Florida Law Review

Volume 10 | Issue 1 Article 5

March 1957

Another Look at that Forbidden Word–Insurance

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ANOTHER LOOK AT THAT FORBIDDEN WORD – INSURANCE

In a personal injury or death action, the courts have habitually sought to conceal the fact that a defendant or plaintiff is insured against liability or loss on account of negligence. At its inception the social impact of the rule was negligible. This is no longer true. Today there are an estimated sixty-two million motor vehicles in operation in the United States and an estimated seventy-five million licensed drivers. Since collisions are to some extent inevitable in a wheeled society propelled by gasoline and alcohol, motor vehicle accidents now constitute a major source of negligence suits burdening our courts. Recognizing the social consequences of mass execution by automobile, all states[1] have enacted laws designed to provide financially responsible defendants, so that personal injuries and property damage resulting from motor vehicle accidents will not go uncompensated. Spurred by these state laws and perhaps by a sensible desire to protect their pocketbooks, most automobile owners now carry some type of motor vehicle liability insurance.

In negligence actions involving motor vehicle accidents, the plaintiff's lawyer's fee is generally a contingent one geared to a percentage of the hoped-for judgment. The plaintiff's lawyer, therefore, is most eager to increase the amount recovered; perhaps it is the pressure that results from this system that aggravates the problems involved in improper insurance disclosure.

The most direct method of disclosing the fact of insurance is to join the insurer as a defendant. In the absence of statute, such joinder is not permitted.[2] This means that if any disclosure is to be made, it will have to be indirectly, for, as a general rule, the lawyer cannot openly inform the jury via evidence or argument of a party's insurance; according to evidentiary logic, insurance is irrelevant to the determination of fault, and a disclosure may prejudice the jury against the defendant on the questions of both fault and damages.[3]

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[1]*E.g.*, FLA. STAT. c. 324 (1955); MICH. STAT. ANN. §§9.2201-.2232 (1952); PA. STAT. ANN. tit. 75, §§1277.1-81.3 (1953).

[2]See Note, 1953 WIS. L. REV. 688, for a general discussion of joinder of insurance companies as party defendants.

[3]See, *e.g.*, Colquett v. Williams, 264 Ala. 214, 86 So.2d 381 (1956); Consolidated Motors, Inc. v. Ketcham, 49 Ariz. 295, 66 P.2d 246 (1937); Lavigne v. Ballantyne, 66 R.I. 123, 17 A.2d 845 (1941).

LEGITIMATE REFERENCES

Issues at Trial

Though the fact of insurance is inadmissible as bearing on the issues of fault or damages, it may be admissible as bearing on some other issue of the case, under the so-called multiple admissibility rule.[4] Theoretically the lawyer introducing the fact of insurance must convince the trial judge that his only purpose is to throw light on the particular issue to which it is directed, and not to covertly prejudice the jury against the defendant on the issues of fault and damages. As a practical matter, whether the mention of insurance is allowed depends more upon the skill of the lawyer in mustering conceptual justifications for the introduction of such evidence than upon the ability of the court to divine his actual purpose.

Vicarious liability. A well-recognized application of the multiple admissibility rule is the admission of the fact of insurance to establish legal relationships giving rise to vicarious liability. The existence of liability insurance on a particular automobile has been used to show the defendant's consciousness of responsibility for the acts of the driver, whom the plaintiff sought to establish as an agent.[5] Similarly, this type of evidence was admitted to prove a master-servant relationship[6] and to prove the ownership or control of the instrumentality that was the subject of the insurance.[7]

Impeachment of Witnesses. The fact of insurance may be introduced to discredit an adverse witness by demonstrating his bias, prejudice, or interest.[8] If the witness is an employee of the insurer – an investigator or an adjuster – the party offering him must be prepared to have his relationship to the insurer disclosed; since the party offers the witness to be believed, he should not have the right to close the door to exploration of facts bearing on the witness' credibility.[9]

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[4]See 2 WIGMORE, EVIDENCE §282a (3d ed. 1940); Annot., 4 A.L.R.2d 761 (1949).

