial judge influenced by local practices and customs."[11]

Although required in jury trials, this right of the defendant could be waived by failure to object.[12] Prior to the 1928 Code, there was no statutory requirement of an opening state-

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6. LA. CODE CRIM. P. art. 333 (1928).

7. 179 La. 453, 154 So. 417 (1934).

8. State v. Garrity, 178 La. 541, 152 So. 77 (1933); State v. Elmore, 177 La. 877, 149 So. 507 (1933); State v. Silsby, 176 La. 727, 146 So. 684 (1933). *See also* State v. Ward, 187 La. 585, 175 So. 69 (1937).

9. 179 La. at 461, 154 So. at 419.

10. State v. Dugas, 252 La. 345, 211 So.2d 285 (1968); State v. White, 244 La. 585, 153 So.2d 401 (1963); State v. Palmer, 227 La. 691, 80 So.2d 374 (1955); State v. Sharbino, 194 La. 709, 194 So. 756 (1940).

11. State v. Himel, 260 La. 949, 971, 257 So.2d 670, 678-79 (1972).

12. State v. Shearer, 174 La. 142, 140 So. 4 (1932). The prosecuting attorney omitted the opening statement and defendants objected during the second day of trial. The supreme court held that the defendants had waived their right to demand an opening statement by the prosecution, reasoning that although R.S. 15:333 was mandatory in jury trials, having been enacted "for the benefit and in the interest of the accused, . . . the going to trial by a defendant without insisting that such formalities be complied with is considered a waiver of the right conferred." *Id.* at 145-46, 140 So. at 5-6. However, if the defendant objected timely to the state's failure to make an opening statement, the failure of the trial judge to require an opening statement would be reversible error. *See* State v. Leslie, 244 La. 921, 155 So.2d 19 (1963).

ment by the prosecution and no case can be found dealing with the problem; therefore, the above jurisprudence properly demonstrates the status of the law regarding the state's opening statment prior to the 1966 Code of Criminal Procedure.

Written Notice by the State and the 1928 Code

Although the 1928 Code of Criminal Procedure contained no express provision concerning notice to the defendant if the state intended to introduce a confession or inculpatory statement, the courts construed the purpose of the state's opening statement as requiring:

> "[the prosecutor] 'to show his hand' by explaining, not only the nature of the crime charged, but the nature and character of the evidence by which he expect[ed] to establish it as well, thereby enabling the accused the better to meet the issue and make his defense."[13]

Thus, the state had to mention the confession in its opening statement if it intended to introduce it in evidence.[14] While this practice provided the accused an opportunity to prepare his defense, the state faced the hazard that a confession or inculpatory statement, read as part of the opening statement, might later be ruled inadmissible; if this occurred, reversible error had been committed.[15]

The State's Opening Statement and the 1966 Code

Article 3 of the 1966 Code abrogates the rule of the 1928 Code that the courts could resort to common law if the Code did not specifically deal with a particular situation. Louisiana courts must first look to the legislation and then "proceed in a manner consistent with the spirit of the provisions of the

13. State v. Shearer, 174 La. 142, 145, 140 So. 4, 5 (1932). *See* State v. Jones, 230 La. 356, 88 So.2d 655 (1956); State v. Ducre, 173 La. 438, 137 So. 745 (1931). *But see* State v. Himel, 260 La. 949, 257 So.2d 670 (1972); State v. Dillon, 260 La. 215, 255 So.2d 745 (1971); and State v. White, 244 La. 585, 153 So.2d 401 (1963), for the purpose accorded the state's opening statement under the 1966 Code.

14. *See* cases cited at note 8 *supra.*

15. State v. Cannon, 184 La. 514, 166 So. 485 (1936).

Code . . . ."[16] Article 765 provides that the "normal order of trial shall be . . ."[17] and requires as one of those steps an opening statement by the state. The article contains no words of limitation. Comment (c) under article 765 provides:

> "The provision of C.C.P. Art. 1632, which authorizes the court to vary the order when circumstances justify, is omitted from this article, because it seems dangerous in criminal cases. Variations can occur, of course, if the defendant does not object, but the court should not have the power to order variations over the defendant's objection."

