Volume 65
Issue 1 *Dickinson Law Review - Volume 65, 1960-1961*

10-1-1960

Insurance Against Liability: An Anomaly in Negligence Cases

Eugene J. McDonald

ARTICLES

INSURANCE AGAINST LIABILITY: AN ANOMALY IN NEGLIGENCE CASES

BY EUGENE J. McDONALD*

That ancient and unique hallmark of the common law, the jury system, has long been an object of imitation and veneration. For countless centuries, English jurisprudence has bowed before the right of an individual to have his cause heard and determined by a panel of peers.[1] The legal system in America early followed the path of its parent when the right to trial by jury was incorporated into the Bill of Rights of the Federal Constitution.[2] Even the individual states, although not so required by the Law of the Land, have, in the administration of their local laws, deemed it wise to guarantee the trial by jury.[3] The venire system is truly one of the more outstanding characteristics of the common law and, for minds steeped in that tradition, trial by jury is as commonplace as trial itself. Lawyers tutored in the common law have come to expect its privileges and respect its methods. They applaud its peculiar path to justice and decry attempts to encroach upon its settled domain. They revere its ideals and seldom revile its faults. In short, trial by jury is a time-honored tradition and, doubtless, is now too firmly entrenched to suffer extinction at the hands of assailants. But the system is not entirely free from defects, and regardless of all the deference shown it, few persons remain blind to its more obvious shortcomings.

The primary defect of the jury system is not unique to this Anglo-American device but is inherent, to a greater or lesser extent, in all legal systems. This essential problem lies in the unavoidable circumstance that the ministration of justice is given to human hands. Precisely because the jury system is a human institution, and thus dependent upon the complex congeries of emotion and passion, dulled intellect and stumbling judgment, it necessarily falls short of its ideal. The individual juror is but a reflection of his own experiences, and these experiences inexorably temper his views

* B.S., Univ. of San Francisco; LL.B., Univ. of San Francisco; LL.M., Georgetown University; Professor of Law, Georgetown University Law Center; Member of the California Bar Association.

1. There is, of course, the obvious exception in the case of equity jurisprudence which had its origin in the courts of chancery, independent of the common law. On this question of the origin of trial by jury, see WIGMORE, KALEIDOSCOPE OF JUSTICE (1941).

2. U.S. CONST. amend. VI and VII.

3. Almost all of the states of the union provide for trial by jury, either by statute or by constitutional provision. Concerning the right to abolish the trial by jury, see CORWIN, UNITED STATES CONSTITUTION ANNOTATED 1096 and 1109 (1952).

in any case on which he sits. He is constricted by his peculiar prejudices and urged by the prompting of his bias, sometimes consciously and often unconsciously. Perhaps the jury system—where the collective arbiters of controversy comprise a potpourri of disparate and legally untrained backgrounds—is less successful at recognition and isolation of prejudices than those systems which rely upon the judgments of detached magistrates.[4] The point is moot, because the essential weakness of finite justice remains regardless of the form in which it is clothed.

A graphic illustration of the healthy respect that the common law accords these intangible motivating factors is found in negligence suits, where the question of liability insurance—its presence or absence—may play a major part in the jury's deliberation. The precise problem concerns the extent to which the jury's deliberation in a negligence case will be influenced by an insurance factor and what preventive measures the law can take to obviate unwarranted verdicts and excessive damage awards. The problem is especially prevalent in personal injury suits involving insured vehicles. Over the decades the courts have come to appreciate the fact that jurors, in common with the majority of their human fellows, will tend to sympathize with the poor and benighted of their brethren while simultaneously scorning such power symbols as insurance companies. Where the defendant in a personal injury suit carries liability insurance and, consequently, where any recompense awarded the plaintiff will be pried from the bulging corporate pocket, juries are much more likely to find liability and award larger sums in damages. Conversely, if the defendant carries no insurance and the onus of an award will fall on his own pocketbook, chances of a plaintiff's verdict are much slimmer. The venireman's reaction to the presence of insurance seems to pivot on the vague thesis that by their nature insurance companies exist to compensate for injuries, and that technical questions of fault should not assume major proportions. Judicial recognition of this influential factor is not wanting, and the attitude of the courts has been well summarized by a Kentucky tribunal in the following language:

> [W]e, as well as all courts, have held that the average juror is either unconsciously or otherwise influenced by the fact that the alleged negligent actor carries insurance. Such average juror, it has been found, is frequently led astray and returns an unauthorized verdict because he concludes that the defendant against whom it is rendered will not be required to pay it out of his individual funds because of indemnity insurance carried by him.[5]

To be sure, the courts have recognized the danger posed to an impartial verdict. But recognition of the problem is one thing, while its correction is

4. This is the method employed in those countries where the Civil Law System is operative.

5. Star Furniture Co. v. Holland, 273 Ky. 617, —, 117 S.W.2d 603, 607 (1938).

quite another. It might fairly be said that the usual corrective measure taken by courts is inadequate for its purpose, if not entirely abortive. The remainder of this article will be addressed to a delineation of this remedial measure, a discussion of its inadequacy, and the exploration of alternative solutions.

