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Insurance--Recovery of Excess Judgement for Insurance Company

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the cause of a hernia" in *Foose*.[34] Finally the court said, "[T]he medical testimony of the surgeon does not stand alone but is supported by other evidence relating to the condition before the collision and the prior absence of a hernia."[35] Thus the West Virginia Supreme Court held that expert testimony stating there was a possibility of causation supported by other evidence could be sufficient to establish a causal relationship.

In considering the quantity and quality of expert medical testimony necessary to establish a causal relation, the courts have taken various paths. Probability is accepted by all and required by some, although there are different standards by which it is constituted. Testimony of mere possibility alone is not sufficient, but, when coupled with other evidence, it is sometimes enough to take the question of causation to the jury. This other evidence requirement is generally satisfied by a factual sequence of events in support of the possibility testimony of the expert. Earlier the West Virginia court seems to have required probability as a basis for establishing the causal relationship. The more recent decisions of *State v. Evans* and *Pygman v. Helton* seem to dictate that West Virginia is following the line of cases which permit causal relationship to be established by the expert's *possibility* testimony when supported by other evidence.

Linda L. Hupp

Insurance—Recovery of Excess Judgment from Insurance Company

X obtained a judgment against *P*, plaintiff, in excess of *P's* liability policy limits. *P* sued *D*, his insurer, to recover the excess alleging that *D* had exercised "bad faith" in failing to settle the claim within the policy limits. The trial court allowed recovery of the excess. *Held*, reversed. In holding that the evidence did not support the verdict for *P*, the court stated that, as a matter of law, *D* was guilty of neither negligence nor bad faith in not settling with the injured party. *Speicher v. State Farm Mutual Automobile Insrance Company*, 151 S.E.2d 684 (W. Va. 1966).

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[34] *Id.* at 287, 134 S.E.2d at 721.

[35] *Id.* at 288, 134 S.E.2d at 722. Here the court cited with approval Hamlin v. N.H. Bragg & Sons, 129 Me. 165, 151 A. 197 (1933), listing the factual sequence of that case, and thus endorsing the *possibility-plus* doctrine.

By holding that the evidence did not support the verdict for the plaintiff, the court was not confronted with the problem of choosing between the two general tests advanced for finding a violation of duty owed by the insurer to the insured when there is a judgment in excess of policy limits. The courts, in this type case, have found liability on the insurer for either making a "bad faith" refusal to settle or being "negligent" in failing to reach a settlement.[1]

The test of good or bad faith rests on the idea that the insurance company has assumed control of the defense and of the right to settling claims, and may be liable in excess of policy limits if the failure to settle was in "bad faith."[2] The negligence test holds the insurer liable for an excess judgment where the insurer negligently rejected a settlement offer.[3] By comparing the general statements of the two tests, it appears that the negligence approach imposes a more stringent standard of conduct upon the insurer.

An insurance company has the duty to defend and "may make such investigation, negotiation, and settlement of any claim or suit as it deems expedient."[4] The insurance company is trying to obtain the discharge of its obligation "at the most economical price possible, through honorable and legal means."[5] It is under no duty to settle or compromise simply for the benefit of the insured as long as the insurer believes it has a reasonably fair prospect of escaping liability.[6] All that is required is that the insurer give equal consideration to the interests of the insured.[7]

The negligence test for finding a breach of these duties is based on the tort theory that once someone acts, he must do so with the care of an ordinary prudent man. A landmark decision on the negligence test was *Dumas v. Hartford Accident and Indemnity*

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[1] The majority of jurisdictions follow the bad faith rule. Annot., 40 A.L.R.2d 168, 178 (1955).

[2] 14 G. COUCH, CYCLOPEDIA ON INSURANCE § 51:130 (2d ed. R. Anderson 1965); 7A J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4712 (repl. 1962).

[3] G. COUCH, *supra* note 2, at § 51:132; J. APPLEMAN, *supra* note 2, at § 4713.

[4] A standard provision quoted in the cases which comes from the automobile liability insurance policy involved.

[5] Demer, *The Views of an Insurance Company Claims Attorney*, 66 DICK. L. REV. 119, 121 (1961).

[6] Southern Fire & Cas. Co. v. Norris, 35 Tenn. App. 657, 668, 250 S.W.2d 785, 790 (1952).

[7] Jessen v. O'Daniel, 210 F. Supp. 317, 326 (D. Mont. 1962); Farmers Ins. Exchange v. Henderson, 82 Ariz. 335, 338, 313 P.2d 404, 406 (1957); *see* Garcia & Diaz, Inc. v. Liberty Mut. Ins. Co., 147 N.Y.S.2d 306, 308 (1955); Roos, *A Note on the Excess Problem*, 350 INS. L.J. 192, 195 (1952).

