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ADMISSIBILITY OF EVIDENCE OF INSURANCE IN AUTOMOBILE NEGLIGENCE ACTIONS

As a matter of strict logic, evidence that a defendant in a negligence action is protected by liability insurance is immaterial. Furthermore, such evidence is generally considered anathema in the trial of negligence cases because of the fear that knowledge of insurance may unduly prejudice juries. A legal doctrine has thus developed that evidence of insurance is inadmissible and, in certain cases, jury knowledge of insurance coverage is of such prejudicial nature as to constitute reversible error.[1] An observation of the recent cases from the Virginia Supreme Court of Appeals indicates a tendency to apply the doctrine in a more lenient fashion. Whether this doctrine has become outmoded in automobile negligence actions is the subject of this comment.

The recent decision in *Creteau v. Phoenix Assurance Co.*[2] suggests a difficulty arising out of the doctrine prohibiting intimations of insurance from reaching the jury. The case concerned the liability of an insurer under the Uninsured Motorist Statute.[3] This statute is intended to protect the insured user of the highway from personal and property damages resulting from the action of a financially irresponsible uninsured motorist.[4]

In the *Creteau* case the plaintiff recovered a $5,000 judgment against the driver of the other automobile in the collision in which she was injured. As the driver of the other vehicle was uninsured and without property to satisfy the judgment, the damages remained unpaid. The plaintiff thereupon filed an amended motion for judgment against her insurance company alleging that her insurer had actual notice of the time, place, and date of the trial of the suit against the uninsured defendant; that the insurance company had its counsel

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[1]Nash, Law of Evidence § 85 (1954); 2 Wigmore § 282(a) (3d ed. 1940).

[2]202 Va. 641, 119 S.E.2d 336 (1961).

[3]Va. Code Ann. § 38. 38.1 1-381(b) (Supp. 1960) provides:

"Nor shall any such policy or contract be so issued or delivered unless it contains an endorsement or provisions undertaking to pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle, within limits which shall be no less than the requirements of § 46.1-1(8), as amended from time to time, of the Code herein. Such endorsements of provisions shall also provide for no less than five thousand dollars coverage for injury to or destruction of the property of the insured in any one accident but may provide an exclusion of the first two hundred dollars of such loss or damage."

[4]Virginia House Joint Resolution No. 39 (1956).

present in the court during the trial of the case, though he did not participate therein; and that her attorney had requested the clerk of court to serve process in that suit upon the insurance company but that the clerk had refused.

The defendant insurance company's demurrer to the amended motion for judgment was sustained in the trial court and affirmed on appeal to the Virginia Supreme Court of Appeals on the ground that the plaintiff had not complied with the statute in that process was not served on Phoenix in plaintiff's action against the uninsured motorist.[5]

If one may speculate as to the circumstances lying behind the bare factual record set forth in this opinion, one can see that the problem of enforcing the liability of an insurance company under the uninsured motorist statute is complicated. If the insurance company is to be served with process the motion for judgment must in some way indicate that such service is proper or else the clerk of court may refuse to issue the process.[6] However, if the insurance company is mentioned in the motion for judgment, which is then read to the jury, this may run afoul of the doctrine that in negligence cases the issue of insurance coverage is irrelevant and, in certain instances, informing the jury of same constitutes reversible error.[7] The dilemma here is how to bring the insurance company into court to face its statutory liability and yet not at the same time prejudice the jury in favor of the plaintiff by informing the jury that the damages incurred against the defendant will in fact be borne by an insurance company? A fair solution necessitates an examination of the law regarding exclusion of evidence of insurance in negligence cases.

Our exegesis of the doctrine excluding evidence of insurance commences with *Virginia-Carolina Chemical Co. v. Knight*,[8] in which the problem of the admissibility of insurance coverage was touched upon. The court stated that "the fact that the defendant was insured against accidents could throw no light upon the question of whether or not the defendant was guilty of negligence."[9]

The Virginia rule upon the subject was expounded more fully in the case of *Rinehart & Dennis Co. v. Brown*,[10] which held that "evi-

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[5]202 Va. at 645, 119 S.E.2d at 340.

[6]Va. Code Ann. § 38.1-381(e)(1) (Supp. 1960). See 202 Va. 641, 645, 119 S.E.2d 336, 340.

[7]Nash, Law of Evidence § 85 (1954); 2 Wigmore § 282(a) (3d ed. 1940).

[8]106 Va. 674, 56 S.E. 725 (1907).

[9]Id. at 681, 56 S.E. at 728.

[10]137 Va. 670, 120 S.E. 269 (1923).

dence of such insurance is irrelevant and inadmissible in an action against a defendant for a negligent injury."[11] The court said further that such irrelevant evidence may be prejudicial and there is no presumption of harmless error.[12] The apparent harshness of the doctrine was assuaged somewhat by the acceptance of the harmless error doctrine in *Irvine v. Carr*.[13] The holding that a mere inadvertent mention of insurance by counsel in an otherwise fair trial was not in itself sufficient error to warrant a mistrial,[14] marked the first of a series of judicial exceptions to the rule.

