Volume 70
Issue 3 *Dickinson Law Review - Volume 70, 1965-1966*

3-1-1966

Recent Cases

RECENT CASES

EXCESS LIABILITY OF AN INSURER FOR BAD FAITH REFUSAL TO SETTLE—MAY INSURED ASSIGN CLAIM TO INJURED PARTY?

Gray v. Nationwide Mut. Ins. Co. 207 Pa. Super. 1, 214 A.2d 634 (1965)

Robert Gray was injured in an automobile accident caused by insured's negligence. Pending litigation, Gray made an offer, refused by Nationwide, to settle the claim within the 5,000 dollar policy limit. In the subsequent negligence action Gray recovered a 15,000 dollar judgment against the insured.[1] Nationwide paid the full extent of the policy coverage. Gray then sought payment of the balance from the insured who, in full satisfaction of the outstanding judgment, assigned to Gray his alleged claim against Nationwide for bad faith refusal to settle within the policy limits. The trial court dismissed Gray's complaint based on the purported assignment. Equally divided, the Pennsylvania Superior Court in *Gray v. Nationwide Mut. Ins. Co.*[2] affirmed, holding that an insured's cause of action against an insurer for bad faith refusal to settle within the policy limits sounds in tort and is not assignable before verdict.[3]

Very few cases have dealt with the question whether the *injured-claimant* may recover in an action against the insurer for failure to settle within the policy limits.[4] It is generally held that

1. Gray v. MacLatchie, 403 Pa. 595, 170 A.2d 590 (1961).

2. 207 Pa. Super. 1, 214 A.2d 634 (1965).

3. *Id.* at 2, 214 A.2d at 637. The superior court also held, by implication, that payment of the excess verdict by the insured was not a prerequisite to his claim against the insurer. Both the trend and the better reasoning support such a result. See, *e.g.*, Anderson v. St. Paul Mercury Indem. Co., 340 F.2d 406 (7th Cir. 1965); National Farmer U. P. & C. Co. v. O'Daniel, 329 F.2d 60 (9th Cir. 1964); Smoot v. State Farm Mut. Auto. Ins. Co., 299 F.2d 525 (5th Cir. 1961); Alabama Farm Bureau Mut. Ins. Co. v. Dalrymple, 270 Ala. 119, 116 So.2d 924 (1959); Brown v. Guarantee Ins. Co., 155 Cal. App.2d 679, 319 P.2d 69 (1957); Southern Fire & Cas. Co. v. Norris, 35 Tenn. App. 657, 250 S.W.2d 785 (1952). *Contra*, Harris v. Standard Acc. & Ins. Co., 297 F.2d 627 (2nd Cir. 1961); Dumas v. Hartford Acc. & Ins. Co., 92 N.H. 140, 26 A.2d 361 (1947).

4. See American Fid. & Cas. Co. v. All American Bus Lines, 179 F.2d 7 (10th Cir. 1949); Kleinschmitt v. Farmer's Mut. Hail Ins. Co., 101 F.2d 987 (8th Cir. 1939); Lemons v. State Auto. Mut. Ins. Co., 171 F. Supp. 92 (E.D. Ky. 1959); Chittick v. State Farm Mut. Auto. Ins. Co., 170 F. Supp. 276 (D. Del. 1958); Wessing v. American Indem. Co., 127 F. Supp. 775 (W.D. Mo. 1955); Comunale v. Trader's & Gen. Ins. Co., 50 Cal.2d 654, 328

the injured-claimant has no cause of action directly against the insurer.[5] Attempts by the injured-claimant to recover indirectly *through* the insured's cause of action by garnishment of the insurer[6] or subrogation to the rights of the insured[7] have met with little success. Two courts have passed on the assignment theory urged in *Gray*, one court allowing,[8] the other rejecting[9] the assignment. Recovery on this theory raises questions as to the nature of the insured's remedy and its assignability.

