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Appellate Review of Damage Awards - An Affirmation of the Trial Court's "Much Discretion"

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as long as the performance is not broadcast in its entirety. The state of the law in appropriation cases is as unsettled now as it was before the instant case, and perhaps even more so due to the "entire act" test and the confusion over what type of damage is suffered. It appears that Judge Biggs' haystack in a hurricane has been hit with a fresh burst of wind.

James N. Mansfield III

APPELLATE REVIEW OF DAMAGE AWARDS—AN AFFIRMATION OF THE TRIAL COURT'S "MUCH DISCRETION"

While operating a dado saw at his place of employment, plaintiff cut off four fingers and a large part of his right hand. The Third Circuit Court of Appeal affirmed the trial court's decision requiring the employer's parent corporation and its insurer to pay $350,000 in damages,[1] but on rehearing reduced the award to $140,000.[2] The Louisiana Supreme Court reinstated the trial court's award and *held* that courts of appeal should modify an award for damages upon a showing that the trial judge or jury abused its discretion in setting the amount but "only to the extent of lowering it (or raising it) to the highest (or lowest) point which is reasonably within the discretion afforded that court." *Coco v. Winston Industries, Inc.*, 341 So. 2d 332 (La. 1976).

Louisiana courts have consistently adhered to the constitutional mandate for courts of appeal to review quantum of general damages awarded by the trial court.[3] The Louisiana Supreme Court has also consistently upheld the rule of Civil Code article 1934(3) that the judge or jury must be given much discretion in setting awards and has held that the rule does not violate the Louisiana Constitution.[4] To strike a balance between these two

1. Coco v. Winston Indus., Inc., 330 So. 2d 649 (La. App. 3d Cir. 1976).

2. *Id.* at 667 (on rehearing).

3. LA. CONST. art. V, § 10(B): SCOPE OF REVIEW
Except as limited to questions of law by this constitution, or as provided by law in the review of administrative agency determinations, appellate jurisdiction of a court of appeal extends to law and facts.
See, e.g., Temple v. Liberty Mut. Ins. Co., 330 So. 2d 891 (La. 1976); Boutte v. Hargrove, 290 So. 2d 319 (La. 1974); Watts v. Town of Homer, 301 So. 2d 729 (La. App. 2d Cir. 1974). *See also* Gonzales v. Xerox Corp., 320 So. 2d 163, 165 n.1 (La. 1975) for a brief recap of the evolution of appellate review of fact in Louisiana.

4. *See, e.g.*, Anderson v. Welding Testing Laboratory, Inc., 304 So. 2d 351,

grants of authority, the supreme court and the courts of appeal have held that "appellate review of awards for general damages is limited to determining whether the trial court abused its discretion."[5] To determine whether the trier of fact abused its discretion, courts of appeal must

352 (La. 1974); Miller v. Thomas, 258 La. 285, 288-92, 246 So. 2d 16, 17-18 (1971); Moore v. Blanchard, 216 La. 253, 257, 43 So. 2d 599, 600 (1949), all construing La. Const. of 1921, art. VII, § 29(2) which provided:

> All appeals of which the courts of appeal have appellate jurisdiction as provided in this section shall be on both the law and the facts, except where the appeal is limited to questions of law only by any other Section of this Constitution.

LA. CIV. CODE art. 1934(3) provides in part:

> Although the general rule is, that damages are the amount of the loss the creditor has sustained, or of the gain of which he has been deprived, yet there are cases in which damages may be assessed without calculating altogether on the pecuniary loss, or the privation of pecuniary gain to the party . . . .
>
> In the assessment of damages under this rule, as well as in cases of offenses, quasi offenses, and quasi contracts, *much discretion must be left to the judge or jury*, while in other cases they have none . . . . (Emphasis added).

