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PROCEDURE

CIVIL PROCEDURE

Frank L. Maraist*

APPEALS

The Louisiana Constitution of 1974 grants appellate courts the power to review facts as well as law,\(^1\) while common law courts are limited in their appellate review of questions of fact. This distinction, however, is elusive. In a common law jury trial, if reasonable minds could not conclude from the evidence the existence of facts necessary to support a verdict, the trial judge commits an error of law if he permits the verdict to stand; his decision, and thus the jury's determination of fact, is subject to appellate review disguised as a question of law. In non-jury cases, decisions on questions of fact may be reversed if they are "clearly erroneous." Thus, although appellate review at common law is described as being limited to questions of law, in reality there is limited review of questions of fact.

By a like token, Louisiana appellate courts do not make unlimited review of questions of fact.\(^2\) Although the Louisiana constitutional provision\(^3\) could support a \textit{de novo} determination of fact questions on appeal, the Louisiana Supreme Court has imposed the restriction that an appellate court should not reverse on questions of fact unless the decision below was "manifestly erroneous."\(^4\) The supreme court also has interpreted the language of Civil Code article 1934(3) as imposing the restriction that an award of general damages should not be modified unless the trial court has abused the "much discre-

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1. LA. CONST. art. V, § 5(c) provides that "[e]xcept as otherwise provided by this constitution, the jurisdiction of the supreme court in civil cases extends to both law and facts." LA. CONST. art. V, § 10(b) states, in pertinent part, that the "appellate jurisdiction of a court of appeal extends to law and facts."


3. See note 1, supra.

tion" granted to the judge and jury. So engrained into Louisiana law are these "manifest error" and "much discretion" standards that it may be argued that they were incorporated into those provisions of the 1974 constitution continuing appellate review of fact. This issue probably will not arise, however, since the supreme court and the intermediate appellate courts consistently have acknowledged the viability of both rules.

The application of the two rules, however, has been fraught with turmoil, much of which has surfaced in the past few years. The following test for "manifest error" was summarized by the supreme court in 1973 through Justice Tate in *Canter v. Koehring Co.*:

When there is evidence before the trier of fact which, upon its reasonable evaluation of credibility, furnishes a reasonable factual basis for the trial court's finding, on review the appellate court should not disturb this factual finding in the absence of manifest error. Stated another way, the reviewing court must give great weight to factual conclusions of the trier of fact; where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable.

By 1978 the supreme court perceived that the appellate courts were overlooking the language of the *Canter* test emphasized above; review was limited to a determination of whether there was evidence in the record from which reasonable minds could have found as the trial court did. This limited application of the "manifest error" rule is arguably an abdication of the constitutional charge to review facts, since it merely provides the same review of facts as in common law courts, where review is theoretically more narrow.

It was in this atmosphere that the court, during the 1978-79


term, handed down its decision in *Arceneaux v. Domingue.* Justice Dixon, writing for the majority, noted an apparent "widespread misunderstanding of the holding of *Canter.*" He then propounded the majority's determination that "appellate review of facts is not completed by reading so much of the record as will reveal a reasonable factual basis for the finding of the trial court; there must be a further determination that the record establishes that the finding is not clearly wrong (manifestly erroneous)."

This pronouncement in *Arceneaux* was adopted without dissent in *Young v. Clement.* In another decision handed down on the same day, Justice Tate reaffirmed the "clearly wrong" standard in an offhanded fashion, concluding that

> [O]n appellate review, the trial court's factual findings of work-connected disability are entitled to great weight. They should not be disturbed where there is evidence before the trier of fact which, upon the latter's reasonable evaluation of credibility, furnishes a reasonable factual basis for the trial court's findings, unless clearly wrong."

By the end of the term, it appeared that *Arceneaux* had replaced *Canter* as the standard for appellate review; appellate decisions which had routinely cited the latter now cited the former.

