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Appellate Review in Bifurcated Trials

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NOTES

APPELLATE REVIEW IN BIFURCATED TRIALS

Plaintiff sued defendant for damages arising out of an automobile accident. In a separate suit, defendant sued plaintiff for damages arising out of the same accident and prayed for a jury trial. The two suits were later consolidated, with plaintiff's suit tried to a judge and defendant's suit tried to a jury. The judge and jury reached opposite conclusions on the issue of defendant's negligence. On appeal by all parties,[1] the First Circuit concluded that neither result was manifestly erroneous and affirmed. In an ex parte decision, the Louisiana Supreme Court reversed and remanded to the court of appeal with instructions to resolve the difference between the findings made by the judge and jury and to render a single opinion based upon the record. On remand, the appellate court accepted the initial jury findings and reversed the findings of the judge. *Thornton v. Moran*, 341 So. 2d 1136 (La. App. 1st Cir. 1976), *reversed and remanded*, 343 So. 2d 1065 (La. 1977), *on remand*, 348 So. 2d 79 (La. App. 1st Cir. 1977).

Some issues in a single trial are often tried by the judge, while others are tried by a jury.[2] Such bifurcated trials may result from stipulation by the parties, from statutory denial of the right to trial by jury for certain issues or parties,[3] or from consolidation of cases for the sake of judi-

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1. It appeared that the defendant appealed only to maintain the status quo.

2. LA. CODE CIV. P. art. 1731 provides in pertinent part: "Except as limited by Article 1733, the right of trial by jury is recognized."

Id. art. 1733 provides:

> A trial by jury shall not be available in:
>
> (1) A suit demanding less than one thousand dollars exclusive of interest and costs;
>
> (2) 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;
>
> (3) A summary, executory, probate, partition, mandamus, habeas corpus, quo warranto, injunction, concursus, workmen's compensation, emancipation, tutorship, interdiction, curatorship, legitimacy, filiation, separation from bed and board, annulment of marriage, or divorce proceeding;
>
> (4) A proceeding to review an action by an administrative or municipal body; and
>
> (5) All cases where a jury trial is specifically denied by law.

3. *Id.* arts. 1733, 1735. See note 2, *supra*, for the text of article 1733. Article 1735 provides:

> The trial of all issues for which jury trial has been requested shall be by jury unless the parties stipulate that the jury trial shall be as to certain issues only, or unless the right to trial by jury as to certain issues does not exist, but in all cases there shall be but one trial.

cial economy.[4]

Although the Code of Civil Procedure recognizes the possibility that judge and jury may act as separate triers of fact for separate and distinct issues in the same trial,[5] the Louisiana Supreme Court only recently permitted the same issue to be decided by separate triers of fact. This question initially arose in cases dealing with a litigant's right to a trial by jury when the state or a political subdivision was a co-defendant. The legislature has specifically denied the right to jury trial if the state or a political subdivision is the only defendant,[6] but situations have arisen which were not envisioned by the legislative scheme. For instance, no provision was made for suits in which the state is named as co-defendant with a private party,[7] or is joined as a third party defendant by a private defendant,[8] or for suits against a liability insurer of the state.[9]

In the late 1960's a conflict arose among the circuit courts of appeal over whether a jury trial is permitted if a public body is a party to the principal demand. The First Circuit ruled that there could be no jury trial on any issue in which the state was one of several defendants.[10] The Second and Third Circuits took a contrary stance and ruled that the judge should decide all questions relating to the public body and allow the jury to decide all questions relating to the other defendants.[11] In *Jobe v. Hodge*[12] the Louisiana Supreme Court adopted the view of the First Circuit and held that there could be no jury trial for any party if the state is a principal defendant. The decision was based in part on the court's desire to avoid conflicting decisions by the judge and the jury on the same point.[13]

Subsequently, *Jobe* was expressly overruled in *Champagne v. American Southern Insurance Co.*[14] In that case the Louisiana Supreme Court

4. *Id.* art. 1561.

5. *Id.* arts. 1734, 1735.

6. LA. R.S. 13:5105 (1975). The Louisiana Constitution provides an exception to this statute, allowing jury trials in expropriation proceedings. LA. CONST. art. I, § 4.

7. *See* Jones v. City of Kenner, 338 So. 2d 1385 (La. 1976); Jobe v. Hodge, 253 La. 483, 218 So. 2d 566 (1969).

8. *See* Champagne v. American So. Ins. Co., 295 So. 2d 437 (La. 1974).

9. *See* Duplantis v. United States Fidelity & Guar. Ins. Corp., 342 So. 2d 1142 (La. App. 1st Cir. 1977).

