Michigan Law Review

Volume 39 | Issue 4

1941

APPEAL AND ERROR - BAD FAITH OF COUNSEL AS A BASIS FOR GRANTING A NEW TRIAL WHERE FACT THAT DEFENDANT WAS INSURED WAS BROUGHT TO ATTENTION OF JURY

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COMMENTS

APPEAL AND ERROR — BAD FAITH OF COUNSEL AS A BASIS FOR GRANTING A NEW TRIAL WHERE FACT THAT DEFENDANT WAS INSURED WAS BROUGHT TO ATTENTION OF JURY — It is generally agreed that the jury in a personal injury action should not be informed that the defendant is covered by indemnity insurance.[1] The reasons for

[1] 56 A. L. R. 1418 (1928); 74 A. L. R. 849 (1931); 95 A. L. R. 388 (1935); 105 A. L. R. 1319 (1936).

the rule are that the matter of insurance is irrelevant,[2] and that the exposition of its existence is prejudicial. The jury is likely to grant more and larger verdicts for the plaintiff when it is known that an insurance company, rather than the individual defendant being tried, will have to pay the judgment.[3] However, the fact that the defendant is insured reaches the jury in a multitude of ways. While direct evidence of insurance is inadmissible as such, it may be introduced if it bears on some material issue.[4] Also, the jury is quick to realize that an insurance company is involved when, upon the *voir dire* examination, each prospective juror is questioned as to his and his family's interest in any insurance company. Often the matter comes in inadvertently, as where the witness' answer mentioning insurance is unresponsive to the question asked. Finally it may be brought to the jury's attention through the wilful misconduct of counsel. In those exceptional situations where evidence of insurance is admissible[5] the introduction of such evidence clearly does not constitute error, but when the matter of insurance is clearly inadmissible, and yet the matter does get before the jury, many courts will grant the defendant a new trial if the opposing counsel acted wilfully, and will deny a new trial if opposing counsel acted in good faith. This comment is addressed to this distinction.

I.

The jury most frequently becomes aware of the defendant's insurance when the jurors are questioned on their *voir dire* as to their possible connection with insurance companies. From this line of questioning they are quick to infer that an insurance company is in the case, especially if they are questioned as to connections with a specifically named company. Strong policy arguments are advanced both for and against permitting plaintiff's counsel to pursue this line of examination. The plaintiff is entitled to an impartial jury free from members who are financially interested in the outcome of the cause. It is argued that to secure to the plaintiff this fundamental right it is necessary that he be allowed to question jurors as to their possible connection with insurance companies so that he can challenge for cause, or at least have

[2] 8 COUCH, CYCLOPEDIA OF INSURANCE LAW, § 2254 (1931).

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

[4] See citations in note 1, supra.

[5] Evidence of insurance is admissible relative to the relationship creating liability: Paepke v. Stadelman, 222 Mo. App. 346, 300 S. W. 845 (1927); Davis v. North Carolina Shipbuilding Co., 180 N. C. 74, 104 S. E. 82 (1920); 56 A. L. R. 1418 at 1433 (1928). To show bias of witness: Di Tommaso v. Syracuse University, 218 N. Y. 640, 112 N. E. 1057 (1916); Lenahan v. Pittson Coal Mining Co., 221 Pa. 626, 70 A. 884 (1908). To show admission of defendant, 95 A. L. R. 388 at 398 (1935).

a basis for the intelligent exercise of his right to peremptory challenge, and thus rid the jury of all those jurors who would be partial because of connections with insurance companies.[6] However, the defendant is also entitled to an impartial jury, and to a trial upon the issues of the case as well. It is clear that once the matter of insurance is injected into the case he receives neither. With such a conflict of policy it is not surprising to find a corresponding conflict among the courts, the decisions ranging from those holding that it is reversible error to mention insurance on the *voir dire*[7] to those at the other extreme which hold it reversible error to refuse to permit the inquiry.[8] The middle ground is occupied by courts which allow the questions if asked in good faith, but disallow them otherwise.[9] In jurisdictions applying the "good faith rule" the basic requisite seems to be that the questions be asked to gain information of the jurors' qualifications rather than to inform the jury of the defendant's insurance.[10] Obviously such a test will often be difficult to apply, for frequently it will be almost impossible to demonstrate counsel's lack of good faith,[11] with the result that the *voir dire* will afford a means of placing inadmissible and prejudicial matter before the jury.

Aside from the difficulties of administering a good faith rule, there is still the question whether the intent of plaintiff's counsel should influence the result. Clearly the information is equally prejudicial whether it is brought to the jury's attention innocently or maliciously, and the result should be the same in either case. After all, the defendant is interested, not in the good faith of plaintiff's counsel, but rather in receiving a fair trial, and therefore if the matter is prejudicial the defendant should not be deprived of a new trial merely because opposing

[6] Bauer v. Reavell, 219 Iowa 1212, 260 N. W. 39 (1935); Iroquois Furnace Co. v. McCrea, 191 Ill. 346, 61 N. E. 79 (1901).

[7] Bergendahl v. Rabeler, 131 Neb. 538, 268 N. W. 459 (1936); Tarbutton v. Ambriz, (Tex. Civ. App. 1924) 259 S. W. 259.

[8] Goff v. Kokomo Brass Works, 43 Ind. App. 642, 88 N. E. 312 (1909).

[9] 56 A. L. R. 1418 at 1454 (1928); 74 A. L. R. 849 at 860 (1931); 95 A. L. R. 388 at 404 (1935); 105 A. L. R. 1319 at 1330 (1936).

[10] Stephens v. Clayton, 22 Tenn. App. 449, 124 S. W. (2d) 33 (1938); Duncan Coal Co. v. Thompson's Admr., 157 Ky. 304, 162 S. W. 1139 (1914); Ryan v. Simeons, 209 Iowa 1090, 229 N. W. 667 (1930); Miller v. Kooker, 208 Iowa 687, 224 N. W. 46 (1929). In the Iowa cases cited it was held that where all the members of the panel were farmers, laborers, or housewives, the possibility of interest in liability insurance was so remote that inquiry was not necessary to protect the right to impartial jury.

[11] Fulcher v. Pine Lumber Co., 191 N. C. 408, 132 S. E. 9 (1926) (good faith indicated by plaintiff's attorney showing that he had reasonable information that defendant was insured); Glick v. Arink, (Mo. 1932) 58 S. W. (2d) 714 (good faith indicated by plaintiff's counsel asking defendant's counsel if he represented an insurance company and refusal of counsel to answer); Kaiser v. Jaccard, (Mo. App. 1932) 52 S. W. (2d) 18 (good faith is presumed).

counsel's conduct was consistent with good faith. On the other hand, if the placing of certain information before the jury is held not to prejudice the defendant when this is done in good faith, then the defendant is equally unprejudiced when counsel acts in bad faith, and to grant a new trial here gives the defendant an undeserved benefit, for by hypothesis he has had a fair trial. Also the court's time is wasted in a useless trial, for if the objectionable matter did not prejudice the defendant in the first trial the exclusion of this matter will not aid him in the new trial, and the result of both trials will in all probability be the same. If the offending counsel is to be punished, some other method should be devised. Counsel's right to question prospective jurors regarding their connection with insurance companies, however, should be the same whether he acts in good faith or bad.[12]

2.

While there are strong policy arguments in favor of permitting the mention of insurance on the *voir dire* examination, there are no such arguments in favor of allowing the matter to be introduced into the trial as part of counsel's argument to the jury, or as evidence, except in those cases where the fact of insurance tends to throw light upon a material issue in the cause. Assuming that the matter is clearly irrelevant, and therefore inadmissible, what should be the effect when such information does reach the jury? Again courts in many jurisdictions distinguish between cases in which the matter came in through counsel's wilful misconduct, and those in which counsel acted in good faith,[13] holding that the wilful bringing of the matter of insurance

[12] Several solutions to this problem, attempting to protect both the rights of plaintiff and defendant, have been suggested: (a) statement by the court as to whether there was insurance, and then a questioning of the jury as to whether this would influence them, Fortner v. Kelly, 227 Mo. App. 933, 60 S. W. (2d) 642 (1933); (b) join insurance companies as parties defendant, thus "clearing the air" and in time educating jurors to abandon their prejudices, 20 CORN. L. J. 110 (1934); (c) further suggestions made in 17 MINN. L. REV. 299 at 312 (1933) are that (1) court inquire of each juror as to his business relations, and ask further specific questions of those who may be interested in insurance companies; (2) court conduct a general examination of jurors as to their interest in insurance companies, first stating that he does not know if the defendant is insured and that the jury should not consider this possibility in deciding the case; (3) on the first day of the term court inquire of all the members of the panel as to their interest in insurance companies and then make this information available to the parties; (4) jurors might be asked if they have any interest in cases of the same character as this.

[13] Some courts use the term "good faith" to indicate those cases in which the matter of insurance enters the case in connection with some material issue, Parker v. Norton, 143 Ore. 165, 21 P. (2d) 790 (1933), and is therefore admissible. These cases will not be discussed in this comment, which will be confined to cases in which the matter of insurance is clearly inadmissible, and "good faith" will indicate that the objectionable matter of insurance did not reach the jury through counsel's misconduct.

before the jury is ground for reversal,[14] but that if counsel has acted in good faith there is no reversible error.[15] A similar distinction is made in evaluating the curative effect of the striking of the offensive matter from the record coupled with an instruction to the jury to disregard it. Thus a Texas court, in *Austin v. Gress*,[16] said that it will be generally presumed that the jury followed the instructions to disregard, but where statements are made deliberately, and the party making the improper comments has obtained the verdict, there is no way to enforce proper practice but to reverse and remand.[17]

Perhaps the best example of cases wherein counsel acts in good faith are those in which a witness gives an unresponsive and unexpected answer containing a reference to defendant's insurance. In such cases the defendant has almost universally been denied a new trial.[18] The courts in making this distinction between wilful and inadvertent injection of extraneous matter reason as follows: If the plaintiff's attorney wilfully and wrongfully attempts to influence the jury, neither he nor his client, who as the principal is responsible for his agent's misconduct, has cause to complain if the verdict in his favor is set aside, since his misfortune is due solely to intentional wrong. Conversely, it would be unjust to deprive a successful party of his verdict when extraneous matter is introduced through no fault of his own.

3.

While perhaps the numerical weight of authority is with those courts which base defendant's right to a new trial on the bad faith of

[14] Standridge v. Martin, 203 Ala. 486, 84 So. 266 (1919); Burgess v. Germany-Roy-Brown Co., 120 S. C. 285, 113 S. E. 118 (1920); Blue Bar Taxicab & Transfer Co. v. Hudspeth, 25 Ariz. 287, 216 P. 246 (1923); 56 A. L. R. 1418 at 1485 (1928), speaking of the plaintiff's counsel, "if he deliberately sets out . . . to inform the jury by improper evidence or arguments that the loss, if any, will fall upon an insurance company, his conduct is deemed so prejudicial as to warrant a reversal of the judgment, if for the plaintiff. . . ."

[15] In Carter-Mullaly Transfer Co. v. Bustos, (Tex. Civ. App. 1916) 187 S. W. 396 at 398, speaking of the rule for granting a new trial when insurance is injected into the case the court said, "we . . . will confine it strictly, when we enforce it at all, to cases in which it is made to appear that plaintiff deliberately and persistently labored to inject an issue not made by the pleadings in order to gain a verdict or influence the amount of it." In Albert v. Maher Bros. Transfer Co., 215 Iowa 197 at 214, 243 N. W. 561 (1932), "Error arises only when a party intentionally brings before the jury on an immaterial or irrelevant matter the fact that the opposite party carries insurance."

[16] City of Austin v. Gress, (Tex. Civ. App. 1913) 156 S. W. 535.

[17] Whether or not an instruction to disregard objectionable matter ever cures prejudice has been the subject of much dispute, but this controversy is not within the scope of this comment, which is concerned solely with the question whether the scienter of counsel should have any effect upon the rights of a party who has been prejudiced.

[18] Meinecke v. Intermountain Transp. Co., 101 Mont. 315, 55 P. (2d) 680 (1936); 56 A. L. R. 1418 at 1451 (1928).

opposing counsel, it is submitted that those courts which disregard the "good faith test," and decide the question on the basis of whether or not the wronged party received a fair trial,[19] employ sounder reasoning. According to this view, if negligence is clearly shown and the verdict is not excessive, there is no new trial, even if plaintiff's counsel acted wilfully; but if the case is close on the issue of negligence or if the verdict is unreasonable, then the injection of the matter of insurance forms the basis for a new trial.

The defendant is, after all, entitled to no more than a fair trial, and even though the conduct of opposing counsel may be reprehensible, if the defendant is not prejudiced thereby, he must rest on his one fair trial and is not entitled to another. Also, where negligence is clearly established and the verdict is not excessive, were a new trial to be granted because of counsel's misconduct, the result in the second trial would duplicate that in the first, and thus the courts would be burdened with useless litigation.

Granting that offending counsel should be punished, the award of a new trial does not seem to be the proper way to accomplish this. While in legal theory a client is responsible for his attorney's acts, and is therefore punishable for his wrongdoing, actually it is the attorney rather than the client who decides how the case shall be tried, and if a new trial is granted it is the client, not the attorney, who suffers through delay in the collection of his claim and through added expense.

On the other hand, an inadvertent reference may be just as prejudicial to the defendant as one made wilfully. If the test for the granting of a new trial is the presence or absence of prejudice, the plaintiff will not be reversed in cases which he would have won without the benefit of an inadvertent reference to insurance, nor will a verdict in favor of the plaintiff be sustained, when arrived at through prejudice, merely because the prejudicial matter came into the case inadvertently. In the latter case the defendant is just as innocent as the plaintiff and hence should no more have to risk an unfavorable verdict than should the plaintiff have to risk the setting aside of a favorable verdict.

Logically the basis for granting or denying a new trial should be the fairness of the original trial as indicated by its result. If the proper result has been reached there should never be a new trial, and conversely, there should always be a new trial if the result is improper. This consideration of the fairness and result of the trial would eliminate from the scene the good or bad faith of counsel and would allow the court to address itself completely to the real issue in the case.

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[19] Holloway v. Telfer, 136 Kan. 80, 12 P. (2d) 826 (1932); Parkdale Fuel Co. v. Taylor, 26 Colo. App. 304, 144 P. 1138 (1914); Daniel v. Asbill, 97 Cal. App. 731, 276 P. 149 (1929); Smith v. Yellow Cab Co., 173 Wis. 33, 180 N. W. 125 (1920); Demars v. Glen Mfg. Co., 67 N. H. 404, 40 A. 902 (1893).