Volume 70
Issue 1 *Dickinson Law Review - Volume 70, 1965-1966*

10-1-1965

The Insurance Syndrome and the Pennsylvania Courts

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COMMENT

THE INSURANCE SYNDROME AND THE PENNSYLVANIA COURTS

With the increasing number of personal injury suits coming before the courts, there is an urgent need to reexamine the general rule of excluding evidence of liability insurance coverage in a trial for personal injuries.[1] The rule not only renders the evidence inadmissible, but if perchance it is mentioned at the trial a motion to withdraw a juror will be entertained and a new trial granted. The rationale of the exclusionary rule is the immateriality and irrelevancy of the fact of insurance to the issue of negligence.[2] Furthermore, the courts reason that any probative value it might have is greatly outweighed by the inherently prejudicial effect of the disclosure upon the jury. As a consequence of this prejudice the jury will award a verdict to the plaintiff not because the defendant is negligent but because the verdict will be paid for by an insurance company. For this reason it would be more correct to speak of prejudice accruing to the insurance company rather than to the defendant. The rule, although one of fairness in theory, actually is detrimental to the administration of justice in that it constantly leads to new trials based on technical errors of procedure.[3] Moreover, the uncertainty existing as to the status of the rule reposes an almost unlimited discretion in the trial judge to either follow the rule or to apply one of its numerous exceptions. This uncertainty is also reflected in the variant decisions of both the Superior and Supreme Courts of Pennsylvania.[4] This comment will delineate the rule's operative orbit by examining its numerous exceptions. Consideration will be given to the future course of the rule in the Pennsylvania courts.

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1. "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 to prove negligence or other wrongdoing." UNIFORM RULES OF EVIDENCE 54. See also 2 WIGMORE, EVIDENCE § 282(a) (3rd. ed. 1940); MCCORMICK, EVIDENCE 355 (1954); 1 HENRY, EVIDENCE § 14 (1953); 21 APPLEMAN, INSURANCE LAW AND PRACTICE §§ 12831-41 (1962); Annot., 4 A.L.R.2d 761 (1949).

2. In Brown v. Walter, 62 F.2d 798 (2d Cir. 1933), Justice Learned Hand addressed himself to the probative value of insurance on the issue of negligence. "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 than outweighed by the probability that the real issues will be obscured." *Id.* at 800.

3. See 2 WIGMORE, *op. cit. supra* note 1.

4. *Compare* Lenahan v. Pittston Coal Mining Co., 221 Pa. 626, 70 Atl. 884 (1908), *with* Kaplan v. Loev, 327 Pa. 465, 194 Atl. 653 (1937).

DEVELOPMENT

The erratic, but steady, growth of the exclusionary rule can best be developed by comparing the most recent pronouncement by the Pennsylvania Supreme Court[5] with the original declaration of the rule.[6] In a 4-3 decision the court in *Nicholson v. Garris*[7] affirmed the grant of a new trial when the word "insurance" was mentioned by plaintiff's counsel. The defendant in a negligence action had taken the stand to testify in support of his counterclaim for damages sustained by his equipment. On cross-examination plaintiff's counsel produced the defendant's income tax return and commenced to question the defendant as to his earnings and expenses. Thereupon the following colloquy occurred: "Q. Mr. Parr, I show you your income tax return for 1957 . . . and ask you how much your return states you paid to your drivers. . . . A. $2,339.31 [here followed the costs of ten specific items]. Q. *Insurance.*"[8] Before the defendant could answer his counsel objected and moved to withdraw a juror. Because the above colloquy occurred during the last hour of a seven day trial, the trial judge denied the motion and admonished the jury to disregard the question. The trial judge later granted a new trial based solely on the injection of insurance into the trial.

The decision failed to consider several interesting factors: (1) The question was never answered;[9] (2) the defendant, being a public carrier, was required by law to have protection against liability;[10] (3) the reference occurred during cross-examination when counsel was attempting to discredit a witness;[11] (4) the lower court directed the jury to disregard the reference to insurance; and (5) there was no indication of the nature of the insurance mentioned. Addressing itself to the fifth factor, the trial

5. Nicholson v. Garris, 418 Pa. 146, 210 A.2d 164 (1965).
6. Hollis v. United States Glass Co., 220 Pa. 49, 69 Atl. 55 (1908).
7. 418 Pa. 146, 210 A.2d 164 (1965).
8. Record, p. 670a. (Emphasis added.)
9. Since counsel was reading from a copy of defendant's income tax return the want of a reply was not significant.
10. PA. STAT. ANN. tit. 66, § 1355 (1959) requires a public carrier to carry liability insurance unless it can qualify as a self-insurer. In this case the jury had no way of ascertaining whether the defendant was a self-insurer. *But see* Croft v. Hall, 208 S.C. 187, 37 S.E.2d 537 (1946) wherein the court stated where "insurance is required by a public act which all citizens are presumed to know, the jurors already have knowledge of such coverage and no prejudice can result [from its disclosure]." *Id.* at 193, 37 S.E.2d at 539.
11. The lower court intimated that the cross-examination was not conducted in good faith or for a legitimate purpose. The court said that there was no possible evidential value to be gained by having a cost breakdown for each item of expense. Record, p. 867(a). On appeal, the supreme court stated "it is beyond doubt that counsel asked the question about Parr's expenditure for insurance intentionally. . . ." 418 Pa. at 152, 210 A.2d at 166.