The fact of insurance coverage was brought to the jury's attention in *Highway Express Lines v. Fleming*[15] and yet the court affirmed judgment for the plaintiff. The evidence of insurance came out incidentally in the cross-examination of one of the defendant's witnesses who happened to be an insurance agent. Evidence that the witness was employed by the defendant's insurance company was held admissible under the "rule that a litigant has a right to establish facts and circumstances tending to show the interest, bias or prejudice of a hostile witness."[16]

Two recent cases show that the court has adopted a more lenient attitude towards the admission of matters pertaining to insurance coverage. In *Phillips v. Campbell*[17] a new trial was granted upon the discovery that the jury had discussed and considered whether or not the defendant was covered by insurance. In *Simmons v. Boyd*[18] a new trial was granted because the fact of insurance coverage was inadvertedly injected into evidence by a doctor who, testifying as plaintiff's witness, read a letter which contained the sentence: "This is an insurance case."[19] In both *Phillips* and *Simmons* the damages awarded on the first trial, in which the juries had considered in-

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[11]Id. at 675, 120 S.E. at 271.

[12]The Rinehart case was followed by Lanham v. Bond, 157 Va. 167, 160 S.E. 89 (1931), which held that counsel's repeated reference to the insurance coverage of the defendant was reversible error.

[13]163 Va. 662, 177 S.E. 208 (1934).

[14]Id. at 669, 177 S.E. at 211. However, the harmless error doctrine in itself has limitations. In Dozier v. Morrisette, 198 Va. 37, 92 S.E.2d 366 (1956), the agent of the insurance company, which insured both of the parties in the negligence action spoke to jurors during a recess and informed them as to the insurance aspects of the case. The court held that this error was not harmless and reversed for a new trial.

[15]185 Va. 666, 40 S.E.2d 294 (1946).

[16]Id. at 672, 40 S.E.2d at 298.

[17]200 Va. 136, 104 S.E.2d 762 (1958).

[18]199 Va. 806, 102 S.E.2d 292 (1958).

[19]Id. at 812, 102 S.E.2d at 296.

surance, were substantially larger than those awarded on the second trial, in which evidence of insurance was kept from the jury. Nonetheless, the Supreme Court of Appeals reinstated the original verdicts in both cases.[20]

Perhaps the most interesting case in the series from the standpoint of this subject is that of *Norfolk & P. Belt Line R.R. v. Jones*,[21] sustaining a verdict for the plaintiff in a wrongful death action. The original motion for judgment had been brought in the name of the administrator, but was amended on motion of the defendant to read in the name of the administrator "and for the benefit of the American Mutual Liability Ins. Co., as its interests may appear."

> "Counsel for the plaintiff, in the opening statement, said that it was for the benefit of the widow and son. That was the truth; it was also for the benefit of the insurance company. Ordinarily we keep from the jury the fact that the plaintiff was insured, but we are of the opinion that one has a right to tell the jury what the record shows. It might be that a widow and child had received complete pecuniary compensation. In such circumstances it would not be fair to tell the jury that the action was for their benefit and so appeal to its sympathy. It should know the facts."[22]

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[20]A comparison of the two cases is interesting:

Phillips v. Campbell	Evidence of insurance not introduced but the jury had discussed it amongst themselves.	Verdict on second trial of $7500.	Original verdict of $25,000 reinstated.
Simmons v. Boyd	Evidence of insurance introduced by letter to doctor read by witness containing sentence: "This is an insurance case."	Verdict on second trial of $6500.	Original verdict of $20,000 reinstated.

[21]183 Va. 536, 32 S.E.2d 720 (1945).

[22]Id. at 544-545, 32 S.E.2d at 724. The holding of Norfolk & P. Belt Line R.R. v. Jones has been modified somewhat by Miller v.Tomlinson, 194 Va. 367, 73 S.E.2d 378 (1952). Plaintiffs brought suit for their trucks which were destroyed in a fire which consumed defendants' garage. Upon motion of the defendants the trial court ordered endorsements placed upon the notices of motion for judgment after the name of each plaintiff, reading: "who sues for himself and the State Farm Mutual Automobile Insurance Company as their interest may appear." The court held that it was improper to require the endorsements and that the plaintiffs had a right to have the issues decided by the jury free from influence with which it was not concerned. The court said the holding was in accord with § 8-96 which reads: "Nothing in this section shall be construed to permit the joinder, or addition as a new party, of any insurance company on account of the issuance to any party to a cause of any policy or contract of liability insurance for the benefit... of any party to any cause." It should be noted that this case deals only with the problem presented by joining an insurance company as a party.

Thus the court has held that under the proper circumstances it is not prejudicial for the matter of insurance coverage to come to the attention of the jury if set forth as a necessary part of the record.