Citing *Arceneaux* is one thing, but applying it is another. One may forcefully argue that no decision which reasonable minds could reach can be "clearly wrong." There is precedent for the distinction, however. The general common law and federal standard for appellate review in non-jury cases requires the appellate court to determine whether the judge's findings of fact were "clearly erroneous." The test for such a determination is that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." A finding will be found to be clearly erroneous if (1) it is not supported by substantial evidence, or (2) although supported by substantial evidence, the findings are against the clear weight of the evidence, or (3) "the appellate court otherwise reaches a definite and firm conviction that a mistake has been made."
Several rationales may be suggested for the court's stance in *Arceneaux*. The academic approach is that *Arceneaux* reflects an attempt to resurrect the distinction between Louisiana and common law appellate review. If a Louisiana appellate court limits its review to a determination as to whether there is evidence from which reasonable minds could have arrived at the same conclusion as the trial court, the review is no broader than common law review of a jury's fact finding, and the constitutional provision becomes meaningless. The court stops short of *de novo* fact review, however, because such unlimited review is both time consuming to the appellate court and demoralizing to the trial court.18

The tension between the supreme court and the appellate courts over the scope of appellate review of fact also has spread to the "much discretion"17 rule applying to appeals of awards of general damages. The general test, enunciated in *Coco v. Winston Industries, Inc.*,19 states that

before a Court of Appeal can disturb an award made by a trial court . . . the record must clearly reveal that the trier of fact abused its discretion in making its award. Only after making . . . [such a finding] 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 afforded that court.19

In *Coco* the supreme court appeared troubled that the appellate courts were either substituting their own judgment for that of the trier of fact20 or placing too much emphasis on awards in similar reported cases,21 or both. *Coco* warned the appellate judges of these evils.22

In the waning weeks of the last term, the supreme court, in *Reck v. Stevens*,23 again chastised the intermediate appellate courts...
for their method of review of general damage awards. Apparently convinced that the courts of appeal, despite the warning of Coco, were placing too great an emphasis upon prior awards, the court strongly stressed that proper appellate review demands a careful study of the particular circumstances surrounding the injury. Justice Tate, as the organ of the court, indicated that the initial inquiry must always be directed to whether the particular effects of the particular injuries of the particular plaintiff before the court are such that there has been a clear abuse of the trier of fact's very "great discretion." An award may be considered as excessive or inadequate only after an articulated analysis of the facts of the particular case discloses abuse. Justice Tate emphasized that, in this initial determination of abuse of discretion, prior awards should play a limited role; they may be considered as an aid to determine an abuse of discretion only in those cases in which, on an articulated basis, the award made by the lower court is shown to be greatly disproportionate to all past awards for truly "similar" injuries. He then noted that, after finding an abuse of discretion, the appellate courts may use prior awards for the purpose of fixing a proper award in the case before the court.

While predicting a judge's legal philosophy is an inaccurate art, attempting to synthesize a court's objective from a few decisions is foolhardy. With that caveat, the writer perceives the following message from the supreme court's most recent decisions on appellate review: the role of the supreme court is to decide questions of law; the role of the appellate courts is primarily to assure that the facts have been found properly, and the law applied to those facts, in the trial court. However, in many cases the trial judge does not prepare written reasons and the appellate court may affirm in a written opinion which reflects only that (1) it has read enough of the record to determine that there is evidence to support the findings of fact, and (2) the award of damages falls within the "ballpark"

24. Id. at 500-01.
25. Id. at 501 n.3.
26. He wrote that "[o]nly after analysis of the facts and circumstances peculiar to [a] . . . case . . . may a reviewing court determine that the award is excessive." Id.
27. In the initial determination of excessiveness or insufficiency, an examination of prior awards has a limited function—if indeed the facts and circumstances of the prior awards are closely similar to the present. The prior awards may serve as an aid in this determination only where, on an articulated basis, the present award is shown to be greatly disproportionate to past awards (not selected past awards, but the mass of them) for (truly) "similar" injuries . . . . Id. at 501.
28. Id.
29. Id.
established by awards in other cases. In such cases, the high court cannot comfortably assume that the facts have properly been found and the law correctly applied without making its own painstaking review of the whole record. The supreme court, with neither the resources nor the inclination to make such a review, may simply be informing the courts of appeal that their job is to make a thorough review and to articulate reasons which will satisfy the supreme court that the job has been done.

Another issue which frequently has arisen is whether the "manifest error" rule should apply in cases in which credibility is not an issue, or in which the trial judge did not observe the witnesses while they were testifying. Since the rule is based in part upon the premise that the trial court enjoys the superior vantage point in determining credibility of witnesses, the argument has been advanced that the rule is inapplicable to cases tried on stipulations of fact, or other cases in which for some reason the judge does not view the testimony of the witnesses. The argument gains added support drawn from the supreme court's observation in Walker v. Union Oil Mill, Inc. that "[s]ince the trial judge who decided the case was not the same judge who tried the case, the manifest error rule is not applicable."

