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Procedural Difficulties Arising out of Liability Insurance of Charitable or Governmental Bodies - Thomas v. Prince George's County

PROCEDURAL DIFFICULTIES ARISING OUT OF LIABILITY INSURANCE OF CHARITABLE OR GOVERNMENTAL BODIES

Thomas v. Prince George's County[1]

The plaintiffs, husband and wife, brought an action in the Circuit Court for Prince George's County against the Board of County Commissioners of Prince George's County to recover for injuries resulting to the wife through the alleged negligence of an anaesthetist employed at a hospital operated by the County while the wife was a paying patient at the institution. The lower Court sustained a demurrer filed by the defendant on the ground that the County was operating the hospital as a governmental function and consequently was immune from tort liability.

The Court of Appeals upheld the decision of the lower Court in sustaining the demurrer to the plaintiffs' declaration because of the absence of an averment that the hospital was being operated as a proprietory or corporate function of the County rather than a governmental one. However, when in the course of the argument it became apparent that the defendant's hospital carried liability insurance, the plaintiffs' request for a remand and new trial was granted in order to test the effect of the Act of 1947, codified as Article 48A, Section 82 of the Maryland Annotated Code which provides:

> "Each policy issued to cover the liability of any charitable institution for negligence or any other tort shall contain a provision to the effect that the insurer shall be estopped from asserting, as a defense to any claim covered by said policy, that such institution is immune from liability on the ground that it is a charitable institution."

In remanding the case for a new trial, the court did not indicate what the effect of the statute would be or in what manner it should be correctly pleaded. However, assuming that under this statute the collectable amount of insurance carried by the charitable institution could be recovered,[2] the following alternatives in pleading are submitted:

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[1] 200 Md. 554, 92 A. 2d 452 (1952).

[2] For a discussion of the substantive law on this point prior to this statute see Note, *Liability of Charitable Corporations and Trusts For Their Torts*, 5 Md. L. Rev. 336 (1941). The scope of the present note will be restricted to a discussion of the procedural side of the problem.

(1) Proceeding against the insurer directly.

(2) Joining the insurer and charitable institution as party defendants.

(3) Naming only the charitable institution as a party defendant but averring in the declaration either that the charitable institution is insured, or that it is not immune from suit.

The privilege of proceeding directly against a liability insurer has been generally denied an injured party following the basic rule of contract law that, in absence of statute or provision in the contract, only parties in privity are allowed to sue thereon.[3] The standard liability insurance contract is a personal one between the insurer and the insured wherein the insurer's only liability arises after a final judgment has been rendered against the insured.[4] Furthermore, the argument of the injured party being a third party beneficiary of the contract cannot be sustained unless it appears that he, or the class of which he is a member, was definitely and expressly recognized by the parties to the contract at the time of its making as a "primary party in interest".[5]

In Federal practice the cases have generally refused to allow a joinder of the insured and the insurer under the Joinder Rules of the Federal Rules of Practice and Procedure.[6] The Federal Courts in applying these rules, which if followed literally would seem to permit such joinder,

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[3] 46 C. J. S. INSURANCE, Sec. 1191.

[4] 4 RICHARDS, INSURANCE (5th ed., 1952) 2051, Ch. 13; Tullgren v. Jasper, 27 F. Supp. 413 (D. C. Md., 1939).

[5] Pennsylvania Steel Co. v. N. Y. City Ry. Co., 198 F. 721 (2nd Cir., 1912). See also Note, *The Effect of Insurance on the Tort Immunity of a Governmental Subdivision*, 34 Neb. L. Rev. 78 (1954), where the writer advocates this method to prevent the insurer from pleading the insured's immunity.

[6] Rule 18(b):

"Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. . . ."