judge stated: "This argument is fallacious because the mention of insurance in reference to the owner of a small fleet of tractor and trailers in which one is involved in a collision definitely means liability insurance to the jury."[12] He also admitted that his admonition to the jury failed to cure the error. The dissenters[13] found this reply somewhat less than satisfactory. They question how the lower court concluded that the insurance referred to was liability insurance instead of fire insurance, cargo insurance, theft insurance, life insurance, hospitalization insurance or any of the myriad other forms of insurance available to businessmen.[14] This decision was "an extreme manifestation of the insurance syndrome"[15] in their opinion. The majority, notwithstanding these probing questions, upheld the lower court because it "was in a much better position than we are to evaluate . . . the effect of this reference to insurance on the jury."[16] *Nicholson* represents the most extreme extension of the exclusionary rule to date. Indeed it is difficult to perceive of any further extension because the mere mention of the word "insurance now presents sufficient grounds to grant a new trial.

The rule as announced in *Nicholson* bears but a slight resemblance to its ancestor, *Hollis v. United States Glass Co.*[17] The issue in *Hollis* arose when plaintiff's counsel remarked in his closing statement to the jury that "it is nothing to the glass company what this verdict should be; it is the insurance company that will pay the verdict."[18] In reversing the lower court and granting a new trial the court adopted the exclusionary rule:

> [T]he bringing to the attention of the jury the fact that the defendant in an action for personal injuries was insured [is] cause for reversal, whether done by the admission of testimony or the statement of counsel, or the offers of proofs, or by questions asked witnesses or jurors.[19]

Two prior decisions dealing with improper remarks by counsel were cited as authority for the rule. *Walsh v. Wilkes-Barre*[20] involved a remark by plaintiff's counsel that final liability would be on the lot owner and "the Lehigh and Wilkes-Barre Coal Company owns the lot."[21] It was believed that the remark would tend to increase the award because of the jurors' known antag-

12. Record, p. 867a.
13. J. J. O'Brien, Musmanno and Cohen.
14. 418 Pa. 146, 153, 210 A.2d 164, 167.
15. *Id.* at 154, 210 A.2d at 167.
16. *Id.* at 152, 210 A.2d at 167.
17. 220 Pa. 49, 69 Atl. 55 (1908).
18. *Id.* at 51, 69 Atl. 55-56.
19. *Ibid.* Most of the rule was obiter dictum since the court was only faced with an improper statement by counsel.
20. 215 Pa. 226, 64 Atl. 407 (1906). The trial judge did not admonish the jury to disregard the statement. Nor was it withdrawn from the jury.
21. *Id.* at 226, 64 Atl. at 408.

onism to large corporations. In the second case, *Saxton v. Pittsburgh Ry.*,[22] counsel for the plaintiff made this appeal to the jury: "I ask you to make this company out of its million to put on that stump a foot as good as the original."[23] This statement, remarked the court, was an invitation "to find a verdict on false grounds."[24] Clearly these cases represent obvious attempts to prejudice the jury. Counsels' motives cannot be mistaken on such occasions. A cursory examination of *Hollis*, *Walsh*, *Saxton* and *Nicholson*, however, reveals certain fundamental distinctions. In *Hollis* counsel made a potentially prejudicial remark to the jury; the reference in *Nicholson* was an innocuous question in the course of cross-examination. There was no doubt remaining in *Hollis* that the defendant was insured and that the insurance company would pay the verdict, while in *Nicholson* there was serious doubt whether the defendant was protected by insurance. In fairness to the *Nicholson* court, however, it must be noted that the exclusionary rule had been previously corrupted in a long line of cases.

This corrupting process commenced with *Lenahan v. Pittston Coal Mining Co.*,[25] decided in the same year as *Hollis* and, more surprisedly, by the same court. The court, after repeating the *Hollis* rule, added this caveat: "The rulings [of the cited cases] will be strictly adhered to and rigidly enforced, and no evasion or circumvention of them by indirection will be tolerated."[26] With equal force and clarity the court proceeded to circumvent its own prior unequivocal ruling by announcing an exception to the rule. That exception pertains to a party's constitutional right to cross-examine a witness.[27] Thus *Lenahan* has assumed a dual character and has become a dream case for both plaintiff's and defendant's counsel. It can be cited for the proposition that the exclusionary rule is rigid and no equivocation will be permitted. Plaintiff's counsel can cite it as allowing certain exceptions to supercede the rule's efficacy since *Lenahan* impliedly condones the application of other exceptions. This proposition is supported by the fact that the majority of cases which have been appealed to the higher courts of Pennsylvania subsequent to *Lenahan* were decided by the application of an exception rather than by the application of the rule itself.

This is not to suggest that the rule is only paid lip service by

22. 219 Pa. 492, 68 Atl. 1022 (1908). *Cf.* Curran v. Lorch, 243 Pa. 247, 90 Atl. 62 (1914) (error to refuse motion to withdraw juror when insurance was mentioned on cross-examination); Brown v. City of Scranton, 231 Pa. 593, 80 Atl. 1113 (1911) (evidence of indemnity bond inadmissible); see also Conover v. Bloom, 269 Pa. 548, 112 Atl. 752 (1921).