American courts have usually followed a common pattern in meeting the challenge which insurance factors pose to the impartial administration of justice. Instead of attempting to purge the jurors of untoward prejudices by appropriate instructions from the judge, courts react in a different manner. The courts seek to create a cloud of confusion in the jurors' minds by throwing a cordon of secrecy around evidence of insurance that may seek to gain entrance at the trial.[6] If the jurors are not informed whether the defendant is insured, their emotional bias will have no outlet and they must confine their decision to the law and the facts. Perhaps the best expression of the practice sanctioned in American jurisdictions is found in the following statement from the Uniform Rules of Evidence:

> Evidence that a person was, at the time a harm was suffered by another, insured wholly or partially against loss arising from liability for that harm is inadmissible as tending to prove negligence or other wrongdoing.[7]

That this expresses the general rule followed by American courts is not open to question.[8] The technical reason for the rule lies, of course, in the fact that the probative value of the proffered evidence is far outweighed by the likelihood of prejudice. If the fact that the defendant carried liability insurance is logically relevant to prove his negligence on the occasion in question—a proposition which is open to serious doubt—it is nevertheless too remotely relevant to overcome the harm it would cause.[9] The rule is directed primarily at attempts to elicit insurance information from the mouths of witnesses, but its orbit of operation is broad enough to preclude any allusion to insurance by counsel in their opening or closing statements.[10]

6. Professor McCormick uses the appropriate term, "conspiracy of silence," to describe the attitude of the courts toward evidence of liability insurance. MCCORMICK, EVIDENCE 356 (1954).

7. UNIFORM RULES OF EVIDENCE 54.

8. See 2 WIGMORE, EVIDENCE § 282(a) (3rd ed. 1940); MCCORMICK, EVIDENCE 355 (1954); MORGAN, BASIC PROBLEMS OF EVIDENCE 188 (1954). See also Annot., 56 A.L.R. 1418 (1928); Annot., 74 A.L.R. 849 (1931); Annot., 95 A.L.R. 388 (1935); Annot., 105 A.L.R. 1319 (1936); Annot., 4 A.L.R.2d 761 (1949), and cases cited therein.

9. A clear expression of the balance is given by Justice Learned Hand in Brown v. Walter, 62 F.2d at 798 (2d Cir. 1933), where he states: "There can be no rational excuse, except the flimsy one that a man is more likely to be careless if insured. That is at most the merest guess, much more outweighed by the probability that the real issues will be obscured."

10. Sandomierski v. Fixemer, 163 Neb. 716, 81 N.W.2d 142 (1957); Kuznicki v. Kuszowski, 2 App. Div. 2d 216, 153 N.Y.S.2d 705 (1956); Fleet Carrier Corp. v. Lahere, 184 Pa. Super. 201, 132 A.2d 723 (1957).

Despite the broad language of the Uniform Rules of Evidence, it must be noted that the exclusionary rule is not an absolute one, and under certain circumstances, evidence of the fact that defendant is insured may be admitted in evidence. Generally speaking, it can be said that, if the item of evidence is logically relevant to any material issue in the case other than the bare question of defendant's negligence, and if its probative force is sufficient to outweigh the resulting prejudice, then such item is admissible. In the words of a California court:

> The admissibility of testimony depends on whether or not it tends to prove some issue in the case. The question at issue herein involved the relationship of master and servant. Such testimony therefore was relevant and material and defendants could not have had it excluded upon the ground that it tended to prejudice appellant's case because it tended to show that the partnership carried insurance.[11]

The reasoning of the courts can be succinctly summarized. Evidence of liability insurance coverage is so laden with potential prejudice that it will be excluded from the jury's consideration unless its exclusion under particular circumstances would work a greater hardship than its admission. If it is offered merely to prove negligence, it is so remotely relevant to that issue that its admission would work greater hardship than can be justified by its probative force. If offered to prove some other material issue, its probative force may be so strong as to justify its admission. Thus, evidence of the fact that defendant carried liability insurance has been admitted for the purpose of showing whether a person is an employee or independent contractor,[12] and to prove the ownership of a vehicle involved in an accident.[13] This evidence has also been admitted to show the bias or interest of a witness for the purpose of impeaching him.[14] Again, where the reference to insurance is an integral part of a damaging admission made by defendant, the courts will admit the reference to insurance rather than omit the entire admission.[15]

---

11. Mullanx v. Basich, 67 Cal. App. 2d 675, 155 P.2d 130 (Dist. Ct. App. 1945).

12. See Annot., 85 A.L.R. 784 (1933), and cases cited therein.

13. Pagano v. Leisner, 5 Ill. App. 2d 223, 125 N.E.2d 301 (1955); Rashall v. Morra, 250 App. Div. 474, 294 N.Y.S. 630 (1937).

