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**EFFECT OF DISCLOSURE OF DEFENDANT'S COVER-
AGE BY LIABILITY INSURANCE**

*Gwynn Oak Park v. Becker*¹

A minor child, while visiting Defendant's amusement park, sustained serious injuries as a result of a fall from a sliding-board. Suit was brought by his mother, both as next friend to recover for the injuries the child sustained, and in her own behalf for loss of his services. Plaintiff's witness was asked on direct examination whether, at the time the child was injured, someone from Defendant's office took a statement from the child; she answered: "I don't remember, because I was going back and forth. They may have and may not have, but they were trying to get

¹ 177 Md. 528, 10 A. (2d) 625 (1940).

some private doctor, and they had wasted at least ten or fifteen minutes trying to get in touch with the doctor because *they said it would make a difference in the insurance.*² That is what they told us right there." Defendant's motion for a mistrial was overruled, and exception noted. At the close of Plaintiff's evidence, the jury were instructed at the request of both sides that the case was to be decided as if there were no insurance. On appeal, after verdicts for Plaintiff, *held*: Affirmed.

The principal case suggests two closely related problems in connection with evidence that a defendant in a negligence suit carries liability insurance, first, whether such evidence is admissible; second, if such evidence is inadmissible and the existence of insurance is somehow brought to the jury's attention, what action should the trial court take in order to prevent its having undue effect on the jury verdict. Thorough general discussion of these two problems has appeared elsewhere;³ the present note will attempt a statement of the rules in a general way, as they have been developed by Maryland cases.

It is generally agreed that evidence that a defendant is insured is inadmissible on the substantive issue of negligence. The Maryland Court has clearly recognized this general rule. In *Hall v. Trimble*,⁴ a suit resulting from the fatal injuring of an employee while working in an elevator shaft, evidence that the employer carried "casualty insurance" against such accidents was held irrelevant to the issue of negligence, hence inadmissible. This general rule of inadmissibility has been approved in later cases.⁵

The reason of policy which explains the rejection of evidence of the defendant's liability insurance is stated dif-

² Italics ours.

³ 56 A. L. R. 1418; 74 A. L. R. 849; 95 A. L. R. 388; 105 A. L. R. 1319; see also 2 WIGMORE, EVIDENCE (3d Ed., 1940) Sec. 282A.

⁴ 104 Md. 317, 64 A. 1026 (1906).

⁵ *Barnes v. United Rys. Co.*, 140 Md. 14, 116 A. 855 (1922); *International Co. v. Clark*, 147 Md. 34, 127 A. 647 (1925); *Schneider v. Schneider*, 160 Md. 18, 152 A. 498, 72 A. L. R. 449 (1930); *Cluster v. Upson*, 165 Md. 566, 168 A. 882 (1933); *York Ice Machinery Corp. v. Sachs*, 167 Md. 113, 173 A. 240 (1934). These cases expressly or implicitly recognize that evidence of defendant's insurance is inadmissible on the substantive issue of negligence as a fundamental rule. The immediate reason for the rule may be the irrelevance of the offered evidence in the average case; perhaps more important, however, is its recognition of the inherently prejudicial character of such evidence. Both aspects of the rule have been considered by the Court of Appeals, as will be developed. For a comprehensive discussion of the rationale behind the rule, and an excellent argument for its abolition, see 2 WIGMORE, *op. cit. supra*, 137.

ferently by different authorities on the subject. One view is that such evidence is completely irrelevant. Another, and perhaps the better view is that while it is possibly relevant, yet it is excluded, not for its irrelevancy, but because, even though relevant, it tends to have a certain deleterious effect on the verdicts of juries. This latter view has been aptly expressed by the New Jersey court as follows:^{5a}

“The ground of such exclusion is, not that such evidential matter is lacking in relevancy or devoid of probative force logically considered, but that, assuming it to be possessed of these qualities, it has been judicially determined that the introduction of such facts and inquiries tends in actual operation to produce a confusion of issues in the mind of the jury and an unfair prejudice against one of the parties, in excess of, and indeed in the place of, the legitimate probative effect of such evidence; in fine, that the true issue before the jury is thereby obscured, rather than illuminated. It is not, therefore, a rule of evidence based upon considerations of logic, but a juridical rule based upon experience. It is the same rule that excludes proof of the criminal disposition of one accused of crime. . . .”