The circuits are split on the perplexing issue whether "the mere denial of a jury trial, without more . . . result[s] in irreparable injury such that it warrants a separate appeal." Some courts have taken the position that the denial of a jury trial cannot result in ir-

31. There is some indication that the rule originated only with regard to credibility questions. See Carlisle v. Steamer Eudora, 5 La. Ann. 15 (1850); Jordan v. White, 4 Mart. (N.S.) 626 (La. 1826); Boissier's Syndics v. Belair, 3 Mart. (N.S.) 29 (La. 1824). But see Shaw v. Canter, 8 Mart. (N.S.) 689 (La. 1830); Walton v. Grant, 2 Mart. (N.S.) 494 (La. 1824).
32. Cases lending support to the proposition that the manifest error rule is applicable only in credibility matters (through stating the reason for the rule as being that the trial judge sees and hears the witnesses and thus is in a better position to determine credibility questions) include Diez v. Diez, 219 La. 575, 53 So. 2d 677 (1951); Trascher v. Ducote, 178 La. 925, 152 So. 567 (1934); Guillory v. Fontenot, 170 La. 345, 127 So. 746 (1930); Guile & Lambert v. Vidal, 15 La. 479 (1840). Comment, supra note 2, at 409-10 n.17.
33. 369 So. 2d 1043 (La. 1979).
34. Id. at 1045 n.2.
35. Guidroz v. State Farm Fire & Cas. Co., 334 So. 2d 535, 539 (La. App. 1st Cir. 1976). Generally, the first circuit is responsive to an application for writs, but not an appeal. The Guidroz court expressed its "fe[el]ing . . . [that the] appropriate remedy . . . is either the application for supervisory writs or appeal after final judgment." Id. (Emphasis added.)
reparable injury; others have concluded that, in some instances, denial may cause irreparable injury. Among those courts which concede that irreparable injury could result, there is division over the test for determining when such an injury will result. The fourth circuit recently opined that the standard is whether any error may practically be corrected by an appeal, following a determination on the merits. In *Hunter v. Health & Social & Rehabilitation Services—Division of Health, Maintenance and Ambulatory Patients Services*, the second circuit observed that the test is not whether the error may be corrected on appeal, but "whether the procedural error will have such an effect on the merits of the case that the appellate court cannot correct an erroneous decision on the merits." Under either test, an order denying trial by jury will not cause irreparable injury. If the case is tried to a judge after erroneous denial of a jury trial, the matter will reach the appellate court after final judgment with a complete record, from which the appellate court can make the same review which it would have made from a jury decision. Since the standard of review in jury and non-jury trials is the same, the only difference is that the appellate court has been deprived of a jury's initial view of the case. However, the supreme court's opinion in *Gonzales v. Xerox Corp.* stands as a declaration that the litigant's opportunity to have his case reviewed after an appropriate jury verdict does not outweigh the cost of the additional judicial resources which may be necessary to provide such a procedure. Balanced against this, of course, is the argument that, in most cases, the right to a jury trial can be determined by the appellate court summarily and from the face of the pleadings. In such cases, the court, following the fourth circuit's lead in *Mangin v. Auter*, should control erroneous denial of jury trial through the use of supervisory writs.

36. See Jacobs v. Jacobs, 365 So. 2d 25 (La. App. 4th Cir. 1978). But see First Nat'l Bank of Commerce, New Orleans v. Miller, 328 So. 2d 383 (La. App. 4th Cir. 1976) (where the fourth circuit noted its "doubts" as to the applicability of an appeal from an interlocutory order, absent a showing of irreparable injury).


38. Id. at 579.


40. See Comment, supra note 2, at 404-05.

41. 320 So. 2d 163 (La. 1975).

42. Id. at 166. The court stated that "[w]hen the entire record is before the appellate court, remand for a new trial produces delay of the final outcome and congestion of crowded dockets while adding little to the judicial determination process." Id.

43. 360 So. 2d 577 (La. App. 4th Cir. 1978).
Prior to 1976 the appellate process often proved perilous to the litigant unsuccessful in the trial court and to his attorney. After obtaining an order of appeal and posting a bond to secure payment of appellate costs, the appellant was required to pay all of the costs of the appeal on or three days prior to the return day. Since the return day usually would be extended if the clerk had not completed the transcript, the appellant’s attorney was required to make continuous inquiry into the process of transcription. If he overlooked the return day or extended return day, thereby failing to pay costs, and the clerk completed the transcript but failed to lodge it with the appellate court—because of the appellant’s failure to pay costs—the appeal would usually be dismissed. The appellant was left with only a malpractice remedy against his attorney, a hollow remedy as the appellant, unable to prove that he would have won the appeal, could not establish damages.