14. Wilson v. Fredericksen, 94 Cal. App. 2d 361, 210 P.2d 741 (Dist. Ct. App. 1949); Hunt v. Ward, 262 Ala. 379, 79 So. 2d 20 (1955).

15. As the California court said in North v. Vinton, 17 Cal. App. 2d at 214, 61 P.2d at 950 (Dist. Ct. App. 1936):

> [W]hile a reference to the fact that defendant is insured against liability may be highly prejudicial, and courts do not hesitate to set aside verdicts of juries where such evidence is improperly admitted, it is a well-settled exception to the general rule that where a defendant makes a statement which may be fairly construed as an admission or acknowledgement of responsibility and as a part of the same statement makes incidental reference to the fact that he carries insurance, the entire statement is admissible, not to prove the fact of insurance, but solely because the reference to the insurance is part of the admission.

See also Dillon v. Wallace, 148 Cal. App. 447, 306 P.2d 1044 (Dist. Ct. App. 1957).

Also, if plaintiff's counsel propounds a question which calls for proper evidence, the fact that an irresponsive answer includes a reference to insurance will not afford grounds for a mistrial.[16] It should be clear that all of these rips in the shroud of secrecy that surrounds the trial are dictated by the requirements of fairness to both parties. Without them, that ultimate justice which is sought to be served by the general exclusionary rule would be undermined by the very harshness of the rule itself.

The rule which excludes evidence of the fact that the defendant carries liability insurance also operates to exclude evidence of the fact that defendant is *not* insured.[17] Thus, where defendant's counsel deliberately states that defendant is uninsured after the court's direction that such evidence is unwarranted, a mistrial will be declared.[18] The reasoning behind this attitude is likewise clear. Evidence of the fact that defendant carries no insurance is not sufficiently relevant on the issue of liability to outweigh the resulting bias in defendant's favor. Such evidence is tantamount to a plea of poverty, gauged to raise sympathy for the defendant. If the jury realizes that defendant must personally shoulder a damage award, chances for a plaintiff's verdict in an adequate sum are materially diminished. Thus, the cloud of confusion is perpetuated and brought full circle by the exclusion of defendant's evidence that he is not insured. Of course, if the plaintiff injects evidence from which the panel would infer that the defendant is insured, defendant may correct the misimpression by proving that he is not insured.[19] This again is an exception dictated by the desire for fairness.

From the above discussion, it should be clear that existing rules of evidence sharply circumscribe the situations in which liability insurance can be mentioned at the trial. These exclusionary rules are obviously calculated to further the impartial administration of justice. The method selected is the cloud of doubt generated by secrecy. If this policy of secrecy were dependent for its success only upon the happenings at trial, its fruits would be bountiful. Even with the previously discussed exceptions to the exclusionary rule, mention of insurance could be muffled in a high percentage of cases. Unfortunately, this exclusionary rule is not nearly as effective in the trial of a negligence case as its mere recitation might seem to indicate. This is true because the rule in question only operates to suppress insurance

16. Shork v. Higgins, 157 N.Y.S.2d 19 (City Ct. N.Y. 1956); Dinger v. Rudow, 13 Ill. App. 2d 444, 142 N.E.2d 128 (1957).

17. Stevenson v. Steinhaver, 188 F.2d 432 (8th Cir. 1951); King v. Starr, 43 Wash. 2d 115, 260 P.2d 351 (1953); Martin v. Manzella, — Mo. App. —, 298 S.W.2d 453 (1957). See also 5 STAN. L. REV. 143 (1952).

18. King v. Starr, 43 Wash. 2d 115, 260 P.2d 351 (1953); Haid v. Loderstedt, 45 N.J. Super. 547, 133 A.2d 655 (App. Div. 1957).

19. Socony Vacuum Oil Co. v. Marvin, 313 Mich. 528, 21 N.W.2d 841 (1946); Brown v. Murphy Transfer and Storage Co., 190 Minn. 81, 251 N.W. 5 (1933).

information at the trial itself. In most jurisdictions today, there are two sources of insurance information apart from the trial which render the quest of the exclusionary rule abortive and its existence anomalous.