10. Abercrombie v. Gilfoil, 205 So. 2d 461 (La. App. 1st Cir. 1967).

11. Watson v. Hartford Accident & Indem. Co., 214 So. 2d 395 (La. App. 3d Cir. 1968); Jobe v. Hodge, 207 So. 2d 912 (La. App. 2d Cir. 1968), *aff'd*, 253 La. 483, 218 So. 2d 566 (1969).

12. 253 La. 483, 218 So. 2d 566 (1969).

13. *Id.* at 495, 218 So. 2d at 571.

14. 295 So. 2d 437 (La. 1974).

noted that the purpose of article 1731 of the Code of Civil Procedure[15] is to preserve inviolate the right to a jury trial, and that Louisiana jurisprudence regards the litigant's right to a jury trial as fundamental.[16] For these reasons the court felt that the possibility of different decisions by judge and jury on the same point should not affect the right to a jury trial. The court noted that the trial judge has the power to set aside a jury decision with which he is not in accord,[17] and that the appellate courts have the right to review findings of fact of both judge and jury.[18] The court maintained that one may speculate about the practical difficulties in cases where the judge and jury disagree, but that these difficulties would be no more severe than those which might arise in separate actions against the state and individual defendants.[19]

In the recent case of *Jones v. City of Kenner*,[20] the supreme court held that a litigant could not be deprived of his right to a jury trial against a non-governmental defendant merely because a governmental defendant is joined as a party, "despite any identity or substantial similarity of the issues against both."[21] The court cited *Champagne* in holding that under article 1735 of the Code of Civil Procedure[22] there should be one trial in which the jury decides only issues involving the non-governmental defendant. The court again noted the procedural controls available to prevent disparity of results in this combined single trial.[23] Unfortunately, the only guidance given in either *Champagne* or *Jones* about the standard of appellate review and the weight to be given to the findings of judge and jury was the statement in *Champagne* that the difficulties are no more severe "than those which might arise in separate actions against the State and individual defendants."[24]

The litigation in the instant case arose out of an automobile accident in which an automobile driven by Miss Moran ran into the rear of the Thorntons' vehicle. The Thorntons and Miss Moran filed separate suits,

15. See note 2, *supra*, for the text of article 1731.

16. 295 So. 2d at 439.

17. *Id.*, *citing* LA. CODE CIV. P. arts. 1812, 1813.

In the *Thornton* case, however, after motions for a new trial had been assigned for hearing, the parties filed a Joint Motion for Withdrawal of Motions for New Trial in which the parties agreed to forego a new trial and to submit the case to the appellate court for review. Record, vol. 1, at 186, appeal docket 10953.

18. 295 So. 2d at 439, *citing* LA. CONST. art. V, § 10.

19. 295 So. 2d at 439.

20. 338 So. 2d 606 (La. 1976).

21. *Id.* at 608.

22. See note 3, *supra*, for the text of article 1735.

23. 338 So. 2d at 607.

24. 295 So. 2d at 439.

each alleging the negligence of the other. In her petition, Miss Moran asked for trial by jury; the Thorntons did not. These two suits were consolidated for trial, with the Thornton suit tried to a judge, and the Moran action to a jury. In the Thornton action, the trial judge found that Mr. Thornton had been negligent but that Miss Moran had the last clear chance to avoid the accident. In the Moran suit, the jury, like the trial judge, found Mr. Thornton to be negligent but, unlike the trial judge, found no negligence on Miss Moran's part.[25]

While motions for new trial filed by each party were pending, the parties agreed to submit the cases to the appellate court for review.[26] The appellate court resolved not to be influenced by a tendency to seek uniformity,[27] and viewed the findings in the consolidated cases separately. Applying the "manifest error" rule,[28] the court found neither result egregiously wrong and affirmed each judgment.[29] Although a consistent result is expected from a single trier of fact, the court reasoned, inconsistent results from separate triers of fact are not beyond the realm of possibility, especially in delictual matters. Due to the flexibility of the "reasonable man" standard, lawsuits are won and lost on personalities and crucial determinations which may hinge on a matter of seconds, inches or feet.[30]

25. Thornton v. Moran, 341 So. 2d 1136, 1139 (La. App. 1st Cir. 1976).

26. Joint Motion for Withdrawal of Motions for New Trial, Record, vol. 1, at 186, appeal docket 10953.

27. 341 So. 2d at 1142.

28. While the appellate jurisdiction of a Louisiana court of appeal extends to both law and facts in civil cases, the "manifest error" rule sets out the standard of appellate review of facts. The following language from *Canter v. Koehring*, 283 So. 2d 716, 724 (La. 1973), accurately summarizes the manifest error doctrine:

> 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 a 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. The reason for this well-settled principle of review is based not only upon the trial court's better capacity to evaluate live witnesses (as compared with the appellate court's access only to a cold record), but also upon the proper allocation of trial and appellate functions between the respective courts.

See also Tate, *"Manifest Error"—Further Observations on Appellate Review of Facts in Louisiana Civil Cases*, 22 LA. L. REV. 605 (1962).