This would seem to offer a solution to the problem posed by the decision of the *Creteau* case. It is necessary that the insurance company in some manner be named in the motion for judgment or related papers in order that the clerk of court will issue the process. Three alternatives are suggested:

(1) Name the insurance company as a party in the motion for judgment.[23]

(2) Attach a separate certificate to the motion for judgment stating that the plaintiff intends to rely upon Code section 38.1-381(b) and requesting that the clerk of court issue a notice of motion for judgment upon the insurance company. This certificate would be analogous to the common law praecipe.[24]

(3) Name the insurance company in the motion for judgment in such manner that the clerk of court will not question the propriety of issuing process.[25] In light of the fact that the motion for judgment may be read to the jury, the insurance company, in entering an appearance, might move to amend the motion for judgment so that knowledge of insurance would not go to the jury by that means.

In regard to the third alternative it should be pointed out that it seems to be in accord with the holding of the Virginia Supreme Court of Appeals in *Norfolk & P. Belt Line R.R. v. Jones* that one "has the right to tell the jury what the record shows," and the statute provides no other means whereby the insurer may be brought into court. Other jurisdictions have held that evidence of insurance is admissible and not prejudicial when the insurer is a party to the record.[26]

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[23]This is perhaps an improvident suggestion in light of the fact that § 38.1-381(e)(1) provides for service of process upon the insurance company "as though such insurance company were a party defendant" but does not actually make the insurance company a party defendant.

[24]This alternative would require a legislative amendment to § 38.1-381(e)(1).

[25]A suggested notation is: "Service of notice of motion for judgement upon the X Insurance Company shall be made in accordance with § 38.1-381(e)(1) of the Code."

[26]New Amsterdam Cas. Co. v. Harrington, 274 F.2d 323 (5th Cir. 1960); Batts v. Carter, 312 P.2d 472 (Okla. 1957); Scott v. Wells, 214 S.C. 511, 53 S.E.2d 400 (1949); Reeves v. Tittle, 129 S.W.2d 364 (Tex. Civ. App. 1939); Engler v. Hatton, 12 S.W.2d 990 (Tex. Com. App. 1929); Roeske v. Schmitt, 266 Wis. 557, 64 N.W.2d 394 (1954); Vuchetich v. General Cas. Co., 270 Wis. 552, 72 N.W.2d 389 (1955). Contra, Turner v. Boleyn, 243 S.W.2d 482 (Ky. 1951); Turner v. Smith, 313 Ky. 635, 232 S.W.2d 1006 (1950); Pecor v. Home Indem. Co., 234 Wis. 407, 291 N.W. 313 (1940); Sheehan v. Lewis, 218 Wis. 588, 260 N.W. 633 (1935).

The rule forbidding evidence of insurance in negligence cases arose in an era when liability insurance was not as common as it is today. Because of the fact that most Virginia motorists have liability insurance[27] and because of the Virginia uninsured motorist statute, it is safe to say that an overwhelming majority of automotive negligence cases being tried do involve insurance. Intelligent jurors know this.[28] For this reason the courts in Virginia would do well to abolish the restriction on evidence of liability insurance in automobile cases altogether. This would bring the trial of such cases closer to the ideal of complete disclosure.[29] The objection of relevance would still be applicable but the indeterminate effects of suppressed evidence or the jury's speculation on the insurance aspects of the case would be done way with.

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[27]"Between October 1, 1958, and June 1, 1959, 6% of the motor vehicles registered in Virginia were uninsured." Note, 47 Va. L. Rev. 145, note 1 (1961).

"In this enlightened age it is common knowledge, and everybody knows that almost every owner of an automobile carries liability insurance, hence everybody knows how it is obtained and the manner of protection." Simmons v. Boyd, 199 Va. 806, 813, 102 S.E.2d 292, 297 (1958).

[28] "As of today the public and jurors are more insurance conscious.... One is indeed naive who does not know that most jurors are now aware of the fact that defendants in this character of tort action are, in a decided majority of instances, protected, in whole or in part, by public liability insurance and that such jurors often take that circumstance into consideration to some degree in their deliberations on what damages shall be awarded." Phillips v. Campbell, 200 Va. 136, 143, 104 S.E.2d 765, 769 (1958).

[29]By dictum in Highway Express Lines v. Fleming, 185 Va. 666, 671-672, 40 S.E.2d 294, 297 (1946) the Virginia Supreme Court of Appeals recognized the wholesome quality of complete disclosure:

"Actually the real defendant is the insurance carrier and this fact should be known to the court and jury, otherwise the court becomes a party to 'benevolent judicial concealment.' If this class of evidence is not admitted, then the presence and interest of the actual defendant is never made known. The exclusion of such evidence is incompatible with an open court and judgments openly and publicly arrived at. 'To compel and permit such proceedings is to countenance and participate in what is tantamount to a fraud.'"

The court cited Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935); Jessup v. Davis, 115 Neb. 1, 211 N.W. 190 (1925); Pavilonis v. Valentine, 120 Ohio St. 154, 165 N.E. 730 (1929); 2 Wigmore § 282(a) (3d ed. 1940).