Volume 60
Issue 2 *Dickinson Law Review - Volume 60, 1955-1956*

1-1-1956

The Defense of Automobile Collision Cases by Insurers in Pennsylvania

Charles L. Casper

NOTES

THE DEFENSE OF AUTOMOBILE COLLISION CASES BY INSURERS IN PENNSYLVANIA

By

CHARLES L. CASPER*

Since the passage of the Pennsylvania "Motor Vehicle Safety Responsibility Act"[1] many motorists in Pennsylvania have obtained and are carrying public liability and property damage insurance. It sometimes happens that a collision will occur between two vehicles, the operators of each of which are insured by the same insurance company. If litigation ensues as a result of such accident, may the insurance company, through counsel of its choice, defend either or both of the operators?

In the California case of *O'Morrow v. Borad*[2] this situation arose. Borad brought an action for damages caused by a collision against O'Morrow, and O'Morrow filed a cross-complaint against Borad. O'Morrow then brought a suit for declaratory relief to obtain a determination as to the rights of the respective parties under their insurance contracts insofar as the provisions relating to the defense of claims were concerned, and whether he had the right to defend the action through attorneys of his own choice. The California Supreme Court held it is contrary to public policy for one person (the insurance company) to control both sides of litigation, and therefore the assureds were excused from compliance with the cooperation clauses of their respective policies, and that the insurance company would be liable not only for the payment of any judgments obtained in the actions between the insureds together with costs, but also for the fees of the parties' individual attorneys, such fees being recoverable in lieu of the defense required by the insurance contracts. It is submitted that the decision in this case promulgates an anomalous, unjust and undesirable rule, and if this situation arose in Pennsylvania, this rule should not be followed.

The California court argues that the issues of negligence and contributory negligence in the action could not be separated. Since these issues require the presentation of evidence by the same witnesses, although the insurance company proposed to retain different counsel for each policyholder, through these respective attorneys the insurance company would have access to all information in regard to the entire case. It is submitted that this is not a valid reason to support the result of this case. The modern theory of litigation is that it

* Ph. B., Yale University; LL. B. Harvard School of Law; Member of the Luzerne County Bar.

Author of PENNSYLVANIA PUBLIC UTILITY LAW AND PROCEDURE (Geo. T. Bisel Co., 1943).

1 PA. STAT. ANN. tit. 75, § 1277.1 - 1277.39 Purdon (1945).

2 27 Cal. 2d 815, 167 P. 2d 483, 163 A. L. R. 894 (1946).

is not a game and contest of wits, but rather that its object is to discover the truth and to do justice.[3]

Modern procedural rules provide broad methods of discovery,[4] and it is rare today that the parties do not have access to all information in regard to the case in advance of trial.

The court also argued that since under the terms of the policy contracts, the insurer undertook to pay any judgment rendered against either of the parties, the company has a pecuniary interest in effecting a balance between the litigants, and in so conducting the litigation that neither party recovers against the other. It is submitted that this reason does not support the court's conclusion. If the parties were represented by counsel of their own choice rather than counsel chosen by the insurer, each party could and probably would maintain that the collision was due to the negligence of the other. If the collision occurred in Pennsylvania and both parties were in fact negligent, neither could recover. The difficulty, if any exists, could easily be solved by, instead of having cross actions by means of counterclaim, having each action tried separately, in which case each of the parties as plaintiff would be represented by counsel of his own choice, while as defendant he would be represented by counsel chosen by the insurance company, particularly since the only duty on the insurer is to defend actions brought against the insured, not to bring action in his behalf. In any event, it would only be just and proper for the insurance company since it must pay any judgment obtained against its assured to the limit of liability provided by the insurance contract, to control the conduct of the defense of the litigation in which any such judgment may be rendered.

