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Propriety of Establishing on Voir Dire Juror's Connection with Insurance Company

George Kloek

NOTES AND COMMENTS

Propriety of Establishing on Voir Dire Juror's Connection with Insurance Company*

In the recent case of *Smithers* v. *Henriquez*,[1] which was an action commenced to recover damages for injuries sustained in an automobile accident, the counsel for plaintiff, over objection of defendant's attorney, filed an affidavit alleging that the suit was defended by the American Employers' Insurance Company and was represented by its counsel. A single question to be asked of the jurors was submitted to the court, and over the defendant's objection the plaintiff's request to ask the question was granted. All this took place in the judge's chambers and out of the presence of the jurors. Twelve jurors were then called in, and plaintiff's counsel asked them collectively the following question:

"'Are you, Mr. Long [one of the jurors], or any of you gentlemen, interested financially, either as stockholders or otherwise in the American Employers' Insurance Company?'"

The repeated objection of the defendant was again overruled. No response was made to this question by any of the jurors. Motion was then made to discharge the panel, and that motion was likewise denied. The Appellate Court[2] having affirmed a judgment for the plaintiff in the amount of $7,500, the defendant appealed to the Supreme Court. The defendant contended that the evidence was so close that the question of the plaintiff propounded to the jurors on their voir dire examination acquainted the jurors with the fact that an insurance company was interested in the case and was prejudicial to his cause. It was also suggested that the purpose of the inquiry was a clever subterfuge to let the jury know that an insurance company was defending the case. The Supreme Court held the question to be proper and affirmed the decision of the Appellate Court.

This case is of unusual interest as it is the first time that this question has been properly raised in the courts of this state. In the Illinois case of *Mithen* v. *Jeffery*,[3] a prospective juror testified that his business was "all kinds of insurance, including liability insurance." The following questions and answers en-

* The writer wishes to acknowledge the assistance of the attorneys for both the plaintiff and the defendant in drafting this comment.

[1] 368 Ill. 588, 15 N. E. (2d) 499 (1938). Followed in Bellchambers v. Ebeling, 294 Ill. App. 247, 13 N. E. (2d) 804 (1938) and Landess v. Mahler, 295 Ill. App. 498, 15 N. E. (2d) 13 (1938).

[2] 287 Ill. App. 95, 4 N. E. (2d) 793 (1936).

[3] 259 Ill. 372, 102 N. E. 778 (1913).

sued: "Do you know Mr. Jackson?"—"No." "Mr. Snow here?"—"No." "The Travelers' Insurance Company?" Upon objection the court held this question to be improper as it did not indicate whether the juror was connected in any way, financially or otherwise, with the Travelers' Insurance Company so that a challenge for cause would be proper. Furthermore from the record in the case, there was nothing to show that the insurance company, as a matter of fact, was an insurer of defendant. In addition, there was nothing to show that the question was asked in good faith, and according to at least one authority[4] this is an essential prequisite. In the case of *Kenny* v. *Marquette Cement Manufacturing Company*,[5] the following question was asked certain jurymen, "Are you acquainted with any of the officers or agents of the Aetna Insurance Company?" Here again the court held the question improper because there was nothing to indicate that the insurance company was the insurer of the defendant. In the case of *McCarthy* v. *Spring Valley Coal Company*,[6] the plaintiff's counsel, in cross-examining a witness in regard to the taking of a written statement, asked whether Mr. Bayne, the attorney of the Aetna Insurance Company, was present. On objection the question was withdrawn, and counsel said that he had meant Mr. Bayne, attorney for the Spring Valley Coal Company. Commenting on the propriety of that question, the court said, "The question and the circumstances were well adapted to intimate strongly to the jury that the appellant was insured against liability for accidents of this character, and that the party which would have to respond for any judgment which might be rendered was the Aetna Insurance Company. Evidence of this character was not competent. The intimation may not have been true, and it is unfortunate that the suggestion should have been inadvertently made. The only effect it could have would be to convey an improper impression to the jury."

On the other hand, in the case of *Iroquois Furnace Company*

[4] Viou v. Brooks-Scanlon Lumber Co., 99 Minn. 97, 108 N. W. 891 (1906); Chybowski v. Bucyrus Co., 127 Wis. 332, 106 N. W. 833 (1906).

[5] 243 Ill. 396, 90 N. E. 724, 727 (1909).

[6] 232 Ill. 473, 83 N. E. 957, 960 (1908). In the case of Aetitus v. Spring Valley Coal Co., 246 Ill. 32, 92 N. E. 579, 580 (1910), attorney for defendant in error inquired of two of the jurors on their voir dire examination if they were interested in any casualty company which insured employers of labor against damages for injuries to employees. The court sustained an objection to that course of examination apparently on the grounds that the questions were not asked for the purpose of exercising the right of peremptory challenge of said jurors and hence were not asked in good faith.

v. *McCrea*,[7] counsel for plaintiff in the trial court asked the jury, "Anybody acquainted with Mr. Hertig, who represents the insurance company, I believe the Union Casualty Company of St. Louis?" Upon objection of counsel for defendant, the court asked whether the question was asked in good faith. Upon an affirmative reply the question was allowed. As to the propriety of this interrogation the Supreme Court stated: "The question was proper at least for the purpose of enabling counsel to exercise their right of peremptory challenge, if for no other purpose."

The rule of the latter case was followed by the Illinois Appellate Court in the case of *Frochter* v. *Arenholz*,[8] where the court stated:

"Counsel for the respective plaintiffs in error complain that prejudicial error arose out of the conduct of counsel for defendant in error in the examination of a juror, and also in the examination of a witness. It is claimed that this led the jury to believe there was an insurance company interested in the defense of the case. The questions asked the juror and his answers showed that he was employed by an insurance company and that one of counsel for George Arenholz represented the same company. There is nothing in the examination of the juror to indicate that the questions were asked for any other purpose than to enable counsel to exercise his right of challenge."

The court in the instant case, depending largely upon the McCrea decision, decided that there are three situations in which the interest of an insurance company not a party to the suit might be disclosed to the jury: "(1) Where the relation is shown by the questions and answers during the course of the trial after the jury is selected; (2) where the voir dire shows a purpose to improperly inform the jury of the relation; and (3) where the information develops on the voir dire through questions propounded in good faith with the object of eliminating interested parties from the jury."[9] In the first situation, the questions and answers are irrelevant. The questions under the second group are not only improper but unethical.[10] The questions under the third group, however, are permissible and it is within this category that the instant case falls.

The above distinctions are similar to those recognized by other authorities. One such authority,[11] considering the propriety of

[7] 191 Ill. 340, 61 N. E. 79, 81 (1901).
[8] 242 Ill. App. 93 (1926).
[9] Smithers v. Henriquez, 368 Ill. 588, 15 N. E. (2d) 499 (1938).
[10] Canon 15, Canons of Legal Ethics, American Bar Association.
[11] 56 A. L. R. 1418.

asking such questions of witnesses during the course of a trial and after the jury has been selected, stated:

"Against no one thing do the courts, in the trial of personal-injury or death cases, guard more zealously than the introduction of, or attempts to introduce, the fact that the defendant carries liability insurance protecting him from the consequences of his own negligence. Jurors as a class are thought to be prejudiced against insurance companies; and consequently, if they are told in effect that an insurance company, rather than the individual defendant of record, must bear the final loss consequent upon a verdict in favor of the plaintiff, they will be less inclined to consider the merits of the case, and more inclined to return a verdict for the plaintiff, because of an unfair prejudice against the insurer. . . . It may be said to be the universal rule that . . . evidence that the defendant in a personal-injury or death action carries liability insurance, protecting him from liability to third persons on account of his own negligence, is not admissible."

However, as to asking the jurors on the voir dire as to their interest in, or connection with, an insurance company under these circumstances, this authority goes on to say:

"The overwhelming majority of the courts sustain the right of counsel for the plaintiff in a personal-injury case, so long as he acts in good faith for the purpose of ascertaining the qualifications of the jurors, and not for the purpose of informing them that an insurance company is back of the defendant of record, to interrogate prospective jurors by one form or another of questions, with respect to their interest in, or connection with, indemnity insurance companies. It has been held error to deny plaintiff's counsel the right to qualify the jurors in this respect, even though the insurer, on the motion for a new trial, offers an affidavit that none of the jurors are related to or connected with it."[12]

A similar differentiation was laid down by the Federal court in the case of *New Aetna Portland Cement Company* v. *Hatt*[13] when it said:

"A manifest distinction arises concerning the pertinency of the questions when testing the qualifications of proposed jurors and when determining the admissibility of evidence under distinct issues during the trial. The weight of authority favors the allowance of such questions and the answers, where the questions

[12] 56 A. L. R. 1456.
[13] 231 F. 611, 618 (1916).

appear to be . . . in good faith and for the purpose only of ascertaining the fitness of persons summoned as jurors. . . . On the other hand, there is a distinct class of decisions forbidding such questions, as well as the answers, while the cause is in course of trial; the theory of these decisions is that, since there are no issues to which the questions and answers can have any relevancy, the real object of the questions is to suggest to the jury that the defendant is protected against loss by an indemnitor. . . . The fact is too well understood to require more than a mere statement that in cases where the right of trial by jury exists litigants are entitled to have their cause tried before an impartial jury; and perhaps the most effective means of securing this end is through an intelligent and legitimate exercise of the right of challenge, both peremptory and for cause."

Reviewing the decisions of the other states we find that only Nebraska supports the defendant. In the case of *Bergendahl* v. *Rabeler*[14] the court said, "The pernicious, unethical purpose for which an unrestricted right to such an interrogation on voir dire may be used is such that restriction is necessary to an attainment of a proper consideration of issues in actions tried to juries. To deny such a right entirely would work far less perversion of proper verdicts than does its unrestricted use." On the other hand we find no less than thirty states definitely holding that questions asked in voir dire similar to that in the instant case are proper.[15] The courts of the remaining states apparently have not passed on this question.

[14] 131 Neb. 538, 268 N. W. 459, 461 (1936).

[15] Alabama:
Citizens' Light, Heat & Power Co. v. Lee, 182 Ala. 561, 62 So. 199 (1913); Jones v. Pritchett, 232 Ala. 611, 169 So. 224 (1936).
Arkansas:
Cooper v. Kelley, 131 Ark. 6, 198 S. W. 94 (1917); Halbrook v. Williams, 185 Ark. 885, 50 S. W. (2d) 243 (1932).
California:
Maggert v. Bell, 116 Cal. App. 306, 2 P. (2d) 516 (1931); Smith v. Sabin, 137 Cal. App. 567, 31 P. (2d) 230 (1934).
Colorado:
Rains v. Rains, 97 Colo. 19, 46 P. (2d) 740 (1935); Potts v. Bird, 93 Colo. 547, 27 P. (2d) 745 (1933).
Connecticut:
Girard v. Grosvenordale Co., 82 Conn. 271, 73 A. 747 (1909).
Florida:
Ryan v. Noble, 95 Fla. 830, 116 So. 766 (1928).
Georgia:
Bibbs Mfg. Co. v. Williams, 36 Ga. App. 605, 137 S. E. 636 (1927); Cobb v. Atlantic C. Co., 46 Ga. App. 633, 168 S. E. 126 (1933).
Idaho:
Bressan v. Herrick, 35 Ida. 217, 205 P. 555 (1922); Faris v. Burroughs Adding Mach. Co., 48 Ida. 310, 282 P. 72 (1929).

Looking at the merits of the case without regard to judicial decisions, we find the weight of logic heavily in support of the decision reached in the majority rule. The basic common-law rule underlying the right to trial by jury is the principle that the plaintiff shall be entitled to a jury free from prejudice. To take a cross-section of the citizenry represented on the average jury there must, of necessity, be a certain percentage of people who would not make fair jurors in personal injury cases where an insurance company is interested in the defense. In many communities, prospective jurors are members of local and mutual

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Indiana:
Goff v. Kokomo Brass Works, 43 Ind. App. 642, 88 N. E. 312 (1909); Inland Steel Co. v. Gillespie, 181 Ind. 633, 104 N. E. 76 (1914).

Iowa:
Raines v. Wilson, 213 Iowa 1251, 239 N. W. 36 (1931); Bauer v. Reavell, 219 Iowa 1212, 260 N. W. 39 (1935). The attitude of these various state courts is possibly best stated in the Iowa case of Foley v. Cudahy Packing Co., 119 Iowa 246, 93 N. W. 284 (1903), where the court stated: "It is common knowledge that many companies and corporations have been formed in this country for the purpose of, and are engaged in, the business of insuring employers of labor against damages growing out of personal injuries sustained by employes. Of necessity, such business is carried on by agents, and so it is that in most cities and towns one or more of such agents can be found. It is easy to understand that the interests of such companies lie on the defensive side of cases such as the one at bar. And if the defendant happen to be insured in some one or more of such companies, the interest becomes a direct and active one. That a defendant in an action of this character may be insured in some such company is immaterial of itself. But it is manifest that a plaintiff may not desire to have the jury which is to try his case made up, in whole or in part, of the agents or employes of such an insurance company. The fact of such employment would not constitute a ground of challenge for cause, but, as parties and their counsel cannot be expected to know personally every juror who may be called into the box, an examination sufficiently broad should be permitted to enable a party to determine upon his peremptory challenges."

Kansas:
Billings v. Aldridge, 133 Kan. 769, 3 P. (2d) 639 (1931); Swift & Co. v. Platte, 68 Kan. 10, 74 P. 635 (1903).

Kentucky:
Hoagland v. Dolan, 259 Ky. 1, 81 S. W. (2d) 869 (1935); Dow Wire Works Co. v. Morgan, 29 Ky. L. Rep. 854 (1906).

Massachusetts:
Compulsory insurance provided by statute so that every case is an insured case.

Michigan:
Harker v. Bushouse, 254 Mich. 187, 236 N. W. 222 (1931); Van Dyke v. Knoll, 262 Mich. 644, 247 N. W. 768 (1933).

Minnesota:
Seitz v. Clybourne, 181 Minn. 4, 231 N. W. 714 (1930); Spoonick v. Backus-Brooks Co., 89 Minn. 354, 94 N. W. 1079 (1903).

Mississippi:
Yazoo City v. Loggins, 145 Miss. 793, 110 So. 833 (1926).

insurance companies. In the city of Chicago, for example, there is one organization with a membership of almost 100,000 persons many of whom are policy holders, and it is not unlikely that the normal jury panel in Chicago would contain one or more members of this club. Surely such interested parties might be loath to grant a large award to a plaintiff where such verdict would result in their being called upon to make a personal contribution to help pay the award (as in the case of the mutual companies) or would result in a smaller annual dividend or rebate to them. Likewise, there are innumerable agents, employees, adjusters, and others working for insurance companies. Both they and

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Missouri:
Decker v. Liberty, 39 S. W. (2d) 546 (1931); Jones v. Missouri Freight Transit Corp., 225 Mo. App. 1076, 40 S. W. (2d) 465 (1931).
Montana:
Beeler v. Butte & London Copper Development Co., 41 Mont. 465, 110 P. 528 (1910).
Nevada:
Nordyke v. Pastrell, 54 Nev. 98, 7 P. (2d) 598 (1932).
New Jersey:
Bashaw v. Eichenberger, 100 N. J. L. 153, 125 A. 130 (1924).
New York:
Odell v. Genesee Const. Co., 129 N. Y. S. 122 (1911); Dulberger v. Gimbel Bros., 134 N. Y. S. 574 (1912); Cahill's New York Civil Practice Act (1937), ¶ 452.
North Carolina:
Fulcher v. Pine Lumber Co., 191 N. C. 408, 132 S. E. 9 (1926); Goss v. Williams, 196 N. C. 213, 145 S. E. 169 (1928).
Ohio:
Salerno v. Oppman, 52 Ohio App. 416, 3 N. E. (2d) 801 (1936); Morrow v. Hume, 131 Ohio St. 319, 3 N. E. (2d) 39 (1936).
Oklahoma:
Beasley v. Bond, 173 Okla. 355, 48 P. (2d) 299 (1935); Kennedy v. Raby, 174 Okla. 332, 50 P. (2d) 716 (1935).
South Carolina:
Pardue v. Pardue, 167 S. C. 129, 166 S. E. 101 (1932).
South Dakota:
Morton v. Holscher, 60 S. D. 50, 243 N. W. 89 (1932); Simmons v. Leighton, 60 S. D. 524, 244 N. W. 883 (1932).
Texas:
D. & H. Truck Line v. Lavallee, 7 S. W. (2d) 661 (1928).
Utah:
Balle v. Smith, 81 Utah 179, 17 P. (2d) 224 (1932).
Washington:
Child v. Hill, 149 Wash. 468, 271 P. 266 (1928); Heath v. Stephens, 144 Wash. 440, 258 P. 321 (1927).
Wisconsin:
Heinzen v. Nuprienok, 208 Wis. 512, 243 N. W. 448 (1932); Martell v. Kutcher, 195 Wis. 19, 216 N. W. 522 (1927).
Wyoming:
Eagen v. O'Malley, 45 Wyo. 505, 21 P. (2d) 821 (1933).
United States:
Eppinger & Russell Co. v. Sheely, 24 F. (2d) 153 (1928); Cleveland Nehi Bottling Co. v. Schenk, 56 F. (2d) 941 (1932).

their immediate relatives would be prejudiced in favor of defendant's cause.

