10-1-1940

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but it is submitted that further recognition of the inefficacy of the rule, should and will likely be forthcoming in the future. Often has it been said that when the reason for a rule ceases to exist, the rule ceases. It might well be urged, then, that this is a rule for which no good reason exists, and which therefore should cease.

William Batrus

THE EFFECT OF INSURANCE ON FAULT WITHOUT LIABILITY

It is the purpose of this note to determine the effect of insurance on the various phases of tort law where, in consideration of public policy, no recovery is generally allowed. The validity of the various theories and arguments for imposing or not imposing liability so far as they do not consider the element of insurance is immaterial to the writer. It is the writer’s purpose to accept the existing rules of the law in the various jurisdictions and apply to them the influence of insurance. In short then, should or should not the fact that the defendant charity, municipality, parent, child or spouse is protected adequately by insurance produce a different result?

Apropos to the discussion, we should keep in mind the extremely widespread use of insurance in all forms. It is not amiss to state that the old phrase, "There is a remedy for every wrong," may safely be replaced by a more effectual one, "There is insurance for every wrong." If this fundamental concept of the purpose of insurance be given its full and entitled office, its effect will be tremendous. Completely intertwined with the increased use of insurance is the ever mounting number of automobiles using our highways daily. The majority of cases cited in this note arose from alleged negligence in the operation of such vehicles.

While many reasons are assigned by the courts for refusing recovery, the basic reason behind all of the holdings is public policy. The public policy reasoning generally breaks down into two classes, the trust fund theory and the family dispute theory. Under the trust fund theory there are two branches, the eleemosynary institutions and municipalities. These will be discussed together.

THE TRUST FUND THEORY

The basic principle behind these cases is that the fund should be used only for charitable or municipal purposes and to permit its divergence for any other use would be to vitiate the primary aim. Conceding, for a working premise, that this is sound, it would appear that when such institutions carry insurance to protect themselves from liability incurred by the torts of their servants, they are in effect recognizing the harshness of the rule, waiving their exemption and cre-
ating a fund out of which these various claims for personal injuries could be met. This certainly would be the logical conclusion for otherwise it is to impute to them the doing of a useless act, a capricious waste of money.

Unfortunately, this view is not accepted by all courts. In Levy v. Superior Court, the California court in answer to this very contention said:

"In jurisdictions where the rule exempting charities from liability has been adopted, and the reason for the rule based upon the trust fund theory, it is held that the charity, whether incorporated or not, is a trustee, and is bound to apply the funds or property in furtherance of the charity and not otherwise, and that the law will not permit the trustee to deplete the fund set aside for charity by using it in paying damages caused by the acts of those engaged in administering the trust. If a liability may be created or an exemption waived by the acts of the trustee of a charity in procuring and accepting the promise of a third person to make good the losses following such liability or waiver, and the trustee thus allowed to accomplish indirectly that which is not permitted to be done directly, the protection afforded by the rule stated would be destroyed. * * * it is our opinion that the theory that a charity, not otherwise subject to liability, may become liable by reason of the procurement by those administering it of indemnity insurance cannot be supported in principle."

Kentucky\textsuperscript{2} and Massachusetts\textsuperscript{3} are in accord.

However, to permit recovery from this theoretical fund provided by insurance is not the same as allowing each claimant to reach the trust fund. The annual expenditure on the part of these institutions for insurance protection is but a trivial sum as compared to the total amount of money handled yearly by them. The amount of indirection would fall under the equitable rule of \textit{de minimis}. The procurement of insurance is no more than the exercise of sound business acumen and there would be no surcharge on the trustee for such expenditure. In truth, then, by permitting the insurance companies (and they are the real defendants) to interpose the defense of nonliability, is to permit them to evade indirectly a liability which they have been paid to meet. It certainly would be an unlikely and anomalous position for a trustee to say in one breath that they took out insurance to meet situation A, and to say in the next breath that we are not liable for situation A. But other courts meet these cases on their own facts, restrict the rule within its legitimate limits and grant a qualified or

\begin{itemize}
\item \textsuperscript{1}174 Cal. App. 171, 239 Pac. 1100 (1925).
\item \textsuperscript{2}Williams v. Church Home, 223 Ky. 355, 3 S. W. (2d) 753, 62 A. L. R. 721 (1928).
\item \textsuperscript{3}Enman v. Trustees of Boston University, 270 Mass. 299, 170 N. E. 43 (1930); McKay v. Morgan, 272 Mass. 121, 172 N. E. 68 (1930).
\end{itemize}
conditional judgment. The recovered judgment may be executed only against the insurance company.

