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lent intent or not.[61] However, in order to annul an alienation made by the husband after suit for a separation is filed, it must be proved that there was a fraudulent view of injuring the rights of the wife.[62] A debt which is contracted in contravention of Article 150 is not chargeable to the community, but must be charged to the husband's separate estate.[63] Article 150 by its terms applies only to suits for separation, but there is no reason why it should not be applicable by analogy to suits for divorce and several courts have applied article 150 to divorce actions.[64] The same reasons exist for preventing the husband from contracting a debt, or alienating property, whether the action is for separation or divorce.

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THE EFFECT OF GASPARD V. LEMAIRE ON AWARDS FOR GENERAL DAMAGES

There are several general areas in which the amount of damages to be awarded a deserving tort claimant is not easily determined, but particularly difficult problems stand out in determining the amount of awards for pain and suffering. Such awards are of necessity arbitrary, since pain and suffering are not commodities which may be assessed in pecuniary terms.[1]

61. See note 60 *supra.*

62. See note 60 *supra.*

63. Ohanna v. Ohanna, 129 So. 2d 249 (La. App. 4th Cir. 1961). According to the court in Davis v. Davis, 23 So. 2d 651, 654 (La. App. 2d Cir. 1945) the wife has the burden of proving that the husband violated article 150 of the Civil Code: "It will be observed from this Article that if the husband alienates immovable property of the community *after institution of suit for separation by the wife,* before the sale can be annulled on the ground of fraudulent intent to cheat her, she must prove that he acted with such intent and that the alienation was consummated subsequent to the date of filing of suit for separation or divorce. In the present case the alienation occurred four days prior to institution of the divorce suit; and it has not been proven that it was fraudulently consummated. Surely, no semblance of fraud or bad faith on the part of the Millers has been proven and, even though Davis had been motivated by a desire to circumvent his estranged wife's interest in the property, proof of this fact alone would not warrant annulment of the sale."

64. Gastauer v. Gastauer, 143 La. 749, 79 So. 326 (1918); Ohanna v. Ohanna, 129 So. 2d 249 (La. App. 4th Cir. 1961).

1. See Leggio v. Broussard, 162 So. 2d 23, 26 (La. App. 1st Cir. 1964) ("no adequate rule has yet been devised for the evaluation of pain and suffering"); Thomas v. Great Am. Indem. Co., 83 So. 2d 485, 487 (La. App. 2d Cir. 1955) ("the establishment of such a rule [for determining the quantum of damages in personal injury cases] appears humanly impossible").

The purpose of this Comment is not to consider the trial court's difficult task of damage evaluation, but rather to consider the scope of appellate review of damage awards. The problem of appellate review of awards which are difficult to assess may be summarized in three statements. First, Louisiana Civil Code article 1934(3) grants the trial court a large degree of discretion in this area.[2] Second, despite this discretion, the Louisiana Constitution requires appellate review of these awards.[3] Third, since such awards are by nature arbitrary, the appellate courts' natural point of reference in determining whether or not an award is proper is to consider previous awards in similar cases.

Because of the impossibility of fixing with precision awards of this type, two different approaches have developed concerning the method of determining the quantum of damages in the area under consideration. The first approach reasons that since this type of award does not lend itself to precise, predictable determination, and since each case will be by nature unique, a large amount of discretion should be left to the trial court.[4] Under this rationale, it follows that an appellate court should alter the amount of an award only where there is manifest error on the part of the trial court, or at least a clear abuse of the trial court's discretion. Advocates of the second approach,

2. LA. CIVIL CODE art. 1934(3) (1870): "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. Where the contract has for its object the gratification of some intellectual enjoyment, whether in religion, morality or taste, or some convenience or other legal gratification, although these are not appreciated in money by the parties, yet damages are due for their breach; a contract for a religious or charitable foundation, a promise of marriage, or an engagement for a work of some of the fine arts, are objects and examples of this rule.

"*In the assesment 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, but are bound to give such damages under the above rules as will fully indemnify the creditor, whenever the contract has been broken by the fault, negligence, fraud or bad faith of the debtor." (Emphasis added.)

3. LA. CONST. art. VII, § 29. In Diggs v. Orleans Parish School Board, 161 So. 2d 433 (La. App. 4th Cir. 1964), a concurring opinion suggests that any restriction placed on a party's right to appellate review by LA. CIVIL CODE art. 1934 (1870) is unconstitutional.