The duty to settle a claim within policy limits arises from the insurer's reservation of the exclusive right to make a binding settlement.[10] Settlement within the policy limits is clearly in the best interests of the insured, exonerating him of all personal liability. The insurer, however, may want to litigate on the chance that the claimant's recovery would be less than the settlement offer. When the settlement offer approaches the maximum policy coverage, the insurer loses little by going to court, but the insurer will subject the insured to personal liability if the claimant obtains a verdict in excess of the policy coverage. Where bad faith is shown,[11] it is generally held that the insurer may be liable for a refusal to settle to the extent that the verdict exceeds the policy limits.[12]

Gray follows the general rule that the insured's cause of action sounds in tort.[13] The greater number of courts, however,

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P.2d 198 (1958); Stilwell v. Parsons, 51 Del. 342, 145 A.2d 397 (1958); Canal Ins. Co. v. Sturgis, 114 So.2d 469 (Fla. 1959); Automobile Mut. Indem. Co. v. Shaw, 134 Fla. 845, 184 So. 852 (1933); Francis v. Newton, 75 Ga. App. 341, 43 S.E.2d 282 (1947); Duncan v. Lumberman's Mut. Cas. Co., 91 N.H. 349, 23 A.2d 325 (1941); Dillingham v. Tri-State Ins. Co., 214 Tenn. 592, 381 S.W.2d 914 (1964); Paul v. Kirkendall, 6 Utah2d 256, 311 P.2d 376 (1957); Murray v. Mossman, 56 Wash.2d 909, 355 P.2d 985 (1955).

5. See, *e.g.*, Wessing v. American Indem. Co., 127 F. Supp. 775 (W.D. Mo. 1955); Murray v. Mossman, 56 Wash.2d 909, 355 P.2d 985 (1955). But see Lemon v. State Auto. Mut. Ins. Co., 171 F. Supp. 92 (E.D. Ky. 1959).

6. See Stilwell v. Parsons, 51 Del. 342, 145 A.2d 397 (1958); Murray v. Mossman, 56 Wash.2d 909, 355 P.2d 985 (1955).

7. Chittick v. State Farm Mut. Auto. Ins. Co., 170 F. Supp. 276 (D. Del. 1958).

8. Comunale v. Trader's & Gen. Ins. Co., 50 Cal.2d 654, 328 P.2d 198 (1958). See also Critz v. Farmers Ins. Group, 230 Cal. App.2d 775, 41 Cal. Rptr. 401 (1964), reaffirming the decision in *Comunale*.

9. Dillingham v. Tri-State Ins. Co., 214 Tenn. 592, 381 S.W.2d 914 (1964).

10. See Record, p. 62, Gray v. Nationwide Mut. Ins. Co., 207 Pa. Super. 1, 214 A.2d 634.

11. Some courts have required only negligent failure to settle. For an excellent analysis and comparison of the good faith and negligence tests see Keeton, *Liability Insurance And Responsibility For Settlement*, 67 HARV. L. REV. 1136, 1139-42 (1959). The test to be utilized in Pennsylvania appears unsettled. See Comment, 67 DICK. L. REV. 321 (1963).

12. For an exhaustive survey of cases and a discussion of the issues which have arisen in this area see *Annot.*, 40 A.L.R.2d 168 (1955).

13. *E.g.*, Fidelity & Cas. Co. v. Gault, 196 F.2d 329 (5th Cir. 1952); Kleinschmitt v. Farmer's Mut. Hail Ins. Co., 101 F.2d 987 (8th Cir. 1939);

have never been faced with the issues of assignability or the possibility of an action in contract. The language of the Pennsylvania Supreme Court in *Cowden v. Aetna Cas. & Sur. Co.*[14] indicates that an action in contract would be proper:

> [A]n insurer against public liability for personal injury may may be liable for the entire amount of a judgment secured by a third party against the insured, regardless of any limitation in the policy, if the insurer's handling of the claim, including a failure to accept a proffered settlement was done in such a manner as to evidence bad faith on the part of the insurer in the discharge of its *contractual duty.*[15]

The court in *Comunale v. Trader's & Gen. Ins. Co.*[16] faced with the issues of assignability and the nature of the action, held that the insured may elect between an action in tort or contract and that the claim was assignable.