In a very recent case, O'Connor v. Boulder Colorado Sanitarium Ass'n, the Colorado court said that they

"* * * committed themselves to what may be denominated the trust fund doctrine, and held that the trust fund rule does not bar an action against a charitable institution based on the torts of its agents, but that it does prohibit the levying of an execution under a judgment procured against it in such suit on any property which is a part of the charitable trust. * * * It would seem, therefore, that no depletion of the trust fund of a charitable institution is here sought. Under the circumstances, and in harmony with our previous pronouncements, it would be just and reasonable to hold that defendant herein is subject to this qualified liability."

The same reasoning was applied by the Tennessee court in Rogers v. Butler, where a county was sued in its governmental capacity for the tort of its servant. The court refused to grant an unconditional judgment but granted one which had to be satisfied out of such recovery as the county might obtain on its liability policy.

Some states, perhaps, would refuse to follow these cases on the ground that no suit can be maintained against an eleemosynary institution for the torts of its servants, arguing that a rule so long established should not be abrogated by anything less than legislative enactment. But the public policy behind these suits was conjured up by the courts, and hence they would not be warranted in using such an argument. They certainly should see that the age in which the rule grew up has been replaced by a different era of commercialism, and in its wake came the widespread use of insurance. The true public policy behind these suits is well expressed in another Tennessee case, McLeod v. St. Thomas Hospital:

"Upon consideration of the cases dealing with the question, and reflecting upon the true principle involved, we think it fairly may be said that the exemption and protection afforded to a charitable institution is not immunity from suit, not nonliability for a tort, but that the protection actually given is to the trust funds themselves. It is a recognition that such funds cannot be seized upon by execution, nor appropriated to the satisfaction of a tort liability. And certainly it is no defense to a tort action, that the defendant has no property subject to execution."

4105 Col. 259, 96 P. (2d) 835 (1939).
5170 Tenn. 125, 92 S. W. (2d) 414 (1936).
6170 Tenn. 423, 95 S. W. (2d) 917 (1936).
This leads us to the next problem. Some courts gratuitously assume, that to permit recovery where the institution carries insurance is to increase its liability, that is to say, you are now imposing a liability which did not exist before. This is answered adequately when we adopt the position taken by the O'Connor and McLeod cases, that the true basis is not to permit execution of the judgment on trust property. This particular limitation will be sufficient and a charitable institution or municipality which does not carry insurance will not be subjected to suit.

Other courts, while recognizing the fact of insurance, restrict its operation so that the purpose expected to be accomplished by carrying insurance is defeated. Where the insurance policy reads "for such liability as may be imposed by law" and in a state where the plaintiff may recover if he can establish the defendant's lack of due care and caution in selecting its servants, then the insurance will be construed to cover only this situation. The frequency of this occurrence is so small that the obvious and reasonable intention of the contracting parties was not so to limit its coverage but to provide relief in all cases where the law would impose liability upon any tortfeasor. In Mississippi Baptist Hospital v. Moore, a Mississippi case, while restricting its operation as indicated above, stated that "the court would be reluctant to hold that a contract of insurance, of which the premium had been collected, could not be given any operation." Their dictum is more impressive than their holding. Premiums were paid so that anyone injured by its employees would be protected; protection not only for the claimant injured by an employee who was not selected with reasonable care, but protection for the claimant injured by any of its employees. Civil degrees of culpability are too often imperceptible. The judicial history of this line of cases unmistakenly and indelibly indicates the latter conclusion.