One significant source that tends strongly to dispel that fabric of doubt so laboriously constructed by the exclusionary rule is the common experience of the average juror. His life does not commence with the opening statement to the jury, and ordinary experience will tell him that the great majority of vehicles today are insured against liability. It has been estimated that more than seventy-five per cent of the vehicles in the United States are insured against liability, and the percentage grows annually.[20] In California alone, more than eighty per cent of the drivers were insured in 1952.[21] The average juror appreciates this trend. As an Iowa court has so aptly declared: "He doesn't need a brick to fall on him to give him an idea."[22] In short, the juror will assume that defendant carries liability insurance, and this assumption will likely pierce the shroud of doubt so carefully constructed at the trial.[23] Indeed, the likelihood of this assumption has caused at least one court to make the following observation:

> We think too much is made of the fact that parties to an automobile collision carry insurance. It is safe to assert that the majority of every jury, called to try such a case in the Twin Cities, comes from families owning cars carrying liability insurance on the car they own or drive. Owners of cars, for the protection of their families and guest passengers, carry such insurance. So long as the insurance is not featured or made the basis at the trial for an appeal to increase or decrease the damages, the information would seem to be without prejudice.[24]

Nor should the fact that a juror's assumption is unwarranted in a given case tend to diminish its importance at this juncture. The concern at present is with the ineffectiveness of the exclusionary rule to prevent verdicts resting on prejudice. If it is true that the jury will react unfavorably to the presence of an insurance company, tending to find liability where otherwise it might not, then it makes little difference whether the insurance company is present in fact or in fiction. So long as the jury thinks that an insurance company is defending the case, the injustice will still abide. Where the prejudice

---

20. Maryott, *Automobile Accidents and Financial Responsibility,* 287 ANNALS 83 (1953).

21. Figures released by the California Department of Motor Vehicles. See 5 STAN. L. REV. 144 n.15 (1952).

22. Connelly v. Nolte, 237 Iowa 114, 132, 21 N.W.2d 311, 320 (1946).

23. McCormick speaks of the "inevitable" assumption jurors have today that the defendant is insured. MCCORMICK, EVIDENCE 357 (1954). See also Pavilonis v. Valentine, 120 Ohio St. 154, 165 N.E. 730 (1929); Piechuck v. Magusiak, 82 N.H. 429, 135 Atl. 534 (1926).

24. Odegard v. Connelly, 211 Minn. 342, 345, 1 N.W.2d 137, 139 (1941).

springs from an unfounded assumption, the situation merely assumes a more dissonant tone.

The bare fact that most jurors assume the presence of liability insurance tends, by itself, to undermine the effectiveness of the exclusionary rule. Any doubt which the secrecy at trial might engender in the jurors' minds as to the presence of insurance is substantially diluted by inference from their own experiences. But whatever adverse effects are caused by such an assumption, the gravity of those effects is but incidental when compared with the informational chaos permitted by most courts on the voir dire examination. If the former obstructs the goal of the exclusionary rule, the latter destroys it completely.

In the great preponderance of American jurisdictions today, counsel are permitted on voir dire examination to probe prospective jurors as to their possible affiliation with, or interest in, liability insurance companies.[25] Before the final jury is impaneled, the plaintiff's counsel may elicit from the candidates what connection, if any, they may have with such companies. In some jurisdictions, the disclosures of such a connection will support a challenge for cause,[26] while in others a peremptory challenge appears to be the only recourse.[27] Nevertheless, it is usually held that this right to examine jurors on voir dire as to their connection with insurance companies exists if such information is sought for the purpose of exercising either type of challenge.[28] The reason for the probe is clear. Every litigant is entitled to a fair and impartial trial, and this includes plaintiff as well as defendant. The plaintiff is entitled to a verdict unaffected by any interest which one or more of the jurors may have in the defendant's insurance company.[29] His means of assuring this impartial panel is the use of extensive questioning

25. McCORMICK, EVIDENCE 356 (1954); MORGAN, BASIC PROBLEMS OF EVIDENCE 188 (1954). See also Annot., 4 A.L.R.2d 761, 792 (1949). The vacillating approval of this practice in Ohio is especially interesting. Initially, such questions were not permissible on voir dire. In 1929, a divided court approved the practice in Pavilonis v. Valentine, 120 Ohio St. 154, 165 N.E. 730 (1929). In 1934, the same court overruled the Pavilonis decision in Vegas v. Evans, 128 Ohio St. 535, 191 N.E. 757 (1934). Finally, in 1936, the Pavilonis decision was reinstated by Dowd-Feder Inc. v. Truesdell, 130 Ohio St. 530, 200 N.E. 762 (1936).

26. See Murphy v. Cole, 338 Mo. 13, 88 S.W.2d 1023, 103 A.L.R. 505 (1935). See also N.Y.R. CIV. PRAC. 452.

27. This appears to be the position taken by the Iowa courts. See Raines v. Wilson, 213 Iowa 1251, 239 N.W. 36 (1931); Mortrude v. Martin, 185 Iowa 1319, 172 N.W. 17 (1919).