Rule 20(a):

". . . All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurences, or series of transactions or occurences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities."

have avoided such a result by basing their decisions on a substantive rule of evidence which excludes any injection of the defendant's insurance into the trial and also on the aforesaid fact that the insurer's liability is conditioned upon a final judgment being procured against the insured.[7] In granting a motion to dismiss by an insurer joined with an insured in an action by the injured party, the Massachusetts District Court, in the case of *Jennings v. Beach, et al.*, said:

> "I do not believe that rule 18(b) was ever intended to cover a situation such as is presented here. As a matter of fact, there is nothing in the pleadings to indicate that the plaintiffs even have a claim against the defendant insurance company at the present time. . . . While the question of the joinder of an insurance company as a party defendant is primarily procedural, nevertheless, the ground for denial of such a right, in part, is the possibility of prejudice through the knowledge of the jury that a verdict will be paid by an insurance company."[8]

These Courts justify their position by citing the enacting clause of the Federal Rules of Practice and Procedure which provides that "said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant".[9]

The question of Joinder of the liability insurer in Maryland would depend largely on how the Court of Appeals would construe the Joinder Rules of the General Rules of Practice and Procedure adopted in 1947 providing for suc-

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[7] Pitcairn v. Rumsey, 32 F. Supp. 146 (W. D. Mich., S. D., 1940); Headrick v. Smoky Mountain Stages, 11 F. R. D. 205 (E. D. Tenn., N. D., 1950); Hertz v. Hudson Motor Car Co., 8 F. R. D. 431 (D. of Col., 1939); 3 MOORE, FEDERAL PRACTICE (2d. ed., 1948), Sec. 18.08; 2 BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE (Rules ed., 1950), Sec. 505, 533.

[8] 1 F. R. D. 442, 443 (D. Mass., 1940). See also Alleghany County, Pa. v. Maryland Casualty Co., 32 F. Supp. 297, 301 (W. D. Pa., 1940), where the Court in refusing to allow an indemnity company to be joined as a defendant on a bond said:

> ". . . the covenant as to payment, or the procuring of judgment before the bringing of an action or proceeding against the Indemnity Company, vested a valuable substantive right in the Indemnity Company; . . . that to deprive the Indemnity Company of the covenant which plaintiff made that it could not bring any action or proceeding against the Indemnity Company until it had been paid the amount of the Casualty Company's bond, or judgment had been procured against the Casualty Company in said amount, would be equivalent to the taking property without due process of law; that Rules 18(b) and 20(a) of the 'Rules of Civil Procedure' can be and should be construed so as not to deprive the Indemnity Company of the aforesaid substantive right, . . ."

[9] Act of June 19, 1934, Ch. 651, 28 U. S. C. A. XI.

cessive remedies against and multiple joinder of defendants.[10] Since these rules are similar to the Federal Joinder Rules discussed previously, the Court might afford them the same treatment given the Federal rules by the Federal Courts which prohibited the joinder because of the intent evidencing a desire to maintain the substantive rights of the litigants, *i.e.*, the defendant's right to have the fact that he is insured kept from the jury, and the conditioning of the insurer's liability upon a final judgment being levied against the defendant.

In two lower court cases decided after the instant case, one of which was the retrial of the principal case, joinder of insurer and insured was held to be improper.[11] It would seem therefore that the general trend of decisions would sustain the improbability of the Court of Appeals approving of the first two alternative means of bringing a case within the statute through the pleadings. That would leave the remaining alternative of inserting an allegation of the charitable institution's insurance coverage or of its non-immunity from suit.

The availability of a procedure whereby the insurance coverage would be mentioned would necessarily depend however on the rule of evidence which demands exclusion of any mention of insurance of the tortfeasor. This rule has been applied to allegations in the pleadings as well as to statements during the trial.[12] However, if under the facts of the case, the subject of the insurance is a pertinent issue, an exception to the rule has been raised permitting the in-

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[10] Part Two, Rule III 2(b):

"Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties."