The Family Discord Theory

The other group of cases pivots around the family discord theory. While the husband-wife cases have sometimes stated that the legal unity concept prevents suits based on personal injury, still, fundamentally, these suits, as well as the parent-child cases, have turned on the ground that public policy looks with askance at intra-family litigation for dissention is deemed a forgone conclusion. Why would there be dispute? The courts have stated that when the parent paid the child, it would arise because you are taking from the other members of the family when you are taking from the parent. The very idea of litigation would be sufficient to cause non-harmonious conditions. Insurance is then a panacea. You are not taking from the parent, or from the other members of the family, but are using this protection-money. If the family formerly looked upon the litigation with distaste, they will now welcome it.

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8156 Miss. 676, 126 So. 465, 67 A. L. R. 1106 (1930).
In *Bulloch v. Bulloch*, the Georgia court wrote: "Liability must exist before such insurance would be applicable." Virginia and Minnesota gave the same reason, although a subsequent Virginia case has allowed recovery. In the Minnesota case, the court refused the child recovery against his father's partner because his partner would then have a right of contribution against the father, although there never would have been any contribution because the partnership was adequately protected by insurance. This is an extremely conservative viewpoint. The wrong is committed, a liability follows, a recovery is denied. It is denied only because there is a disability to sue. The strict rule must give way to reason. The leading case from New Hampshire, *Dunlop v. Dunlop*, anticipating this contention, states:

"It will be said that the father's act in taking out insurance against personal liability cannot create the liability where none existed before. The act which creates the liability, or, more correctly, removes a barrier to the enforcement of a right, is the parent's removal of the element which theretofore impaired the right. **The parties interest and the family interest become for and not against a recovery. It is the fact that the interest lies where it does, and not the means by which the change of interest was brought about, that is of importance. Whenever, and however, the change is wrought, it removes the only objection to the suit.**"

This is meeting the problem in a commendably realistic manner.

In *Worrell v. Worrell*, the Virginia court met the same contention.

"It is true that the issuance of an insurance policy creates no cause of action where no cause of action exists in the absence of insurance. The existence of insurance has no effect upon the merits of the cause of action. The merits of the action depend upon culpability, from whence may arise liability. Liability insurance, while it does not, therefore, affect the merits of the cause of action against the insured, does lessen the effect of the liability on the wrongdoer."

Some courts refuse to adhere to these persuasive reasons for permitting recovery on the ground that a rule of such long standing should be abrogated only

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945 Ga. App. 1, 163 S. E. 708 (1932).
11Belleson v. Skilbeck, 185 Minn. 537, 242 N. W. 1 (1932); Lund v. Olson, 183 Minn. 515, 237 N. W. 188 (1931).
12Worrell v. Worrell, ... Va. ..., 4 S. E. (2d) 343 (1939).
14... Va. ..., 4 S. E. (2d) 343 (1939).
by the legislature. Alabama, 16 Michigan 16 and Connecticut 17 have expressed such a view.

"When no need exists for parental immunity, the courts should not extend it as a mere gratuity. Without such an extension, nothing stands in the way of this action. It is a familiar law that a child may bring to account the parent for wrongful disposition of the child's own property. It must not be said that courts are more considerate of the property of the child than of its person (when unaffected by the family relationship). The plaintiff must still establish the liability of the father (stripped of parental immunity) for her injury." 18

Fear of collusion has been expressed in some of the opinions 19 but it is significant that in none of them was the court able or willing to say that it existed. To say that there will be intentional injuries in order to collect insurance is to run counter to human nature. Nor need the fear of the possibility of testifying falsely concern the court. So long as the right of cross examination exists, and so long as the court has the power to grant new trials, this fear is nullified. In the same category is the contention that the cooperative clauses found in the policies will be violated. 20 This assumes that these clauses mean that in every case the one not insured must be the wrongdoer and it is the insured who must always prove this wrongdoing. This overlooks the fact that the wrongful act must be established before recovery is permitted. The courts generally say that good faith is the test and all that is necessary is that the defendant cooperate by telling the truth.