28. Pacific Transportation Co. v. Talley, 199 Ark. 835, 136 S.W.2d 688 (1940); Schwickerath v. Maas, 230 Iowa 329, 297 N.W. 248 (1941).

29. As was said by a Texas court in Green v. Ligon, — Tex. —, 190 S.W.2d at 742 (1945):

> It is undoubtedly true that in cases where a jury trial is demanded, both litigants are entitled to a jury composed of men free of bias and prejudice and without an interest in the subject matter of the litigation . . . . If counsel has reason to believe that a juror is directly or indirectly interested in the result of a trial to be had, he has a right to question the juror concerning that interest.

on the voir dire examination. If his inquiry reveals a juror's possible bias toward an insurance company, then counsel may challenge his presence on the panel.

The rules which limit the form and scope of the insurance investigation on voir dire are highly varied from one jurisdiction to another.[30] It is generally agreed that counsel must propound the questions in good faith, and if it clearly appears that they are calculated to suggest that defendant is insured, the questions are objectionable.[31] In this regard, it should be noted that the "good faith" shibboleth is usually satisfied by showing that counsel had reasonable cause for believing that an insurance company was actually involved in the case.[32] Consequently, these questions could conceivably be asked where no insurance was involved. Most jurisdictions have developed a rather rigid body of case law which delineates with particularity exactly what questions may be asked. Thus, in some jurisdictions it is permissible to ask prospective jurors about their interest in or affiliation with the particular insurance company involved in the case.[33] In other jurisdictions particular reference is not permitted, and counsel must confine their questions to the juror's interest in "any" insurance company.[34] The different views as to the particular form of questions result, of course, from the attempt of courts to strike an equitable balance between the right of plaintiff to full disclosure of a juror's existing bias, and the right of defendant to avoid any prejudice that might result from disclosure of the fact that he carries liability insurance.[35] Some jurisdictions employ even more elaborate procedures for the purpose of striking this equitable balance.[36] Whether any such balance is possible of attainment seems open to serious question.

This cursory review of common court practices on the voir dire examination should serve to show just how empty is any attempt to police insurance disclosures at the trial. The same jurors who are so carefully sheltered from insurance contamination at the trial itself have already been subjected to

30. See the extensive discussion in Annot., 4 A.L.R.2d 761, 792 (1949). Seemingly, there are as many incidental variations as there are jurisdictions which permit such questioning.

31. Galotti v. Deansboro Supply Co., 248 App. Div. 20, 289 N.Y.S. 535 (1936); Swift v. Winkler, 148 Cal. App. 2d 927, 307 P.2d 666 (Dist. Ct. App. 1957).

32. See Annot., 4 A.L.R.2d 761, 798 (1949).

33. Clark v. Hudson, 265 Ala. 630, 93 So.2d 138 (1957); Williams v. Layne, 53 Cal. App. 2d 81, 127 P.2d 582 (Dist. Ct. App. 1942).

34. Shaddy v. Daley, 58 Idaho 536, 76 P.2d 279 (1938); Ashland Sanitary Milk v. Messersmith, 236 Ky. 91, 32 S.W.2d 727 (1930). See also Rogers v. Lawrence, — Ark. —, 296 S.W.2d 899 (1956).

35. See the discussion by the Texas court in Green v. Ligon, — Tex. —, 190 S.W. 2d 742 (1945). See also Note, 43 MICH. L. REV. 621 (1944).

36. In Oklahoma, the following procedure has been employed: Plaintiff must first ask if the juror has an interest in any corporation. If not, no further questions are asked. If so, plaintiff must ask what type of corporation. If it is not an insurance corporation, no further questions are warranted. See Safeway Cab Serv. Co. v. Minoi, 180 Okla. 448, 70 P.2d 76 (1937).

a barrage of insurance innuendoes and insinuations at their pre-trial examination. Incongruously enough, their inoculation at the trial follows their exposure to the germ on voir dire. These probing questions on voir dire which seek to determine the connection of each juror with liability insurance companies must convey to all but the very dull-witted that insurance is involved in the case. These questions posed on voir dire must have some reason or they would not be asked, and any juror who fails to see the obvious reason behind them might well have his qualifications to sit on the panel reviewed.[37] The complete and utter inconsistency that exists between judicial practice on voir dire and at the trial was drawn by a Colorado court in terms too vivid to be denied expression:

> It is permissible, and rightly so, that each of twelve prospective jurors in a case be asked on voir dire examination whether he is a stockholder, agent, or employee of an insurance company. We have heretofore held that if, during the trial, the same twelve men are advised by inadmissible testimony, whether introduced unintentionally or designedly, that defendant is insured they become ipso facto and instantly as a matter of law too prejudiced to render a fair verdict. If incurable prejudice results in the one case, logically it obtains in the other. If it is not incurable as a matter of fact in the one instance it is not incurable as a matter of law in the other. To attempt a distinction between the two is equivalent to giving weight to the mental processes of an ostrich that puts its head in the sand and assumes the nonexistence of a danger that thereby it is unable to see. To be consistent, if we hold there is incurable vice in a suggestion of such fact during trial, we should also declare that a suggestion of it before trial is an equally incurable vice. . . .[38]

In light of the clear references to insurance which are generally permitted at the voir dire examination, the cogency of the court's position can ill be doubted.

