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PRACTICE AND PROCEDURE-UNDER WHAT CIRCUMSTANCES MAY COUNSEL ASK JURORS REGARDING THEIR INTEREST IN INSURANCE COMPANIES, ON TRIAL OF A CASE AGAINST AN INSURED DEFENDANT

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PRACTICE AND PROCEDURE—UNDER WHAT CIRCUMSTANCES MAY COUNSEL ASK JURORS REGARDING THEIR INTEREST IN INSURANCE COMPANIES, ON TRIAL OF A CASE AGAINST AN INSURED DEFENDANT?—From a verdict in favor of the plaintiff in a personal injury action, defendant appeals, alleging as error questions repeatedly asked the jurors in their voir dire examination by plaintiff over defendant's objection. Plaintiff examined the jurors as to their connections, if any, with insurance companies in general and with Lloyd's specifically. All questions were answered in the negative. The argument of the defendant is that an affidavit, which had been previously presented to the court and to the plaintiff by the defendant, showing that no person on the jury list was in any way interested in Lloyd's or any other insurance company, made it unnecessary for the plaintiff to question the jurors on this point in order to obtain a jury free from bias. Defendant contends that these circumstances indicated that the questions must have been asked in bad faith and for the sole purpose of prejudicing the jury against the defendant. Three justices agreed with defendant but the majority felt that the affidavit was insufficient because it did not aver that the persons on the jury list had no close friends or relatives connected with Lloyd's or other insurance companies who might be interested in the outcome of the trial. *Held,* judgment affirmed. Counsel's questions were made in good faith for the purpose of insuring his client an impartial jury and not for the purpose of prejudicing the jury against the defendant.[1] *Moore v. Edmonds,* (Ill. 1944), 52 N.E. (2d) 216.

It is almost universally accepted that any reference to insurance in an action for damages prejudices the defendant's case, but it is likewise recognized that the plaintiff is entitled to a fair and impartial jury.[2] Therefore the rule permitting counsel to ask in good faith whether a prospective juror is interested in a particular insurance company has been established as a rule of necessity.[3] The problem of how to protect both the plaintiff and defendant simultaneously has caused a great deal of trouble and has met with little agreement among the courts.[4] A great number of the American [5] courts, while not quite as liberal,[6] follow the

[1] The minority appears to have the support of recent Illinois decisions. See Edwards v. Hill-Thomas Lime & Cement Co., 378 Ill. 180, 37 N.E. (2d) 801 (1942) and Kavanaugh v. Parret, 379 Ill. 273, 40 N.E. (2d) 500 (1942).

[2] 2 WIGMORE, EVIDENCE, § 282a, pp. 134-135 (1940). Also see id. at note 1 on page 134 for relevant cases. Read Robinson v. Wada, 10 Cal. App. (2d) 5, 51 P. (2d) 171 at 172 (1935).

[3] Ibid.

[4] See 105 A.L.R. 1320 at 1330 (1936), 95 A.L.R. 388 (1935), 56 A.L.R. 1418 at 1454 (1928) for a complete discussion of the conflicting views of the courts. For the turmoil that has existed in a state court during a forty-year period of looking for a solution, see Powell v. Kansas Yellow Cab Co., 156 Kan. 150, 131 P. (2d) 686 (1942).

[5] England does not allow the counsel to interrogate witnesses. Queen v. Stewart, 1 Cox Crim. Cas. 174 (1845); W. B. Perkins, "Some Needed Reforms in the Methods of Selecting Juries," 13 MICH. L. REV. 391 (1914).

[6] Morrison v. Perry, 104 Utah 139, 140 P. (2d) 772 (1943); Grant v. Matson,

procedure adopted by the Illinois court in the principal case allowing counsel to question prospective jurors as to any interest they might have in an insurance company, but only after a conference between the judge and counsel outside the hearing of the jury has proven to the judge's satisfaction that an insurance company will have to pay at least part of the judgment.[7] Some of these courts are quick to find bad faith [8] on the part of counsel, and even though the verdict would have been sustained had no such misconduct occurred, reversal will be ordered.[9] A more liberal view is presented in the case of *Popoff v. Matt*,[10] when the court said, "Mistrial should not have been granted unless it appeared that counsel for the . . . [plaintiff] . . . deliberately, willfully, or collusively had undertaken to inform the jury that the defendant was in some way protected by liability insurance." [11] This court is one of a group of courts [12] which does not require that there be a preliminary conference. This group is, as the whole, more liberal [13] in allowing questions of insurance to be put to the jury.[14] Their

68 N.D. 402, 3 N.W. (2d) 118 (1942); Cone v. Davis, (Ga. App. 1941) 17 S.E. (2d) 849; Powell v. Kansas Yellow Cab Co., 156 Kan. 150 (1942); Lynch v. Alderton, 124 W. Va. 446, 20 S.E. (2d) 657 (1942). For older cases see A.L.R. citations in note 4. These courts demand that the questions be as general and unbiased as possible.

[7] Id.

[8] See cases cited in note 6. But for views similar to that of Illinois, although preliminary conference required, see Hatton v. Sidmon (Mo. App. 1943) 169 S.W. (2d) 91; Lunn v. Ealy, 176 Tenn. 374, 141 S.W. (2d) 893 (1940).

[9] In Central Transfer & Storage Co. v. Frost, (Ohio App. 1935) 36 N.E. (2d) 494, the court held that although the trial judge had been told of the interest of an insurance company in the case at a pre-trial conference, such knowledge was gained outside his official capacity as judge and therefore counsel for the plaintiff should have asked for another conference at the trial before asking questions concerning jurors' interests in the insurance company. The verdict appeared fair; but a reversal was ordered. Lynch v. Alderton, (W. Va. 1942) 20 S.E. (2d) 657, gave a reversal because no preliminary conference was asked for. The court implies that even if there had been such a conference, counsel would have to have good reason for interrogating jurors on the insurance matter, and he would have had to question one juror at a time outside the presence of the others. For other cases see note 6 supra. For courts holding that, if no harm is done by the misconduct of counsel, the case will not be reversed, see Cannon v. Brown, 142 Kan. 700, 51 P. (2d) 1007 (1935); Berry v. Park, 188 Okla. 477, 110 P. 902 (1940). The court said that the evidence is clear that plaintiff should win, otherwise it might examine the conduct of counsel more closely.

[10] 14 Wash. (2d) 1, 126 P. (2d) 597 (1942).

[11] Id. at 10.

[12] Kennedy v. Little, 191 Miss. 73, 2 S. (2d) 163 (1941); Phillips Petroleum Co. v. Capps, (Tex. Civ. App. 1943) 170 S.W. (2d) 522; Heinrich v. Ellis, (Ind. App. 1943) 48 N.E. (2d) 96; Reichmann v. Reasner, (Ind. 1943) 51 N.E. (2d) 10; and Byington v. Horton, 61 Idaho 389, 102 P. (2d) 652 (1940); Olgiun v. Thygesen, 47 N.M. 377, 143 P. (2d) 585 (1943).

[13] But see Hatton v. Sidmon, (Mo. App. 1943) 169 S.W. (2d) 91; and Lunn v. Ealy, 176 Tenn. 374 (1940) for liberal courts that demand a preliminary conference.

[14] In Kennedy v. Little, 191 Miss. 73 (1941), the court said that bad intent must be affirmatively shown before a reversal will be given. In Byington v. Horton, 61 Idaho 389 (1940), the court held that questions may be very pointed that defendant has insurance so long as they are made in good faith. But what constitutes good faith? See other cases in note 12 supra.

theory is that the trial judge, who is much closer to the action than an appellate court, is better able to tell whether the defendant is or is not prejudiced by questions asked the jury by plaintiff's counsel.[15] The trial judge in these jurisdictions will be reversed only when it appears clear that he was wrong in concluding that the defendant had not been prejudiced.[16] But even the courts in this group will not allow counsel for the plaintiff to tell the jury that the defendant has liability insurance.[17] A few courts have allowed questions of insurance to be propounded to the jury in their voir dire examination even though no insurance company was interested in the outcome of the suit.[18] On the other hand, when the company being sued is required to carry liability insurance, the courts have liberally allowed such questions.[19] All courts seem to allow counsel more discretion in his questioning after a juror has admitted that he is connected with the insurance business.[20] It appears from the cases that as the prevalence of insurance has increased, the courts have naturally become more liberal[21] in allowing counsel to question the jury during their voir dire examination concerning their possible connection with the insurance company interested in the case. The courts, however, have not agreed to a solution of the problem of obtaining an impartial jury for the plaintiff without, at the same time, causing the jury to be prejudiced against the defendant. Perhaps, if every member of the jury panel was required to fill out a questionnaire covering matters relating to his personal qualifications, as jurors in the Wayne Circuit Court in Detroit are now required to do, and suitable questions were added relating to possible relations with insurance companies, this difficult subject might be entirely eliminated from the voir dire examination.

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[15] See supra note 12.

[16] See supra note 12.

[17] Phillips Petroleum Company v. Capps, (Tex. Civ. App. 1943) 170 S.W. (2d) 522. For the view of the other courts see Berry v. Park, 188 Okla. 477 (1940); and Saltas v. Affleck, 99 Utah 381, 105 P. (2d) 176 (1940). "The examination must be made in good faith and precaution taken to ask the questions in such manner as will not convey the impression that *the defendant, is in fact,* insured" (p. 391). Also see Harker v. Bushouse, 254 Mich. 187, 236 N.W. 222 (1931).

[18] In Roselle v. Beach, (Cal. App. 1942) 125 P. (2d) 77, the court said that counsel could ask the question to discover the frame of mind of the juryman. If he is in some way connected with insurance, he may be prejudiced against liability suits in general and be subject to peremptory challenge. Also see Silvester v. Walz, (Ind. 1943) 51 N.E. (2d) 629, holding the same way. Same theory adopted when an insurance company is involved, but there is no chance that one of the jurymen is interested. See Shams v. Saportas, 152 Fla. 48, 10 S. (2d) 715 (1942); and Hedgecock v. Orloskey, (Ind. App. 1942) 39 N.E. (2d) 452. For contrary view see Bennett v. Cauble, (Mo. App. 1943) 167 S.W. (2d) 959.

[19] Brundrett v. Hargrove, 204 Ark. 258, 161 S.W. (2d) 762 (1942).

[20] Jones v. Bayley, (Cal. App. 1942) 122 P. (2d) 293; Berry v. Park, 188 Okla. 477 (1940).

[21] For discussion on this point see Faber v. C. Reiss Coal Co., 124 Wis. 554, 102 N.W. 1049 (1913). Also Olgiun v. Thygesen, 47 N.M. 377, 143 P. (2d) 585 (1943).