The matter was further complicated by the 1976 amendment to article 2126 of the Code of Civil Procedure requiring the appellant to pay the cost of the appeal in cash within twenty days after obtaining the order of appeal and posting bond. In 1977 the Louisiana State Law Institute sponsored legislation designed to eliminate the perils and to make the appeal a simple, workable process. The amendments eliminated the requirement of a bond for devolutive appeal and provided that the appellant need not pay the costs until the clerk has notified him in writing of the amount. Thus, since 1978 the steps necessary to prosecute a devolutive appeal are relatively simple: appellant need only (1) obtain an order of appeal, (2) pay the costs of the appeal within twenty days after receiving written notice from the clerk of the amount of the costs, and (3) pay any additional costs within a similar period after notification that additional costs are due. The appellant no longer has to worry about the return day or the completion of the transcript; nor is he required to post a bond. Another change effected by the 1977 legislation is

47. 1977 La. Acts, No. 198, § 5 provided that “[t]he effective date of this Act is January 1, 1978; the provisions hereof shall apply to all appeals in which the order of appeal is granted on or after the effective date thereof.”
48. Article 2126 requires estimation of the cost of the preparation of the record on appeal “immediately after the order of appeal has been granted.” (Emphasis added.)
49. “Within twenty days of the mailing of notice, the appellant shall pay the amount of the estimated costs to the clerk.” La. Code Civ. P. art. 2126.
50. La. Code Civ. P. art. 2126 states that “[i]f the payment of additional costs is required, the appellant shall pay the amount of additional costs within twenty days of the mailing of the notice.”
that, even if the appellant fails to comply with the simplified appellate procedure, he need not necessarily suffer the harsh penalty of dismissal. In lieu of dismissal, a court is authorized to punish the litigant or his attorney by imposition of a fine upon either, or both.\textsuperscript{52} This latter change was applied by the fourth circuit in \textit{Williams v. Aetna Insurance Co.}\textsuperscript{53} The plaintiff's suit had been dismissed on an exception.\textsuperscript{54} She obtained a timely order of appeal and furnished an appeal bond, signed by her and her surety. The clerk sent notice of the estimated costs, but the plaintiff's counsel did not pay the costs within twenty days thereafter. Apparently relying upon prior law, her attorney paid the costs on the return day originally set by the trial court. The trial court then dismissed the appeal for failure to comply with the provision of article 2126 of the Louisiana Code of Civil Procedure requiring payment of costs within twenty days.\textsuperscript{55}

In reversing the trial court's decision, the fourth circuit noted that article 2126 eliminated mandatory dismissal as the only available penalty when the costs are not timely paid.\textsuperscript{56} Additionally, since the article permits imposition of a separate penalty upon the attorney who is at fault, his fault can no longer reasonably be imputed to the appellant. Thus, in the instant case where the appellant (1) was not at fault, (2) manifested an intent not to abandon the appeal by executing the unnecessary bond, and (3) in fact paid the costs before the filing of the motion to dismiss, dismissal of the appeal was too extreme a penalty.

### JURY TRIALS

Code of Civil Procedure article 1733(2)\textsuperscript{57} provides that a jury

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\textsuperscript{52.} \textsc{La. Code Civ. P.} art. 2126 provides:
If the appellant fails to pay the estimated costs, or the difference between the estimated costs and the actual costs, within the time specified, the trial judge, upon motion by the clerk or any party, and after hearing, may:
(1) Extend the time within which the costs may be paid, not to exceed thirty days with or without penalty upon appellant or his attorney; or
(2) Impose a fine, not to exceed one hundred dollars, upon the appellant, or his attorney, or both; or
(3) Dismiss the appeal.

\textsuperscript{53.} 368 So. 2d 1252 (La. App. 4th Cir. 1979).
\textsuperscript{54.} \textit{Id.} at 1253.
\textsuperscript{55.} \textit{Id.} at 1254.
\textsuperscript{56.} Judge Lemmon wrote that "[s]ignificantly, the amended article [2126] also eliminated mandatory dismissal as the only available penalty when costs were not paid timely." \textit{Id.} See \textsc{Lemmon & Maraist, Simplifying Appellate Procedure, 25 La. B.J.} 193 (1977).