However, the broad principle of inadmissibility occasionally conflicts with other rules calling for the admission of evidence indirectly establishing the fact of defendant's insurance. For example, is plaintiff entitled to question prospective jurors, on the voir dire, as to an interest in insurance companies? Obviously, other jurymen would draw the inference that defendant was insured from such a question, yet the question might be deemed reasonable, were it not for that fact. Again, is plaintiff entitled to question witnesses for bias by showing them to be interested in an insurance company? Neither of these illustrative questions has been answered in the Maryland appellate court, although, apparently, neither technique is practiced in the trial courts of the State.⁶ Where courts are

^{5a} *Sutton v. Bell*, 79 N. J. L. 507, 77 A. 42 (1910).

⁶ It is the almost universal rule in personal injury and death actions throughout the courts of the nation to permit the quizzing of jurors for an interest in insurance companies, with an eye to challenging them: 56 A. L. R. 1454; 74 A. L. R. 860; 95 A. L. R. 404; 105 A. L. R. 1380. As to showing witnesses to be interested in insurance companies in order to establish bias the rule seems to be the same, within discretionary limits: 56 A. L. R.

presented with two such conflicting principles, it becomes necessary that one must yield; yet the relative importance of the same two principles can differ in each individual case. It seems likely that exceptions to our rule of inadmissibility will become more numerous, as time goes on. In *Yellow Cab Co. v. Bradin*, plaintiff, a passenger in one cab, was injured when it collided with another operated by the defendant. An agent who had solicited releases of plaintiff was asked, on cross-examination by plaintiff, whom he represented. He answered: "Markel Service." On being then asked what Markel Service was, he answered over objection that it was an insurance adjustment agency; motion for a mistrial was denied.⁷ In affirming the trial court's actions, the Court of Appeals stated:⁸

"In the present case, a reference to the Markel Organization was practically unavoidable, and the resulting implication that the defendant had insurance protection would not have justified a termination of the trial on that ground, in view of the jury's presumptive knowledge of the legal requirement of public liability insurance for taxicab companies as common carriers."

An extension of this idea of presumptive knowledge of insurance on the part of juries was indicated in a recent U. S. District Court case, *Tullgren v. Jasper*. In a suit by a taxicab passenger against the taxi company and the owner of a truck with which the cab collided, the taxi company sought to implead as third-party defendant the insurer of the truck; the insurer objected on the ground, among others, that it was prejudicial thus to inform the jury that one defendant was insured. The insurer won out on other grounds, but as to this objection, Judge Chesnut stated:⁹

"While there have been many judicial decisions to this effect . . . it may be doubted whether now, in

1438; 74 A. L. R. 855; 95 A. L. R. 397; 105 A. L. R. 1326. The writer has been informed that the local practice is to the contrary, and it leaves no room for quizzing prospective jurors as to their interest in the insurer concerned; the defense is supplied with a printed jury-list giving the occupation of each juror, and the name of a juror interested in the particular insurer involved can be stricken from the list, without informing the remainder of the jury directly or otherwise of the circumstances.

⁷ Under local practice, a motion for a mistrial consists of a motion to withdraw a juror and continue the case.

⁸ 172 Md. 388, 392, 191 A. 717, 721 (1937).

⁹ 27 F. Supp. 413, 416 (D. C., D. Md., 1939).

view of the fact that automobile liability insurance is so general, the rule should be so rigidly applied; at least, where the practice . . . permits definite legal instructions to the jury with respect to the legal effect of insurance in these negligence cases."

The *Bradin* case seems to indicate that in suits against defendants required to carry liability insurance, the admission of evidence as to this insurance will not be grounds for appellate reversal—at least, if the evidence is otherwise relevant and proper. The *Tullgren* case may well foreshadow some such rule as to all automobile accident suits.