The Code itself gives direction in determining the intent of article 765 by providing that "[t]he word 'shall' is mandatory, and the word 'may' is permissive."[18] Therefore, the article should be read as leaving the trial judge no discretion concerning the state's opening statement.

The intent of article 765 also may be demonstrated by the arrangement of its language as compared to R.S. 15:333. R.S. 15:333 provided "[t]*he jury having been empaneled* and the indictment read, the trial shall proceed in the following order ...." (Emphasis added.) Obviously this provision refers exclusively to jury trials. Article 765, however, has no limiting language before the mandatory requirement that "[t]he normal order of trial shall be as follows . . . ."[19] It is to be noted that the mandatory language in article 765 pertains to all steps in trial. By comparing the placement of the mandatory language in the present article with the old provision, it can be concluded that the legislature intended the present article to apply to non-jury and jury trials.

In addition to the placement of the mandatory language in article 765, the generality of the language itself "denies any attempt to restrict its application to jury trials alone."[20]

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16. LA. CODE CRIM. P. art. 3: "Where no procedure is specifically prescribed by this Code or by statute, the court may proceed in a manner consistent with the spirit of the provisions of this Code and other applicable statutory and constitutional provisions." The method of analysis required by the Code is stressed because of the court's resort to common law jurisprudence and other state statutes in *State v. Himel.*

17. LA. CODE CRIM. P. art. 765.

18. *Id.* art. 5.

19. *Id.* art. 765.

20. State v. Himel, 260 La. 949, 972, 257 So.2d 670, 679 (1972) (dissenting opinion).

The primary purpose of the state's opening statement is to "explain the nature of the charge, and set forth, in general terms, the nature of the evidence by which the state expects to prove the charge."[21] Article 769 contains the well settled jurisprudential rule that evidence "not fairly within the scope of the opening statement of the state shall not be admitted in evidence." The rule is modified, however, in the second paragraph of that article, which permits the court to admit evidence that the state has inadvertently and in good faith failed to mention in its opening statement.[22] But the discretion of the court in admitting such evidence is not unbridled; for, although the evidence was inadvertently and in good faith omitted, the court cannot admit the evidence "if it finds that the defendant is . . . taken by surprise or prejudiced in the preparation of his defense."[23] This latter limitation indicates that the primary purpose of the state's opening statement is to benefit the defendant.[24]

The opening statement further serves to fix the time at which the state must give the defendant written notice if it intends to introduce a confession or inculpatory statement.[25] However, neither article 769 nor article 768 contains any words that would limit these requirements to jury trials.

Another significant factor is the provision concerning waiver of opening statements in article 765. Although this article permits the defendant to waive his opening statement, no mention is made of the state's corresponding right.[26] Having expressly dealt with the waiver of opening statements by defendants and not having made reference to the right of the state to waive its statement, "the clear meaning which emerges from this article is that an opening statement is required by the State in all cases—jury and non-jury alike."[27]

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21. LA. CODE CRIM. P. art. 766.

22. LA. CODE OF CRIM. P. art. 769 reads in part: "If the state offers evidence that was inadvertently and in good faith omitted from the opening statement, the court, in its discretion may admit the evidence if it finds the defendant is not taken by surprise or prejudiced in the preparation of his defense."

23. *Id.*

24. *But see* State v. Himel, 260 La. 949, 257 So.2d 670 (1972); State v. Dillon, 260 La. 215, 255 So.2d 745 (1971); State v. White, 244 La. 585, 153 So.2d 401 (1963).

25. *See* Justice Summers' dissent in *Himel*, 260 La. at 966, 257 So.2d at 677.

26. LA. CODE CRIM. P. art. 765: "A defendant may waive his opening statement."

27. *See* Justice Summers' dissent in *Himel*, 260 La. at 972, 257 So.2d at 679.

If an opening statement by the state is mandatory in all trials, may the defendant, by his own inaction, waive the state's opening statement? The Code does not answer this problem but comment (c) under article 765 lends direction by declaring that variations can occur in the normal order of trial if the defendant does not object.[28] It therefore appears that the defendant will voluntarily waive his right to an opening statement by the prosecution if he fails to make timely objection. It must be pointed out, however, that the court should not "order variations over the defendant's objection,"[29] and thus should not allow the state to dispense with its opening statement over the objection of the defendant.