4. See, *e.g.*, Cassreino v. Brown, 144 So. 2d 608, 610 (La. App. 4th Cir. 1962) ("An award of damages for personal injury is of necessity somewhat arbitrary and must vary greatly with the facts and circumstances of each case; therefore the trial court's large discretion in making such an award should not ordinarily be disturbed on appellate review."); Little v. Safeguard Ins. Co., 137 So. 2d 415, 422 (La. App. 3d Cir. 1962) ("The law is well settled that in the assessment of damages, such as the ones sustained here, much discretion must be left to the trial judge or jury.").

recognizing that an award for pain and suffering is by nature arbitrary, also emphasize the use of precedent as a starting point in fixing these awards,[5] the reliance on previous cases hopefully resulting in uniformity of awards in similar cases.[6] Following this approach, an award for a moderately severe whiplash injury should not be substantially more or less than awards for moderately severe whiplash injuries in the past, allowing for adjustment due to the changing value of the dollar.[7] Under this method of attack, the reviewing appellate court would be obligated to examine the facts of the case to determine the exact nature of the injury, and the award must be altered if it is not in line with awards for injuries of a similar nature. Good arguments can be made for both lines of reasoning, and both have ample support in Louisiana jurisprudence.[8]

These two methods of fixing damages at first seem mutually exclusive, one giving the trial court almost unlimited discretion, and the other fixing a definite, almost mechanical method for determining damages of an inexact nature. It may be suggested, however, that the first ground for appellate interference with the trial court's discretion, that of abuse, is not only compatible with, but dependent upon, the second ground, that of consistency.[9] A careful examination of the cases posing problems

5. See, *e.g.*, Broussard v. Lormand, 138 So. 2d 677, 681 (La. App. 3d Cir. 1962) ("It is well recognized that awards made in similar cases are to be considered by the courts so that within the limits permitted by particular states of fact a degree of uniformity will be maintained"); Thomas v. Great Am. Indem. Co., 83 So. 2d 485, 488 (La. App. 2d Cir. 1955) ("We have concluded that an award of $7,000 is . . . more consistent with awards in comparable cases.").

6. Cassreino v. Brown, 144 So. 2d 608, 610 (La. App. 4th Cir. 1962 ("there should be some degree of uniformity, so that awards will not be all out of proportion with one another"). Similar language is used in almost all cases which altered the amount of an award for personal injuries prior to Gaspard v. LeMaire, 245 La. 239, 158 So. 2d 149 (1963). See text at note 11 *infra*.

7. See Winfree v. Consolidated Underwriters, 163 So. 2d 377, 381 (La. App. 3d Cir. 1964) ("The value of the dollar has been steadily decreasing over the past years. What may have been an appropriate amount for an award for a particular injury in . . . the 1940's or the 1950's, would not be an appropriate amount in the 1960's. One cannot buy as much with a dollar today as he could in decades past.").

8. See, *e.g.*, McFarland v. Illinois Cent. Ry., 241 La. 15, 127 So. 2d 183 (1961); White v. Robbins, 153 So. 2d 165 (La. App. 3d Cir. 1963); Hickman v. Bawcom, 149 So. 2d 178 (La. App. 3d Cir. 1963); Broussard v. Lormand, 138 So. 2d 677 (La. App. 3d Cir. 1962); Doyle v. McMahon, 136 So. 2d 89 (La. App. 4th Cir. 1962); Carhee v. Scott, 104 So. 2d 236 (La. App. 2d Cir. 1958).

9. The awareness that the scope of the trial court's discretion is bounded by the need for uniformity is clearly seen in the case of Landry v. Southern Farm Bureau Cas. Ins. Co., 125 So. 2d 474, 477-78 (La. App. 3d Cir. 1960), where the court said: "[A]wards made in similar cases should be considered . . . , so that, *within the limits permitted by particular states of facts*, a degree of uniformity will be maintained." (Emphasis added.) Arguments which attack this

concerning the amount of damages for loss of support, loss of love and companionship, pain, mental anguish, and similar afflictions, reveals that even where considerable emphasis is placed on one approach, the influence of the other method will still be felt. The language of the cases, when quoted out of context, appears to suggest a sharp dichotomy between uniformity of awards on one side and discretion of the trial court on the other. When the full texts of the opinions are examined, however, it becomes apparent that most of the cases calling for uniformity of awards recognize that awards in similar cases are only a starting point for the trial court in determining the proper award.[10]

