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But even this "cooling off" period does not resolve the problem of what constitutes reconciliation.

Thus, it is suggested that the best solution is to enter a final decree in the first instance, and do away with reconciliation periods. By doing this, the parties are not deprived of an opportunity to reconcile because there is nothing to prevent them from remarrying each other.

PAUL H. BOSWELL

LIABILITY INSURANCE AND THE RULE OF EXCLUSION IN TORT ACTIONS

Mention of the word "insurance" in the court room brings about an amazing sequence of events: the judge straightens in his chair, counsel for the plaintiff is speechless upon the realization that he "unwittingly" spoke the forbidden word, defendant's counsel is on his feet objecting and moving for a mistrial, the confused jury is hastily escorted to the jury room, and the trial is most likely at an end.

An almost universal rule of exclusion has evolved in our courts, subject to certain exceptions and qualifications,¹ which prohibits the direct or indirect mention of the fact of liability insurance in the trial of personal injury or wrongful death actions.² The reasoning of the courts is based upon the proposition that evidence of liability

notice, depending upon the individual state. This waiting period between the filing of the complaint, and the hearing upon the merits is known as a "cooling off period" during which the parties can reconcile if they so desire. See Conn. Gen. Stat. Rev. § 46-16 (1958) (90 day waiting period); Ill. Ann. Stat. ch. 40, §§ 23-29 (Smith-Hurd 1949) (60 day waiting period); Kan. Gen. Stat. Ann. § 60-1517 (1949) (60 day waiting period); Mich. Comp. Laws § 552.9 (1956); S.C. Code Ann. § 20-108 (1962) (2 mos. waiting period); Tex. Rev. Civ. Stat. Art. 463a (1948) (30 day waiting period); Vt. Stat. tit. 14 ch. 157 (1947) (6 mos. waiting period if children are involved).

¹The "Rule of Exclusion" will not operate to exclude: (1) a showing of interest or of bias of a witness, (2) an admission of liability including a reference to insurance coverage, (3) voir dire disqualification of prospective jurors or, (4) evidence of a material nature. See generally, 21 Appleman, Insurance Law and Practice §§ 12834-12836 (1962); annot., 4 A.L.R.2d 761 (1949).

²References to insurance have been held not to constitute error where the insurance carrier is named party of record, or where insurance coverage is compulsory. *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); *Reeves v. Tittle*, 129 S.W.2d 364 (Tex. Civ. App. 1939).

insurance is irrelevant to the material issues in the case and is likely to have a prejudicial effect upon the verdict.³

Although the fact of liability insurance is frequently brought to the attention of the jury by the direct introduction of evidence,⁴ this comment is devoted to a consideration of instances in which counsel indirectly, either by design or otherwise, suggests to the jury that the defendant is insured.

The question recently confronted the Supreme Court of South Carolina in the case of *Crocker v. Weathers*⁵ which was an action for damages for the wrongful death of plaintiff's intestate. The facts of the case disclose that decedent was a passenger in an automobile owned and operated by the defendant, and that his death was the result of injuries received from an accident involving the automobile in which he was riding. At the close of the plaintiff's case-in-chief, defendant moved for a nonsuit on the ground that plaintiff's intestate was driving the automobile at the time of the accident, and that he was guilty of contributory negligence. The trial judge overruled the motion and defendant rested without offering any testimony.

During his argument to the jury, plaintiff's counsel stated: "If you will write a verdict for the amount we ask for in this complaint, I will collect at least \$20,000.00."⁶ Immediately after this statement was made, defendant's counsel objected and moved for a mistrial on the ground that the argument was highly improper and prejudicial in that the only inference which could be drawn was that the defendant carried liability insurance. The motion was overruled, and the defendant excepted. After the rendition of a verdict for actual and punitive damages, the defendant moved for judgment *non obstante veredicto* or for a new trial in the alternative. Appeal was taken upon an adverse ruling on the motion.

The Supreme Court of South Carolina held that the trial judge properly refused to grant defendant's motions and affirmed the judgment. In regard to the argument by plaintiff's counsel, however, the court reaffirmed its adherence to the long established rule that the fact

³*Strahan v. Webb*, 231 Ark. 426, 330 S.W.2d 291 (1959); *Struetker v. Neiser*, 290 S.W.2d 781 (Ky. 1956); *Butera v. Donner*, 177 Misc. 966, 32 N.Y.S.2d 633 (Sup. Ct. 1942); *Smith v. Pacific Truck Express*, 164 Ore. 318, 100 P.2d 474 (1940); *Woodward v. Wilbur*, 54 R.I. 60, 169 Atl. 486 (1933); *Ronan v. J. G. Turnball Co.*, 99 Vt. 280, 131 Atl. 788 (1926).