Notice of Confessions and Inculpatory Statements Under the 1966 Code

As previously discussed,[30] under the 1928 Code the state had to mention a confession or inculpatory statement in its opening statement if it intended to introduce it in evidence. Since this constituted notice to the defendant, there was no requirement of notice prior to the state's opening statement. Many problems were involved in such a procedure.[31] Although the procedure obviously involved substantial damage to the defendant,[32] the Code recognized the need of the defendant to be apprised of the evidence against him. One of the purposes of the 1966 Code of Criminal Procedure was to present "an entirely new approach to the problem of reference to a confession [or inculpatory statement] in [the state's] opening statement."[33] Article 767 provides that "[t]he state shall not, in the opening statement, advert in any way to a confession or inculpatory statement made by the defendant." Article 768 further provides that:

"[i]f the state intends to introduce a confession or inculpa-

28. LA. CODE CRIM. P. art. 765, comment (c): "Variations [in the normal order of trial] can occur, of course, if the defendant does not object, but the court should not have the power to order variations over the defendant's objection."

29. *Id.*

30. *See* note 8 *supra.*

31. Bennett, *The 1966 Code of Criminal Procedure*, 27 LA. L. REV. 175, 216 (1967).

32. The procedure involved substantial damage to the defendant in that the notice, given in the state's opening statement, immediately informed the jury that defendant had made a confession or inculpatory statement. This would tend to raise a presumption of guilt from the outset of the trial.

33. LA. CODE CRIM. P. art. 796, comment (c)(2).

> tory statement in evidence, it shall so advise the defendant in writing prior to beginning the state's opening statement. If it fails to do so a confession or inculpatory statement shall not be admissible in evidence."

No language contained in these articles in any way limits their application to jury trials.

The argument has been made that article 703[34] and the jurisprudence dealing with pre-trial discovery of confessions[35] have weakened the need for making article 768 mandatory. Although article 703 and the Louisiana jurisprudence have allowed pre-trial discovery of written or video-taped confessions and inculpatory statements, there is still no authority allowing pre-trial discovery of the defendant's oral confession or inculpatory statement.[36] It is submitted that an oral confession or inculpatory statement introduced in evidence without prior notice to the defendant can surprise the defendant at least as much as a written one. In any event, the comments to article 703 indicate that the legislature intended that article 768 should not be affected by article 703.[37] Article 768 is clear—it applies to all confessions and inculpatory statements made by the defendant. Consequently, it must be concluded that articles 767 and 768 are mandatory in both jury and non-jury trials.

An additional problem is whether the defendant, by waiving the state's opening statement, also waives his right to demand written notice as required in article 768. Under the Code, the only correlation of the state's opening statement with the requirement of written notice is that the time designated for giving the opening statement is also the time by which the state must have given the notice required by article 768.[38] Except for this

34. *Id.* art. 703 (B): "A defendant may move to suppress for use as evidence at the trial on the merits a written confession or written inculpatory statement, on any ground that would make it inadmissible as evidence."

35. State v. Square, 257 La. 743, 244 So.2d 200 (1971); State v. Pesson, 256 La. 201, 235 So.2d 568 (1970); State v. Crook, 253 La. 961, 221 So.2d 473 (1969); State v. Hunter, 250 La. 295, 195 So.2d 273 (1967); State v. Johnson, 249 La. 950, 192 So.2d 135 (1966).

36. State v. Himel, 260 La. 949, 257 So.2d 670 (1972).

37. LA. CODE CRIM. P. art 703, comment (f): "This article does not affect the operation of Art. 767, prohibiting advertence to any confession or inculpatory statement in the state's opening statement, nor Art. 768, requiring notice to the defendant of intention to introduce a confession or inculpatory statement. If a motion to suppress a confession or inculpatory statement is denied, the notice required by Art. 768 must be given if the state decides to introduce the confession or inculpatory statement."