In Pennsylvania, the terms of the standard policy of liability insurance expressly entrust to the insurer, the entire management of the defense of any action against the insured, and the decision of whether to settle or try the case is absolutely committed to it, and if it refuses to make a settlement for less than the judgment finally recovered, it is not liable to the assured.[5] But this does not mean that the insurer can conduct the defense arbitrarily or capriciously with impunity. The relationship of the insurer and insured required the highest degree of good faith in the conduct of the defense.[6] When the company, to protect itself from liability, assumes the defense of an action to the entire exclusion of the defendant of record, it should be held to a strict rule of good faith in conducting the defense, and when, in its own interest, it deprives the defendant of a substantial advantage in the course of a trial, it should be held liable for

---

3 Hickman v. Taylor, 329 U. S. 495 (1947); DeSimone v. City of Philadelphia, 78 Pa. D. & C. 483 (1951); Lower Merion Twp. v. Hobson Jr., 79 Pa. D. & C. 385 (1952).

4 FED. R. CIV. P. 26-37; PA. R. CIV. P. 4001-4025.

5 Schmidt v. Travelers Ins. Co., 244 Pa. 286, 90 Atl. 653 (1914); McClung v. Pennsylvania Taximotor Cab. Co., 25 Pa. Dist. 583 (C. P. No. 2, Phila. 1916). See also: Indemnity Ins. Co. v. Eazor, 71 Pa. D. & C. 626 (C. P. Allegheny 1950).

6 Weiner v. Targon, 100 Pa. Super. 278 (1930).

the damages naturally resulting thereby.[7] And in *Perkoski v. Wilson,*[8] the Pennsylvania Supreme Court said:

> "When the company voluntarily undertook the defense of Wilson, in pursuance of its privilege under the policy, it assumed a position of trust and confidence which called for an exercise of the utmost good faith, particularly in view of the possible conflict of interest between the insurer and the insured such as later developed. It was accordingly incumbent upon the company to inform its policyholder of its prospective adverse interest . . . ."

In *Karp v. Sun Insurance Office, Ltd. (No. 2),*[9] it appeared that there was a collision between an automobile owned by Delmonte and one owned by Karp. Delmonte commenced an action of trespass against Karp and thereafter Karp started suit in trespass against Delmonte. At the time of the collision Karp carried an automobile indemnity policy with defendants, who undertook the defense of Karp in the action brought against him by Delmonte. Subsequently, without notice to Karp, his insurer's counsel settled Delmonte's suit against Karp in such a way as to bar Karp's claim against Delmonte. Karp thereupon brought an action of trespass against his insurers, alleging that were it not for the negligent manner in which defendants settled the Delmonte claim, Karp would have a valid cause of action against Delmonte for damages and injuries sustained as a result of the accident. Preliminary objections were filed to the complaint, but the Court held that the complaint stated a good cause of action, on the proposition that in conducting a defense, it is the duty of the insurer to act in a careful and prudent manner, giving the insured its undivided support; otherwise, it is liable for resulting damages, even though such damages exceed the amount limited in the policy.

It is probable that the situation which arose in the *O'Morrow* case will some day come before the appellate courts of Pennsylvania. In such event, it is submitted that the rationale and rule of that decision should not be followed. The rule which should be followed would be to permit the insurer to select separate counsel for each assured and to require the cooperation of each assured. The insurer will be under the strict duty of exercising the utmost good faith towards each assured, and to inform each assured of the insurer's prospective adverse interest, in which case each assured would be entitled, at his own and not at the insurer's expense, to retain his own counsel who would be required to cooperate with counsel selected by the insurer. Should the insurer fail to exercise the good faith required or perform its duties in a negligent manner, it would be liable to its assured, for such negligence, even though the damages should exceed the limitations of liability contained in the policy contract.

---

[7] N. Y. C. R. R. Co. v. Mass. Bonding Co., 184 N. Y. Supp. 243 (cited with approval in Weiner v. Targon, *supra*).
[8] 371 Pa. 553, 92 A. 2d 189 (1952).
[9] 83 Pa. D. & C. 566 (1952).