⁴The question of insurance most commonly presents itself by the introduction of documents and testimony of witnesses. See generally, Annot., 4 A.L.R.2d 761 (1949).

⁵240 S.C. 412, 126 S.E.2d 335 (1962).

⁶126 S.E.2d at 340.

of liability insurance should not be made known to the jury, and that where the fact of insurance is clearly implied by argument of counsel, the court would not hesitate to reverse a judgment for the plaintiff.⁷ The court went on to point out that the argument of counsel is largely within the control and discretion of the trial judge and that his rulings will be upheld unless there has been an abuse of discretion. In finding no abuse of discretion, the court affirmed the judgment, noting however, that the point was a close one.

At one time, the Nebraska courts followed a judicial doctrine allowing the introduction of evidence indicating that the defendant in a tort action was covered by liability insurance. The rule was announced in the case of *Jessup v. Davis*.⁸ The court reasoned that the insurance carrier was the real party in interest, and that a rule of exclusion put the court in the position of being a party to a kind of "benevolent judicial concealment," incompatible with an open court and judgments which are arrived at openly and publicly. The *Davis* case was subsequently overruled by *Fielding v. Publix Cars, Inc.*⁹ There, the court held such evidence to be inadmissible on the ground that it was irrelevant and likely to have a prejudicial effect upon the verdict.

Where counsel expressly mentions insurance in the opening statement or in the closing argument, such conduct has been universally condemned,¹⁰ and where such statements have obviously prevented a fair and impartial verdict, courts will not hesitate to hold that they constitute reversible error.¹¹

The issue of insurance is most frequently brought into a case through indirect references by counsel in argument to the jury.¹² Such statements as "You people know exactly who will pay that verdict"¹³ or "We have sued here merely for \$5,000.00 for reasons which we cannot explain . . ."¹⁴ may very well result in reversal of a judgment for

⁷The rule is set forth in *Horsford v. Carolina Glass Co.*, 92 S.C. 236, 75 S.E. 533 (1912).

⁸115 Neb. 1, 211 N.W. 190 (1926).

⁹130 Neb. 576, 265 N.W. 726 (1936).

¹⁰*Edwards v. Earnest*, 206 Ala. 1, 89 So. 729 (1921); *Ryan v. Noble*, 95 Fla. 830, 116 So. 766 (1928); *Floyd v. Hibbard*, 227 Iowa 149, 287 N.W. 829 (1939); *Chilcutt v. Keating*, 220 Miss. 545, 71 So. 2d 472 (1954); *Harris v. Elliott*, 178 Okla. 98, 61 P.2d 1089 (1936).

¹¹*Norris v. West*, 78 Ind. App. 391, 129 N.E. 862 (1921); *Trevillian v. Boswell*, 241 Ky. 237, 43 S.W.2d 715 (1931); *Leonard v. Stepp*, 175 Okla. 487, 53 P.2d 1110 (1936); *Hollis v. United States Glass Co.*, 220 Pa. 49, 69 Atl. 55 (1908).

¹²Annot., 4 A.L.R.2d 761, 788 (1949).

¹³*McCornack v. Pickerell*, 225 Iowa 1076, 283 N.W. 899, 903 (1939).

¹⁴*Ingerick v. Mess*, 63 F.2d 233, 235 (2d Cir. 1933).

the plaintiff. Where, however, it is not sufficiently clear that the jury has been improperly influenced by such remarks, and the evidence supports the verdict, many courts will affirm the judgment if it appears that the error was cured by the trial judge's admonishment to the jury to disregard the improper statement.¹⁵

Although earlier cases took the view that the error in the mention of insurance could not be cured by striking the improper statement and instructing the jury to disregard it,¹⁶ the recent trend of cases appears to accept a general rule that such improper statements can be cured at the trial level.¹⁷ However, while admitting that recent decisions tend to wink at and ignore such transgressions, the Missouri Court of Appeals in *Hildreth v. Key*¹⁸ recently said:

“[T]he condemned practice of injecting liability insurance coverage into jury trials is just as pernicious and reprehensible today as it was fifty years ago. . . [and where] counsel have chosen deliberately to pollute and poison the stream of justice, imposition of the drastic, but only effectual, remedy of setting aside the verdict should be imposed.¹⁹

It should be noted that even in jurisdictions which adhere strictly to the rule of exclusion, there are certain instances where it will be held proper for counsel to refer to the fact of liability insurance.²⁰ For example, counsel's argument concerning a witness's connection with an insurance company has been held proper where it is justified by the evidence as indicating bias or interest.²¹ It has also been held proper for counsel to argue the fact of insurance where the subject has been properly admitted during presentation of the evidence.²²

¹⁵*Stafford v. Noble*, 105 Kan. 219, 182 Pac. 650 (1919); *O'Brien v. Bernoi*, 297 Mass. 271, 8 N.E.2d 780 (1937); *Gerbing v. McDonald*, 201 Wis. 214, 229 N.W. 860 (1930).