38. *See* note 25 *supra*.

temporal relationship, notice of intent to use confessions and the state's opening statement are two separate and distinct problems. Thus, if the defendant waives his right to an opening statement by the prosecution, then the time by which the state must have given notice would be the time allotted for that purpose by article 765. This is not to say that the defendant could not voluntarily waive his right to demand the written notice required by article 768; but waiver of the state's opening statement should not automatically result in waiver of his right to demand the notice required by article 768.

Judicial Interpretations of the 1966 Code

The State's Opening Statement

It appears that the supreme court regards the state's opening statement as a device primarily to aid the jury and not to assist the defendant in the preparation of his defense.[39] In *State v. Kreller*, the supreme court stated that

> "the District Attorney's opening statement forms no part of the evidence, has no binding force, and is designed only to give a general acquaintance with the case which will enable the jury to understand and appreciate the testimony as it falls from the lips of the witnesses."[40]

Although defined in this manner, the state's opening statement would nevertheless be required in all trials if the normal order of trial established by article 765 were considered mandatory. But the supreme court has not interpreted article 765 in such a manner.

> "There is nothing in article 765 indicating that the steps in the normal order of trial are sacramental. All the steps in article 765 refer to jury trials; there is one reference to the announcement of the judgment in non-jury cases. There is, however, nothing contained in the article to indicate that an opening statement . . . is essential in a non-jury case."[41]

39. State v. Himel, 260 La. 949, 958, 257 So.2d 670, 674 (1972): "[W]e are of the opinion that the office of the opening statement is primarily to program the jury so that it may better follow and understand the evidence as it unfolds during the trial." Although not within the scope of this article, it should be noted that whether the state's opening statement is designed primarily for the jury or the defendant, the present brevity of the state's opening statement prevents it from benefiting anyone.

40. 255 La. 982, 991, 233 So.2d 906, 909 (1970).

41. State v. Didier, 259 La. 967, 979-80, 254 So.2d 262, 267 (1971).

The reasons for this rule were further articulated in *State v. Himel*.[42] After stating that article 765 was not entirely limited in its scope to jury trials, the court determined which provisions of the article apply to non-jury trials. Comparing article 761, which provides that "[a] trial by a judge alone commences when the first witness is sworn," with article 765, the court reasoned that any steps in article 765 which preceded the presentation of evidence were applicable only to jury trials. Thus, the state's opening statement was made applicable only to jury trials.

Justice Summers pointed out in his dissent in *Himel* that, although article 761 does set the time for commencement of trial, the purpose of the article is

> "to fix definitely the point of beginning the trial in order that it may be ascertained when jeopardy begins, when a motion to quash must be filed and to measure limitations for its prosecution."[43] (Citations omitted.)

If article 761 is read in this manner, then it is certainly possible that the legislature intended article 765 to provide the defendant with the right to demand an opening statement by the state prior to the formal commencement of the trial.[44]

As a result of the supreme court's ruling in *Himel*, article 765 does apply to all trials. However, those steps listed in the article that occur prior to the "commencement" of non-jury trials as defined by article 761 are applicable only to jury trials. Thus, the opening statement by the state is not mandatory in non-jury trials.

Article 768 and the Supreme Court

The supreme court has interpreted an inculpatory statement to be "the out-of-court admission of incriminating facts made by a defendant after the crime has been committed. It relates to past events."[45] Under this definition the state does not have to give written notice to the defendant of those statements made by him before the crime was committed. In addition, the supreme court has held that the state does not have to

42. 260 La. 949, 257 So.2d 670 (1972).
43. 260 La. at 975, 257 So.2d at 680.
44. State v. Himel, 260 La. 949, 966, 257 So.2d 670, 677 (1972) (dissenting opinion).
45. State v. Fink, 255 La. 385, 390, 231 So.2d 360, 362 (1970).

analyze its evidence to determine if the testimony sought to be introduced is a confession or inculpatory statement.[46] This means that not until the presentation of the state's evidence does the defendant know whether to prepare his defense to meet an oral confession or an oral inculpatory statement.[47]

Another area of concern is the written notice itself. In *State v. Anderson*, the supreme court held that the following notice substantially complied with article 768:

> " 'The State of Louisiana intends to introduce in evidence each and every confession and statement of each and everyone of these defendants, *whether same be oral* or recorded (and later transcribed into writing) or written, and whether inculpatory or exculpatory, particularly BUT NOT LIMITED TO the following statements . . . .' "[48]

Although the 1966 Code does not lend direction in determining how detailed the written notice required by article 768 must be, it is obvious that a broad notice such as that in *Anderson* gives little, if any, warning to the defendant to enable him to prepare his defense adequately.[49]

In addition to permitting such broad notice, the court has allowed the writen notice to be given immediately preceding the state's opening statement.[50] This decision seems to be within article 768 in that the article simply requires that the written notice be given prior to the state's opening statement, and specifies no limit concerning how far in advance of the opening statement the notice must be given.[51]

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46. State v. Palmer, 251 La. 759, 766, 206 So.2d 485, 487 (1968).

47. *See* notes 34, 35, 36 and accompanying text *supra*.

48. 254 La. 1107, 1133-34, 229 So.2d 329, 338 (1969).

49. The writer suggests that, if the state uses such nonspecific notice, the court would abuse its discretion by refusing a defendant's request for a recess after the confession or inculpatory statement was introduced so that he could properly prepare his defense.

50. State v. Rodgers, 251 La. 953, 207 So.2d 755 (1968).

51. *See* LA. CODE CRIM. P. art. 769, comment (d): "The Louisiana system results in a defendant being put on notice of the facts he has to face, at the very late time of the opening statement, immediately after which the defendant is involved in battling with the state. It is no exaggeration to say that a defendant can be made to prepare his defense against a charge of murder with far less opportunity or time than he would have to prepare his defense against a damage claim in a civil suit based on the same homicide."

The supreme court, in *State v. LaCoste*,[52] went even further in limiting the protection afforded by article 768 by declaring that if the state inadvertently and in good faith fails to give the written notice required by article 768, the defendant must either object timely or waive his right to demand notice. Although the article gives no latitude in requiring that the state give written notice, the court reasoned that article 769 granted it this discretion. This article provides that the court may admit evidence that was inadvertently and in good faith omitted from the state's opening statement "if it finds that the defendant is not taken by surprise or prejudiced in the preparation of his defense."[53] This article, by its language, relates only to evidence omitted from the state's opening statement. As Justice Sanders stated in his dissent in *State v. LaCoste*, "[t]he majority, in my opinion, erroneously transpose[d] this discretion to Article 768."[54]

Although the supreme court had severely limited the protection afforded the defendant by Article 768, the court had never declared article 768 applicable to jury trials alone until *State v. Himel*.[55] The reasoning of the court in not requiring written notice in non-jury trials is unclear. The court stated that if "[i]nculpatory statements are treated in parity with the evidence to be disclosed in the opening statement"[56] and if the state's opening statement is not mandatory in non-jury trials, then it follows that requiring the state to give written notice as required in article 768 is not mandatory in non-jury trials. As

52. 256 La. 697, 237 So.2d 871 (1970). Two assistant district attorneys were jointly prosecuting the case and each had thought, mistakenly, that the other had delivered the written notice to the defendant. Upon discovering their mistake, they delivered the written notice to the defendant. The defense counsel had the inculpatory statement in his hands for approximately 12 hours before he objected that its admission would be a violation of article 768 of the 1966 Code. There was no question concerning the prosecution's good faith or that it was an inadvertent mistake.

53. LA. CODE CRIM. P. art. 769.

54. 256 La. at 743, 237 So.2d at 888 (dissenting opinion).

55. 260 La. 949, 257 So.2d 670 (1972).

56. *Id.* at 965, 257 So.2d at 676. In declaring that inculpatory statements are to be treated in parity with the other evidence to be disclosed in the state's opening statement, the supreme court relied on *State v. LaCoste*, 256 La. 697, 237 So.2d 871 (1970). "The effect of the holding in the recent case of State v. Lacoste [*sic*] [citation omitted] was to make the exception to the exclusion of evidence under Article 769 applicable to the notice of the confession or inculpatory statement under Article 768. This treatment of the inculpatory statement shows it to be no more and no less important than the other matters which are included in the opening statement." State v. Himel, 260 La. 949, 965, 257 So.2d 670, 679 (1972).

previously discussed, the procedure of requiring the state to give notice to the defendant of its intention to introduce confessions was removed by the 1966 Code from the opening statement.[57] The only relation the state's opening statement has with article 768 is to fix the time by which the state must have given the written notice required by that article.[58] Merely because the state's opening statement is not mandatory, it does not follow that the requirement of written notice is not mandatory.