Part Two, Rule III 2(d):

"Separate claims involving different plaintiffs or defendants or both may be joined in one action whenever any substantial question of law or fact common to all the claims will arise in the action or for any other reason the claims may conveniently be disposed of in the same proceeding. The claims joined may be joint, several, or in the alternative as to plaintiffs or defendants or both. Any person may join in the action as a plaintiff who demands any relief on any of the claims joined and he need not be interested in the other claims or in obtaining all the relief demanded. Any person may be joined as a defendant against whom any relief is demanded on any claim, and he need not be interested in defending against the other claims or all the relief demanded."

[11] Karr v. Johns Hopkins Hospital, Daily Record, May 1, 1953; Thomas v. Board of County Commissioners of Prince George's County, Daily Record, June 17, 1953. These lower Court decisions were not appealed.

[12] Elliott v. Lester, 126 S. W. 2d 756 (Tex. Civ. App., 1939); 21 APPLEMAN ON INSURANCE (1947), Sec. 12831.

jection of insurance at the trial.[13] Furthermore, where the fact that a class of persons, such as common carriers, are required to carry liability insurance, it has been held that, since it was a matter of public knowledge, evidence of insurance could be admitted.[14] Wigmore has criticized this rule of exclusion of evidence concerning insurance as inconsistent. He points out the mention of insurance in good faith is allowed on *voir dire* challenges of jurors and also in questioning witnesses as to their interest or bias toward the litigants where frequently the witness's relation to the liability insurer allows the injection of insurance at the trial.[15]

As to the effect of the injection of insurance at the trial in Maryland, in the case of *International Co. v. Clark,* the Court of Appeals stated:

> "... this fact (insurance of the defendant) has nothing whatever to do with the merits of the suit being tried and is wholly irrelevant and immaterial to the issue and could only have the effect of prejudicing the jury in their verdict, either as to finding for the plaintiff or the amount of damages which they might assess."[16]

However, the Court qualified this position in the later case of *Takoma Park Bank v. Abbott* where they said: ". . . in situations where the reference to insurance of the defendant is practically unavoidable, a mistrial will not be declared".[17] The allegation of the charitable institution's insurance therefore might be allowed since it is a pertinent fact, and since the Maryland Court of Appeals has consistently granted charitable institutions an immunity from liability for torts committed by its servants in carrying out

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[13] Hoover v. Turner, 42 Oh. App. 528, 182 N. E. 598 (1931); Goldstein v. Johnson, 64 Ga. A. 31, 12 S. E. 2d 92 (1940); Paxson v. Davis, 65 F. 2d 492 (D. C. Cir., 1933); 21 APPLEMAN, INSURANCE (1947), Sec. 12834.

[14] Croft v. Hall, 208 S. C. 187, 37 S. E. 2d 537 (1946).

[15] 2 WIGMORE, EVIDENCE (3rd. ed., 1940), Sec. 282(a). See also, Green, *Blindfolding the Jury,* 33 Texas L. Rev. 157 (1954).

[16] 147 Md. 34, 42, 127 A. 647 (1925). Parenthetical material added. See also Niles, Notes on Trial Practice, Negligence Cases, and Evidence, published as part of the Veterans' Refresher Course, p. 63.

[17] 179 Md. 249, 264, 19 A. 2d 169 (1941). See also Cluster v. Upton, 165 Md. 566, 168 A. 882 (1933); Yellow Cab Co. v. Bradin, 172 Md. 388, 191 A. 717 (1937); Rhinehart v. Lemmon, 181 Md. 663, 29 A. 2d 279, 280 (1942), where a Court in allowing a witness to testify to an insurance emblem on car where the issue of whether the defendant's car was at the scene of the accident was in question, said:

> "A suggestion of the possession of insurance is not to be avoided at the cost of suppressing evidence material to the establishment of the cause of the accident and the *liability* of the defendant sued for damages."