23. 219 Pa. at 495, 68 Atl. at 1022.

24. *Id.* at 495, 68 Atl. at 1023.

25. 221 Pa. 626, 70 Atl. 884 (1908).

26. *Id.* at 629, 70 Atl. at 884.

27. See Alford v. United States, 282 U.S. 687 (1931).

the court.[28] To the contrary, the rule has vigorous vitality where an exception cannot be rationalized. Thus when defendant's counsel reiterated in his summation to the jury that since there was insurance in the case a false recovery would cause insurance rates to rise and ultimately the jurors would be the losers, a new trial was granted and affirmed. With characteristic frankness, Justice Musmanno replied: "To throw over the jury an entangling net of self-interest would be to make a mockery of justice."[29] Another interesting case, *Patton v. Franc*,[30] presented a situation in which defendant's counsel solicited from the defendant on direct examination the existence of insurance. He then asked whether the defendant had any financial responsibility in the outcome of the case to which the defendant answered in the negative. The theory behind such an examination was to bolster the defendant's credibility by showing that he had no motive to tell a falsehood since he would not be monetarily affected by an adverse verdict. The theory is fallacious because more than money is at stake in a suit of this nature. Reputation and vanity are also involved. There is also a strong likelihood that the defendant's insurance premiums would be increased, if not cancelled, by an adverse verdict.

A novel approach to circumventing the rule was attempted in *Trimble v. Merloe*,[31] decided one year prior to *Nicholson*. In his closing remarks to the jury plaintiff's counsel said that jurors often ask counsel why insurance is not mentioned at the trial. Replying to his rhetorical question, he stated that it is unimportant whether the defendant was insured and that they should arrive at a verdict free from any prejudice. He then emphasized that at no time did he mention whether the defendant had insurance. A bare majority of the court stated that it would be naive to accept the unrealistic assumption that counsel's argument was not a conscious and deliberate attempt to build his case.[32] The dissent emphasized the value of such a comment in aiding the jury to remove irrelevances which may lurk in their minds.[33] *Trimble* can be distinguished from both *Patton* and *Finney* in that the jury had no way of knowing whether the defendant had insurance. It has been suggested that a charge of this nature by the court at the culmination of every negligence trial would "expunge the thought

28. *But see* Fleischman v. Reading, 388 Pa. 183, 198, 130 A.2d 429, 436 (1957) (B. Jones, J., dissenting) wherein it is stated that the majority honors the rule only in its breach.

29. Finney v. G. C. Murphy Co., 400 Pa. 46, 50, 161 A.2d 385, 387 (1960).

30. 404 Pa. 306, 172 A.2d 297 (1961).

31. 413 Pa. 408, 197 A.2d 457 (1964).

32. The defendant would face a dilemma if such a comment was admissible. If he did not comment he would be at a disadvantage. A comment by the defendant, however, might be considered a waiver of his objection.

33. 413 Pa. 408, 413, 197 A.2d 457, 460.

of insurance" from every juror's deliberations.[34] Perhaps the only error committed in *Trimble* was that counsel's perceptive comment was spoken five or ten years too early.

The exclusionary rule also applies to cases where the plaintiff's insurance coverage is revealed. The leading case, *Lengle v. North Lebanon Township*,[35] centered around the disclosure that the plaintiff's children had received compensation payments. The offer of proof to admit both the agreement and the amounts received was to show that the plaintiff could not maintain a cause of action in the name of her children. Reversing a verdict for the defendant, the court stated that regardless of the offer of proof the real purpose was to show that the children were being taken care of by the state. The court concluded that under such circumstances plaintiff's chance of recovery was materially injured. A similar issue was presented in *Blatt v. Davis Construction Co.*[36] Here, as in *Lengle*, both the terms of the contract and amount received were admitted over plaintiff's objection. Ostensibly the purpose for its admission was to attack the plaintiff's credibility, but it was held that such evidence could not possibly establish the point in controversy. This branch of the exclusionary rule is predicated on the assumption that while workmen's compensation payments are adequate from the legislative viewpoint, they should not be considered as representing total compensation for a wrong.[37] An injured party is regarded as having an independent cause of action against a tortfeasor other than the employer without regard to any payments received from an outside source.[38]

A refusal to apply the rule in these situations would reveal that fairness is not the real motive behind the rule. This is especially true when there is not only a mere reference to insurance payments but the admission of both the agreement and the amount received under the contract. Nothing is left to the juror's imagination in such cases. The natural reaction would be to deduct a corresponding sum from the verdict.

It is difficult to reconcile the court's decision in *Rice v. Shenk*[39] with *Blatt*. Here plaintiff admitted under cross-examination that he had received payments from an insurance company. A verdict

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34. McDonald, *Insurance Against Liability: An Anomaly in Negligence Cases*, 65 DICK. L. REV. 19, 33 (1960).

35. 274 Pa. 51, 117 Atl. 403 (1922).

36. 184 Pa. Super. 30, 133 A.2d 576 (1957).