The rationale for this rule of article 1934(3) is that the trial court finder of fact has a direct encounter with the parties and witnesses to the suit and thus can evaluate the true extent of plaintiff's injury, whereas the court of appeal must base its decision solely on the written record of the case, briefs and oral argument. *See, e.g.*, Revon v. American Guar. & Liab. Ins. Co., 296 So. 2d 257, 258 (La. 1974); Palmer v. Avalon Oil Co., 120 So. 781, 783 (La. App. 2d Cir. 1929); Redwitz v. Waggamen, 33 La. Ann. 26, 28 (Orl. App. 1881).

Courts in other jurisdictions hold that the trial judge or jury is given great discretion and that their verdict must stand unless it is so excessive or inadequate that the judgment appears to have been the result of passion, prejudice, partiality, corruption, or error of law. These decisions also give great weight to the trial court's personal encounter with the parties and witnesses. This is especially true since in other jurisdictions courts of appeal do not have power to review findings of fact. *See generally* Bankers Life & Cas. Co. v. Kirtley, 307 F.2d 418, 423, 425 (8th Cir. 1962); Schroeder v. Auto Driveaway Co., 11 Cal. 3d 908, 523 P.2d 662, 114 Cal. Rptr. 622 (1974)(In Bank); Spicer v. Armco Steel Corp., 68 Ohio App. 2d 314, 322 N.E.2d 279 (Ct. App. 1974).

5. Anderson v. Welding Testing Laboratory, Inc., 304 So. 2d 351, 352 (La. 1974). *See also* Revon v. American Guar. & Liab. Ins. Co., 296 So. 2d 257, 258 (La. 1974); Spillers v. Montgomery Ward & Co., 294 So. 2d 803, 809 (La. 1974); Boutte v. Hargrove, 290 So. 2d 319, 321 (La. 1974); Ballard v. National Indem. Co., 246 La. 963, 970-71, 169 So. 2d 64, 67 (1964); Averett v. Alexander, 336 So 2d 227, 232 (La. App. 1st Cir. 1976).

General damages are defined in *Anderson v. Welding Testing Laboratory Inc.*, 304 So. 2d at 352 as "[t]hose which may not be fixed with any degree of pecuniary exactitude but which, instead, involve mental or physical pain or suffering, inconvenience, the loss of gratification of intellectual or physical enjoyment, or other losses of life or lifestyle which cannot really be measured definitively in terms of money . . . ."

examine all the relevant evidence in the case and decide whether the damage award conforms to the facts.[6] Courts of appeal may not modify awards of damages simply because they disagree with the amount awarded by the trial court[7] or because the facts justify a different amount.[8] Only upon finding that the judge or jury abused its "much discretion" can the court of appeal raise or lower the amount of damages awarded.[9] However, when modifying trial court awards of quantum, courts of appeal often have simply substituted their judgment for that of the trier of fact.[10] In making this substitution the courts of appeal have stated only that the judge or jury abused its discretion and that a more appropriate amount should be awarded.[11]

A survey of quantum in previous similar cases had been held to be an appropriate aid to the courts of appeal in deciding whether the trial court abused its discretion in setting the award.[12] This use of similar awards originated in early decisions which required some uniformity of awards in cases presenting similar fact situations.[13] Following this principle, trial court damage awards were often reduced or increased to maintain uni-

6. *See, e.g.*, Anderson v. Welding Testing Laboratory, Inc., 304 So. 2d 351, 352 (La. 1974); Bitoun v. Landry, 302 So. 2d 278, 279 (La. 1974); Revon v. American Guar. & Liab. Ins. Co., 296 So. 2d 257, 258 (La. 1974).

7. Bitoun v. Landry, 302 So. 2d 278, 279 (La. 1974).

8. Revon v. American Guar. & Liab. Ins. Co., 296 So. 2d 257, 258 (La. 1974); Spillers v. Montgomery Ward & Co., 294 So. 2d 803, 809 (La. 1974).