From the foregoing discussion, the anomalous stature of the rule which excludes insurance disclosures at trial should be clear. If it is true, as generally seems to be conceded, that juries will be prejudiced against insurance companies—tending to find liability where none by law exists—then this exclusionary rule seeks a laudable ideal, namely, equal justice under the law. Indeed, if the jurors' sources of insurance information were limited to the four walls of the trial, the rule would enjoy some measure of effectiveness. But under existing conditions, that rule as a defense against the contamination of prejudice assumes almost farcical proportions. In

37. See the instruction of the trial court which was reviewed in Jaeckel v. Funk, 111 Colo. 179, 138 P.2d 939 (1943). The trial judge informed the jurors that if they were intelligent enough to be jurors, they must know that insurance was involved in this case.

38. Johns v. Shinall, 103 Colo. 381, —, 86 P.2d 605, 608 (1939).

reality, it is fighting the wind with a wand, for the generally conceded likelihood that juries will assume the presence of insurance is almost sufficient by itself to discredit the rule. When this circumstance is coupled with the blatant allusions to insurance on the voir dire examination, the *coup de grace* has been administered. These two forces destroy the efficacy of the rule and render its continued existence anomalous. In short, justice is circumvented by the failure to effectively shelter the jury from the insurance factor.

That this condition should not be allowed to continue seems evident. The present exclusionary rule either seeks a desirable objective or it does not: if it does, then it should be granted efficacy by the emasculation of these outside sources of insurance information; if it does not, it should be discarded.

At the outset, it seems clear that to correct the existing rule the courts must decide between two possible courses of action. On the one hand, they could seek to perpetuate the objective now sought by the exclusionary rule. That is to say, they could strive to engender a true state of doubt or uncertainty in the minds of jurors as to whether insurance is actually involved in the case. This, of course, would require substantial implementation of the present exclusionary rule. On the other hand, the courts could drop the whole facade which the exclusionary rule now constructs at the trial, and freely inform the jurors whether insurance is involved in the case. Both courses of action have been suggested, and, it is submitted, either would be an improvement over the state of affairs that now abides in most jurisdictions.

Professor McCormick favors the view that an insurance company's interest in the trial should freely be admitted to judge and jury alike.[39] The existing facade should be dropped, and the conspiracy of silence terminated. Presumably, this could be accomplished by statutes such as those now existing in Louisiana and Wisconsin which allow the insurance company to be joined as a party defendant.[40] At common law, such joinder was not permissible because the liability of the insured was in tort and the liability of the insurer in contract.[41] The results, of course, would be clear. Jurors would no longer assume the existence of an insurance factor because they would know in a given case whether an insurance company were defending the action. Again, there no longer would be need for the cat-and-mouse antics that so often plague the voir dire examination. The present rigidity of the exclusionary rule would be unnecessary, because the courts would police not the bare disclosure of insurance by counsel but rather the prolonged and

39. McCormick, Evidence 358 (1954). See also Note, 20 Cornell L.Q. 110 (1934).
40. LSA-R.S. 22:655 (1958); W.S.A. 85.93 and 260.11 (1953).
41. Smith Stage Co. v. Eckert, 21 Ariz. 28, 184 Pac. 1001 (1920).

undue emphasis on that factor. While there is much to commend a straightforward practice such as this, still there is much that it leaves to be desired. In favor of the practice, it could be said that the insurance company is a real party in interest and, as such, should enjoy no more favorable position than when it is sued directly. As one writer has aptly said, such a procedure would "clear the air."[42] The more cogent reasons behind this position are well summed up in the words of Professor McCormick:

> They [the jurors] will then make some assumptions as to the capacity of the insurance company to pay. These are no different from similar assumptions as to the capacity to pay of other corporations who may be parties of record before them. The corrective is not a futile effort at concealment, but an open assumption by the court of its function of explaining to the jury its duty of deciding according to the facts and the substantive law, rather than upon sympathy and ability to pay.[43]