In more sparsely settled communities the lawyers are frequently acquainted with the jurors and know whether or not they are interested, directly or indirectly, in the insurance company involved. In large cities like Chicago, however, such cannot be the case. In Cook County the counsel in civil cases has little opportunity to investigate the prospective jurors. Even if he did have access to the jury list, it would be impossible to check into the interests and connections of each, in order to determine whether or not he might have prejudicial interests. The right of the plaintiff to an impartial jury should certainly set off the problematical injury to the defendant that might be caused by conveying to the minds of the jury that an insurance company is defending the case. An Ohio court[16] in discussing this feature indicated that we still have the right to rely on the assumption that twelve men picked from the average community will "sit together, consult, apply their separate experience to the affairs of life to the facts proven, and draw a unanimous conclusion."

A question might arise as to why the insurance company should be mentioned at all. If the jury does not know about the company's connection, should there be any prejudice either way? The answer is that during the examination of witnesses this information does creep out. Another answer seems to be that very little harm is done by such interrogations on voir dire because it seems to be quite well understood by the public at large that the people who can afford to pay a judgment are the ones who are insured and it is very rare that suit is brought against a defendant who is not in some manner covered by insurance. But even if damage is done to the insurance company which is neither the plaintiff nor the defendant of record, that fact should not outweigh the right of the plaintiff to an impartial jury. Then, too, why all this worry about the insurance company? In Massachusetts there is compulsory insurance, while in Wisconsin the insurance company is a proper defendant.[17] In the normal case the insurance company often makes the investigations, takes the written statements of the witnesses, and provides the attorneys for the defense. After all, the company is the real defendant, for it must pay the ultimate judgment, while the

[16] Paullonis v. Valentine, 120 Ohio St. 154, 165 N. E. 730 (1929), citing Sioux City & Pacific R. R. Co. v. Stout, 84 U. S. (17 Wall.) 657, 21 L. Ed. 745 (1874), and Davidson Steamship Co. v. United States, 205 U. S. 187, 27 S. Ct. 480, 51 L. Ed. 764 (1907).

[17] Wis. Stats. 1931, § 85.93.

defendant of record is merely a nominal defendant. No irreparable injury would seem to result by protecting the plaintiff from a prejudicial jury even though the jury is supplied, indirectly and in good faith, with the knowledge that the defendant is insured. We need but review the actions brought in death cases to see how rarely is the maximum statutory judgment rendered by the jury. It appears that juries still decide the cases largely upon the merits rather than upon the question of whether or not the defendant is covered by insurance.

It was suggested in the dissenting opinion in the instant case and by others[18] that the information of the interest of the jurors could be ascertained in an indirect method. It is thought that this could be accomplished by asking the juror about his financial affairs, his occupation, his relatives, and their occupations, and if it were found that he had a financial interest in any corporation, he should be compelled to name such corporation. Similar questions might be asked to ascertain whether he was a member of a mutual insurance company. The objection to such a procedure is that, in addition to taking a great deal of time, it would take no great amount of intelligence for the prospective juror to infer from the nature of the questions that an insurance company was connected with the case. Furthermore, such prying into the juror's personal affairs would naturally cause him to become annoyed. As a result the juror would have such a hostile attitude toward the plaintiff's cause as to nullify all the efforts expended towards securing a fair jury. It has also been suggested by another Ohio case[19] that the judge could conduct the examination of the jurors on this point and instruct the jurors that they must assume that the defendant is not insured. It is highly probable, however, that such an instruction would have little or no effect upon the subconscious prejudice which the jury might feel against an insurance company, and the defendant might logically argue this point. The best answer to the defendant's contention would be that, since the legislature of the state of Illinois has seen fit to give to parties litigant the right to challenge in order to enable them to select a jury of men who will serve without prejudice or partiality,[20] the courts should be reluctant to restrict such right merely for fear of

[18] Mithen v. Jeffery, 259 Ill. 372, 102 N. E. 778 (1913); Bergendahl v. Rabeler, 131 Neb. 538, 268 N. W. 459 (1936); Holman v. Cole, 242 Mich. 402, 218 N. W. 795, 797 (1928).

[19] Vega v. Evans, 128 Ohio St. 535, 191 N. E. 757 (1934).

[20] Ill. Rev. Stat. 1937, Ch. 78, § 14 and Ch. 110, § 190.

remote injury to an insurance company which has voluntarily injected itself, for reasons of profit, into the case.

The final test in Illinois as to whether questions may be asked of jurors on voir dire which involve their connections with an interested insurance company is good faith. This good faith may be exercised in two ways. The plaintiff may file an affidavit alleging that he has been reliably informed that an insurance company is defending the suit, or the counsel for the plaintiff may allege that that question is asked in good faith. In either case the questions must be asked for the purpose of permitting the counsel for the plaintiff to exercise his right of challenge.

G. KLOEK