29. Thornton v. Moran, 341 So. 2d 1136 (La. App. 1st Cir. 1976), *reversed and remanded* 343 So. 2d 1065 (La. 1977), *on remand* 348 So. 2d 79 (La. App. 1st Cir. 1977).

30. *Id.* at 1142.

In an ex parte decision, the supreme court reversed the judgment of the court of appeal and remanded the case to that court with instructions to reconcile the differences in the factual findings, and to render a single opinion based on the record.[31] The court of appeal rendered judgment in favor of Miss Moran, holding that the trial judge's application of the last clear chance doctrine to the actions of Miss Moran should yield to the jury's conclusion that she was not at fault.[32]

Thornton v. Moran represents a true test of the underlying basis of appellate review in Louisiana civil cases. By its reversal of the First Circuit, the Louisiana Supreme Court has partially repudiated the manifest error doctrine as the applicable standard for appellate review of fact. According to this doctrine, in reviewing the findings of the initial trier of fact, the appellate courts are constrained to accept the original findings as long as they fall within a certain range of "reasonableness," even though other conclusions may seem equally reasonable to the appellate court.

This doctrine recognizes the trial court's greater ability to weigh the credibility of witnesses, and is intended to effect a logical and efficient allocation of functions between the appellate and trial courts.[33]

Implicit in allowing both the judge and the jury to determine separately a single issue of fact in one trial is the possibility that opposite results will be reached. Opposite results certainly can be expected in the analogous situation of separate suits arising out of the same accident being tried separately. Had the suits in the instant case not been consolidated, failure to apply the manifest error doctrine to each result would presumably have been reversible error.

The appellate court was apparently correct in its initial application of the manifest error rule to the case at hand. The reasons which support the application of the manifest error doctrine do not change merely because cases are consolidated. The Louisiana Supreme Court's deviation in the instant case from its usual staunch adherence to the manifest error doctrine is inconsistent with prior jurisprudence, and with the rationale underlying appellate review of fact. Although a consistent result may be desirable, it is the trial court, and not the appellate court, which

31. Thornton v. Moran, 343 So. 2d 1065 (La. 1977). Justice Summers dissented from the "*ex parte* in chamber reversal of the judgment of the court of appeal without a hearing and opportunity for the parties to be heard." *Id.* at 1065. Justices Calogero and Dennis dissented, being "of the opinion the writ should be granted and the case taken up in this Court in the normal course, with oral arguments followed by written opinion." *Id.* at 1065.

32. Thornton v. Moran, 348 So. 2d 79 (La. App. 1st Cir. 1977) (on remand).

33. *See* Tate, *supra* note 28.

is the proper forum for reconciling divergent findings. The proper approach for the appellate courts to follow is a uniform application of the manifest error doctrine.

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LOUISIANA'S USEFUL CLASS ACTION: *WILLIAMS V. STATE*

> *When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next step is either to kill, or to tame him and make him a useful animal.* *

Five inmates of the state penitentiary attempted to bring a class action on behalf of the approximately six hundred prisoners who had suffered severe attacks of food poisoning. Negligent and unsanitary preparation of the prison meal was the alleged cause of the contamination. Class certification was denied by the district court because of the possible variance in damages to individual class members. The Louisiana Supreme Court *held* that the class action remedy was available to victims of this mass tort, even though there was a possibility of variance in the individual damages. To satisfy due process requirements, however, the court utilized its inherent power to order notice to individual class members in the absence of a statutory provision. *Williams v. State*, 350 So. 2d 131 (La. 1977).

Although unknown in civil law countries,[1] the class action has been adopted by statute in Louisiana.[2] The redactors of the Louisiana Code of Civil Procedure based the class action provisions upon Federal Rule 23, as it was written at that time.[3] Finding Louisiana's liberal joinder

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* Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

1. Homburger, *State Class Actions and The Federal Rule*, 71 COLUM. L. REV. 609, 610 n.6 (1971). The class action is an invention of equity which allows a group of claimants with a similar interest in a particular matter to sue through one or more representatives without having to join each member of the class on a suit. *See* Hansberry v. Lee, 311 U.S. 32, 41 (1940); C. WRIGHT, THE LAW OF FEDERAL COURTS, § 72 at 345 (1976) [hereinafter cited as WRIGHT]; Comment, *Federal Rules of Civil Procedure—Litigation of Air Crashes*, 29 RUTGERS L. REV. 425, 427 (1976); Comment, *Federal and State Class Actions: Developments and Opportunities*, 46 MISS. L.J. 39, 40 (1975).

2. LA. CODE CIV. P. arts. 591-597.

3. LA. CODE CIV. P. art. 591, comment (b). As enacted in 1937, Federal Rule of Civil Procedure 23 provided in part: