The Mention of Insurance at the Voir Dire or During the Trial in Ohio

In General

It may be laid down as a general rule that evidence that a defendant in a personal injury or wrongful death action carries casualty insurance protecting him from liability to third persons on account of his own negligence is inadmissable, technically because such evidence is irrelevant.[1] The prejudicial character of such testimony leads courts to be most strict in guarding against it. However the court may allow insurance to enter where it will assist in proving a material issue.[2] This aspect of the problem will be discussed in the latter part of this comment.

The issue of insurance can be injected into the trial at any stage from the *voir dire* to the closing argument. If not done by counsel in good faith to prove a material issue in the case it will almost invariably be held prejudicial error on appeal.[3] The question of the actual effect of insurance company defendants on jurors has been the subject of much discussion. While it is generally agreed that if such fact is known to the jury it will influence the amount of the judgment,[4] one commentator after a study of Franklin County juries suggests that it may be without weight to the jurors or go unnoticed altogether.[5] Another writer with evident unbounded faith in the jury system firmly believes the mention of insurance is prejudicial to the side raising the issue as the jury will realize what counsel is trying to do and react accordingly.[6]

The few cases where appellate courts did not reverse the trial court judgment after plaintiff's attorney inserted the issue, had other strong factors in favor of affirmance. The upper court will not find reversible error where the court is unable to find a different verdict would have been returned without the insurance issue.[7] A question by plaintiff's attorney to defendant, "Has not your insurance been

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[1] 17 Ohio Jur. 316; see exhaustive annotations 56 A.L.R. 1418, 74 A.L.R. 849, 95 A.L.R. 388, 105 A.L.R. 1319; O'Toole, Cases and Materials on the Law of Evidence 197 (2nd Ed. 1937); Wigmore, Evidence Sec. 282a (3rd Ed. 1940).

[2] 17 Ohio Jur. 217.

[3] Schmidt v. Schalm, 2 Ohio App. 268 (1913); Messinger v. Karg, 48 Ohio App. 244 (1934); Emrick v. Penna. Rd. Y.M.C.A., 69 Ohio App. 353 (1942).

[4] 11 U. of Cin. L. Rev. 153 *et. seq.*

[5] Hunter, *Law in the Jury Room,* 2 Ohio St. L. J. 15.

[6] 15 Neb. L. Rev. 327.

[7] Knutzen Motor Trucking Co. v. Steiner, 31 Ohio App. 46, 166 N.E. 243 (1928), an admission by plaintiff on questioning that a report had been made to the insurance company.

cancelled as a result of this accident?" was objected to and sustained.[8] The reviewing court said this question did not fall in the category of prejudicial material in attempting to show there is an insurance policy to indemnify litigant against loss, hence there was no misconduct of counsel. In an action against a taxicab company plaintiff's counsel was permitted over objection to examine one of the defendant's witnesses concerning the company's relation with an insurance company and to elicit the fact that defendants were insured.[9] The court reached the result by noting the fact that in that city taxies were required to carry insurance. However perhaps more important was the fact that the case was tried before the court and not to the jury. The case which perhaps went the furthest in holding such questions not error was *Yellow Cab v. Kackloudis.*[10] There plaintiff's counsel mentioned there was an insurance company involved when in fact no such company was interested. Held by the reviewing court as cured where the court directed the jury not to pay any attention to such statements, explaining they were improper and the attorney apologized and withdrew his remarks.

The *Kackloudis* case is against the weight of authority in Ohio. The attitude of courts generally is that where counsel is guilty of such misconduct the mere sustaining of objections or admonishing the jury to disregard the statements is not sufficient to free the case from the possibility of prejudice.[11] Even where the plaintiff's case is clear the verdict will be set aside as excessive by the reviewing court where it is apparent the jury was influenced by repeated attempts of counsel to inject the issue of insurance into the trial.[12] One Ohio court of appeals held so closely to this rule that they reversed the lower court where counsel for the plaintiff in questioning a doctor asked him if he testified often in cases for "insur- for various defendants."[13]

The converse of the proposition is also true. The defendant may not dwell on his poor financial position and give the jury information that he personally would have to pay a judgment.[14] Nor may a corporate defendant inform the jury that the company does not carry liability insurance and that the stockholders would be forced to pay.[15]

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8 Backman v. Ambos, 50 Ohio L. Abs. 97, 79 N.E. 2d 177 (C. of A. 1947).

9 Shadwick v. Hills Cab Co., 79 Ohio App. 143, 69 N.E. 2d 197 (1946).

10 29 Ohio App. 438, 163 N.E. 633 (1928).

11 Wilson v. Wesler, 27 Ohio App. 386, 160 N.E. 863 (1927); Mowery v. Wileman, 25 Ohio L. Abs. 172 (C. of A. 1936).

12 Bliss v. Harnett, 48 Ohio App. 156, 192 N.E. 818 (1933).

13 Contract Cartage Co. v. Kern, 55 Ohio App. 481, 9 N.E. 2d 869 (1935).

14 Maggio v. Cleveland, 151 Ohio St. 136, 84 N.E. 2d 912 (1946).

15 Hatsio v. Red Cab Co., 77 Ohio App. 301, 67 N.E. 2d 513 (1945).

The casualty companies are further protected by the courts in that communications between insured and insurer are held privileged under Ohio General Code Section 11494.[16] A statement made by an insured defendant to his insurance agent for the purpose of communicating it to his attorney is privileged where the agent was examined on deposition.[17] A report from the insured to the insurer concerning a casualty becomes the property of the insurer and subject to its complete control; and, when the insurer transmits it to its attorney for the purpose of preparing a defense against a possible lawsuit growing out of the accident it is again a communication from client to attorney and privileged.[18]

This general rule that the mention of an insurance company should not be injected into the trial is subject to two main exceptions. The first that counsel for plaintiff is permitted to question prospective jurors on the *voir dire* examination concerning possible connections with liability companies and the second under the general rule that evidence competent on one issue will not be rejected because it contains some element that otherwise would be inadmissible.

VOIR DIRE

In 1927 the Supreme Court of Ohio in *Pavilonis v. Valentine* held that it was not error to permit the examination of a prospective juror as to his connection with or interest in a casualty insurance company where such a company is directly or indirectly interested in the result of the trial.[19] In doing so they rejected former Ohio decisions[20] and brought this state in line with the majority view in this country.[21] The majority reasoned that the claim that this would influence the jury shows "a contempt of the jury system, as to lead us to believe that jurors, in violation of their oaths, render verdicts pro and con according to their suspicions." This argument seems of doubtful validity in view of the attitude of courts generally in protecting against any mention of insurance at the trial level. Marshall, Chief Justice, dissented on the grounds that where it was not apparent to the jurors that an insurance company was conducting the defense this was a patent effort to apprise their minds of that fact and create whatever bias might naturally follow. He questioned the majority contention that it was fairly common knowledge that drivers carry casualty insurance and stated that only 14% of Ohio

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16 *Ex parte* Schoepf, 74 Ohio St. 1, 77 N.E. 276 (1906).

17 *In re* Heile, 65 Ohio App. 45, 29 N.E. 2d 175 (1939).

18 *In re* Kleman, 132 Ohio St. 187, 5 N.E. 2d 492 (1936); *Ex parte* Schoepf, 74 Ohio St. 1, 77 N.E. 276 (1906).

19 120 Ohio St. 154, 165 N.E. 730 (1929).

20 Schmidt v. Schalm, 20 C.C. (N.S.) 99 (C. of A. 1913).

21 56 A.L.R. 1418, 74 A.L.R. 849, 95 A.L.R. 388, 105 A.L.R. 1319.

motorists carried such insurance in 1925. The *Pavilonis* case was questioned soon afterwards in the same court[22] and was overruled just five years later in *Vega v. Evans.*[23] There the court said, "But if it is not revealed that the defendant has an insurance contract, what difference could it make that some juror is interested in insurance." The opinion concluded by holding the probability of evils was more remote where counsel is not permitted to so question jurors. The *Vega* case lasted just two years till it was overruled in *Dowd-Feder Inc. v. Truesdell* which reinstated the *Pavilonis* decision.[24] One restriction was appended however to the *Pavilonis* case, that is that all questions must be propounded during the *voir dire* examination in good faith. Moreover they established a procedure to be followed in the examination. The general question of whether the juror has or has had any connection with or interest in a casualty company must be asked first. If the answer be in the affirmative, the juror may then be asked the name of such company and the nature of his connection with or interest therein.[25]

It would seem that the "interminable controversy" was finally settled. The supreme court later held it was the duty of the trial court in all cases to require counsel to put the questions in such a way as to be in accordance with orderly procedure.[26] Just what constitutes good faith and what is orderly procedure have of course been the problems. The following questions have been held to be within the scope of proper examination:

1. Are any of you financially interested in any company writing idemnity or public liability insurance?[27]
2. Are any of you, or is anyone in your immediate family engaged in any way in the business of indemnity insurance or public liability insurance?[28]
3. Is there anyone in your immediate family connected with the adjustment or claim department of any public liability or indemnity insurance company?[29]
4. Do any of you know this man? (Pointing to agent of insuring defendant).[30]

It has been held reversible error where counsel for plaintiff asked members of the jury if any were stockholders or employees of a certain named casualty insurance company not a party to the

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22 Fromson and Davis Co. v. Reider, 127 Ohio St. 564, 189 N.E. 851 (1934).
23 128 Ohio St. 535, 191 N.E. 757 (1934).
24 130 Ohio St. 530, 200 N.E. 762 (1936).
25 *Id.* para. 2 of the syllabus.
26 Morrow v. Hume, 131 Ohio St. 319, 3 N.E. 2d 39 (1936).
27 Salerno v. Oppman, 52 Ohio App. 416, 3 N.E. 2d 801 (1936).
28 *Ibid.*
29 *Ibid.*
30 Greenawalt v. Yuhas, 83 Ohio App. 426, 84 N.E. 2d 221 (1947).

suit—no juror having indicated any interest in such company.[31] It must be remembered that any specific questions can only come after an affirmative answer by one or more jurors to the general question of interest. If the answer is a unanimous negative the examination is concluded in that respect.[32] If counsel does not examine jurors in this respect he will be held to have waived the privilege to challenge.[33]

The effect of a failure on the part of a juror to answer these questions truthfully has also been interpreted differently by Ohio Courts of Appeals. In an action for personal injuries, where it is claimed that a juror's husband had an interest in an automobile insurance agency, the reviewing court cannot say there was not a jury of twelve qualified persons, where affadavits for and against new trial therefore conflicted and the trial court found no prejudicial error.[34] However the majority of the decisions hold the plaintiff is prejudiced where jurors withhold pertinent information on similar grounds. Such as where a juror withheld he had once worked for a detective agency and settled claims,[35] where a juror conceals the fact he has previously presented accident claims,[36] where a juror remains silent when asked if any of them have previously presented claims for personal injuries,[37] or where a juror remains silent to a similar question and claims forgetfulness.[38]

Various solutions to this dilemma have been presented. The best of which in the writer's opinion is that made by Judge Marshall dissenting in *Pavilonis v. Valentine.* His suggestion was that all jurors on the panel be required to fill out a questionnaire, including therein all necessary questions as to possible connections with insurance companies. This practice has already been adopted in some jurisdictions.[39] The idea has found favor with other writers[40] and would seem to eliminate the objections to either position. In that, it would bring out any connection with insurance companies and still avoid the mention of the subject at the actual trial.

Other possible solutions are aimed usually at stricter financial responsibility laws or following the example of Massachusetts in

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31 Yates v. Irvin, 85 Ohio App. 164, 85 N.E. 2d 404 (1948).

32 Ensign v. New York Life Ins. Co., 26 Ohio L. Abs. 281 (C. of A. 1937).

33 Conrad v. Kirby, 66 Ohio App. 359, 31 N.E. 2d 168 (1940).

34 Faucett v. Hensley, 35 Ohio App. 16, 171 N.E. 352 (1929).

35 Petro v. Donner, 137 Ohio St. 168, 28 N.E. 2d 503 (1940).

36 Pearson v. Gardner Cartage Co., 148 Ohio St. 425, 76 N.E. 2d 67 (1947).

37 Cleveland Ry. Co. v. Myers, 50 Ohio App. 224, 197 N.E. 803 (1935).

38 Maggio v. Cleveland, 151 Ohio St. 136, 84 N.E. 2d 912 (1949). The court here suggests that the trial court put the jurors under oath before their examination.

39 See Note, 43 MICH. L. REV. 623.

40 10 U. of CIN. L. REV. 315, 11 U. of CIN. L. REV. 157.

compulsory insurance. This however is subject to the objection that insurance rates will invariably increase in Ohio. In Massachusetts with compulsory insurance, rates rose 22.7% in twelve years despite the exclusion of guests from the statute in the interim.[41] There is also the possibility of a statute similar to that of Wisconsin which forces the insurance company to join and tell the amount of their interest.[42] This too has resulted in higher insurance rates, Wisconsin rates after this legislation rose fifty per cent more than adjoining Minnesota's and forty one per cent more than Ohio's.[43]

It is suggested that a system whereby the defendant would be permitted to inform the jury as to the extent of his coverage once the issue of insurance has been raised either on the *voir dire* or later in the trial would accomplish the purpose desired.

Declaration Against Interest

In *Goz v. Tenney*[44] the Ohio Supreme Court established the rule that a statement to an insurance company is relevant evidence where it shows defendant's liability on the grounds that it is a declaration against interest. The fact that the statement is made to an insurance company furnishes no immunity from the general rule. It might perhaps be more properly called an admission of a party opponent.[45]

This rule has been followed repeatedly in Ohio courts. Where the defendant denied ownership of the automobile and operation of it but told a witness he didn't care about the accident as he carried insurance the court held it admissible[46] following *Goz v. Tenney.* Cross-examination of defendant as to any statements made by her to an insurance company, or to her attorneys, as to the speed of her automobile was not error.[47] Conversations are not rendered incompetent for the sole reason that the parties discussed liability insurance.[48] In a later case the rule was tightened by adding "it is not prejudicial in the absence of some unnecessary act or comment by counsel or witness."[49] In that case the conversation went, "What are you going to do about this car?" Defendant answered, "I will notify the insurance people tomorrow." It is open to question whether such

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41 Financial Responsibility in Motor Accidents 22 (Illinois Legislative Council, Pub. 41, 1941). This pamphlet is suggested for a comprehensive study of this problem.

42 Wis. Stat. §260.11 (1931).

43 2 Ohio St. L. J. 318.

44 104 Ohio St. 500, 136 N.E. 215 (1922).

45 Wigmore, Evidence, Sec. 1048 (3rd. Ed. 1940).

46 Wicker v. Kenney, 19 Ohio App. 346 (1924).

47 Lindeman v. Eyrich, 21 Ohio App. 314 (1926).

48 Frank v. Corcoran, 25 Ohio App. 356, 158 N.E. 501 (1926).

49 Hall v. Gayes, 6 Ohio L. Abs. 267 (C. of A. 1927).

a statement is either an admission or a declaration against interest at the time made.

The extent of the doctrine was further clarified in *Humphreys v. Madden.*[50] There defendant told the doctor in the hospital that he would see plaintiff received proper care and he would see that his insurance took care of it. The defendant objected to such testimony and asked for a mistrial. The Court of Appeals said that if there was nothing more it would be prejudicial but overruled the mistrial motion as defendant had finished sentence "for I guess I am to blame." This case seems more correct than some of the earlier ones. The mere fact that the defendant states he is going to report the accident to the insurance company is no evidence of liability but simply a requirement of most insurance contracts.

AGENCY

The other ground where the fact of insurance may properly be introduced during the trial is to prove a master-servant relationship. It is generally accepted that where an action is predicated on the doctrine of *respondeat superior,* and defendant denies that he was in fact the master, evidence that he carries insurance for injuries to an alleged servant is admissable, for it has some relevant bearing on the fact of whether or not he was the master.[51]

While such evidence is entirely material, relevant, and competent to be considered in a determination of the relationships, it must be admitted expressly for that purpose,[52] and the charge of the court should explicitly state that the jury should examine the evidence in this light only.[53] An application and permit to operate a motor truck upon the highways of a foreign state are competent evidence to show relationship between the driver and the owner of a truck on the issue of agency, notwithstanding the fact it also advises the jury that the defendant possesses protective insurance.[54] Or where the plaintiff has offered an insurance policy to prove one of the defendant's relationship and the plaintiff was later forced to elect and this defendant was dismissed, the evidence is no longer competent and its withdrawal from the jury with appropriate instructions does not constitute error.[55]

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[50] 68 N.E. 2d 562 (1943).

[51] JONES, EVIDENCE 282 (4th Ed. 1938); Hoover v. Turner, 42 Ohio App. 528, 182 N.E. 598 (1931); Cushman Motor Delivery v. Smith, 51 Ohio App. 421, 1 N.E. 2d 628 (1935); Kraemer v. Bates Motor Transport, 24 Ohio L. Abs. 262 (1937).

[52] Leonard v. Kreider, 51 Ohio App. 474, 1 N.E. 2d 956 (1935).

[53] Campbell v. Koerner, 20 Ohio L. Abs. 441 (C. of A. 1935).

[54] Cushman Motor Delivery v. Bernick, 55 Ohio App. 31, 8 N.E. 2d 446 (1936).

[55] Reserve Trucking Co. v. Fairchild, 128 Ohio St. 519, 191 N.E. 745 (1934).

INADVERTANCE

It would be quite unfair to the plaintiff in a personal injury case to penalize him by forcing a new trial where insurance comes into the case accidentally from one of his witnesses. Ohio courts have recognized this and have held that where insurance was mentioned inadvertently and counsel did every thing possible to avoid further mention of it there is no error.[56] It is advisable however that the plaintiff move to have such reference stricken from the record.[57]

CONCLUSION

The rule in Ohio as to the admissibility of references to defendant's insurance is on the whole a rigid one. The use of the word insurance in a negligence action will be grounds for a new trial even where the jury has been instructed to disregard the reference.[58] It would seem however that the effect of this strictness is greatly lessoned by the opportunity to stress the issue on *voir dire*. A solution to this problem would greatly strengthen the evidenced purpose of the Ohio courts.

To summarize it may be said:

(1) As a general rule any reference to insurance in a personal injury suit at the trial level is improper; violation of the rule where the defendant may have been prejudiced will result in a new trial even though the jury has been instructed to disregard the evidence;

(2) Prospective jurors may be examined on the *voir dire* as to any interest in a casualty insurance company; specific questions may be asked if one or more jurors answer the general question in the affirmative;

(3) Relevant evidence will not be excluded as prejudicial where it contains an insurance reference; the best example being declarations against interest or an admission of a party opponent;

(4) Evidence to prove a master-servant relationship is properly admissible notwithstanding the fact it also informs the jury of defendant's insurance;

(5) Inadvertent reference by a witness to the issue of insurance not solicited by the plaintiff will not be grounds for reversal.

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[56] Stevens v. Lepley, 46 Ohio App. 445, 189 N.E. 260 (1933); McAdams v. Blosser, 31 Ohio L. Abs. 92 (1938); Henderson v. Daniels, 67 Ohio Ohio App. 380, 36 N.E. 2d 876 (1940).

[57] Bellar v. Cenci, 29 Ohio L. Abs. 1 (C. of A. 1939).

[58] Wilson v. Wesler, 27 Ohio App. 386, 160 N.E. 863 (1927); Mowery v. Wileman, 25 Ohio L. Abs. 172 (C. of A. 1936).