Considerable controversy over damage awards has been created by the recent case of *Gaspard v. LeMaire*.[11] There a jury award of $19,500 for a back injury was reduced by the Louisiana Supreme Court to $8,500 on the ground that the award was out of proportion with previous awards for similar injuries. On rehearing the court reinstated the original jury award of $19,500, saying that the large discretion of the trial court should be respected, and that uniformity of awards should not be a goal of the reviewing appellate court.[12] The court said that "the appellate courts should consider the amount of awards in other cases only so far as they are relevant to the question of whether the judge or jury has abused its discretion in fixing the award in the case under consideration."[13]

Prior to the *Gaspard* decision, guidelines established in *Cassreino v. Brown*[14] were frequently used in deciding whether or not an award was excessive or inadequate. The *Cassreino* opinion repeated the language often used to point out that dam-

and similar cases for supporting the idea of uniformity of awards as an end in itself usually conveniently ignore the italicized words.

10. See Ropollo v. State, 23 So. 2d 374, 375 (La. App. 1st Cir. 1945): "[A]s is so frequently stated by the courts, authorities cited on a question of quantum may very well serve as a guide to the court but they should not be controlling."

11. 245 La. 239, 158 So. 2d 149 (1963).

12. The position of the appellate courts prior to *Gaspard* seems lucidly illustrated by the language used in Little v. Safeguard Ins. Co., 137 So. 2d 415, 422 (La. App. 3d Cir. 1962), in which the court said: "[It] is well settled that . . . much discretion must be left to the trial judge or jury. However, our jurisprudence is likewise well settled, that awards made by a jury are subject to review by an appellate court and will be altered in the event of an abuse of discretion. Furthermore, awards made in similar cases should be considered by our courts, so that a degree of uniformity will be maintained *to the end* that awards will not be out *of all proportion*, one with the other." (Emphasis added.)

13. 245 La. at 266, 158 So. 2d at 158 (1963) (on rehearing).

14. 144 So. 2d 608 (La. App. 4th Cir. 1962).

ages for personal injuries are necessarily arbitrary in nature and the trial court's discretion in making such an award should therefore be respected, but, on the other hand, there should be "*some degree* of uniformity, so that awards will not be all out of proportion with one another."[15] (Emphasis added.) *Cassreino* involved a whiplash injury, and, after an extensive review of awards for other whiplash injuries, the court outlined three broad categories of whiplash injuries and the range of awards for each category.[16] The categories, intended as an aid for subsequent cases, were developed after a careful examination of previous awards for whiplash injuries, and would seem to be a useful aid for subsequent cases if cautiously used. *Cassreino* was referred to with disapproval by the Supreme Court on rehearing in the *Gaspard* decision,[17] and for a while the court of appeal judges seemed divided in their opinion whether *Gaspard* actually overruled *Cassreino* and forbade the use of the categories of injuries there outlined.[18] The Supreme Court recently attempted to settle this controversy in *Winfree v. Consolidated Underwriters*[19] by saying that "insofar as [the *Cassreino* case] classifies whiplash injuries in three categories with a fixed award for each category, we now specifically overrule that case."[20] It should be noted, however, that while the Supreme Court was specifically overruling the *Cassreino* decision, it affirmed a reduction by the court of appeal of an award of $8000 for a "moderate whiplash injury" to $3000, and an award of $3000 for a whiplash injury was reduced to $1500. From the description of the injuries, it would appear that the first injury

15. *Id.* at 610.

16. The decision suggests three basic categories of whiplash injuries, citing cases for the amounts of awards in each category: (1) injuries which produced permanent disability or severe pain of prolonged duration were conceived to be satisfied by awards in excess of $5,000.00; (2) injuries which caused severe initial pain with only a short period of residual discomfort, or which produced less severe pain but a relatively long period (*e.g.*, more than one year) of residual discomfort, deserved an award between $2,500.00 and $3,500.00; and (3) injuries which produced only moderate or slight pain and which were cured without residual discomfort in a matter of weeks were compensated by awards below $2,500.00.

17. 245 La. at 263, 158 So. 2d at 158 (1963).

18. See, *e.g.*, Poleman v. Employers Liab. Assur. Corp., 164 So. 2d 630 (La. App. 3d Cir. 1964), in which the appellate court found that since a whiplash injury could fit into the first category of *Cassreino*, an award of $10,000 was not all out of proportion for similar injuries in previous cases. See also Roy v. United Gas Corp., 163 So. 2d 587 (La. App. 3d Cir. 1964), in which the court examined the details of the plaintiff's injury and based the amount of the award on *Cassreino*.

19. 169 So. 2d 71 (La. 1964).

20. *Id.* at 72.

would fall in the $2500-$3000 category suggested by *Cassreino*, while the second injury should properly be awarded below $2500 under the *Cassreino* decision. It thus seems that the Supreme Court will allow the categories of the *Cassreino* case to be used as *guidelines* in determining whether an award is so out of proportion with previous awards as to constitute an "abuse of discretion." This method of review appears to be useful for determining whether an abuse of the trial court's discretion has occurred, as long as the established categories are broad enough to remain flexible and are not applied mechanically.

The Supreme Court's concern over undue reliance on previous awards in determining the amount of awards for pain and suffering did not originate with the *Gaspard* case. An earlier case, *McFarland v. Illinois Cent. Ry.*,[21] contains language which is closely parallel to the text of the rehearing in *Gaspard*. Although *McFarland* involved an action for wrongful death, the language used and the cases which followed it show that the court was also concerned with similar problems involved in pain and suffering awards.[22] The Supreme Court noted that damages of this type could not be determined upon any scientific basis, and said that the amounts of these awards must be left "more or less" to the discretion of the trial court.[23] The language of the *McFarland* case is, if anything, stronger than the language of the *Gaspard* case in its insistence that, under Louisiana Civil Code article 1934(3), the district court has broad discretion in making these awards and that the award of the district court is not to be disturbed on review unless there has been an abuse of discretion.[24]

It is apparent from the *McFarland* case and others decided prior to 1963 that the *Gaspard* decision does not establish a new line of thinking in Louisiana jurisprudence concerning the role of the appellate courts in determining the amounts of awards

21. 241 La. 15, 127 So. 2d 183 (1961).

22. The court of appeal had used a mathematical formula to determine the amount of the award for wrongful death in the *McFarland* case, 122 So. 2d 845 (La. App. 1st Cir. 1960), and the Supreme Court expressed strong disapproval of such formula. 241 La. at 25, 127 So. 2d at 187 (1961).

23. The court emphasized that while an arbitrary formula for fixing such awards may be desirable, the establishment of such a formula is a legislative, rather than judicial, function. 241 La. at 25, 127 So. 2d at 187.

24. However, after carefully pointing out the extreme degree of caution to be used by the appellate courts, the Supreme Court then concluded that "there was a slight abuse of discretion by the trial court," and consequently increased the amount of the award. 241 La. at 25, 127 So. 2d at 187.

for pain and suffering. However, the Supreme Court did cite with disapproval several court of appeal decisions in the *Gaspard* case, and criticized those decisions for placing too much emphasis on uniformity of awards and thus robbing the trial court of the discretion given to it by article 1934.[25] Does the *Gaspard* decision thus have the effect of overruling a line of cases which seem to require uniformity? The answer is probably no, because a close examination of the disapproved cases shows that while the cases referred to use previous cases as a guide in determining whether to alter the award of the trial court or leave it unchanged, the court in every case realized that the facts of each particular situation are unique and previous awards may be relied upon, but only as far as similarities will allow.

If, as suggested, the *Gaspard* case neither establishes a completely new policy for reviewing damage awards nor overrules a group of previous cases, the question of its practical effect on damage awards still remains unanswered. It is suggested that the *Gaspard* decision calls for a shifting of emphasis rather than a totally new approach to the problem of damages. The fact that appellate courts are duty bound to review the amounts of damage awards remains unchanged; and, for lack of a better guide, awards in previous, similar situations will be used in determining whether the award of the trial court, notwithstanding its undisputed discretion in the area, will be altered. What may possibly be changed by the *Gaspard* decision is the attitude taken by the courts of appeal and the manner in which they go about sustaining or altering the award of the lower court. In most pre-*Gaspard* decisions, the appellate courts, in reviewing an award for pain and suffering, would carefully scrutinize the individual facts of the particular injury and, if they altered the award, would base their decision on the principle that uniformity of awards, as far as possible, should be maintained.[26] Since the *Gaspard* case, however, the phrase "uniformity of awards" has been scrupulously avoided, but in its place has been substituted an equally nebulous expression, the key words now being "abuse of discretion."[27] If there has been an "abuse

25. 245 La. at 263, 158 So. 2d at 158.