Other cases say that the insurance policy may not be sufficient to meet the verdict. 21 So long as the judgment may be executed only against the insurance company by a conditional judgment, this possibility is immaterial. Furthermore, the court can order the plaintiff to remit all of the verdict over the amount of the policy. Also the parent or spouse could petition the court to mark the excess of the judgment satisfied. Furthermore, the number of times this will occur will be so infrequent that it need not be an obstacle to the courts.

The fact that the defendant carries insurance is irrelevant as a matter of evidence. 22 The liability must be established independently of the insurance.

18Lusk v. Lusk, 113 W. Va. 17, 166 S. E. 538 (1932).
Therefore, it need not be disclosed to the jury, nor need the present rules as to this nondisclosure be changed. It will be sufficient to advise the court of the presence of insurance by a stipulation. In this way it will not be necessary to permit a direct right of action against the insurance company.

There is another class of cases which some courts in their anxiety to prevent recovery attempt to differentiate. The leading cases in this group are *Dunlop v. Dunlop*,23 *Lusk v. Lusk*,24 and *Worrell v. Worrell*.25 In the first case the infant son worked for his father during the summer vacation. In the second case the father was the driver of a school bus, in which his daughter was a passenger. In the third case the father was the owner of a bus line and his daughter was injured in one of the buses. In each case, the parent was protected by insurance. It is said that these cases must be distinguished because they present the parent, not in the role of a parent, but in his vocational capacity. A father remains a father although he may change his name. If the courts look at the caption of the case it still remains child against parent. But what the courts do recognize is the fact that no longer should the outworn disability be imposed. It must be conceded that these courts do not clarify the issue. Especially in the *Worrell* case, a Virginia case, a very interesting situation is presented.

In 1934, there was a case26 before the same court in which recovery was refused. They then stated that "the fact that the father carried accident liability insurance does not create any liability against the father which would not exist were he uninsured." When the *Worrell* case came up five years later, the court, realizing that recovery should be permitted but remembering the former case, found themselves on the horns of a dilemma and attempted to handle the situation by distinguishing the two cases. Superficially they said, the child was just another passenger, the father was a common carrier, the insurance was compulsory, the negligence was committed by an agent. Still the action is child against parent. It does not require much prophetic vision to conclude that if the first case had followed the second, recovery would have been allowed in the first one. The courts should hold directly that the reason for recovery is the presence of insurance. When they speak of emancipation,27 vocational capacity, compulsory insurance and the like, they are only confusing the real issue. For the sake of proper law, such unimportant considerations should be omitted from the courts' opinions.

**LIABILITY AND INDEMNITY INSURANCE**

There is one defense that has been recognized by the courts in both classes of cases, that is, where the defendant is protected only by an indemnity insurance

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24113 W. Va. 17, 166 S. E. 538 (1932).
policy. Under the indemnity policy, the insured is only protected against loss, and until there is an actual loss the insurer need not pay. This policy is distinguished from a liability policy which indemnifies the insured from liability. Under the indemnity policy the insurance company can require that an execution be levied against the insured before it would be bound by its contract to protect the insured. Thus where the courts are confronted with this type of policy they can hold properly that until the parent, child, husband, wife, charity or municipality incurs a loss, they need not make good. Even here, should the court permit the suit against the charity or municipality, there would be no fund available upon which to issue execution. But in the case of the intra-family suits the courts need not be deterred because it is only an indemnity policy for in these cases there will be property on which to execute and this will be a sufficient loss to call the indemnity policy into action without the sale on the execution.

The Wisconsin case, Segall v. Ohio Casualty Co., displays the extreme limits to which some courts will go to prevent recovery in these cases. In that state there had been a series of statutes which wanted obviously to impose liability in cases where insurance was carried. Among these statutes was one which gave the injured party a direct right of action against the insurer. Then there was another which was under consideration in the case. It provided that "no policy of insurance (or) agreement of indemnity . . . shall exclude from the coverage afforded or the provisions as to the benefits therein provided, persons related by blood or marriage to the assured." Patently, the intention of the legislature was to make these defenses personal as between the parties and to deprive the insurance company of a defense to which they were not entitled. Nevertheless, the court construed the statute as meaning that it precluded only a defense that a wife, child or other relative of the named insured was driving the car.

