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Trial - Prejudicial Error - Disclosure of Defendant's Liability Insurance

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as when he represented the creditors.[5] The rule of civil procedure which provides for compulsory counterclaims contemplates situations where the primary parties – the cross-plaintiff and at least one cross-defendant – are before the court as parties to an action which arises out of the same "transaction or occurrance".[6]

The rule as stated in the cited cases appears to be that the demands must be mutual, between the same parties, and in the same capacity. A judgment against one as an individual does not bind him as executor, nor does one against him as executor bind him as an individual in a subsequent action, although the issue is identical and the decision in the first action was upon its merits.[7]

While actions by the same individual in different capacities are treated as actions brought formally in different capacities, but actually for the ultimate benefit of the same person, are by the same person.[8] This view appears to be a minority with the great weight of authority supporting the theory that the parties must also be acting in the same capacity.

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TRIAL – PREJUDICIAL ERROR – DISCLOSURE OF DEFENDANT'S LIABILITY INSURANCE. – In a damage suit resulting from an automobile accident, plaintiff was asked by his attorney who took the statement of facts following the accident. Plaintiff answered that he was unaware of the person's name, but thought he was an insurance man. Defendant's motion for a mistrial was overruled, but the court admonished the jury not to consider the matter of insurance. The Supreme Court of Arkansas *held* that the reference to insurance was voluntary and not responsive and the prompt admonition to the jury removed any prejudicial effect. *Ragon v. Day*, 306 S.W.2d 687 (Ark. 1957).

A majority of the courts[1] hold that in an action for personal injury or death, the disclosure of the fact that the defendant is protected by liability insurance is inadmissible and ground for mistrial.[2] Such evidence is inadmissible because it does not bear on the issue of negligence and tends to

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5. Campbell v. Aahler, 320 Mass. 475, 70 N.E.2d 302 (1946). See also *In re* Kenin's Estate, 346 Pa. 127, 29 A.2d 495 (1942), where the court held that in an action by an individual, a claim against him as executor or administrator cannot be pleaded as a set-off.

6. Stevenson v. Reed, 96 A.2d 268 (Mun. Ct. of App. for D. C. 1953); Ruzicka v. Rager, 305 N.Y. 191, 111 N.E.2d 878 (1953); Rose v. Motes, 220 S.W.2d 734 (Tex. Civ App. 1949). See Hoffman v. Stuart, 188 Va. 785, 51 S.E.2d 239 (1949).

7. First Nat'l Bank v. Shuler, 153 N.Y. 163, 47 N.E. 262 (1897).

8. Chicago, R. I. & P. Ry. Co. v. Schendel, 270 U.S. 611 (1925); *In re* Parks Estate, 166 Iowa 403, 147 N.W. 850 (1914). See Clark, Code Pleading, p. 479 n.157 (2nd ed. 1947). *But see* Newton v. Mitchell, 42 So.2d 53 (Fla. 1949).

1. See, *e. g.*, Garee v. McDonell, 116 F.2d 78 (7th Cir. 1940), *cert. denied*, 313 U.S. 561 (1941); Johnson v. Stotts, 344 Ill. App. 614, 101 N.E.2d 880 (1951); Carls Markets v. Meyer, 69 So.2d 789, (Fla. 1953); 21 Appleman, Insurance Law & Practice § 12832 (1947). *But see* Crum, *Counterclaims and Third-Party Practice*, 39 N. Dak. L. Rev. 7, 24 (1958) as to joining an insurance company as an outright codefendant.

2. See Beardsley v. Ewing, 40 N.D. 373, 168 N.W. 791 (1918). ("The trial judge, who has the advantage of the atmosphere of the trial can best determine the extent of the threatened prejudice, and can take precautionary measures . . . even to the extent of granting a new trial.")

effectuate excessive verdicts.[3] However, there are several exceptions to the general rule. Thus, it is not error (1) where it is material to establishing a cause of action and liability of the defendant;[4] (2) where insurance is used to show bias of a witness due to his relationship with an insurance company;[5] (3) where the insurer is a party to the proceeding at the time;[6] (4) where the evidence concerning insurance is introduced by the insured;[7] (5) where the reference to insurance stems from an unresponsive answer to a proper question.[8]

The instant case falls within the well recognized above exception that evidence of liability insurance introduced by an unresponsive answer to a proper question does not constitute reversible error.[9] It is highly probable that North Dakota courts would reach the same result.[10] Where the reference to insurance was not deliberate and malicious it is largely in the discretion of the trial court whether the error is so prejudicial as to require a mistrial.[11]

In view of the almost universal custom of automobile owners to carry liability insurance and of the juror's knowledge of such custom,[12] it is not as prejudicial to a fair trial as in earlier times.[13] This is evidenced by the fact that courts will now refuse to declare a mistrial unless the damages are greatly execessive or the evidence clearly shows the defendant was not liable.[14]

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3. Leishman v. Taylor, 199 Ore. 546, 263 P.2d 605 (1953); Buehler v. Festus Mercantile Co., 343 Mo. 139, 119 S.W.2d 961 (1938).
4. Cook-O'Brien Co. v. Crawford, 26 F.2d 574 (9th Cir. 1928); Freeman v. Nickerson, 77 Cal. App. 2d 40, 174 P.2d 688 (1946).
5. Fleischman v. City of Reading, 388 Pa. 183, 130 A.2d 429 (1957); Barton Plumbing Co. v. Johnson, 285 S.W.2d 780 (Tex. Civ. App. 1955).
6. Engler v. Hatton, 129 S.W.2d 990, (Tex. Comm'n. App. 1929); Vuchetich v. General Cas. Co., 270 Wis. 552, 72 N.W.2d 389 (1955) (statutory).
7. Turner v. Modern Beauty Supply, 152 Fla. 3, 10 So.2d 488 (1942); Chilcult v. Keating, 220 Miss. 545, 71 So.2d 472 (1954).
8. Garee v. McDonell, 116 F.2d 78 (7th Cir. 1940), *cert. denied*, 313 U. S. 561 (1941); Hughes v. Quackenbush, 1 Cal. App. 2d 349, 37 P.2d 99 (1934).
9. See note 8 *supra*.
10. See Smith v. Knutson, 78 N.D. 43, 47 N.W.2d 537 (1951).
11. Johnson v. Stotts, 344 Ill. App. 614, 101 N.E.2d 880 (1951); Doheny v. Cloverdale, 104 Mont. 534, 68 P.2d 142 (1937); 21 Appleman, Insurance Law & Practice, § 12837 (1947).
12. Moniz v. Bittencourt, 24 Cal. App. 718, 76 P.2d 535 (1938).
13. North Dakota Financial Responsibility Act, N. D. Rev. Code § 39-16 (Supp. 1957).
14. Bloxom v. McCoy, 178 Va. 343, 17 S.E.2d 401 (1941); 21 Appleman, Insurance Law & Practice, § 12838 (1947), which raises the question whether it may be more prejudicial to prevent defendant from showing he is uninsured than showing he is insured. For an excellent, brief discussion of liability insurance see McCormick, Evidence c. 19 (1954).