26. See Williams v. W. R. Pickering Lumber Co., 125 La. 1087, 52 So. 167 (1910); Broussard v. Lormand, 138 So. 2d 677 (La. App. 3d Cir. 1962); Warren v. Fidelity Mut. Ins. Co., 99 So. 2d 382 (La. App. 1st Cir. 1957).

27. See, *e.g.*, Thomas v. Paper Haulers, Inc., 165 So. 2d 61 (La. App. 2d Cir. 1964); Bee v. Liberty Mut. Ins. Co., 165 So. 2d 73 (La. App. 4th Cir. 1964);

of discretion" on the part of the trial judge or jury, the appellate court can alter the award and still be consistent with Louisiana Civil Code article 1934. The obvious problem which arises is, of course, how to determine whether an abuse of discretion has occurred. The phrase does not readily lend itself to precise definition, and no attempt at defining it has been made in the cases, but its ambit seems to be somewhere between mere "error" and "manifest error."[28] Regardless of the phraseology used, it seems apparent that the courts will continue to examine closely the circumstances of the injury and compare the amount of the award with awards in prior, similar cases.

The total effect of the *Gaspard* decision has not yet been determined. The appellate courts are still reviewing and altering awards for pain and suffering and are still using prior cases as a guide in determining what the amount of an award should be.[29] After the decisions in *Ballard v. National Indem. Co.*[30] and *Winfree v. Consolidated Underwriters*,[31] it is clear that careful scrutiny of trial court awards by appellate courts will be continued, and that while the awards of the lower courts will not be altered in order to "maintain uniformity of awards in similar cases," an award which the appellate court considers improper will be altered. It is submitted that the Supreme

Lege v. Pioneer Cas. Co., 164 So. 2d 634 (La. App. 3d Cir. 1964); Thibodeaux v. Sternberg, 164 So. 2d 606 (La. App. 3d Cir. 1964); Jacobs v. Marquette Cas. Co., 164 So. 2d 612 (La. App. 3d Cir. 1964); Taylor v. Kendall, 162 So. 2d 156 (La. App. 3d Cir. 1964).

The language used in *Taylor* clearly illustrates that prior awards in similar situations are used in determining whether there has been an "abuse of discretion." After reviewing all the facts concerning the injury, the court said: "After reviewing the cases cited to us on quantum, and in view of the nature of the injuries . . . , we find the district court did not abuse its discretion." 162 So. 2d at 160.

See also Maryland v. Allstate Ins. Co., 162 So. 2d 226 (La. App. 1st Cir. 1964); Cole v. Lumbermen's Mut. Cas. Co., 160 So. 2d 785, 790-91 (La. App. 3d Cir. 1964) ("We agree . . . that the evidence could reasonably justify a much more substantial award . . . . Considering all the circumstances . . . , we are unable to say that the trial judge abused its large discretion . . . or that . . . this award is manifestly insufficient."); Jones v. Continental Cas. Co., 159 So. 2d 5, 11 (La. App. 3d Cir. 1964) (citing *Gaspard* as authority, the court said, "the amount of damages awarded . . . is not out of proportion to awards made in similar cases, and accordingly, we find that the trial judge has not abused his discretion").

28. For a comprehensive discussion of the meaning of "manifest error" as used by Louisiana courts, see Comment, 21 LA. L. REV. 402 (1961).

29. *E.g.*, Jones v. Continental Cas. Co., 159 So. 2d 5 (La. App. 3d Cir. 1964).

30. 169 So. 2d 64 (La. 1964).

31. *Id.* at 71.

Court's warning that the discretion of the trial court should be respected should be accepted only as a matter of degree,[32] and that awards in previous cases will still be considered by the reviewing court.

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32. See Ayres v. Great Am. Ins. Co., 163 So. 2d 866, 867 (La. App. 2d Cir. 1964): "In Gaspard v. LeMaire our Supreme Court reminded the appellate courts that greater consideration should be given to the principle enunciated in LSA-C.C. Art. 1934, § 3."