Co.,[8] which decided that such claims should be based on negligence since the company must use "due care and diligence" in finding out the facts of the case, in learning the law, and considering whether or not to settle. The thrust of the decision was that "the caution of the ordinary person of average prudence should be employed."[9] Another standard which has been applied by this approach was that the insurer should exercise the degree of care and diligence, in determining whether to settle, which an ordinary prudent person would exercise in the management of his own business.[10] The negligence test has been misused,[11] and the fact that this test is very difficult in application[12] has caused it to be rejected in some jurisdictions.[13]

In considering the cases which have applied the bad faith approach, a common element throughout seems to be that the insurer should not be held to further liability simply because it ultimately turns out that the judgment exercised in refusing to settle was mistaken.[14] This approach reasons that since the parties agree by contract to the policy limits, the duty owed to the insured is read into the agreement and therefore the obligation of the insurer should not be extended beyond the duty of good faith. The insurer insures up to a certain amount, the limit set by insured and for which he pays premiums, and it is a big penalty to hold the insurer liable for a larger sum. It is therefore reasoned that substantial culpability, bad faith, should be involved.[15]

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[8] 94 N.H. 484, 56 A.2d 57 (1947).

[9] *Id.* at 489, 56 A.2d at 60. This case was largely based on 8 J. APPLEMAN, INSURANCE LAW AND PRACTICE §§ 4712-13 (1942) which the case quotes as saying the negligence rule is in the majority. This work has since been revised and no longer holds to this proposition. 7A J. APPLEMAN, *supra* note 2, presently says there is little difference in the results of the two tests.

[10] G. A. Stowers Furniture Co. v. American Indem. Co., 15 S.W.2d 544, 547 (Tex. Com. App. 1929).

[11] *See* Anderson v. St. Paul Mercury Indem. Co., 340 F.2d 406 (7th Cir. 1965). In this case the court applied what they called the negligence test, but since the injuries were substantial, the settlement offered by plaintiff was reasonable, and the liability of the insured looked certain, the decision appeared to be based on bad faith.

[12] Epps and Chappell, *Insurer's Liability in Excess of Policy Limits: Some Aspects of the Problem*, 44 VA. L. REV. 267, 271 (1958).

[13] *See* Best Bldg. Co. v. Employers' Liability Assurance Corp., 247 N.Y. 451, 456, 160 N.E. 911, 912 (1928); Burnham v. Commercial Cas. Ins. Co., 10 Wash. 2d 624, 639, 117 P.2d 644, 650 (1941).

[14] *See* Wong and Marr v. Metropolitan Cas. Ins. Co. of N.Y. (Sup. Ct. of City and County of San Francisco sitting as a *nisi prius* ct. 1948) cited in Christian v. Preferred Accident Ins. Co., 89 F. Supp. 888, 890 (N.D. Cal. 1950).

[15] Brown v. Guarantee Ins. Co., 155 Cal. App. 2d 679, 688, 319 P.2d 69, 74 (1957).

Some of the fact situations which courts have considered to constitute bad faith on the part of the insurer are: when the company has not given due regard to the recommendations of its trial counsel,[16] when the severity of plaintiff's injury is such that any verdict against the insured is likely to be greatly in excess of policy limits,[17] "when the facts in the case indicate that a defendant's verdict on the issue of liability is doubtful,"[18] when there is a failure to investigate properly and ascertain the facts,[19] and when the settlement offer was equal to policy limits and the insurer failed to consider it because he stood to lose very little.[20]

Perhaps there is no difference in the two approaches. In discussing this problem Appleman[21] says that even though a difference in language exists between the two tests, the same result would be reached using either. He concludes that the question is essentially, "Did the insurer exercise that degree of skill, judgment, and consideration for the welfare of the insured which it, as a skilled professional defender of lawsuits having sole charge of the investigation, settlement, and trial of the suit may have been expected to utilize. . . ."[22] It has been said that the difference between the bad faith rule and the negligence rule is merely a matter of methods of expression[23] and the results reached are the same.[24] More recent cases point to the fact that the two doctrines are merging and that an insurance company must exercise good faith in its decision on whether or not to settle, and not be negligent in the investigation of the facts of the case.[25]

In an exhaustive study of the excess verdict problem, Keeton[26] says that the bad faith rule recognizes that ordinary care must be

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[16] Royal Transit Inc. v. Central Sur. & Ins. Corp., 168 F.2d 345 (7th Cir. 1948), *cert. denied*, 335 U.S. 844 (1948).

[17] Harris v. Standard Accident & Ins. Co., 191 F. Supp. 538, 540 (S.D. N.Y. 1961), *rev'd on other grounds*, 297 F.2d 627 (2d Cir. 1961).

[18] *Id.*

[19] Radio Taxi Service, Inc. v. Lincoln Mut. Ins. Co., 31 N.J. 299, 304, 157 A.2d 319, 322 (1960).

[20] *See* Georgia Cas. & Sur. Co. v. Reville, 97 Ga. App. 888, 891, 104 S.E.2d 643, 645 (1958).

[21] 7A J. APPLEMAN, *supra* note 2, at §§ 4712-13.

[22] *Id.* at 562.

[23] Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136, 1141 (1954).