9. *See, e.g.*, Anderson v. Welding Testing Laboratory, Inc., 304 So. 2d at 352; Bitoun v. Landry, 302 So. 2d 278, 279 (La. 1974); Miller v. Thomas, 258 La. 285, 292, 246 So. 2d 16, 17-18 (1971).

10. *See, e.g.*, Sanders v. Western Cas. & Sur. Co., 337 So. 2d 286 (La. App. 2d Cir. 1976) (reduced from $7500 to $5000); Sticker v. General Foods Corp., 324 So. 2d 568 (La. App. 1st Cir. 1975) (reduced from $5000 to $1500); Allen v. Aetna Life & Cas. Ins. Co., 254 So. 2d 69 (La. App. 3d Cir. 1971) (increased from $12,000 to $22,000).

11. *See, e.g.*, Sanders v. Western Cas. & Sur. Co., 337 So. 2d 286, 288 (La. App. 2d Cir. 1976) ("the award to [plaintiff] of $7,500 for her personal injuries constituted an abuse of discretion and we reduce this amount to $5,000 . . . . "); Curry v. Vallot, 271 So. 2d 711, 713 (La. App. 1st Cir. 1972) ("we are of the opinion . . . that a reasonable award for such injuries, pain and discomfort is $4,750.00"); Allen v. Aetna Life & Cas. Ins. Co., 254 So. 2d 69, 73 (La. App. 3d Cir. 1971) ("we think that an award of $22,000 would be more equitable and would neither be excessive nor inadequate").

12. *See, e.g.*, Miller v. Thomas, 258 La. 285, 292, 246 So. 2d 16, 17-18 (1971); Gaspard v. LeMaire, 245 La. 239, 266, 158 So. 2d 149, 158 (1963); Miller v. Rooks, 256 So. 2d 499, 500 (La. App. 2d Cir. 1972).

13. *See, e.g.*, Williams v. W. R. Pickering Lumber Co., 125 La. 1087, 1099, 52 So. 167, 172 (1910) ("some reasonable uniformity in the awards in like cases should be observed"); Rice v. Crescent City R.R., 51 La. Ann. 108, 115, 24 So. 791, 794

formity with awards in preceding similar cases.[14] This standard of uniformity was dominant in the early 1900's but declined in use until 1963,[15] when in the case of *Gaspard v. LeMaire*,[16] the supreme court noted that too many damage awards were modified "solely for the purpose of maintaining uniformity of awards."[17] The court concluded that courts of appeal were placing too much emphasis on prior awards and held that previous awards should thereafter be used only as an aid in determining whether the trial judge or jury had abused its discretion.[18]

In the instant case, the Third Circuit affirmed the trial court on original hearing, having found no abuse of discretion in establishing quantum.[19] However, on rehearing, after examining awards in previous cases with similar facts, the court reduced the award from $350,000 to $140,000.[20] Finding that courts in previous cases had awarded smaller amounts for similar injuries, the court of appeal determined that the trial court had abused its discretion and lowered the award to what, in its judgment, was a more appropriate amount.[21]

Finding no abuse of discretion by the trier of fact, the Louisiana Supreme Court reinstated the original damage award[22] and expressed its dissatisfaction with the appellate court's method of modifying damage awards. After the supreme court recognized the trial court's "much

(1899) ("a due regard . . . being always had to the proper observance of a reasonable uniformity . . . . "); Grissom v. Heard, 47 So. 2d 108, 109 (La. App. 1st Cir. 1950) ("we do endeavor to maintain some standard of uniformity . . . .").

14. *See, e.g.*, Jones v. Tremont Lumber Co., 139 La. 616, 71 So. 862 (1916); Williams v. W. R. Pickering Lumber, 125 La. 1087, 52 So. 167 (1910); Rice v. Crescent City R.R. Co., 51 La. Ann. 108, 24 So. 791 (1899); Grissom v. Heard, 47 So. 2d 108 (La. App. 1st Cir. 1950).