\textsuperscript{57.} \textsc{La. Code Civ. P.} art. 1733(2) provides that "a suit on an unconditional obligation to pay a specific sum of money, unless the defense thereto is forgery, fraud, error, want or failure of consideration" is not an instance where a jury trial shall be available.
trial is not available in a suit on an unconditional obligation to pay a specific sum of money, unless the defense is forgery, fraud, error, or want or failure of consideration. If such a defense is urged, is the litigant entitled to a jury trial only on that issue, or is he entitled to trial by jury on the entire case? The second circuit, assuming without deciding that a suit on a continuing guaranty is a suit on an unconditional obligation to pay a specific sum of money, held that where the defendant pleads one of the enumerated defenses, he is entitled to trial by jury on all of the issues in the case. The court observed that the general rule is that a litigant is entitled to trial by jury and that article 1733 sets forth exceptions to that general rule; it then concluded that where the exceptions are inapplicable, the parties are entitled to a jury trial of the whole case under the general rule.  

Procedural law normally requires that the plaintiff bear the burden of producing evidence and that, if he fails to make out a prima facie case in the initial presentation of his case in chief, the suit should be dismissed and the trial ended. Prior to 1977, however, Louisiana did not provide a mechanism for disposition of claims in which the plaintiff failed to make out a prima facie case. The peremptory exception urging no cause of action proved unsatisfactory, as it is triable on the face of the pleadings. Summary judgment also was inappropriate, both because it was triable on documentary evidence and because it required ten days notice. The Louisiana procedural code made no provision for a directed verdict or a motion to dismiss, and the courts refused to supply one.

In 1977 the legislature added article 1810 of the Code of Civil

59. Id. at 900.
60. Succinctly, the court concluded that "[d]efendant is entitled to a trial by jury of all issues." Id.
61. LA. CODE CIV. P. art 931 provides:
   On the trial of the peremptory exception pleaded at or prior to the trial of the case, evidence may be introduced to support any of the objections pleaded, when the grounds thereof do not appear from the petition.
   When the peremptory exception is pleaded in the trial court after the trial of the case, but prior to a submission for a decision, the plaintiff may introduce evidence in opposition thereto, but the defendant may introduce no evidence except to rebut that offered by the plaintiff.
   No evidence may be introduced at any time to support or controvert the objection that the petition fails to state a cause of action.
62. See LA. CODE CIV. P. art. 966.
Procedure to provide for a directed verdict in civil jury trials. In the following year, it amended the article to add a similar device—the motion to dismiss—in civil non-jury trials. While the legislative effort was noteworthy, it failed to provide the standard of proof by which the judge must decide whether to direct a verdict or grant a motion to dismiss.

In the past term, the appellate courts began the task of formulating the standard of review in directed verdicts. In Dupree v. Pechinay Saint Gobain, the first circuit, evaluating the propriety of a directed verdict below, wrote that where "there was substantial evidence, if believed by the jury, from which reasonable inferences could be drawn by the jury in reaching a verdict against [the defendant] . . . , the trial judge properly denied the motion . . . for a directed verdict." This rule seems to comport with the general common law standard and the test applied within the United States Fifth Circuit Court of Appeals. That standard, articulated in Boeing Co. v. Shipman, is that the court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary verdict, granting of the motion is proper. On the other hand, if there is substantial evidence opposed to the motion, that is,
evidence of such quality and weight that reasonable and fair-minded
men in the exercise of impartial judgment might reach different con-
clusions, the motion should be denied and the case submitted to the
jury.\footnote{70} In \textit{Campbell v. Mouton},\footnote{71} the third circuit adopted the com-
mon law and fifth circuit test, quoting the \textit{Boeing} language.\footnote{72}

Adoption of the common law standard appears workable and
wise; it has stood the test of time in other jurisdictions and there is
a wealth of jurisprudence to aid the Louisiana courts in further
development. In applying the standard, the judge's thought process
should proceed in this fashion: (1) what are the primary facts, \ie,
the elements of plaintiff's cause of action; (2) is there direct evidence
to support each primary fact, \ie, the testimony of a witness with
the opportunity for firsthand knowledge testifying as to the ex-
istence of such fact; or (3) is there testimony of witnesses, with the
opportunity for firsthand knowledge, as to the existence of cir-
cumstances from which a reasonable mind could infer the primary
facts? If there is direct evidence, or sufficient circumstantial
evidence, as to each primary fact, the motion for directed verdict
should be denied; if not, it should be granted.

\textbf{PLEADINGS}

May a plaintiff in a tort action recover general damages in ex-
cess of that which he has demanded in his pleadings? In \textit{Wexler v.
Martin},\footnote{73} a decision which could have significant impact in personal
injury litigation, the fourth circuit answered affirmatively. The pro-
cedural issue arose when the plaintiff, who had sought only $20,000
in general damages, moved during trial to amend his petition to in-
crease the demand for general damages. The trial court at first
refused, but subsequently permitted, amendment "to [e]nforme with
the [e]vidence."\footnote{74} The jury then awarded $41,000 in general
damages.\footnote{75} On appeal, the court first noted that amendment of
the pleadings under Code of Civil Procedure article 1154 did not apply.
That article\footnote{76} permits amendment to reflect issues not raised by the
pleadings but tried by consent of the parties, or amendment to meet
the objection that evidence is not within the issues made by the

\footnotesize{\begin{itemize}
\item \footnote{70}{Id. at 374.}
\item \footnote{71}{373 So. 2d 237 (La. App. 3d Cir. 1979).}
\item \footnote{72}{Judge Stoker wrote that "since the source of ... article 1810(A) is the Federal
Rules of Civil Procedure, we believe that the correct standard is that applied in the
Federal Courts." \textit{Id.} at 239. See note 70, \textit{supra}, and accompanying text.}
\item \footnote{73}{367 So. 2d 111 (La. App. 4th Cir. 1979).}
\item \footnote{74}{Id. at 113.}
\item \footnote{75}{Id.}
\item \footnote{76}{See text at note 89, \textit{infra}.}
\end{itemize}}
pleadings. Since evidence of general damages was admissible under the pleadings, neither provision was applicable. However, the court concluded that amendment was unnecessary. Judge Lemmon first noted that the Code of Civil Procedure requires specific allegations of special damages, but that it is silent on the issue of pleading general damages. He then observed that article 862 permits final judgment to exceed in amount that which is demanded in the petition, unless judgment is by default. He concluded that the plaintiff's petition was not defective and that the plaintiff was not bound by the amount of general damages for which he prayed.

The decision, if followed, could herald the end of the itemization of general damages and the abuse which has accompanied it. Such itemization has limited utility in the administration of justice. In contested cases, lawyers and judges ignore it. Moreover, the amount demanded is usually so great that few litigants will forego defense because of the "ceiling" which a plaintiff has placed in his demand. The abuses are many, however. Demand for exorbitant sums in the pleadings may mislead jurors when reference to general damages is permitted in voir dire or argument. Equally important, claims for great amounts of damages can have an in terrorem effect upon the individual defendant, particularly where the amount demanded exceeds his insurance coverage. On balance, the policy decision appears wise and the codal interpretation to reach the result appears proper.

**SUMMARY JUDGMENT**

In support of its motion for summary judgment on the basis that the plaintiff in a tort action was its "statutory employee" whose recovery was limited to workmen's compensation benefits, the defendant filed an affidavit stating that the affiant was "district production manager," that the facility at which plaintiff was injured was within the affiant's district, and that he was therefore competent to testify to the facts contained in the affidavit and knew those

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77. 367 So. 2d at 114.
78. LA. CODE CIV. P. art. 862 provides:

[E]xcept as provided in Article 1703, a final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings and the latter contain no prayer for general and equitable relief.

79. Judge Lemmon wrote that through Code of Civil Procedure article 862 the legislature "provide[d] that the amount of demand is only relevant to default judgments." 367 So. 2d at 114.
80. Id.
facts of his "own personal knowledge." The supreme court held in *Barnes v. Sun Oil Co.* that this affidavit was not sufficient to support a grant or denial of summary judgment because it failed to "'show affirmatively' that the affiant was competent to testify to the matters stated therein." The court found that these allegations were mere conclusions. The court reasoned that article 967 of the Code of Civil Procedure requires that the affidavit contain facts which show that the affiant has the requisite personal knowledge, not mere conclusions that he has such knowledge.

The court's decision is merely a common sense application of basic evidentiary principles to summary judgment. Before a witness may testify to facts relevant to the issues in the lawsuit, there must be evidence that he has firsthand knowledge of those facts. Ordinarily, the foundation is laid through questioning which indicates that the witness was in a position to perceive the facts regarding his testimony. Testimony that he is aware of the facts is not a sufficient

82. 362 So. 2d 761 (La. 1978).
83. Id. at 763.
84. Justice Dennis wrote that "[a]ffidavits supporting or opposing motions for summary judgment must be made on personal knowledge, set forth such facts as would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein." Id.

LA. CODE CIV. P. art. 967 provides:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or by further affidavits.

When a motion for summary judgment is made and supported as provided above, an adverse party may not rest on the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided above, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be rendered against him.