[5]See Moore-Handley Hdwe. Co. v. Williams, 238 Ala. 189, 189 So. 757 (1939); Leonard v. Kreider, 51 Ohio App. 474, 1 N.E.2d 956 (1935); Biggins v. Wagner, 60 S.D. 581, 245 N.W. 385 (1932).

[6]Rashall v. Morra, 250 App. Div. 474, 294 N.Y. Supp. 630 (2d Dep't 1937).

[7]Pagano v. Leisner, 5 Ill. App.2d 223, 125 N.E.2d 301 (1955) (automobile); Perkins v. Rice, 187 Mass. 28, 72 N.E. 323 (1904) (elevator).

[8]2 WIGMORE, EVIDENCE §282a (3d ed. 1940).

[9]Hoke v. Atlantic Greyhound Corp., 227 N.C. 412, 42 S.E.2d 593 (1947); Butcher

Some enterprising lawyers have carried the rule a step further and raised the spectre of insurance in rehabilitating their witnesses who had been discredited on cross-examination.[10] For example, in a Florida case defendant's counsel attacked the credibility of the plaintiff by use of a written statement obtained shortly after an accident in which the plaintiff was seriously injured. On redirect plaintiff's counsel was permitted to show that the statement was obtained by an agent of the defendant's insurer while plaintiff was in the hospital.[11]

Voir Dire Examination

The fact of insurance may be disclosed even before the trial; the plaintiff's right to an impartial jury undoubtedly extends to finding out on voir dire examination whether a prospective juror has some insurance company connection that would tend to make him prejudiced against the plaintiff.[12] If the venireman is in fact interested in the defendant's insurer, he may be challenged for cause;[13] if his interest is only in a similar insurance company, the plaintiff probably will not have ground for a challenge for cause, but he may desire to challenge peremptorily.[14]

Obviously, an unrestricted inquiry by the plaintiff on voir dire into the insurance connections of the veniremen would disclose, either directly or by notorious inference, that the defendant is insured. Therefore, the courts, seeking to balance the conflicting rights of the parties, have limited this inquiry so as to protect the defendant from great prejudice while affording the plaintiff access to sufficient information upon which to base his challenges effectively. Although the restrictions on a plaintiff's mode of inquiry differ from state to state, most jurisdictions allow the plaintiff to make the inquiry if it is characterized by "good faith."[15]

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v. Stull, 82 S.E.2d 278 (W. Va. 1954); *cf.* Majestic v. Louisville & N.R.R., 147 F.2d 621 (6th Cir. 1945).

[10]See Williams v. Matlin, 328 Ill. App. 645, 66 N.E.2d 719 (1946); Young v. Sonking, 275 App. Div. 871, 88 N.Y.S.2d 392 (3d Dep't 1949); Schuetzle v. Nash-Finch Co., 72 S.D. 588, 38 N.W.2d 137 (1949).

[11]See Turner v. Modern Beauty Supply Co., 152 Fla. 3, 10 So.2d 488 (1942) *(semble)*.

[12]See cases collected in Annot., 4 A.L.R.2d 761, 793 (1949).

[13]See Murphy v. Cole, 338 Mo. 13, 88 S.W.2d 1023, 103 A.L.R. 505 (1935).

[14]See Shams v. Saportas, 152 Fla. 48, 52, 10 So.2d 715, 717 (1942) (dictum); Fedorinchik v. Stewart, 289 Mich. 436, 439, 286 N.W. 673, 674 (1939) (dictum).

[15]See *e.g.*, Lambert v. Higgins, 63 So.2d 631 (Fla. 1953); Helton v. Prater's Adm'r,

The precise meaning of "good faith" remains vague. There has been a definite tendency on the part of some states, however, to specify certain steps for the plaintiff to follow in establishing his good faith.[16] He may be required to show that he has reasonable grounds to believe that the defendant is actually insured; this may be done by an affidavit or an oral statement made to the court out of the presence of the venire. In some jurisdictions the lawyer must then proceed with his questioning through definite stages, beginning with very general questions about their business or corporate connections, and proceeding to questions about connections with insurance companies generally, and finally to pointed questions about specific insurers. If the plaintiff follows the appropriate procedure in his state, the defendant generally cannot get a reversal on the basis that he was prejudiced by the interrogation. But if the plaintiff deviates from the charted course, a new trial may be granted unless the error is cured, or deemed harmless.[17]