15. Early cases stated emphatically that a standard of uniformity should be maintained. *See* Jones v. Tremont Lumber Co., 139 La. 616, 71 So. 862 (1916); Williams v. W. R. Pickering Lumber Co., 125 La. 1087, 52 So. 167 (1910); Cavicchi v. Gaiety Amusement Co., 173 So. 458 (Orl. App. 1937); Jones v. Toye Bros. Auto & Taxicab Co., 119 So. 446 (Orl. App. 1928). Later courts held that awards should be uniform, but only so far as the particular facts and circumstances of each case would allow. *See* Casserino v. Brown, 144 So. 2d 608, 609-10 (La. App. 4th Cir. 1962); Grissom v. Heard, 47 So. 2d 108 (La. App. 1st Cir. 1950); Hare v. New Amsterdam Cas. Co., 1 So. 2d 439 (La. App. 1st Cir. 1941).

16. 245 La. 239, 158 So. 2d 149 (1963).

17. *Id.* at 264, 158 So. 2d at 158.

18. *Id. See also* Note, 25 LA. L. REV. 545 (1965); Note, 49 TUL. L. REV. 460 (1975).

19. Coco v. Winston Indus., Inc., 330 So. 2d 649 (La. App. 3d Cir. 1976).

20. *Id.* at 673-75.

21. *Id.*

22. 341 So. 2d at 337.

discretion" in awarding general damages[23] and the constitutional mandate of courts of appeal to review these awards,[24] it set out new guidelines for courts of appeal to follow in modifying general damage awards. The primary change is to prohibit a court of appeal from simply substituting its judgment on quantum for that of the trial court.[25] Courts of appeal may still modify an award of damages only after a finding that the trier of fact abused its discretion, but "only to the extent of lowering it (or raising it) to the highest (or lowest) point which is reasonably within the discretion afforded that court."[26]

The court expressed concern that courts of appeal had disregarded the standard formulated in *Gaspard v. LeMaire*[27] and had placed too much emphasis on awards in similar cases to decide whether a trial court had abused its discretion.[28] Although the court in *Coco* recognized the over-reliance on previous similar cases, it did not prohibit their use as an aid in determining whether the fact finder abused its discretion in setting quantum. The court restated the *Gaspard* rule and warned courts of appeal against relying too greatly on previous awards since each case must be decided on its own facts.[29]

Cases after *Coco* indicate a general dissatisfaction with the deci-

23. *Id.* at 335.

24. *Id.*

25. *Id.*

26. *Id.* This rule enunciated by the Louisiana Supreme Court closely resembles the "maximum recovery rule" of the federal courts. In *Anderson v. Sears, Roebuck & Co.*, 377 F. Supp. 136, 138 (E.D. La. 1974), the court stated, "This rule directs the trial judge to determine whether the verdict of the jury exceeds the maximum amount which the jury could reasonably find and if it does, the trial judge may then reduce the verdict to the highest amount that the jury could properly have awarded. Functionally, the maximum recovery rule both preserves the constitutionally protected role of the jury as finder of facts and prevents the predilections of the judge from infecting the jury's determination. Thus, the court's task is to ascertain, by scrutinizing all of the evidence as to each element of damages, what amount would be the maximum the jury could have reasonably awarded."

27. 245 La. at 264-66, 158 So. 2d at 158; see also text at notes 16-17, *supra.*

28. 341 So. 2d at 335. *See, e.g.*, Reggio v. Louisiana Gas Serv. Co., 333 So. 2d 395, 408 (La. App. 4th Cir. 1976) ("A consideration of the most recent cases where catastrophic damage awards were made leads us to conclude that the general damage award to Villere is excessive."); Hoffman v. Allstar Ins. Corp., 288 So. 2d 388, 395 (La. App. 4th Cir. 1974) ("considering recent cases emanating from this Court . . . the sum of $5000 would fairly and justly compensate Hoffman"); Tamplain v. Collinswood Poultry Co., 279 So. 2d 277, 280 (La. App. 4th Cir. 1973) ("With the pain and suffering associated with plaintiff's headaches discounted, it is apparent that the damages awarded constitute an abuse of discretion.").

