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Evidence--Admissibility of Evidence That Defendant Has or Has Not Liability Insurance

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filling station where no conforming use of the land would be remunerative.[15] Construction begun before the amending of a zoning law is not ordinarily affected thereby[16] but a subsequent ordinance may extinguish a building permit even though expenditures have been made in reliance on it.[17]

The revisers of the West Virginia Code largely adopted the Standard State Zoning Act, and as a consequence the state has a statute similar to the one in question.[18] Its constitutionality has not been adjudicated. The discretion of boards of appeals or adjustment appears to be judicially controllable, and in view of the desirability of the delegation of such a discretion, as an adjunct to modern regulative machinery, it seems that it should not be held invalid.

—DONALD M. HUTTON.

EVIDENCE — ADMISSIBILITY OF EVIDENCE THAT DEFENDANT HAS OR HAS NOT LIABILITY INSURANCE. — In an action for personal injury, it is the general rule that informing the jury of the existence of insurance, when evidence of such is inadmissible on any issue in the case, constitutes grounds for a new trial.[1] It is a matter, within limits, in the discretion of the trial court,[2] and some courts hold the fault is cured by proper instructions to the jury.[3] All hold, however, that without such instructions the admission of such evidence requires a new trial.

The reason assigned is that, in cases of personal injury, it increases the already strong tendency of juries to be influenced, especially where a corporation is defendant, by sympathy and prejudice. Juries confronted by the injuries to the plaintiff are too apt to lose sight of the real issues and true merits of the case

[15] Sundlun v. Zoning Board, 50 R. I. 107, 145 Atl. 451 (1929).
[16] Caponi v. Walsh, 228 App. Div. 86, 238 N. Y. Supp. 438 (1930).
[17] City of Tucson v. Arizona Mortuary, 34 Ariz. 495, 272 Pac. 928 (1928); Matter of Fox Lane Corp., 216 App. Div. 813, 215 N. Y. Supp. 334 (1926); People v. Kleinert, 237 N. Y. 580, 143 N. E. 750 (1924), writ of error dismissed 268 U. S. 646, 45 S. Ct. 618 (1925); Gresnaugh v. Allen Theatre and Realty Co., 33 R. I. 120, 80 Atl. 260 (1911).
[18] W. VA. REV. CODE (1931) c. 8, art. 5, § 8(c).

[1] Hollis v. United States Glass Co., 220 Pa. 49, 69 Atl. 55 (1908); Wilkins v. Schwartz, 101 W. Va. 337, 132 S. E. 887 (1926).
[2] Bradley v. D. E. Cleary Co., 86 N. J. L. 338, 90 Atl. 1015 (1914).
[3] Gortz v. Ravenel, 127 S. C. 505, 121 S. E. 369 (1924); Fuller v. Mazetti, 231 Mich. 213, 203 N. W. 868 (1925).

and award excessive damages, since they feel that such are to be taken from the coffers of so impersonal and supposedly wealthy a party as a large insurance company.

It is the general rule that the plaintiff is not permitted to show that the defendant is insured against accident and liability.[4] The mere fact, however, that evidence may disclose that the defendant is insured does not necessarily make such evidence inadmissible. It is admissible regardless of the showing of insurance, with its consequent prejudicial effect, if it is otherwise relevant to some material issue in the case. Thus where ownership of the automobile causing the injury is denied, ownership may be evidenced by showing that the car is insured in the defendant's name.[5] Moreover, credibility of a witness may be impeached by showing bias in favor of an insurance company, for example, that the examining physician was in the employ of the insurance company.[6] If the insurance company places its attorney on the stand he may be cross-examined as to his employment by the company.[7] An admission may contain matter showing insurance and still be admissible.[8] Agency and employment may be shown by evidence that the principal or employer had the party insured along with other employees or agents.[9] Perhaps evidence of insurance is admissible on the issue of negligence where in a particular fact situation the probative qualities of the evidence outweigh its prejudicial qualities.[10]

The defendant is not in general permitted to show that the plaintiff has liability insurance.[11] The reason for not admitting this evidence is the same as that assigned for not generally allowing the plaintiff to show that the defendant is insured. It is only remotely relevant, if at all, and tends to prejudice the jury in favor of the defendant.