Some courts still regard disclosure of defendant's insurance on voir dire examination as a very prejudicial matter. The extreme example of this attitude is the Illinois court, which has ruled[18] that the plaintiff must demonstrate his good faith not only by privately revealing the defendant's insurance to the court but also by presenting grounds for a reasonable belief that the venire contains prospective jurors who have disqualifying interests. A plaintiff's affidavit to the effect that the defendant's insurance company had a large office and many employees in the area was held[19] insufficient to support such a belief in the face of the defendant's affidavit that no prospective juror was a stockholder, employee, officer, broker, or agent of the particular insurer involved. Thus in Illinois the defendant can by this stratagem foreclose questioning the venire about connections with other insurers.

A less drastic procedure than that of Illinois is found in the Arizona practice.[20] This procedure requires that the inquirer first determine whether any juror is connected with large corporations or businesses; if there are affirmative answers, the prospective juror may

272 Ky. 574, 114 S.W.2d 1120 (1938); Leishman v. Taylor, 199 Ore. 546, 263 P.2d 605 (1953).

[16]See Annot., 4 A.L.R.2d 761, 802 (1949).

[17]Avery v. Collins, 171 Miss. 636, 157 So. 695 (1934); *cf.* Blanton v. Butler, 81 So.2d 745 (Fla. 1955).

[18]Wheeler v. Rudek, 397 Ill. 438, 74 N.E.2d 601 (1947).

[19]*Ibid.*

[20]Dunipace v. Martin, 73 Ariz. 415, 242 P.2d 543 (1952).

then be asked to disclose the type of corporations or businesses involved and his relationship to them. Thus, insurance will not be mentioned unless a venireman has an interest in some insurance company. Nevertheless, the plaintiff's right of inquiry extends to possible connections with similar insurers as well as the particular insurer involved.

It has been suggested that the possibility of a prospective juror's being prejudiced in favor of a defendant because of his interest in an uninvolved insurance company is remote. The argument is that without an inquiry inferring insurance the juror would not know that the defendant is insured; and if by the usual questions it is determined that the juror is unacquainted with the defendant and his attorney he would not suppose that his particular insurance company is defending the suit even if he suspects that the defendant is insured. The ground for fearing prejudice is that *his* company, not just any company, is going to pay the verdict. If the inquiry is allowed, however, the possibility that the venire will infer that the defendant is insured is very high. In answer to this argument, plaintiffs' attorneys suggest that because jurors interested in insurance companies may be "defense-minded" the need to eliminate such jurors is nonetheless real.

The Florida Supreme Court has specifically rejected the use of the Illinois affidavit technique and has held[21] that the plaintiff's right of inquiry into the insurance connections of prospective jurors extends to those connections with companies similar to that insuring the defendant. In *Ryan v. Noble*[22] the Florida Court indicated its preference for a procedure approximating that espoused by the Arizona court. There is a significant difference, however: having ascertained that the venireman has a business interest, in Florida the plaintiff may then broach the subject of insurance by asking whether the business is an insurance corporation. A number of Florida lawyers have indicated that the voir dire examination is the most convenient time for bringing the defendant's insurance to the jury's attention.[23]

All of the Florida practitioners interviewed concurred in the view that once the plaintiff asks a question concerning insurance connections, the prospective jurors understand that the defendant has insurance.

[21]Shams v. Saportas, 152 Fla. 48, 10 So.2d 715 (1942).

[22]95 Fla. 830, 840, 116 So. 766, 769 (1928) (dictum).

[23]In response to this practice, one defense attorney suggested filing a counterclaim and then laying the predicate to enable an interrogation of the veniremen concerning insurance, thus attempting to nullify the effect of the plaintiff's questioning in this regard.