SHOULD WE HAVE MANDATORY SEARCHERS OF LITIGANTS?

Within a period of less than two years, two courtrooms in Pennsylvania have been the scenes of unprecedented acts of anarchy. On both occasions, an irate litigant has assumed the role of the assassin in an effort to administer an individual form of "justice". The costs of these attempts have been appalling—the lives of a judge and an attorney, the wounding of other principals in the proceeding.

Responding to the call of necessity, the House of Representatives on August 29, 1955 proposed House Bill 1748 in order to prevent future recurrences. It says:

> "Any person who is a party to a judicial proceeding shall submit himself to a search for any deadly weapons before entering a courtroom. Failure to submit to the search shall bar the person from entrance into the courtroom."

With the passage of this act still pending, this writer has attempted to evaluate its probable effect in response to a very definite controversy presently existing within the legal profession. The following presentation includes arguments both for and against its enactment, as well as possible alternative solutions. It must be noted, however, that any possible constitutional issue is beyond the scope of this note.

For

It goes without saying that some affirmative action must be taken to protect those who exercise their sacred right to litigate; the fear of murder should be the least of a person's worries when he is innocently reaching out for the aid of the judicial system. Likewise, it is readily agreed that the officers of the court—both bench and bar—should not be subjected to the peril of bodily injury merely because they have dedicated their lives to a community of orderly and decent government.

It cannot be disputed that House Bill 1748 will attain these desired objectives if it is properly and conscientiously administered. Further discussion of its intended effectiveness is obviously unnecessary.

Against

Although the argument in favor of this legislation can be disposed of quickly because of its apparent necessity, the problems and adverse attitudes attendant upon its enactment are both many and material.

The most basic argument against such a procedure is the impracticability of its administration. With political policies as they are, such a requirement would be a substantial incentive to increase courtroom personnel. This would obviously be unnecessary, but it is still a possibility when you consider the multitude of political appointees who occupy the four corners of the courtroom at the present time. Also, the time and trouble involved is a material factor. With

standard court schedules calling for a morning and afternoon session and several recesses in the course of each, it is obvious that a thorough search each time would greatly reduce the efficiency of our already congested court schedules.

Another argument advanced by many prominent jurists is that to require a mandatory search in all types of litigation would result in lowering the dignity of the court and the litigants—a result which no one desires. A moment's reflection will reveal the embarrassment and disgust which would accompany the usual "frisking" in attempting to locate deadly weapons through physical contact. It is plausible to predict that this could result in the type of harm which the bill is seeking to prevent. Of course, it can always be argued that electronic devices, i.e. x-ray or electric eyes, could do the job as well if not better. But with county budgets already bursting at their seams, it appears unlikely that such machines could be installed and maintained. Even if some other means were employed, the problem of mental injury is still to be encountered. A person innocently prosecuting or defending a perfectly innocuous matter is unlikely to allow his personal integrity to be questioned without feeling some loss of dignity. This is not to be sanctioned!

Closely associated with the matter of dignity is the further contention that such an embarrassing procedure is likely to have an adverse effect upon the attitude of the parties to their own problems and to the possibility of a fair adjudication by the court. This is especially true where the contest is one in which there are already super-charged emotions prior to the actual trial or hearing. In such a case, it is entirely possible that the search procedure could add the final touch to complete irrationality and thus impede the correct presentation of the parties' views on the case at bar. It must also be pointed out that if a person is lawfully concealing a weapon and has no intention to use it for purposes of violence, the act would still apply. The danger here is that the judge or jury may be influenced by such a discovery and thus render a decision tinted with prejudice. It seems grossly unfair to open the door to this possibility, although a mathematically slight one, through an act which makes no provisions for exceptional yet lawful and reasonable situations.