37. See, *e.g.*, Lobalzo v. Varoli, 409 Pa. 15, 185 A.2d 557 (1962); Palandro v. Bollinger, 409 Pa. 296, 186 A.2d 11 (1962); *cf.* Moidel v. Peoples Natural Gas Co., 397 Pa. 212, 154 A.2d 399 (1959); Ridgeway v. Sayre Electric Co., 258 Pa. 400, 102 Atl. 123 (1917).

38. The employer or insurance company has the right to be subrogated in any verdict recovered for the amount to be paid by virtue of the Workmen Compensation Board's award. PA. STAT. ANN. tit. 77, § 671 (Supp. 1964).

39. 293 Pa. 524, 143 Atl. 231 (1928).

for the defendant was affirmed because the jury had found for the defendant and, therefore, it was impossible for the evidence to minimize the damages. The fallacy of this argument is obvious. The very reason why the jury did not find for the plaintiff may have been the prejudicial effect of the evidence. Such evidence can do more than mitigate damages; it can defeat a favorable verdict as well.

EXCEPTIONS TO THE EXCLUSIONARY RULE[40]

Disclosure On Cross-examination

The exclusionary rule is not an absolute one. Theoretically, whenever the evidential value flowing from the disclosure of insurance is greater than the possible prejudice to the defendant, the reference to insurance will be admitted. Nowhere is this fine balancing act more acute than in the right to cross-examine a witness. Cross-examination is more than a privilege, it is a constitutionally protected right.[41] It is not surprising, therefore, that the exclusionary rule must give ground to such a right when in conflict. The Pennsylvania Supreme Court so held in *Lenahan v. Pittston Coal Mining Co.*[42] In this case defendant's co-counsel was called to impeach one of the plaintiff's witnesses. On cross-examination he admitted that he represented a casualty company which had insured the defendant. The court, in affirming a verdict for the plaintiff, upheld the right to cross-examine by holding that:

> The right is not to be denied or abridged because incidentally facts may be developed that are irrelevant to the issue and prejudicial to the other party. This chance the party takes when he calls the witness.[43]

This decision preserves the right to impeach a witness who is biased or has an interest in the case when the cross-examination is conducted in good faith. Unfortunately this good faith requirement has lead some courts to the conclusion that every mention of insurance is an act of bad faith.[44]

Despite the soundness of the exception, it stands in serious doubt as a result of the decision in *Kaplan v. Loev.*[45] In *Kaplan*, the plaintiff sought to attack the credibility of defendant's witness. The issue was whether the witness, who was a passenger in defendant's car at the time of the accident, had signed a release

40. Several of the following cases could be classified under more than one category. In this comment they are classified under that category which the author considers the chief reason for the decision.

41. Alford v. United States, 282 U.S. 687 (1931).

42. 221 Pa. 626, 70 Atl. 884 (1908); See DiTommaso v. Syracuse Univ., 172 App. Div. 34, 158 N.Y. Supp. 175 (1916).

43. 221 Pa. at 629, 70 Atl. at 885.

44. See note 11 *supra.*

45. 327 Pa. 465, 194 Atl. 653 (1937).

with defendant's insurance company. A conference at side bar established that the witness had signed a release. The lower court denied plaintiff the right to cross-examine on the grounds that in order for the witness to tell the *whole truth* about the transaction, the jury might discover that the defendant was covered by insurance. A verdict for the defendant was affirmed, in a 4-3 decision, on the assumption that the case involved was an adroit attempt, executed in bad faith, to reveal before the jury the "forbidden" fact. A moment's reflection will disclose the untenability of the decision. It holds that a witness may claim and accept money from the defendant's insurance company and then deny under oath that the defendant was not liable for the accident in which the witness claimed damage without fear of cross-examination.[46] To say that counsel was acting in bad faith is equally indefensible. It is doubtful whether *Kaplan* would be followed today.[47] The case, however, does stand for the wide and practically complete discretion in the trial judge in the matter of cross-examination.

Participation by Insurance Company

A related conflict is posed when the plaintiff gives a statement to an insurance adjuster. The statement is subsequently introduced into evidence as a declaration against interest. A question then arises whether the plaintiff may divulge the identity of the person who took the statement. *Fleischman v. Reading*[48] answered this question in the affirmative:

> Candor and fair dealing dictate that when an insurance company undertakes to participate in a trial to the extent that it produces a paper, allegedly signed by the plaintiff, who repudiates the paper, the insurance company should not be allowed to conceal its interest behind a misty curtain of anonymity.[49]

A subsequent case, *Beardsley v. Weaver*,[50] suggests a backtracking from *Fleischman*. On similar facts the Pennsylvania Supreme Court reversed an order for a new trial by the court en banc following a verdict for the defendant. The trial judge had denied plaintiff the right to testify that the scrivener of his statement was an insurance agent. The plaintiff, however, admitted that the averments in the statement were correct. Therefore, the credibility of the scrivener was not in issue. On this factual distinction contrary decisions were rendered.

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46. *Id.* at 478, 194 Atl. at 661 (dissenting opinion).
47. See Fleischman v. Reading, 388 Pa. 183, 130 A.2d 429 (1957).
48. *Ibid.*
49. *Id.* at 190, 130 A.2d at 433. See Taylor v. Ross, 50 Ohio L. Abs. 577, 78 N.E.2d 395 (Ct. App. 1948); Webb v. Hoover-Guernsey Dairy Co., 138 Ore. 24, 4 P.2d 631 (1931).
50. 402 Pa. 130, 166 A.2d 529 (1961).