These two cases suggest what may be true qualifications to the general rule of inadmissibility. Other qualifications which have appeared in Maryland cases actually exist under the doctrine that certain aspects of the rule are operative only if invoked by opposing counsel. Thus, if similar evidence of insurance be already in the case without objection,¹⁰ or subsequently further evidence that the defendant is insured be admitted without protest by the defendant,¹¹ clearly the defendant is in no position to press an exception in the one case, where he has consented to admission in the other. And if the defendant chooses to bring out the fact of his insurance from his own witnesses, he cannot complain if plaintiff's counsel comments legitimately on this evidence.¹²

As to our second main problem, assuming that inadmissible evidence of defendant's insurance in a negligence case has seeped in, through statements of witnesses, plaintiff, or plaintiff's counsel, what course of conduct will be open to the trial court to cure the defect of admission? The offending statements can be stricken out and the jury instructed to disregard them, as was done in the principal case;¹³ or if the court feels that it cannot thus erase the prejudicial effect of such evidence, it may declare a mistrial by withdrawing a juror and continuing the case for trial before a new jury. This latter method is by no means infrequently adopted in Baltimore City trial

¹⁰ *International Co. v. Clark*, 147 Md. 34, 43-44, 127 A. 647, 651 (1925).

¹¹ *Barnes v. United Rys. Co.*, 140 Md. 14, 16-17, 116 A. 855, 856 (1922). Here, similar testimony had also been admitted without objection prior to the excepted ruling as well.

¹² *International Co. v. Clark*, *supra*, n. 10.

¹³ *Supra*, n. 1. See also, *Kirsch v. Ford*, 170 Md. 90, 133 A. 240 (1936).

courts.¹⁴ It must be invoked by defendant's motion to withdraw a juror and continue the case.¹⁵ Motion for a non pros. or dismissal will be properly overruled.¹⁶

Thus, we see that at least two courses of conduct are open to a trial judge when the fact that the defendant in a negligence case is insured creeps into the case through inadmissible evidence, or improper statements of counsel. Two subordinate inquiries might now be posed: First, in a given situation, which method is proper; and second, assuming that trial court chose the wrong one, would an appellate reversal ensue?

The reason why a new trial might be necessary in these cases was clearly stated in *International Co. v. Clark* as follows:

“. . . no matter how it should be, all persons who are familiar with the trial of this class of cases in our courts know from experience that juries are affected and influenced by such evidence and statements. In a case like this, it seems to be natural and a weakness of human nature to allow the fact that the record defendant will not have to pay the judgment, to influence the jury in their verdict, and this even though they have a firm determination not to allow themselves to be so influenced.”¹⁷

This statement would seem to be applicable whether the jury's knowledge of the fact of insurance came from a deliberate improper statement of plaintiff's counsel or from a completely unresponsive answer by defendant's witness on cross-examination. However, the Court of Appeals seems to have felt the need of a compromise in order to reduce the number of new trials likely to result if all statements indicating defendant's insurance called for a new trial. In the *International Co.* case and in *Ice Machinery Corp. v. Sachs*¹⁸ it was unequivocally stated that where the suggestion of insurance came from plaintiff, his counsel or witnesses, whether deliberately or not, a mis-

¹⁴ See, for example, the cases cited in appellant-defendant's brief in the principal case: *Steining v. Sileski*, Sup. Ct. of Baltimore, Mar., 1924; *Tenkensley v. Stabler*, Sup. Ct., Feb., 1923; *Beatty v. Stewart & Co.*, Sup. Ct., Jan., 1924; *Brinton v. Henthorn*, Baltimore City Ct., Jan., 1923; *Brown v. Hofferbert*, Baltimore City Ct., Jan., 1923; *Braum v. Coppahite*, Baltimore City Ct., Jan., 1923; *Brown v. Goldberg*, Baltimore City Ct., May, 1924.