The argument has also been raised that a mandatory search would give undue prominence to a situation which might be regarded as an occupational hazard of anybody in high office. This may very well be true in the case of judges and government prosecutors since they may be said to have impliedly consented to be subjected to the criticisms and ill-feelings of their electors. This contention, however, does not follow in the cases of private lawyers and litigants; these persons surely have not intended to assume the risk of injury upon entering the courtroom. Still, this argument against the bill is reasonable provided there is a substitute method to relieve the threat of peril for those who do not wish to accept its consequences.

As a final argument against the bill it must be realized that although a search, if properly conducted, would relieve all probabilities of assassination in the courtroom, it would in no way prevent the possibility of retaliation outside the court. It is more likely that the person bent upon accomplishing some violence would attempt it in a situation where he is less likely to be apprehended. This contention has been substantiated by at least one case in Pennsylvania. Besides, a procedure calling attention to the possibility of violence may prompt those duller yet more violent personalities to try something which they otherwise would not have thought to do or at least would not have attempted in a public courtroom.

Alternative Solutions

In the above presentation, we have seen the need envisaged by the framers of the bill as well as the objections attendant upon its enactment. No conclusion may be made as to its merits or detriments without first considering other possible means for accomplishing the desired end. No doubt the reader has already formulated some alternate methods. The following is a discussion of a few solutions which this writer believes to be the most valuable, but note that he does not purport to exhaust all the possibilities.

One method which has been used with flawless success concerns the role of the judge as an interpreter of the decision which he renders. Here, if the judge with the cooperation of counsel explains an unpalatable order objectively to those upon whom it is imposed, the emotional impact will be lessened considerably. This, of course, will not remove the feeling of wrong or hurt on the part of the person receiving the order, but it will go a long way to prevent any violence. It will cause the cooling-off period to be greatly accelerated, thus tending to stay even the out-of-court recourse to physical injury. If this method, as well as any of the following suggestions, should not appear to be immediately effective, a 24-hour lock-up would do wonders in curing a stubborn party.

Since the two previously mentioned headline cases have occurred in non-support proceedings, a procedure especially adapted for domestic relations cases may be suggested. In these situations, the probation officer or other court official conducts a pre-trial examination of the parties, investigating backgrounds, present conditions and other relevant factors. On the basis of this investigation, he makes an effort to effect a reconciliation, thereby causing the cooling-off period to have an early beginning. If the reconciliation is accomplished the matter is ended; if not, the case is brought to trial. The important thing in the latter situation is that the parties enter court with the attitude, so to speak, of having agreed to disagree. This feeling coupled with the usual informal atmosphere of a non-public hearing practically insures rationality and negatives the probability of violent demonstrations.

A third method of prevention, independent of a statute, is one which is both practical and recommended for any type of proceeding. It merely calls for the anticipation of situations in which overheated emotions might result in displays of temper or violence, and then taking adequate precautionary measures. The experienced judge should be able to foresee such situations, and he is certainly armed with the necessary instruments of prevention. The tipstaff, that illusive character of debatable origin, could undoubtedly fulfill this preventative element if his duty of maintaining decorum were strictly enforced. Also, the numerous deputy sheriffs found around the courthouse could be mobilized for this purpose. The very presence of efficient courtroom personnel would go a long way in deterring any outbreaks of violence.

Finally, it may be suggested that the existing Penal Code be re-evaluated with a thought given to increasing the present penalties, especially those concerned with concealing deadly weapons. It is true that such an action would only indirectly affect the matter under consideration, but it still might reduce the already slight possibility of future recurrences.

Whatever the sentiment may be as regards House Bill 1748, the above alternatives may be assumed to be effective. Several of them are combinations of time-tested procedures currently being used in a few courts in Pennsylvania. The unblemished records for peaceful litigation of those courts which anticipated and provided for such possibilities silently but forcefully testify to the effectiveness of the method employed.

Conclusion

Having considered the pros and cons of House Bill 1748 and in view of the possible substitutional remedies, it is submitted that the benefits to be derived from it are outweighed by its disadvantages. Any of the suggested alternative methods would make such an act unnecessary and would still insure peaceful courtroom litigation.

RICHARD C. SNELBAKER