the work of the charity.[18] On the *nisi prius* level, the injection of insurance in the pleadings has been suggested as a means by which possible plaintiffs might take advantage of the statute.[19] However in the recent lower court case of *Phillips v. Epworth Methodist Church, Inc.*,[20] such a procedure was held to be demurrable. In order to avoid this result the lower Court maintained that the better procedure would be to allege that the defendant is not immune from suit. This method would definitely avoid the violation of the evidencial rule against the mention of insurance to the jury. However in doing so the declaration might violate the equally well settled rule of pleading that:

> "Whatever facts are necessary to constitute the ground of action, defense, or reply, as the case may be, shall be stated in the pleading and nothing more; and *facts only* shall be stated and not arguments, or inferences, or matter of law or of evidence, or of which the Court takes notice *ex officio*."[21]

Since the reform in the pleading system of Maryland took place in 1856, any ". . . plain statement of the (essential) facts . . . without reference to *mere form*" is sufficient.[22] However this change did not relieve the pleader from his common law duty of apprizing his adversary of the facts on which he intends to rely. The Court of Appeals in case of *Pearce v. Watkins* recognized this when they said:

> "Although the Code, Art. 75, Sec. 3, says, 'any plain statement of the facts necessary to constitute a ground of action shall be sufficient', yet it says in the same Article, Sec. 2, that 'whatever facts are necessary to constitute a ground of action shall be stated'. This is necessary that the defendant 'may be forewarned of the nature of the proof to be preferred against him, and be prepared to contradict, explain, or avoid it'."[23]

Thus although the old requirement of formal allegations was dispensed with, matters of law, of evidence, within judicial notice, and conclusions of law still have no place in

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[18] Perry v. House of Refuge, 63 Md. 20 (1885); Loeffler v. Sheppard-Pratt Hospital, 130 Md. 265, 100 A. 301 (1917).

[19] *Supra*, n. 11.

[20] Daily Record, Mar. 18, 1955.

[21] Md. Code (1951), Art. 75, Sec. 2. First italics supplied.

[22] Md. Code (1951), Art. 75, Sec. 3. Parenthetical material and italics added.

[23] 68 Md. 534, 538, 13 A. 376 (1888).

the allegations of a declaration.[24] For this reason it would seem that an allegation of the charitable institution's non-liability without stating the facts which render it such would be demurrable.

In the only case construing the statute[25] the Court decided "the plaintiff here has not brought himself within the terms of the section quoted" where the declaration made no mention of the insurer or of the charitable institution's non-liability.[26] This case would seem to indicate the necessity of some form of allegation whereby the court would be notified of the insurance of the charitable institution. Furthermore the Maryland court has recognized an exception to the rule requiring the exclusion of insurance at the trial where it was a pertinent issue and would not have to reach far afield to apply the same reasoning to the situation presented here. In the total absence of any direct ruling on the instant problem, the statute must remain as a monument to legislative shortsightedness, and an amendment clearing up the procedural difficulty resulting from it would apparently be welcomed by the practitioners of this state.

[24] 1 POE, PLEADING & PRACTICE AT LAW (5th ed., 1925), Sec. 545 *et seq.* Gent v. Cole, 38 Md. 110 (1873); Mills v. B. C. & A. Ry. Co., 111 Md. 260, 73 A. 885 (1909); Lapp v. Stanton, 116 Md. 197, 81 A. 675 (1911); Roth v. Balto. Trust Co., 161 Md. 340, 158 A. 32 (1931); Brack v. Barton, 185 Md. 366, 45 A. 2d 100 (1945); Aetna Indemnity Co. v. Fuller Co., 111 Md. 321, 73 A. 738 (1909); Strauss v. Denny, 95 Md. 690, 53 A. 571 (1902); Consolidation Coal Co. v. Shannon, 34 Md. 144 (1871).

[25] Md. Code (1951), Art. 48A, Sec. 82.

[26] Howard v. South Balto. General Hosp., 191 Md. 617, 620, 62 A. 2d 574 (1948).