Is it permissible for the defendant to show that he is not in-

[4] Walters v. Appalachian Power Co., 75 W. Va. 676, 84 S. E. 617 (1915); James Stewart and Co. v. Newby, 266 Fed. 287, 56 A. L. R. 1418 (C. C. A. 4th 1920).

[5] Paepke v. Stadelman, 300 S. W. 845 (Mo. App. 1928).

[6] Di Tommaso v. Syracuse University, 218 N. Y. 640, 112 N. E. 1057 (1916).

[7] Lenahan v. Pittston Coal Mining Co., 221 Pa. 626, 70 Atl. 884 (1908).

[8] Ward v. De Young, 210 Mich. 67, 177 N. W. 213 (1920).

[9] Davis v. North Carolina Shipbuilding Co., 180 N. C. 74, 104 S. E. 82 (1920).

[10] Herschensohn v. Weisman, 80 N. H. 557, 119 Atl. 705, 28 A. L. R. 514 (1923). In the usual case evidence of insurance is not considered admissible on the issue of negligence. Fletcher v. Saunders, 132 Or. 67, 284 Pac. 276 (1930); Bianchi v. Miller, 94 Vt. 378, 111 Atl. 524 (1920).

[11] Brody v. Cooper, 45 R. I. 453, 124 Atl. 2 (1924).

sured, or that he is only partially insured? It has been held in several recent decisions[12] that such evidence is not admissible, at least on the issue of negligence, even when the jurors have been interrogated on the *voir dire* as to their connections with an insurance company.[13] The reason assigned is that the evidence is an attempt to show pecuniary status of the defendant and is prejudicial. In *Toulborg v. Andersen*[14] the court held it was improper for defendant in a personal injury action to show he was not insured, where the plaintiff made no attempt to show the contrary.

To-day the fact that liability insurance is very generally carried by automobile owners, and employers is common knowledge among jurymen. Would not, then, the very reason that excluded a direct showing that defendant had insurance, tend to make it permissible for him to show that he does not have insurance? If juries trying the case are apt to assume that the defendant is covered by insurance, should he not be allowed to introduce such evidence at least for the sole purpose of removing this prejudice by a direct showing that he is not insured? At any rate much could be said for that view where on the *voir dire* an inference has been raised that an insurance company is interested in the case. However, these points were specifically raised in two recent cases; the former in *Piechuck v. Magusiak*[15] and the latter in *Malone v. Small*[16] and the courts held in both cases that the evidence was inadmissible and its admission required a new trial.

It would seem, then, that as a general rule in a personal injury action, evidence that either party has or has not liability insurance is inadmissible, unless specially made so by peculiar circumstances and unusual issues of the particular case. Even then the fact of insurance is jealously guarded and, if possible, kept from the jury.[17]

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[12] Fox v. Missouri Jobbing House, 32 S. W. (2d) 130 (Mo. App. (1930); Malone v. Small, 291 S. W. 163 (Mo. App. 1927); Tenetz v. St. Louis Lime and Cement Co., 252 S. W. 65 (Mo. 1923); Taulborg v. Anderson, 119 Neb. 273, 228 N. W. 528, 67 A. L. R. 642 (1930); Piechuck v. Magusiak, 82 N. H. 429, 135 Atl. 534 (1926).

[13] Malone v. Small, *supra* n. 12.

[14] *Supra* n. 12.

[15] *Supra* n. 12.

[16] *Supra* n. 12.

[17] McCurdy v. Flibotte, 83 N. H. 143, 139 Atl. 367 (1927). (It was stated by the court, that a reference to insurance should be excluded from an admission if possible).