29. 341 So. 2d at 335.

sion.[30] Several opinions considered *Coco* to have given the trial court too much discretion in establishing quantum and thus to prevent effective review.[31] In one case,[32] the Fourth Circuit indicated that *Coco* was irreconcilable with the constitutional mandate that courts of appeal review trial court awards of damages. However, *Coco* correctly applied the rule of Civil Code article 1934(3), that much discretion be given to the judge or jury in setting damages. Thus to find *Coco's* requirement of much discretion unconstitutional would logically require concluding that article 1934(3) is unconstitutional. However, Civil Code article 1934(3) has consistently been upheld by the Louisiana Supreme Court.[33]

Another aspect of *Coco* that has met with dissatisfaction is the requirement that courts of appeal first determine a reasonable range of quantum and then modify the award accordingly if it does not fall within that range.[34] Some opinions suggested that the courts of appeal did not fully understand how to set the limits of a reasonable award.[35] Yet these same courts had no difficulty in the past in substituting awards which they deemed more appropriate than those granted by the trial courts.[36] Ostensibly the mental processes are the same for setting up a reasonable range of awards and for determining the most appropriate award or for making any other value judgment which requires "drawing the line" at some particular point.

Limiting the appellate court's power to modify the award only to the lowest or highest reasonable figure protects the discretion of the judge or jury by requiring more than a mere substitution of judgment on the part of the courts of appeal. Arguably, when a trial court has clearly abused its

30. *See, e.g.*, Gaudet v. Allstate Ins. Co., 346 So. 2d 333 (La. App. 4th Cir. 1977); Carollo v. Wilson, 345 So. 2d 601 (La. App. 4th Cir.), *quantum modified*, 353 So. 2d 249 (La. 1977); Smith v. Taylor, 343 So. 2d 313 (La. App. 2d Cir. 1977); *See also* Marcus, J., dissenting in Schexnayder v. Carpenter, 346 So. 2d 196, 200 (La. 1977).

31. *See* the cases cited in note 30, *supra*.

32. Gaudet v. Allstate Ins. Co., 346 So. 2d 333, 336 (La. App. 4th Cir. 1977).

33. See text at note 4, *supra*.

34. *See, e.g.*, Gaudet v. Allstate Ins. Co., 346 So. 2d 333 (La. App. 4th Cir. 1977); Carollo v. Wilson, 345 So. 2d 601 (La. App. 4th Cir.), *quantum modified*, 353 So. 2d 249 (La. 1977); Sanders v. Hall, 345 So. 2d 590 (La. App. 4th Cir. 1977).

35. Carollo v. Wilson, 345 So. 2d 601, 604 (La. App. 4th Cir.), *quantum modified*, 353 So. 2d 249 (La. 1977). *See also* Gaudet v. Allstate Ins. Co., 346 So. 2d 333 (La. App. 4th Cir. 1977); Sanders v. Hall, 345 So. 2d 590 (La. App. 4th Cir. 1977). *But see* Andrepont v. Naquin, 345 So. 2d 1216 (La. App. 1st Cir. 1977); Kidder v. Anderson, 345 So. 2d 922 (La. App. 1st Cir. 1977).

36. *See* the cases cited in notes 10-11, *supra*.

discretion, that discretion is no longer deserving of protection.[37] It seems that the supreme court's concern in *Coco* is based on cases where the trial court award has been modified by a proportionally small amount.[38] It seems clear that when the court of appeal reduces or increases the trial court award by only a very small amount, it is ignoring the *much* discretion given the trial court by article 1934(3). Thus, the rule set out in *Coco*, by forcing the courts of appeal to set up a reasonable range of damages, should ensure a finding that the judge or jury did in fact abuse its discretion before modification of quantum is effected.