An example of how the rule can effectively deprive a party of making known pertinent facts is emphasized in *Sloniger v. Enterline*.[51] Defendant's counsel, on cross-examination of plaintiff's witness, questioned her about a conversation which she had with one of plaintiff's counsel prior to the trial. The trial judge permitted this cross-examination but refused to allow the witness to testify that she had spoken with defendant's counsel (who was representing defendant's insurance company) prior to the conversation with plaintiff's counsel for fear she might blurt out that he was from an insurance company. *Query*, is the rationale of the exclusionary rule one of fairness toward one party only? If so, the rule is untenable. Certainly fairness dictates that the rule should not be utilized to prevent a party from rebutting a damaging inference by revealing the truth. The law should not condone an evidential rule which favors one party over another, for the real purpose of a trial is to arrive at the truth. The impact of the *Sloniger* rule is to suppress the truth rather than to disclose it.

Vague or Indefinite Reference

This exception is best illustrated by *King v. Keller*[52] wherein the court stated that "the thing prohibited by the rule is bringing to the attention of the jury in any way the fact that the defendant . . . is protected from liability by an insurance company which must pay any verdict rendered."[53] A fortiori, any reference to an insurance company or representative which is so vague that it is impossible for the jury to determine whether the defendant is insured does not violate the rule. The exception is most often called into play when a witness states that he gave a statement to an insurance man or conversed with a lawyer from the insurance company. Statements such as "there was an adjuster on it and he looked it over and he agreed to it"[54] and "one of the insurance company's lawyers came to my place and told me to tell the story"[55] are typical expressions which were held to be so vague as to be nonprejudicial.[56]

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51. 400 Pa. 457, 162 A.2d 397 (1960).

52. 90 Pa. Super. 596 (1927). There were four separate references to insurance during the trial. All the references were made by the plaintiff or plaintiff's witnesses.

53. *Id.* at 605.

54. Richardson v. Wilkes-Barre Transit Corp., 172 Pa. Super. 636, 95 A.2d 365 (1953 no error in refusing to withdraw juror).

55. McCaulif v. Griffith, 110 Pa. Super. 522, 168 Atl. 536 (1933). The lower court, after denying defendant's motion to withdraw a juror, charged the jury to disregard any mention of insurance. An exception was subsequently taken to this charge. Replying to this exception the superior court stated that "defendant should not in fairness, urge as error the portion of a charge necessitated by what counsel urged in his own objection to testimony in itself not objectionable." *Id.* at 535-36, 168 Atl. at 541.

56. The injection of insurance into the trial is apparently prejudicial

This exception affords the trial judge and, to a lesser degree, the appellate courts, tremendous discretion in enforcing the rule. For instance, the reference to insurance in *Nicholson* was undoubtedly vague, yet a new trial was granted and affirmed.[57]

Unresponsive and Unexpected References

Frequently a witness will volunteer an answer which is unresponsive to the question asked. In a negligence trial the unresponsive answer might refer to an insurance company or agent. The courts recognizing the complete innocence of counsel, have adopted a lenient attitude toward such occurrences. Consequently, another exception to the exclusionary rule was conceived. It is submitted, however, that a reference to insurance is either prejudicial or it is not, irrespective of how it is injected into the trial, unless, of course, the reference is within another exception. The courts, nonetheless, have failed to draw any such distinctions in this area.

The reference in *Denney v. Krauss*[58] positively established that the defendant was protected by liability insurance. The defendant on cross-examination was asked whether he had had any conversation with a particular passenger in his car while he was driving his wife to the hospital following the accident. He replied that they were taking her to the hospital and that he had insurance. This reference to insurance was found to be nonprejudicial, but the court may have been influenced by the fact that it was the defendant who injected insurance into the trial. The unresponsive reference in *Keefer v. Lombardi*,[59] on the other hand, was indefinite and could have come within the purview of the vagueness exception. A witness was asked whether he was required to determine the size of dynamite blasts in his work as an inspector. He replied, "yes, and we had the insurance companies."[60] In another case decided under this exception, the reference to insurance was

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per se. Therefore a finding that the verdict was excessive is not necessary. However, a few cases do state or imply that the verdict was excessive, *e.g.*, Nicholson v. Garris, 418 Pa. 146, 210 A.2d 164 (1965), or not excessive, *e.g.*, King v. Keller, 90 Pa. Super. 596 (1927); Lambert v. Polen, 346 Pa. 352, 30 A.2d 115 (1943).

57. *But see* Rodgers v. Ashley, 207 F.2d 534 (3d Cir. 1953) (reference to insurance company nonprejudicial); Bortz v. Henne, 415 Pa. 150, 204 A.2d 52 (1964) (per curiam) (reference to insurance adjuster nonprejudicial); Amey v. Erb, 296 Pa. 561, 146 Atl. 141 (1929) (reference to doctor from insurance company nonprejudicial).

58. 394 Pa. 380, 147 A.2d 369 (1959). A second reference to an insurance representative was also made by the defendant. This statement was held to be within the vagueness doctrine.