In *State v. Himel*, the supreme court expressed its desire to provide swift administration of criminal justice:

> "If opening arguments were mandated in bench trials, our city courts, traffic courts, other courts of limited jurisdiction, and the misdemeanor sections of our district courts would be unduly burdened with an unnecessary and time-consuming procedural device to further crowd their already clogged dockets. At a time when millions of dollars are being spent nationwide to find more expeditious ways and means of administering criminal justice, it is fortunate that our Legislature has not made this step backward."[59]

Although this language was directed to the state's opening statement, it is equally applicable to the procedure of giving written notice to the defendant.

While judicial efficiency is obviously a desirable end, the writer submits that the supreme court should reevaluate its elimination of the effects of articles 765 and 768. The 1966 Code of Criminal Procedure, without words of limitation to jury trials, requires an opening statement be made by the state and written notice be given to the defendant. Even if applying articles 765 and 768 only to jury trials would expedite criminal proceedings, it would appear that a limitation of this magnitude should be made only by the legislature. If the legislature desires to expedite criminal proceedings, two alternatives are available. Articles 765 and 768 could be made applicable to all trials except those in which a prosecuting attorney is not used; or articles 765 and 768 could be made applicable to all trials except city court and parish trials in which the necessary informal pro-

57. *See* note 33 and accompanying text *supra*.
58. *Id.*
59. 260 La. at 963 n.10, 257 So.2d at 676 n.10.

ceedings are incompatible with the procedures of articles 765 and 768.[60] In both instances the requirements of these articles would only undermine the desired informalities in such proceedings.

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THE MEDICAL MALPRACTICE ACTION IN LOUISIANA

Medical malpractice[1] in Louisiana has been defined as a physician or surgeon's dereliction from his professional duty to possess and exercise the skill ordinarily employed by the members of his profession; or as a breach of his duty to apply this skill to the case with reasonable care and diligence, along with his best judgment.[2] If the definition of medical malpractice were so limited, those actions arising out of professional conduct, but not based upon a want of professional skill and reasonable care, would be excluded. However, actions which may not fall within the above definition, such as abandonment or unauthorized medical treatment, are frequently classified as malpractice actions. The primary purpose of this paper is to compare the principles of tort law to the problems of the medical malpractice action.

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60. LA. CODE CRIM. P. art. 15: "A. The provisions of this Code, except as otherwise specifically provided by other statutes, shall govern and regulate the procedure in criminal prosecutions and proceedings in district courts. They also shall govern criminal prosecutions in city, parish, juvenile, and family courts, *except insofar as a particular provision is incompatible with the general nature and organization of, or special procedures established or authorized by law for, those courts.*" (Emphasis added.)

Comment (d) lends direction in interpreting article 15 by providing that "[a]pplication of this Code to city courts presents a particularly difficult and important problem. Many rules of the Code apply to all criminal prosecutions. Others, by their very nature, are inapplicable to the more informal procedures for the trial of minor cases in city courts."

1. "Malpractice. A dereliction from professional duty whether intentional, criminal or merely negligent by one rendering professional services that result in injury, loss or damage to the recipient of those services or to those entitled to rely upon them or that affects the public interest adversely." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1969).

2. *See* Meyer v. St. Paul-Mercury Indem. Co., 225 La. 618, 619, 73 So.2d 781, 782 (1953): "A physician, surgeon or dentist . . . is not required to exercise the highest degree of skill and care possible. As a general rule it is his duty to exercise the degree of skill ordinarily employed, under similar circumstances, by the members of his profession in good standing in the same community or locality, and to use reasonable care and diligence, along with his best judgment, in the application of his skill to the case."