The procedure to be followed by the courts of appeal when they review quantum is substantially the same as prior to *Coco*. The courts of appeal must still examine all the evidence to determine whether it supports the trial court award[39] and may modify the award only upon finding an abuse of discretion by the trial court, not merely because the court of appeal finds another amount to be more appropriate.[40] *Coco* changes the law by requiring less emphasis to be placed on awards in previous similar cases,[41] and by forbidding the court of appeal merely to substitute its judgment for that of the trial court.[42] Although these are important changes, *Coco* does not remove the power of review of the courts of appeal, but rather explicitly affirms that power.[43]

The thrust of *Coco* is to assure respect for the legislative policy placing much discretion in the trier of fact. The case serves to strike a balance between trial courts and courts of appeal with regard to setting the amounts of damage awards, and in doing this promotes "the proper allocation of trial and appellate functions between the respective courts."[44] The decision gave a somewhat more difficult standard for the

37. Instances of these clear abuses are found in cases where the trial court's award has been modified by a large amount. *See, e.g.*, Hebert v. Travelers Ins. Co., 245 So. 2d 563 (La. App. 3d Cir. 1971) (award reduced from $25,000 to $5,000); Reeder v. Allstate Ins. Co., 235 So. 2d 111 (La. App. 4th Cir. 1970) (award reduced from $200,000 to $120,000); Poche v. Frazier, 232 So. 2d 851 (La. App. 4th Cir. 1970) (total pain and suffering award for six plaintiffs reduced from $300,000 to $119,500).

38. *See, e.g.*, Wiggins v. Kansas City S. Ry. Co., 240 So. 2d 744 (La. App. 2d Cir. 1970) (award increased from $1500 to $2500); Rogers v. Great American Ins. Co., 220 So. 2d 198 (La. App. 1st Cir. 1969) (awards reduced from $3000 to $2000 and from $1500 to $750); Milano v. Saia, 205 So. 2d 841 (La. App. 4th Cir. 1968) (award reduced from $3000 to $2000).

39. 341 So. 2d at 335.

40. *Id.* at 335.

41. See text at notes 26-29, *supra*.

42. See text at notes 24-25, *supra*.

43. See text at note 24, *supra*.

44. Canter v. Koehring Co., 283 So. 2d 716, 724 (La. 1973).

courts of appeal to meet before modifying an award of the trial court, but since the judge or jury is in the better position to evaluate actual damages, this is the better standard.

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THE POST-*KATZ* PROBLEM OF WHEN "LOOKING" WILL CONSTITUTE SEARCHING VIOLATIVE OF THE FOURTH AMENDMENT

Several days after receiving a phone call from defendant Fearn's neighbor concerning his observation of some strange looking plants in Fearn's back yard, the police went to the neighbor's home to determine what the plants were. A deputy testified that he could identify the plants as marijuana while standing on the neighbor's property. After arresting the defendant, the deputy went to the back yard and seized the plants. The trial court granted the defendant's motion to suppress the plants as having been unconstitutionally seized. The Louisiana Supreme Court affirmed and *held* that the fourth amendment guarantee[1] against unreasonable seizures was violated since the plants were in an area in which the defendant had a reasonable expectation of privacy and that their warrantless seizure could not be justified by any exception. *State v. Fearn*, 345 So. 2d 468 (La. 1977).

The fourth amendment to the United States Constitution guarantees that individuals shall "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[2] Many courts used

1. The court cited the "right to privacy" in article I, section 5 of the Louisiana Constitution of 1974 as a basis for its decision, but based its arguments solely on the United States Constitution. State v. Fearn, 345 So. 2d 468, 469 (La. 1977). Art. I, § 5 provides:

> Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this section shall have standing to raise its illegality in the appropriate court.

2. U.S. CONST. amend. IV provides:

> The right of the people to be secure in their persons, houses, papers, and