[24] Comment, 48 MICH L. REV. 95, 100 (1949).

[25] Gaskill v. Preferred Risk Mut. Ins. Co., 251 F.Supp. 66, 68 (D. Md. 1966); Sweeten Adm'r v. National Mut. Ins. Co., 233 Md. 52, 55, 194 A.2d 817, 818 (1963); Hilker v. Western Auto. Ins. Co., 204 Wis. 1, 12, 235 N.W. 413, 415 (1931).

[26] Keeton, *supra* note 23.

exercised in defending a case, and that the investigation is a part of the defense, and therefore negligence in investigation is an element to be considered even in a bad faith jurisdiction. He concludes that with the jury system determining the final verdict there seems to be little difference in result when either test is employed in a specific situation.[27]

A recent Virginia case, *Aetna Casualty and Surety Company v. Price*,[28] decided that the good faith test rather than the negligence test would be applied in that jurisdiction. Although this was an excess judgment case for refusing to settle a malpractice claim, the court relied upon an automobile liability case for precedent.[29] The District Court for the Southern District of West Virginia has recently decided an excess judgment case applying the "good faith" test.[30] In the opinion the court speaks of both the bad faith and negligence tests, but good faith is specifically stated as the proper test. The insurer "may become liable in excess of its undertakings under the policy provisions if it fails to exercise 'good faith' in considering offers to compromise the claim for an amount within the policy limits."[31]

The West Virginia Vehicle Safety Responsibility Law,[32] while applicable only to that portion of the policy required by law for financial security following an automobile accident, is pertinent when considering which approach West Virginia should follow. It states that a company can discharge its legal obligations for the amount of the policy covered by the act by a *good faith settlement.* This statement of public policy should be persuasive authority upon the West Virginia court when it must choose between the two tests.

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[27] *Id.* at 1142. Keeton states further that the real division of authority in the courts may be in defining the duty to settle, and in what weight the company must give to its own interests and to those of the insured.

[28] 206 Va. 749, 146 S.E.2d 220 (1966).

[29] Radio Taxi Service, Inc. v. Lincoln Mut. Ins. Co., 31 N.J. 299, 157 A.2d 319 (1960). This case held that good faith must be used in dealing with offers of compromise, and that a diligent effort must be made to ascertain the facts upon which to base a good faith judgment.

[30] Inland Mut. Ins. Co. v. Peerless Ins. Co., 152 F. Supp. 506 (S.D. W. Va. 1957), *aff'd on rehearing*, 251 F.2d 696 (4th Cir. 1958).

[31] *Id.* at 513.

[32] W. VA. CODE ch. 17D, art. 4, § 12(f)(3) (Michie 1966) provides: "The insurance carrier shall have the right to settle any claim covered by the policy, and if such settlement is made in *good faith*, the amount thereof shall be deductible from the limits of liability . . . ." (emphasis added).

Before a liability insurance company can be held liable in excess of policy limits, it must be guilty of either "negligence" or "bad faith" in refusing to settle within the policy limits. Although these are theoretically two separate tests, in practical application the results may be very similar. Since the Virginia court[33] and the District Court for the Southern District of West Virginia,[34] along with the West Virginia Legislature in the Safety Responsibility Law[35] have all endorsed the "good faith" rule, it is most likely that when the West Virginia Supreme Court of Appeals is confronted with the question they will follow the majority and require that refusal to settle be a "good faith" refusal.

Richard Edwin Rowe

Juvenile Delinquency—Jurisdiction—Double Jeopardy

A juvenile, properly confined by the Juvenile Court of Ohio County to the West Virginia Industrial School for Boys for automobile theft and breaking and entering, was placed in the Taylor County jail because of misconduct at the school. Juvenile Court of Ohio County ordered the youth returned to it whereupon he was transferred, apparently without hearing, to the Intermediate Court of Ohio County. Upon indictment and plea of guilty to auto theft, he was placed on probation. Later he violated probation and was sentenced to the penitentiary. Petitioner successfully sought a writ of habeas corpus from Marshall County Circuit Court alleging unlawful and illegal detention. The warden of the state penitentiary brought error. *Held,* reversed. The Intermediate Court of Ohio County had jurisdiction of the subject matter and the petitioner waived his right to object to the jurisdiction over his person by remaining silent. Validity of conviction is not dependent upon how one gets before the court and double jeopardy is inapplicable in juvenile court proceedings. *Brooks v. Boles,* 153 S.E.2d 526 (W. Va. 1967).

The West Virginia Code provides that the jurisdiction of a juvenile court over one adjudged to be a delinquent continues

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[33] Aetna Cas. & Sur. Co. v. Price, 206 Va. 749, 146 S.E.2d 220 (1966).
[34] Inland Mut. Ins. Co. v. Peerless Ins. Co., 152 F. Supp. 506 (S.D. W. Va. 1957), *aff'd on rehearing,* 251 F.2d 696 (4th Cir. 1958).
[35] W. VA. CODE ch. 17D, art. 4, § 12(f)(3) (Michie 1966).