¹⁵ *Beam Motor Car Co. v. Loewer*, 131 Md. 552, 556, 102 A. 908, 909 (1917); *International Co. v. Clark*, 147 Md. 34, 44, 127 A. 647, 651 (1925).

¹⁶ *Ibid.*

¹⁷ *Supra*, n. 15, 147 Md. 34, 42.

¹⁸ 167 Md. 113, 127, 173 A. 240, 246 (1934).

trial should result. On the other hand, in each of the above cases, the statement showing insurance came from defendant's witness, and the appellate court held that a motion for mistrial was properly refused. Both these cases were cited in *Gwynn Oak Park v. Becker*, and their holdings seem to have been persuasive, rather than their descriptions of the law; for here the fact of insurance was brought out by plaintiff's counsel from plaintiff's witness.

The result of the instant case is supported, however, by *Cluster v. Upson*.¹⁹ There, the plaintiff's counsel deliberately elicited the information from his own witness that defendant had given witness, driver of the car in which plaintiff was riding when injured by collision with the defendant, a slip of paper with the name of a third person and a telephone number on it. Motion for mistrial was refused, and in affirming the trial Court, the Court of Appeals made this significant statement:

"It is difficult to imagine any purpose in referring to the paper other than the improper one supposed, and there is some possibility that it may have carried to the jury the suggestion feared, and it should not have been brought out; but the possibility of injury from it seems to this court too slender to have required termination of the trial as unsatisfactory; and the court cannot say that the trial court's discretion was improperly exercised."²⁰

In *Nelson v. Seiler*,²¹ in reversing trial court's refusal of a mistrial when plaintiff's counsel had made frequent attempts to introduce patently inadmissible evidence of defendant's driver's previous conviction for traffic violations, the Court of Appeals said: "Generally, the choice of measures to protect the fair, unprejudiced workings of its proceedings is left to the discretion of the trial court, and only in exceptional cases will its choice of measures be reviewed in this court."²² Reference was made thereafter to *International Co. v. Clark*. Reference might also be made to *Kirsch v. Ford*.²³ Suit was for personal injuries and property damage resulting from collision of plaintiff's automobile with defendants' truck. An insurance com-

¹⁹ 165 Md. 566, 568, 168 A. 882 (1933).

²⁰ Italics ours.

²¹ 154 Md. 63, 72, 139 A. 564, 567 (1927), citing *International Co. v. Clark*, *supra*, n. 15.

²² Italics again ours.

²³ 170 Md. 80, 95, 183 A. 240 (1936).

pany was co-plaintiff for the purpose of recovering its expense under a collision policy issued to plaintiff Ford. One of the company's agents was allowed to testify that his company also had outstanding a collision policy on defendant's truck. The statement was made to explain the agent's knowledge that all three defendants owned the truck (one had disclaimed ownership). The trial court carefully instructed the jury that the insurance company was to be disregarded, and that in no manner would the insurance inure to the benefit of the individual plaintiff, if a verdict were forthcoming. The appellate court held that a mistrial was not necessary under the circumstances, and affirmed the trial court action; it relied on *Cluster v. Upson*, and suggested that there was no inconsistency between that ruling and *International Co. v. Clark*. Note, however, that in *Kirsch v. Ford* we have testimony concerning insurance given by plaintiff's witness on direct examination, with no mistrial resulting which would seem on its face to violate the dictum of *International Co. v. Clark*.

However, the *International Co.* case must still carry considerable weight, in view of the fact that it has been cited in virtually all succeeding cases dealing with the problems under discussion. Yet, *Cluster v. Upson*, *Kirsch v. Ford*, and the principal case, *Gwynn Oak Park v. Becker*, represent holdings seemingly contra to its dictum. The logical solution seems to be that the *International Co.* case and the *Ice Machinery Corp.* case, which directly follows it, enunciate the trial court rule of thumb, while the cases contra to their statements indicate that the appellate court will hesitate to reverse the trial court decision departing from the rule, in recognition of the lower court's opportunity to judge first-hand the probable effect of the statements indicating insurance, and to take what action it may feel appropriate under the particular circumstances.