This would not be an unreasonable assumption by the jury even in the absence of questioning, for jurors are likely to assume insurance coverage in most motor vehicle accident cases, even though a financial responsibility law such as Florida's[24] is not compulsory. Realizing this, some courts have come to regard the attempt to conceal insurance from the jury as a futile gesture. This attitude has prompted a lenient view of transgressions of the inadmissibility rule; in some jurisdictions the procedure itself seems to place few limitations on the interrogation of the veniremen.[25]

Improper References

Improper injection of the fact that the defendant is insured ordinarily will constitute prejudicial error, warranting a mistrial, new trial, or reversal on appeal. There are situations, however, in which insurance may be improperly disclosed to the jury and yet be deemed harmless. A defendant who injects the matter himself[26] or who fails to make timely and appropriate objection[27] to the plaintiff's disclosure of the fact cannot thereafter be heard to complain. Even if the plaintiff injects the matter and the defendant properly objects, the trial court, by exclusion of the objectionable matter and an immediate instruction to the jury to disregard it, may succeed in curing the error.[28]

Whether improper injection of insurance will be deemed reversible error differs from state to state and from case to case, depending on a myriad of variables. The size of the verdict,[29] the apparent good or bad faith of the references by witness or counsel, and the cumulative effect of improper references[30] have all received emphasis in the decisions.

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[24]Fla. Stat. c. 324 (1955).

[25]See Dedmon v. Thalheimer, 290 S.W.2d 16 (Ark. 1956); Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935).

[26]See Fogelsong v. Jarman, 168 Ore. 177, 121 P.2d 924 (1942); Reid v. Owens, 98 Utah 50, 59, 93 P.2d 680, 684 (dictum).

[27]Ryan v. Noble, 95 Fla. 830, 116 So. 766 (1928); Hatfield v. Levy Bros., 18 Cal.2d 798, 813, 117 P.2d 841, 848 (1941) (dictum); Johns v. Shinall, 103 Colo. 381, 390, 86 P.2d 605, 609 (1939) (dictum).

[28]See Hiller v. Goodwin, 258 Ala. 700, 65 So.2d 152 (1953); Wall v. Little, 102 Fla. 1015, 136 So. 676 (1931).

[29]Indamer Corp. v. Crandon, 217 F.2d 391 (5th Cir. 1954); Morton v. Holaday, 121 Fla. 813, 164 So. 514 (1935).

[30]Carl's Markets, Inc. v. Meyer, 69 So.2d 789 (Fla. 1953); Boyne v. Schulte, 222

Instruction to Disregard

To evaluate the success of this method of saving a trial, attention can be profitably turned to some of the results of the University of Chicago Law School Jury Project,[31] which studied, among other things, the effect of the mention of insurance on jury verdicts. Using recordings of an ordinary negligence case, three degrees of insurance emphasis were introduced into the same basic case. These cases were then played to a total of thirty different lay juries. In the first version of the case, the defendant disclosed on cross-examination that he had no insurance. The mean jury award was $33,000. In the second version of the case, the defendant, at the same point in the trial, disclosed that he had insurance, but no objection was made and no further mention of insurance occurred. The mean award for this version of the case was $37,000. In the third version, the defendant again disclosed on cross-examination that he had insurance, but the disclosure was objected to by the defendant's counsel and the trial court explicitly instructed the jury to disregard the statement. The mean jury award rose to $46,000!

The same three versions of the case were submitted to a group of trial and appellate judges. As might be expected, the judges gave their lowest awards in the instance in which there was the instruction to disregard the insurance. In the other two situations the familiar pattern re-occurred. When the defendant revealed that he had no insurance, the mean award was $32,500; a mean award of $40,300 was granted when the defendant disclosed that he had insurance but no further notice was taken of it.

Assuming these figures to be an accurate reflection of the reaction to insurance, they document the common suspicion that juries react more prejudicially to the defendant as insurance receives greater emphasis, whether that emphasis comes by instruction to disregard or otherwise. Conversely, insurance is least prejudicial when everyone is silent on the point. While the size of the sampling and the methods employed in the Chicago Jury Project cannot be said to have developed unimpeachable data for determination of this issue, it can be said that the results conform to the observations of many practitioners and

S.W.2d 503 (Mo. 1949).