Despite these reasons, one is inclined to wonder whether such a crass confession of insurance would not have ill effects of greater consequence than any benefit it produces. Certainly, it does not conquer the problem of jury prejudice. Rather, it connotes a surrender of despair because of what Professor McCormick labels the "futile effort at concealment." If the courts are correct in assessing a jury prejudice against insurance companies, then that prejudice would be equally potent when jurors are freely informed of the presence of insurance. Such a practice would merely bow in despair before a recognized injustice, instead of taking positive steps to obviate the cancer. At least this would be true without any "open assumption by the court of its function of explaining to the jury its duty of deciding according to the facts and the substantive law," such as Professor McCormick suggests. And would such an explanation by the court alter the result? Could such an instruction operate as the necessary emotional cathartic? It seems highly doubtful that it could. The existing prejudice is grounded in emotion and doubtless would be unshaken by the shafts of reason available to the judge. The feeble nature of instructions for this purpose was graphically depicted by a federal court which, in speaking of the prejudice ignited by insurance, remarked that:

> [T]he poison is of such character that, once being injected into the mind, it is difficult of eradication. Where it is allowed to remain during the whole course of a trial, and by persistent unrebuked references is allowed to influence the jurors' consideration of all the other evidence during the trial, the antidote of the final instruction to disregard the testimony is ineffective. The removal of the fly does not restore an appetite for the food into which it has fallen.[44]

42. Note, CORNELL L.Q. 110, 112 (1934).
43. MCCORMICK, EVIDENCE 358 (1954).
44. James Stewart & Co. v. Newby, 266 Fed. 287, 295 (4th Cir. 1920).

Perhaps the strongest objection to the schemata offered by Professor McCormick would come from the plaintiffs' camp when no insurance company was involved in the case. On those occasional instances when no insurance company was joined as a party defendant, the jurors would realize that the burden of any award would fall upon the defendant personally. As a consequence, it seems that their sympathies would lie with defendant, and plaintiff's chances for a verdict in an adequate sum would be correspondingly diminished. Certainly, this would be true if there is any reason at all behind that aspect of the exclusionary rule which now refuses a defendant's offer to prove that he is not insured.[45] Indeed, such a procedure would seem to be a mere variant of the "inadmissible plea of poverty."[46]

In view of the weakness inherent in the aforementioned scheme, the wisdom of inaugurating it seems open to serious question. While it might be some improvement over the existing practice, still, many of the present evils would abide the change. The outlet for jury prejudice would still exist and attempts to plug that outlet by reasoning with jurors would prove largely futile. Seemingly, the practice which will most closely approximate perfect impartiality in jury deliberations is the practice which will successfully close the outlet for jury prejudice. The present exclusionary rule, while seeking this goal, is ineffective primarily because doubt is dispelled from sources outside the trial, rendering the attempt at concealment futile. Whether all attempts at concealment would necessarily be futile, as Professor McCormick seems to imply, is open to doubt. The writer submits that a system can readily be devised which will largely assure an impartial jury. This can only be accomplished, however, by closing the outside sources of insurance information which now plague the exclusionary rule's effectiveness.

Of those two outside sources of insurance information which combine to defeat the goal of the exclusionary rule, certainly the voir dire examination is by far the most damaging. When a juror's belief that insurance is present in the case stems from his own general knowledge that most people carry insurance, he will still be in substantial doubt as to whether this defendant conforms to the common pattern. He would realize that his own general knowledge of behavior patterns is a precarious basis from which to infer the presence of insurance in the case on which he sits and, consequently, would be less likely to let that knowledge play a part in his deliberation. But when he and his fellows are subjected to a battery of insurance questions at the outset of the very case on which he sits, the presence of liability insurance is too obvious to be ignored. There is then no problem of deducing the presence of insurance from a general knowledge of what most people do. Rather, the juror is practically told, in so many words, that insurance is

45. See p. 23 *supra.*
46. Piechuck v. Maguziak, 82 N.H. 429, 135 Atl. 534 (1926).

important in the case. Without question, the major obstacle to the effective operation of the exclusionary rule is the wide range of questioning permitted on voir dire. The allusions to insurance on the voir dire examination constitute the only major challenge to the web of doubt so carefully spun by the exclusionary rule. Consequently, if this ravishment of the insurance issue on voir dire could be effectively throttled, the policy of the exclusionary rule would be well on its way to success.

The present practice on voir dire is said to be tolerated because of the plaintiff's right to an impartial jury. No one will deny him that right. And yet, if that right can be effectively secured without the blatant insurance innuendoes now permitted, justice would cry for their cessation. The simple fact is that such right can be secured without the broad range of questioning now permitted. Indeed, it can be secured effectively without any questioning on voir dire concerning possible insurance affiliation.

In the first place, it might naturally be queried whether any such information can possibly help the plaintiff to secure an impartial panel. Even if some jurors have an interest in defendant's insurance company, how can such a connection operate to the detriment of plaintiff if those jurors do not know that their company is involved in the case? If jurors were not informed on voir dire of the presence of insurance, it is difficult to appreciate how their affiliation could possibly prejudice the plaintiff. The seeds of bias cannot take root in jury ignorance. This is what an Ohio court had in mind when it queried, "if it is not revealed that the defendant has an insurance contract, what difference could it make that some juror is interested in insurance?"[47] Indeed, there seems to be no reason in justice why the courts could not deny plaintiff the right to seek such information, unless it lies in the possibility that the insurance factor might be brought out during the trial.