59. 376 Pa. 367, 102 A.2d 695 (1954); *cf.* Hendrickson v. Quaker City Cab Co., 84 Pa. Super. 218 (1924) (witness volunteered statement relating to men from an insurance company).

60. 376 Pa. at 374, 102 A.2d at 698.

induced by the court itself.[61] In reply to the trial judge's question concerning the location of a certain piece of paper, the witness stated that he took it to the shop so that they could give it to the insurance people. This reference was held to be unresponsive to the question asked and therefore did not violate the rule.

Relevancy to Issue of Negligence

There are two issues to be resolved in every negligence suit: (1) Is the defendant negligent and (2) if negligent, what damages were suffered by the plaintiff. Usually any evidence which has probative value to these issues may be admitted. The reason why the fact of insurance liability is not admissible is because it generally has no probative value[62] and any value which it might have is greatly outweighed by its prejudicial effect to the defendant or the plaintiff. There are rare instances, however, where the disclosure of insurance is relevant to the issue of negligence[63] or damages. Such a situation was presented in *Jury v. New York Cent. R.R.*[64] when the defendant answered that a release executed by the plaintiff barred the action. The release did not include damages to the vehicle as covered by a certain insurance policy carried by the plaintiff. Although the release and accompanying insurance policy were relevant to show what damages were covered by the policy, to admit it would inject into the trial the fact that plaintiff was protected by an insurance policy and would therefore be compensated for the damage irrespective of the jury's verdict. The trial judge first ruled that the release was inadmissible, but then granted a new trial, which was affirmed by the Pennsylvania Superior Court:

> [T]he release was relevant testimony . . . in determining how much the defendant should, in addition to the amount set forth in the release, pay to the plaintiff. Evidence, therefore, as to the coverage of the insurance policy is as material and relevant to the jury's disposition of the case as is evidence of defendant's negligence.[65]

A related problem arises when a written contract containing an insurance clause is sought to be admitted into evidence. As a general rule either all or none of a contract may be introduced.[66]

61. Cain v. Kohlman, 344 Pa. 63, 22 A.2d 667 (1942).
62. See note 2 *supra*.
63. See Herschensohn v. Newman, 80 N.H. 557, 119 Atl. 705 (1923) where testimony concerning insurance was admissible as having probative value on the issue of defendant's negligence. The defendant had told a passenger in his car not to worry about his driving too fast for he carried insurance for that. The court thought that this evidence reflected on the defendant's state of mind prior to the accident and was therefore relevant.
64. 167 Pa. Super. 244, 74 A.2d 531 (1950).
65. *Id.* at 247-48, 74 A.2d at 532.
66. *E.g.*, Cary v. Cary, 189 Pa. 65, 42 Atl. 19 (1899).

It is thought to be unfair to allow a party to introduce that portion of a contract which is advantageous and to withhold any portion that harms his case. The lower court in *Capozi v. Hearst Publishing Co.*,[67] followed the general rule and admitted a relevant contract which disclosed that the defendant was insured. On appeal, the Pennsylvania Supreme Court reversed, holding that the provision had no probative value on the issue of the legal relationship of the joint defendants. The decision does imply, however, that the insurance clause would have been admissible if it were relevant. As pronounced by the *Capozi* court, the test governing the admissibility of documents in which insurance is mentioned is whether the exclusion of the prejudicial document "adversely affects the party insisting upon the introduction of the document in its entirety."[68] In other words, is the prejudicial effect to the party seeking the document's exclusion outweighed by the adverse consequences to the introducting party. Illustrative of this test is a case where the lessee and lessor are joint defendants in a negligence action.[69] On the issue of control one relevant indicia would be the terms of the lease agreement. If the lease contains a provision for public liability insurance, a legal question arises whether this clause casts any light on the issue of control. *Capozi* will allow its admission if the question is answered in the affirmative.[70]

No examination of this exception would be complete without a reference to the early case of *Randall v. Gould*.[71] At issue in an action for ejectment was whether the defendant had notice of fraud in his title when he purchased the contested property. An offer of proof that the defendant had purchased extra title insurance noting the existence of the plaintiff's claim was accepted.

Reference Induced or Volunteered by Defendant

The courts are adverse to enforcing the exclusionary rule where defendant's counsel has been overly aggressive in cross-examination causing the witness to mention insurance. The soundness of the exception was affirmed in *Ellsworth v. Lauth*:[72]

> [I]t would be an anachronism to apply [the rule] in favor of a defendant who himself educed the evidence to which he objects, without plaintiff being in any way responsible, directly or indirectly, for its production.[73]

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67. 371 Pa. 503, 92 A.2d 177 (1952).
68. *Id.* at 519, 92 A.2d at 184.
69. Dively v. Penn-Pittsburg Corp., 332 Pa. 65, 2 A.2d 831 (1938) (disclosure by co-defendant).
70. *Cf.* Scranton Gas & Water Co. v. Weston, 63 Pa. Super. 570 (1916) (admissibility of whole conversation).
71. 225 Pa. 42, 73 Atl. 986 (1909).
72. 311 Pa. 286, 166 Atl. 855 (1933).
73. *Id.* at 290, 166 Atl. at 856.