If it appears from the affidavits of a party opposing the motion that for reasons stated he cannot present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

If it appears to the satisfaction of the court at any time that any of the affidavits presented pursuant to this article are presented in bad faith or solely for the purposes of delay, the court immediately shall order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees. Any offending party or attorney may be adjudged guilty of contempt.

foundation; he must state facts which demonstrate that he could have perceived that about which he will testify. Summary judgment is a substitute for trial in which the testimony is submitted through affidavit rather than personal appearance. Accordingly, the allegations of the affidavit should contain those facts which the witness would be required to state if he were testifying in person. Thus, the court's decision appears logical. In preparation of affidavits for use in summary judgment, attorneys should follow the form for eliciting the witness' testimony at trial; in so doing, they necessarily would comply with the Barnes ruling.

AMENDMENT OF PLEADINGS

Article 1154 of the Code of Civil Procedure, permitting amendment of pleadings during the course of a trial, envisions two distinct situations, one in which a party fails to object to inadmissible evidence and the other in which he does. If he fails to object, he has impliedly consented to trial of the issue raised by the evidence. In such case, article 1154 provides that

[s]uch amendment of the pleadings as may be necessary to cause [the pleadings] to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues.

86. See C. McCormick, supra note 85.
87. The burden of laying a foundation by showing that the witness had an adequate opportunity to observe is upon the party offering the testimony. By failing to object the adversary waives the preliminary proof, but not the substance of the requirement, so that if it later appears that the witness lacked opportunity, or did not actually observe the fact, his testimony will be stricken.

Id.

88. LA. CODE Civ. P. art. 966 provides:
The plaintiff or defendant in the principal or any incidental action, with or without supporting affidavits, may move for a summary judgment in his favor for all or part of the relief for which he has prayed. The plaintiff's motion may be made at any time after the answer has been filed. The defendant's motion may be made at any time.
The motion for summary judgment shall be served at least ten days before the time specified for the hearing. The adverse party may serve opposing affidavits prior to the day of the hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law.
With respect to summary proceedings, FED. R. Civ. P. 56 states that

[the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

89. LA. CODE Civ. P. art. 1154.
Where a party timely objects to proffered inadmissible testimony, he does not consent to trial of the issues raised by the evidence.\textsuperscript{90} The court ordinarily will sustain the objection, and the party offering the evidence will seek to amend orally to raise the issues which would permit introduction of the excluded testimony. In such cases "the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby."\textsuperscript{91} However, unlike the first situation, in which the opponent failed to object, article 1154 does not relieve the proponent who is permitted to amend orally during the course of the trial from subsequently preparing and filing a written amendment. This distinction was pointed out by the first circuit in \textit{Industrial Sand \& Abrasives v. Quebedeaux}.\textsuperscript{92} There the court reasoned that, since article 852\textsuperscript{93} requires that all pleadings be in writing and since article 1154 does not relieve the proponent of the inadmissible evidence of this burden when the evidence is admitted through oral amendment over the opponent's objection, evidence admitted pursuant to such amendment cannot be considered by the court if a written amendment is not subsequently made.\textsuperscript{94}

\section*{CLASS ACTIONS}

The evolution of the class action in Louisiana procedure has been swift and perhaps is now complete. The final stage was reached in the last term in the decision in the celebrated "engine switch" case, \textit{State v. General Motors Corp.}.\textsuperscript{95} The Attorney General brought a class action on behalf of the 1,467 Louisiana purchasers of automobiles in which the manufacturer allegedly substituted engines from another make of automobile.\textsuperscript{96} Since the members of the class were adequately represented and were sufficiently numerous to make joinder impracticable, maintenance of the class action hinged upon whether "the character of the right sought to be enforced for

\textsuperscript{90} Obviously, a timely objection to an opponent's proffered inadmissible testimony destroys any notion of actual or implied consent. However, Louisiana law "is well settled that the pleadings may be enlarged by evidence adduced without objection, which is not pertinent to any of the issues raised by the pleadings, and hence would have been excluded if objected to timely." \textsc{La. Code Civ. P.} art. 1154, comment (b).

\textsuperscript{91} \textsc{La. Code Civ. P.} art. 1154.

\textsuperscript{92} 366 So. 2d 999 (La. App. 1st Cir. 1978).

\textsuperscript{93} \textsc{La. Code Civ. P.} art. 852 provides that "(t)he pleadings allowed in civil actions, whether in a principal or incidental action, \textit{shall be in writing.}" (Emphasis added.)

\textsuperscript{94} 366 So. 2d at 1000.

\textsuperscript{95} 370 So. 2d 477 (La. 1979).