¹⁶Annot, 4 A.L.R.2d 761, 821 (1949).

¹⁷*Clark v. Hudson*, 265 Ala. 630, 93 So. 2d 138 (1956); *Ades v. Brush*, 66 Cal. App. 2d 436, 152 P.2d 519 (Dist. Ct. App. 1944); *Gwynn Oak Park, Inc. v. Becker*, 177 Md. 528, 10 A.2d 625 (1940); *Barger v. Green*, 255 S.W.2d 127 (Kansas City, Mo. Ct. App. 1953); *Pedek v. Wegemann*, 275 Wis. 57, 81 N.W.2d 49 (1957). Contra, *Rothenberg v. Collins*, 161 App. Div. 387, 146 N.Y.S. 762 (1914); *Wilkins v. Schwartz*, 101 W.Va. 337, 132 S.E. 887 (1926).

¹⁸341 S.W.2d 601 (Springfield, Mo. Ct. App. 1960).

¹⁹*Id.* at 615-16.

²⁰See 21 *Appleman, Insurance Law and Practice* § 12840 (1962).

²¹*Crawford v. Rose*, 2 Cal. App. 2d 734, 39 P.2d 217 (Dist. Ct. App. 1934); *Hedger v. Davis*, 236 Ky. 432, 33 S.W.2d 310 (1930); *Hornby v. Wiper*, 155 Ore. 203, 63 P.2d 204 (1936).

²²Where the evidence introduced is competent upon some material issue, see *International Co. v. Clark*, 147 Md. 34, 127 Atl. 647 (1925); *Joyce v. Biring*, 226 Mo. App. 162, 43 S.W.2d 845 (St. Louis 1931); *Lisanti v. William F. Kenny Co.*, 225 App. Div. 129, 232 N.Y. Supp. 103 (1928).

Furthermore, even where it is improper for plaintiff's counsel to argue the fact of insurance, such argument will usually be permitted if it is invited by the improper argument of defendant's counsel.²³

It is submitted that, in reaffirming its adherence to the long established rule of exclusion, the South Carolina court added precedent to a judicial doctrine that has become outmoded.

The rule against disclosure of liability insurance arose in an era when such coverage was uncommon and when the possibility of insurance would never occur to a jury without its being brought to its attention. Today, liability insurance is almost a necessity of life, and its existence is assumed. It is inconceivable that the average jury would be unaware of the probability that the defendant is covered by liability insurance.

It is generally thought that there are only two persons before the court in a tort action, and that the trial should be conducted without reference to the question of whether or not the defendant is insured.²⁴ Nevertheless, the fact is that insurance companies are real parties to actions against their insured; they control the investigation, litigation and settlement of each case.

In attempting to conceal from the jury something that they already assume, our courts put a tremendous strain on the trial of tort actions. Counsel are never quite sure of the stand they should take, and even the most careful preparation and conduct of the trial cannot always guard against inadvertent references to insurance.²⁵ In *Indian Ref. Co. v. Crain*,²⁶ plaintiff's counsel said "this insurance company" in his closing argument, when he meant to say "this Indian Company." There, the Kentucky Court of Appeals flatly condemned the injection of the question of insurance, regardless of intention, and reversed a judgment for the plaintiff. Similarly, the New York Supreme Court in *Tackill v. Eastern Capitol Lines, Inc.*²⁷ held that an inadvertent reference to insurance by counsel in his summation constituted reversible error, even where the trial court attempted to cure the error in its instruction to the jury. Moreover, concealing the fact of insurance only

²³ *Vineyard v. Storm*, 185 Ark. 1148, 51 S.W.2d 860 (1932); *Houston v. Taylor*, 50 Ga. App. 811, 179 S.E. 207 (1935); *Hinman v. Gould*, 205 Minn. 377, 286 N.W. 364 (1939); *McKay v. Pacific Bldg. Materials Co.*, 156 Ore. 578, 68 P.2d 127 (1937); *Majestic Steam Laundry v. Puckett*, 161 Va. 524, 171 S.E. 491 (1933).

²⁴ *Pennix v. Winton*, 61 Cal. App. 2d 761, 143 P.2d 940 (Dist. Ct. App. 1943).

²⁵ See *Slough, Relevancy Unraveled*, 5 Kan. L. Rev. 675, 710 (1957).

²⁶ 280 Ky. 112, 132 S.W.2d 750 (1939).

²⁷ 260 App. Div. 58, 21 N.Y.S.2d 14, 16 (1940). Plaintiff's counsel, in his summation, said: "[T]his insurance company—I mean bus company . . ."