No doubt remains to the efficacy of this exception as subsequent cases have cited *Ellsworth* with approval.[74]

It is appropriate to note the case of *Portner v. Wible Bros.*[75] while examining this exception. Counsel for plaintiff, after calling the defendant's truck driver, was surprised by the witness's testimony. He immediately confronted the witness with a signed statement which contradicted his testimony. After denying the accuracy of the statement the witness was asked by the court whether he did not care about signing a statement that was not true. "I thought he was from our insurance company" was his reply.[76] The court refused to withdraw a juror since the remark was volunteered by a witness obviously hostile to the plaintiff. One can only speculate on the degree of acceptance by the public of such an attitude toward insurance reports. The veracity of all insurance reports and statements would certainly be suspect if this attitude were generally accepted.

Curing of Prejudice

How effective is an admonition to the jury to disregard a reference to insurance injected into the trial? Although the Pennsylvania courts are not in unanimity on this question, several observations can be made. Generally the courts do not distinguish between cases in which the admonition to the jury was made simultaneously with an order to strike the reference to insurance[77] and those made in the court's charge to the jury.[78] As a general practice, however, the jury is admonished at both occasions.[79] A more basic observation is whether an instruction to the jury, in and of itself, is sufficient to cure any prejudice occurring from the reference to insurance. Usually there is a justification, vis-a-vis exception, for the reference and the admonition merely strengthens the court's decision when a motion to withdraw a juror is denied. Thus the admonition's exact role is difficult to determine. The case of *Keefer v. Lombardi*[80] does offer some guidance, although it was also within the unresponsive reply exception. Nevertheless, the following instructions were held to cure any prejudice:

74. Tuttle v. Suznevich, 394 Pa. 614, 149 A.2d 888 (1959); Harriett v. Ballas, 383 Pa. 124, 117 A.2d 693 (1955); Lambert v. Polen, 346 Pa. 352, 30 A.2d 115 (1943); Knapp v. Willys-Ardmore, Inc., 174 Pa. Super. 90, 100 A.2d 105 (1953).

75. 91 Pa. Super. 522 (1927).

76. *Id.* at 524.

77. *E.g.*, Keefer v. Lombardi, 376 Pa. 367, 102 A.2d 695 (1954).

78. *E.g.*, Harriett v. Ballas, 383 Pa. 124, 117 A.2d 693 (1955). The defendant in Harriett argued that an accumulation of complaints called for a mistrial. The court replied that "since no one of the reasons advanced for a new trial possesses merit, we do not see how an accumulation of zeros can add up to more than zero." *Id.* at 131, 117 A.2d at 696.

79. King v. Keller, 90 Pa. Super 596 (1927).

80. 376 Pa. 367, 102 A.2d 695 (1954).

> [T]his witness had inadvertently made reference to an insurance company. I do not know whether an insurance company is involved in this transaction or not, but in any event, we are not concerned with that, and whether there is or not, that is not to influence you one iota in your deliberations.[81]

Similar instructions, however, were held not to cure the prejudicial effect on the jury in *Fleet Carrier Corp. v. Lahere*.[82] This decision can be distinguished from *Keefer* on the nature of the reference. In *Fleet* counsel for the plaintiff remarked that the defendant will not have to pay one cent of the verdict. Considered in this light the cases can be reconciled.

The charge given in *King v. Keller*[83] is frequently cited as authority for the curative effect of proper instructions to the jury. The trial judge, cognizant of the onerous task before him, gave this charge:

> We can strike it off the record, but we cannot always strike it out of the minds of the jurors. We cannot tell you to forget something, because if we told you to forget something it might make you remember it; but we can instruct you and you can follow our instructions to this extent, that you are to decide this case between the plaintiffs and this defendant without considering any reference to any insurance company.[84]

Other Exceptions

From time to time other exceptions have been created as a result of unique factual situations. Illustrative of this proposition is *Strout v. American Stores Co.*[85] Here the court refused to withdraw a juror when a witness for the defense revealed that he was a representative of an insurance company. The court said that in considering the obvious magnitude of the defendant's operation, it would make little difference to the jury whether the defendant was insured or not. Although this exception has a

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81. *Id.* at 374, 102 A.2d at 699.

82. 184 Pa. Super. 201, 132 A.2d 723 (1957); *cf.* Martin v. Baden Borough, 233 Pa. 452, 83 Atl. 284 (1912) (reference to contract); Fisher v. Delaware, L. & W. R. R., 227 Pa. 635, 76 Atl. 718 (1910) (reference to value of land set by viewers).

83. 90 Pa. Super. 596 (1927).

84. *Id.* at 605. *But see* James Stewart & Co. v. Newby, 266 Fed. 287 (4th Cir. 1920) wherein the court said:

> [T]he poision 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 . . . the antidote of a 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.

Id. at 295.

85. 385 Pa. 230, 122 A.2d 797 (1956).

limited applicability, the decision may signal a judicial concern of the rule's present utility. Another exception may arise when a question pertaining to insurance coverage is not answered.[86]

THE RULE'S FUTURE COURSE

At least two compelling reasons dictate a reexamination of the exclusionary rule. The first is directed at the rule's rationale. The second questions the effect of the rule on the just and expeditious administration of justice.