\textsuperscript{96} The Unfair Trade Practices and Consumer Protection Law, \textsc{La. R.S.} 51:1401-18 (Supp. 1972), prohibits a private litigant from maintaining a class action for actual
or against the members of the class [was] common to all members of the class. As with many other procedural devices, the Code of Civil Procedure does not afford assistance in determining when the claims of the members of the "class" are sufficiently related to permit utilization of the class action. Recently, the supreme court has interpreted the relevant articles in such a manner as to equate the Louisiana class action with the liberal class action provided by rule 23(b)(3) of the Federal Rules of Civil Procedure. In the General Motors case, the Louisiana court perhaps has gone beyond anything contemplated by the federal or state rulemakers.

In Stephens v. Board of Trustees of Police Pension Fund, the court found sufficient "commonality" when the claims shared questions of law or fact and when joinder in a single action would comport with the policies of judicial efficiency, fairness to the parties, and implementation of substantive policy. The class action in Stevens met those criteria. It was an action by former municipal policemen to recover mandatory contributions to a retirement system. Williams v. State, subsequently decided, represented an extension of the class action. In that case over 600 inmates at the state penitentiary allegedly sustained food poisoning from a single damages. Under section 1407, the Attorney General may bring suit for injunctive relief. Section 1408 then provides that "[t]he court may . . . render judgments against any party, as may be necessary to compensate any aggrieved person for any property . . . which may have been acquired from such person by means of any [unlawful] method, act or practice . . . " The fourth circuit in General Motors held that, although the Attorney General may be prohibited from bringing a class action for damages on behalf of the aggrieved purchasers, he could maintain an action for restitution or diminution as a part of his enforcement authority. However, his right to maintain the class action also was dependent upon meeting the requirements of articles 591-97 of the Code of Civil Procedure. 354 So. 2d 770 (La. App. 4th Cir. 1978).

97. 370 So. 2d at 479.
98. See, e.g., Stevens v. Board of Trustees of Police Pension Fund, 309 So. 2d 144 (La. 1975).
100. FED. R. CIV. P. 23(b)(3) provides for class action when the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.
101. 309 So. 2d 144 (La. 1975).
102. Id. at 147 & 149.
103. 350 So. 2d 131 (La. 1977).
meal; the supreme court held that the class action should have been certified.

In *Stevens* the claims of the parties hinged on a single set of facts and a single issue of liability, and determination of monetary recovery by a member of the class would not necessarily require evidence different from that necessary to establish the monetary recovery of another. In *Williams* the facts bearing upon the defendant's liability to persons sustaining injury were identical, and the concentration of facts and witnesses in one place—the state penitentiary—supported the argument that judicial efficiency could be attained through the use of the class action device. Similarly, since many of the injured claimants would be at a disadvantage in presenting their claims, due to the size of the claims and the claimants' incarceration, the other goals of the class action could be met by permitting its use. The use of the class action in the *General Motors* case is more difficult to defend. Unlike *Stevens* and *Williams*, the claims of the *General Motors* class members did not necessarily hinge upon a single set of facts. The terms and conditions of each purchase could depend upon what was understood by the seller and the purchaser in their negotiations. The amount of the claims, the difference in factual patterns, the possibility of additional defendants (the automobile dealers) who did not share common liability to all plaintiffs, and the demand for a jury trial indicate that the matter would be an unwieldy one for a class action. If a class action such as that before the court in the *General Motors* case is to be certified, a more prudent action would appear to be a certification of the class action only as to a particular issue, i.e., the liability *vel non* of the manufacturer for the engine "switch." The remaining issues, including the liability of the dealer and the amount of damages, if any, could be determined in separate suits.

104. Id. at 133.
105. Id. at 139.
106. 309 So. 2d at 150-51.
107. 350 So. 2d at 133-34.
108. Id. at 135.
109. The federal rule, Fed. R. Civ. P. 23(c)(4), permits a class action "with respect to particular issues." A similar authorization for a Louisiana court may be inferred from articles 191, 193, and 1561 of the Code of Civil Procedure. Furthermore, language in *Williams* supports the notion that a class action may be maintained with regard to certain issues, but not others, arising from the same cause of action. Justice Tate wrote that the Louisiana courts are constitutionally authorized to issue all writs, orders and process in aid of their constitutional or legislative jurisdiction. La. Const. of 1974, Art. 5, Section 2. See also La. Code Civ. P. art. 191: "A court possesses inherently all of the power necessary for the exercise of its jurisdiction even though not granted expressly by law."