Even if the plaintiff is thought to be entitled to such information, the crude practice now permitted in most jurisdictions is neither necessary nor desirable. Instead, why could not the court, in lieu of the questions now permitted on voir dire, substitute the simple expedient of a questionnaire. All prospective jurors, either when first enrolled on the jury list or at some later time, could be required to complete a questionnaire giving detailed information as to any affiliation with or interest in liability insurance companies. This practice has been suggested before,[48] and employed by at least one jurisdiction with apparent success.[49] The virtue of this method is

47. Vegas v. Evans, 128 Ohio St. 535, —, 191 N.E. 757, 760 (1934).

48. See the dissenting opinion by Justice Marshall in Pavilonis v. Valentine, 120 Ohio St. 154, 165 N.E. 730 (1929). See also Note, 11 OHIO ST. L.J. 370 (1950); Note, 43 MICH. L. REV. 621 (1944).

49. See the dictum of the Vermont court in Wilbur v. Towrangeau, 116 Vt. 199, 205, 71 A.2d 565, 569 (1950).

obvious. That information which is elicited from jurors concerning their insurance connections would not be directly associated in their minds with the case on which they sit, as is true under the present system. The insurance issue would not be buffeted about before their very eyes, and they could enter the trial itself free from the usual tarnish. The plaintiff could still have all the information which it is now possible to bleed from the jurors on the voir dire examination, and they would not be rudely reminded of the insurance spectre at the very time the trial commenced. The suggested procedure seems flawless, and it is doubtful that any other device could so equitably balance the rights of both parties to the trial.

If the insurance issue could be thus circumvented on voir dire, one problem would remain for consideration. This concerns the assumption by jurors, based on their common experience, that insurance is carried by the defendant. As noted previously, this thorn does not assume nearly the proportions of the one raised by the voir dire examination.[50] Yet, it could conceivably be of sufficient moment to disturb the jurors' emotional equanimity. These occasions would be rare, however, and the major obstacle to an unprejudiced panel would be obviated with correction of the voir dire procedure. However, the problem is still of sufficient consequence to deserve consideration.

Because the fact of such an assumption by jurors is unpredictable, both in its occurrence and in the extent of its damage, preventive measures would seem impossible. The only way to forestall such an assumption is to re-educate the populace on the validity of inferences from the general to the particular. This being true, remedial measures in the form of court instructions would seem to be the only alternative. Despite the feeble results that such instructions usually have, it is submitted that they will be much more effective under circumstances where the insurance factor has not been bludgeoned into the jurors' minds at the very outset of the trial. In addition, the writer would offer another facet to the usual instruction given. Instead of merely telling the jurors that they are not to speculate on the question of whether defendant carries liability insurance but are to decide strictly in accordance with the law and the facts, they should also be told that such speculation would be unfair to both parties concerned, not only because the jurors have no way of knowing whether defendant is insured, but also—and especially—because even if the defendant were insured the jury would have no way of readily knowing the policy limits of his coverage. Thus, jurors who were anxious to assist the injured plaintiff at what they thought to be the expense of an insurance company, might be placing a heavy financial burden on the individual defendant, even if perchance they were correct in assuming the presence of insurance. While the writer has never seen

50. See p. 30 *supra*.

this latter instruction suggested, it is submitted that such a caveat would make even the most crusading of jurors expunge the thought of insurance from his deliberations. In the usual case the jurors would hear no mention of insurance from the commencement of the proceedings on voir dire until the time for their decision was at hand. With the improvement of the voir dire procedure, no provocative insinuations would call their attention to the presence of insurance. The web of doubt would be successfully spun, and its only challenge would be the jurors' penchant to liken the defendant to most drivers. The suggested instruction would then, seemingly, compound their uncertainty and spotlight the dangers of any such adventuresome assumption. In this manner, the *raison d'etre* of this exclusionary rule seems justified.

The purpose of the exclusionary rules is to assist the jurors by eliminating largely unrelated and confusing matter in order to insure intelligent decisions based on a clear grasp of the facts. In addition, the rule excluding evidence of liability insurance seeks a laudable goal of impartial judgment by excluding a prejudicial factor from the jury's consideration. But the rule is largely ineffective because outside sources of insurance information still can bring the prejudicial factor before the jury's attention. This condition, it is submitted, should be rectified in view of the incidence of legal conflicts involving liability insurance. While the methods suggested for this purpose may not be entirely effective, they should improve the condition of affairs which now exists in most jurisdictions. As a result, it is hoped that the efficacy and future of trial by jury will be strengthened.