In Louisiana, the legislature of that state also passed an act which gave the injured person a direct right of action against the insurance company. In the case of Edwards v. Royal Indemnity Co., the court held that "the plea of coverture is personal to the wife and is wholly unrelated to the provisions of the policy and the alleged negligent injury." This is clearly the proper result.

Returning to the case of a charity or municipality which carries only an indemnity policy, could not the court hold that this constituted a fund not impressed solely for public needs, and therefore property on which the injured plaintiff could issue execution? Is it too much to impose a liability against one who is paid to bear it?

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30182 La. 171, 161 So. 191 (1935).
THE PENNSYLVANIA CASES

In Pennsylvania the appellate courts have once spoken of the instant problem, and there also is a very recent lower court case. However, there is a certain unmistakable trend in the cases which might be indicative of a possible holding. So far as the husband-wife and parent-child situations are concerned, Pennsylvania refuses to permit a direct suit. In the cases of charitable institutions, no liability is imposed if due care was used in the selection of the personnel. A municipality is not liable for the torts of its servants committed when the latter was engaged in a governmental capacity but is liable when engaged in a proprietary capacity.

With these as the controlling rules of law, let us consider the case of municipalities and charities. Since there is a possibility that some liability might be imposed on them, it is possible that Pennsylvania will follow those jurisdictions which state that protection against this possible liability is the only protection the insured needs, and that is the only protection it bought. If, however, the court desires to meet the real problem they can so restrict the judgment's field of execution as to do no violence to the basic rule. In this they would have some authority. In Winnemore v. Philadelphia, the Girard estate which was operated for charity, also had an office building, the income of which was entirely turned over to the charity. The plaintiff was injured by the negligence of one of their servants in the office building and a recovery was allowed from the income derived from this building although it was impressed with the charitable use. Pennsylvania courts have the inherent power to so mould judgments as to do justice.

In the intra-family litigation there is more authority for permitting the suit. In Koontz v. Messer, the plaintiff wife was injured by the negligence of her husband who at the time was working for the defendant. The wife sued the master who issued a writ of scire facias and brought the husband in as an additional defendant. Then the master raised the defense that as his liability was based on the husband's negligence, if a recovery was allowed the wife ultimately would recover from the husband. The court held that the suit against the original defendant remained unaffected.

33Gable v. Sisters of St. Francis, 227 Pa. 254, 75 Atl. 1087 (1910); Boyd v. Insurance Patrol, 113 Pa. 269, 6 Atl. 536 (1886).
34Boro of Norristown v. Fitzpatrick, 94 Pa. 121 (1880).
36Cf. Gable v. Sisters of St. Francis, 227 Pa. 254, 75 Atl. 1087 (1910), where the plaintiff disclaimed all right of execution against any fund which was used for charity, but the court refused to permit a recovery.
In the recent case of *Briggs v. City of Phila.*, a child was injured on the sidewalk in front of her father's home, he being the tenant at the time. She sued the municipality who in turn brought the parent in as an additional defendant. But again the court held that "insofar as she was concerned, the only issue involved in this action was whether there was a liability on the part of the city to her, and that issue was not extended by introducing additional defendants."

It is true that in these cases the suit, at least from its caption, did not disclose it to be an adverse one. But if the courts look behind mere form to reality, which they do, these suits are just as adverse as any of the other.

In *Duffy v. Duffy*, the defendant's mother sued her child for his negligence in operating a car, thereby injuring her. The plaintiff contended that automobile cases should be considered in a separate class because so many are covered by insurance but the court said they would not follow that reasoning without legislative authority for so doing. In that case, it does not affirmatively appear that the defendant was covered by insurance, although the circumstances so indicate, nor does it appear that the plaintiff wanted to limit the rule to cases where the defendant is insured, but wanted to permit suits in all automobile cases.