It must be conceded that the mention of insurance at a trial is generally immaterial and irrelevant. Is it, however, so prejudicial to the defendant's (or plaintiff's) rights that a new trial must be granted whenever it appears? Insurance companies were in their infancy when the exclusionary rule was first formulated. Safety devices on automobiles and trains were crude, if not nonexistent, with the result that many serious accidents occurred unnecessarily. Large corporations were springing up from a basic agrarian society. All of these factors tended to prejudice a juror toward large insurance companies in favor of an injured plaintiff. Today, in contrast to fifty years ago, insurance companies are freely accepted as a common fact of the American way of life. More than seventy-five percent of all vehicles in the United States are insured against liability.[87] It is also unlikely that a negligence case would ever go to trial if the defendant were not insured. These facts have behooved several courts to reconsider the exclusionary rule. A California court in *Causey v. Cornelius*,[88] addressing itself to the basic issue of prejudice, remarked that it was time to reappraise the insurance bugaboo. It suggested that it is "naive conceit" to think that a juror will give an excessive award if an insurance company must pay the verdict.[89] An Illinois court has stated that "the public acquaintance with and attitude toward liability insurance is far different today than it was in . . . 1909."[90]

Combined with this changing attitude toward insurance companies is an awareness of the court's "hypocritical futility"[91] in

86. Sperry v. White Star Lines, Inc., 315 Pa. 361, 172 Atl. 646 (1934); see O'Brien v. Bernoi, 297 Mass. 271, 8 N.E.2d 780 (1937).

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

88. 164 Cal. App.2d 269, 330 P.2d 468 (Dist. Ct. App. 1958).

89. The court was concerned with the strong effort by insurance companies to inject insurance into the trial. Prospective jurors are warned, via advertising media, not to be overly generous with an insurance company's money for otherwise the cost of every service and article which they purchase will increase. See People *ex rel.* Barton v. American Auto. Ins. Co., 130 Cal. App.2d 317, 282 P.2d 559 (Dist. Ct. App. 1955).

90. Pinkerton v. Oak Park Nat'l Bank, 16 Ill. App.2d 91, 97, 147 N.E.2d 390, 394 (1958).

91. See 2 WIGMORE, *op. cit. supra* note 1.

blinding themselves to the fact that the average juror knows that the defendant is insured.[92] A juror "doesn't need a brick to fall on him to give him an idea."[93] Certainly the juror's common knowledge of insurance casts serious doubt on the rule's efficacy, if not destroying it completely.[94]

It is submitted that the following opinion of the Minnesota Supreme Court places the exclusionary rule in its proper perspective:

> 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 . . . comes from families owning cars carrying liability insurance. Every person fit to be a juror knows that none but the wholly irresponsible and reckless fail to carry liability 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.[95]

Although the complete abolition of the exclusionary rule is the best solution to the insurance syndrome, a compromise in the nature of the above opinion would at least be preferable to the present rule. Instead of listing exceptions to the rule, a reference to insurance would be either prejudicial or non-prejudicial depending upon the nature of the remark. Under this rule a reference would be nonprejudicial unless it constituted a flagrant appeal to the jury that they should find for plaintiff because the defendant was insured. A specific finding by the court that the verdict was either excessive or not based upon the evidence would be required for the granting of a new trial. Such a rule would prevent future decisions such as *Nicholson*.

The exclusionary rule is based on the premise that the mere mention of insurance will prejudice the jury to such an extent that they will arrive at a false verdict. Accepting, *arguendo*, the validity of this premise, is the interest against possible prejudice commensurate with the rule's attendant evils? A rule of evidence must have predictibility if it is to be properly observed and enforced. Otherwise confusion and evasion will ensue. The end results of unpredictibility are constant appeals and new trials based solely on technical errors, thereby further clogging our already crowded courts. A simple law suit to recover damages for per-

92. See Rains v. Rains, 97 Colo. 99, 46 P.2d 740 (1935).

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

94. Of course, the adoption of a direct action statute would render the exclusionary rule moot. See LA. REV. STAT. tit. 22, § 655 (1958); WIS. STAT. §§ 85.93, 260.11 (1953). Moreover, the rule is reduced to a near absurdity in those jurisdictions which permit counsel the right to question prospective jurors on voir dire about their possible interest in a liability insurance company. See, *e.g.*, Elford v. Hiltabrand, 63 Cal. App.2d 65, 146 P.2d 510 (Dist. Ct. App. 1944); MCCORMICK, *op. cit. supra* note 1, at 356.

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

sonal injuries can suddenly be transformed into a costly series of appeals and new trials by the mere mention of the word insurance. That the exclusionary rule is unpredictable is not surprising. Any rule that is better known by its exceptions than by the rule itself is inherently unsound. Such a rule, apart from placing almost unlimited discretion in the trial judge, is also unfair to unsuspecting counsel. The fact that the reference to insurance might be deemed nonprejudicial does not make the rule more palatable because the courts are not consistent in their rulings.

Since insurance is destined to play an increasing role in all phases of our personal and professional lives, it will be virtually impossible to prevent some mention of it from being injected into a personal injury trial. The rule in its present form is inadequate to meet this challenge. Apparently, however, the Pennsylvania courts are too engrossed in discovering new exceptions to take time to reexamine the validity of the rule itself.

J. RICHARD LAUVER