[31]All facts concerning the jury project were taken from a mimeographed text of a speech, entitled "Report on the Jury Project of the University of Chicago Law School," delivered at a conference on legal research at the University of Michigan Law School on Nov. 5, 1955, by Prof. Harry Kalven, Jr., of the University of Chicago Law School.

judges of long experience. The curative effect of an instruction to disregard, then, may be seriously doubted, for apparently it serves only to further prejudice the defendant's insurance company and, if the defendant be only partially insured, the defendant as well.

CONCLUSION

It is hardly controvertible that the plaintiff's lawyer often wishes to expose the defendant's insurer so that the jury will be able to identify the pocket from which an eventual judgment will be paid. It is precisely this inclination that the inadmissibility rule seeks to frustrate.

The rule as presently applied by the courts does little more than increase the already burdensome appellate work-load and add another argumentative factor at the trial level; it clearly does not effectuate the underlying policy. Assuming the desirability of this policy, strict enforcement of the rule is needed. A reference to insurance should not be deemed legitimate if there is other evidence of a nonprejudicial nature sufficient to establish the point in issue; the Illinois procedure, or at least the Arizona procedure, should be adopted for voir dire examinations. The prejudicial effect of an improper reference by a plaintiff's witness should not be left to the questionable cure of an instruction to disregard, but should be automatic grounds for mistrial.

The present trend of decisions evinces a disposition on the part of the courts to be more concerned with adequately compensating the injured plaintiff than with the prejudicial effect of a disclosure of insurance on the insurer's pocketbook. This adumbrated shift in policy has rendered the inadmissibility rule archaic and the courts' verbal homage unrealistic. In view of this, alternatives that entirely banish the rule have some appeal. Three proposed alternatives will be considered briefly. They are devised for other purposes as well, but they may effectively supplant the need for the inadmissibility rule.

Direct Action Statutes. In at least two states[32] plaintiffs in motor vehicle accident cases may proceed directly against the wrong-doer's insurer, whose defenses against the insured are saved. Obviously, verdicts are somewhat higher when a direct remedy is available; consequently, insurance rates tend to become higher as well. But the ensuing decrease in the rather excessive and fruitless litigation over

[32]LA. REV. STAT. ANN. §22:655 (1951); WIS. STAT. §260.11 (1955).

purported infractions of the inadmissibility rule may be worth the price.

Compulsory Liability Insurance. Some states that have compulsory liability insurance laws applicable to a particular class, such as common carriers, have ruled that disclosure of the insurer's interest is not error.[33] If the compulsory features of these statutes were extended to the now existing general financial responsibility laws, the inadmissibility rule would cease to function; a juror should be presumed to know the laws of his own state, and merely refreshing his memory would be harmless. An increase in insurance rates might result, but not necessarily so, for the compulsory feature of the law would provide a wider base for distribution of the risk.

Administrative Handling of Claims. Another suggestion is that automobile accident litigation should be disposed of administratively, in a manner somewhat like the present workman's compensation procedure.[34] Whether the concept of fault should be displaced by strict liability as has been done in one jurisdiction[35] is an important policy question. Some such system could conceivably be the eventual solution; practically the same motivating factors which led to the adoption of the workman's compensation plan — prolonged and expensive litigation, excessive verdicts, forced settlements, the general uncertainty, the increasing number of accidents — are now operating in favor of creation of a similar system for settlement of automobile claims.

The reader's reaction to this suggestion should emphasize to him that most attitudes concerning the alternatives to or justifications for the inadmissibility rule are determined by policy attitudes toward the present or potential role of insurance in society, rather than by technical legal attitudes toward the administration of rules of evidence and procedure in the courtroom.

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[33]See, *e.g.*, Yellow Cab Co. v. Bradin, 172 Md. 388, 191 Atl. 717 (1937); Shadwick v. Hills, 79 Ohio App. 143, 69 N.E.2d 197 (1946); Scott v. Wells, 214 S.C. 511, 515, 53 S.E.2d 400, 401 (1949) (dictum).

[34]See Green, *The Automobile Accident Insurance Act of Saskatchewan*, 2 CHITTY'S L.J. 38 (1952).

[35]*Id.* at 39: "[The] Act imposed upon the motoring class an absolute liability to collectively pay limited compensation to persons suffering from bodily injury or death as the result of the operation of a motor vehicle, irrespective of fault . . . ."