There is a recent case in which the court went through to the realities of the case although it does not deal with the instant problem. But it is enlightening for the fact that the court took official notice that the real defendant was the insurance company. This is the case of *Hamilton v. Moore*. The court refused to direct a new trial for the minor defendant although he was not represented at the trial by a guardian ad litem. The lower court appointed a guardian after the judgment was entered who made a thorough investigation of the case and reported that the minor was ably defended. The Supreme Court in their opinion stated that

"the guardian filed a report setting forth that the minor had been ably represented throughout the litigation and that her interests (as distinct from those of the Insurance Company, which was the real party in interest in the litigation) would be served by permitting the judgment to remain undisturbed."

This certainly is a commendable attitude. The interests of justice will be best served by forgetting formalities.

The Philadelphia Common Pleas Court handed down a decision late last year which passed on the effect of insurance in a suit by the wife against her husband for personal injuries sustained in an automobile accident caused by his

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41335 Pa. 433, 6 A. (2d) 787 (1939).
negligence. This was *Shoyer v. Shoyer*.

The court recognized that the domestic peace and felicity of the husband and wife would be enhanced if recovery were permitted since the insurance company would have to pay. But they refused to permit recovery, holding that the Act of 1893, the *Married Woman's Property Act*, was a "positive statutory prohibition." The court then distinguished their case from *Minkin v. Minkin*, which was handed down by our Supreme Court while their case was pending. They held that in the latter case the statute especially provided for the recovery. This leads us to a consideration of that case.

In the *Minkin* case the child sued her mother for the wrongful death of her father, that is, the defendant's husband, which was caused by the alleged negligent driving of the mother. The majority opinion stated in that case that since the statutes of 1851 and 1855 did not exclude the suits, it was deemed to have been the expressed legislative policy to include the same. Significant enough neither the concurring opinion nor the dissenting opinion came to that conclusion, but on the other hand came to the exactly opposite conclusion, so that in reality you have four to three against the holding that was termed the majority opinion. Perhaps, the dissenting opinion of Judge Musmanno of the Allegheny County Common Pleas Court will shed some light, inferentially.

"It is obvious in this case that Mrs. Kate M. Minkin, the defendant, carries liability insurance, and that it is the insurance company which is defending the litigation. While, of course, that has no bearing on the question before us, one cannot escape the ironical observation that in taking out the insurance policy to protect others against her possible negligent acts, Mrs. Minkin never intended to exclude, from the beneficient provisions of that protection, those whom she loved most. She never believed, and certainly it was not explained to her, that under the vast sheltering expanse of the umbrella of liability insurance there would be room for everyone in the world—except her own children."

But it is a fact that at no place in any of the three opinions written by the Supreme Court was insurance mentioned although the supplemental briefs of both appellant and appellee discussed the question. This might be indicative of some future pronouncement. It is to be hoped that when the question is presented directly to our courts the same result will be reached.

There is a maxim of law that has often been repeated by all courts that when the reason for a rule no longer exists, the rule ceases to exist. These cases

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43 Act of June 8, 1893, P. L. 344.
44 336 Pa. 49, 7 A. (2d) 461 (1939).
45 Act of April 15, 1851, P. L. 669.
46 Act of April 26, 1855, P. L. 309.
certainly present a very adaptive situation for an application of this maxim. "It is the essential function of the courts to administer justice, and while they will not overrule a statute, they should not hesitate to overrule a precedent to attain that end when it has not become a rule of property. For a stronger reason, the courts should never create a precedent (when there is, as here, neither statute nor precedent) upon a supposed public policy, and when, as in this case, it will deprive anyone of just rights." 47 "The law does not make fetishes of ideas. It limits them to their proper spheres." 48 "Public policy is not static. It changes with the changes in the times. It changes as the needs of the people, the mode of their living, and the manner and methods of doing business change. The legislature and the courts must keep as closely abreast as they can." 49

It is to be hoped that the courts will recognize the important role of insurance. And it is also to be hoped that the Pennsylvania legislature as well as those of other states will pass adequate legislation to take care of these situations so that no theoretical extraneous question of public policy need stand in the way of a recovery. Conceding that public policy substantiates the present basic rules of law, there is no longer reason for their enforcement when the defendant is protected by insurance.

ARTHUR BERMAN