One consequence of finding a contractual duty is to negate the policy provision regarding settlement which is expressly permissive. Such a construction, however, appears justified. The modern liability insurance policy is a standardized contract, imposed and drafted by the insurer, whose superior bargaining strength leaves to the insured only the opportunity to adhere to the contract or reject it.[17] The agreement lacks "that freedom in bargaining and equality of bargaining which are the theoretical parents of the American law of contracts."[18] Since the insured has no choice but to contractually relinquish the power to settle, he should be contractually assured that his financial interests will be considered.

An action in contract, of course, would be assignable. *Gray* placed the sole remedy in tort and held it was not assignable. In precluding assignment of a claim for damage to the economic interests of the insured the court relied upon *Sensenig v. Pennsylvania R.R.*,[19] which involved a *statutory* cause of action for unfair price discrimination by a carrier. The court held that the *statute* provided a cause of action "to the party injured" and that the

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Dillingham v. Tri-State Ins. Co., 214 Tenn. 592, 381 S.W.2d 914 (1964). *Contra,* Comunale v. Trader's & Gen. Ins. Co., 50 Cal.2d 654, 328 P.2d 198 (1958) (tort or contract).

14. 389 Pa. 459, 134 A.2d 223 (1957).

15. *Id.* at 468, 134 A.2d at 227 (dictum) (emphasis added). See also Gedeon v. State Farm Mut. Auto. Ins. Co., 410 Pa. 55, 188 A.2d 320 (1963) (dictum), where the court appears to rest the insurer's duty on a contractual basis.

16. 50 Cal.2d 654, 328 P.2d 198 (1958).

17. The term "adhesion" contract has been used to describe this type of mass standardized contract. See Comment, 5 SANTA CLARA LAW. 60 (1964) which discusses the applicability of this doctrine to the field of insurance.

18. Neal v. State Farm Ins. Co., 188 Cal. App.2d 690, 694, 10 Cal. Rptr. 781, 784 (1961).

19. 229 Pa. 168, 78 Atl. 91 (1910).

claim was personal to the injured party and not assignable. The reasoning in *Sensenig*, grounded completely on statutory construction, appears totally inapplicable to the facts in Gray and should not be considered as barring the assignment urged in *Gray*. Furthermore, unless the insured's cause of action be classed as a purely personal wrong such as slander, false imprisonment, malicious prosecution or assault, there appears no decisive Pennsylvania authority to bar the assignment.[20] It can be argued that the injury to the insured is not of a personal nature at all, but an injury to his estate, property or financial interests[21] and within the rule that a liquidated tort claim for damage to property interests is assignable.[22] The Pennsylvania courts have never considered the assignability of the insured's cause of action and any attempt to bring it within the existing framework of case law appears both artificial and unsound. The real issue is whether *this specific cause of action* should be assignable to the injured-claimant. Clearly if there is no sound policy against the assignment in *Gray*, the claim should be assignable.

The *Gray* court cited possible fraud or collusion between the insured and the injured party if the assignment be allowed.[23] Fear of fraud or collusion appears unwarranted. The test of the insurer's liability—bad faith—is not susceptible of being influenced by any collusion on the part of the insured and the injured-claimant. It is the merits of the original negligence action, *at the time of the refusal to settle*,[24] which will determine whether refusal to settle was in bad faith. In view of the practice of insurance companies in taking statements from all parties concerned, the chances of false testimony appears negligible. Moreover, any attempt by the insured party to make the claim at the time of settlement appear in favor of the injured party would probably run afoul of his testimony at the original negligence action. Thus, the effect of collusion or fraud on the test utilized in determining insured's bad faith appears negligible, if not non-existent.

Even if the collusion of the insured and the injured party could affect the merits of the claim against the insurer, the danger appears more prevalent in a suit by the *insured* against the insurer rather than under the facts in *Gray*. In a suit by the insured against the insurer, both the insured and the injured party have a financial interest in the outcome. The results of any collusion or fraud will benefit both the insured and the injured party. Under

20. See 3 P.L.E., Assignments, § 9 (1957).

21. One court has described the injury to the insured stating that "the [insurer's] act strikes the insured in his pocketbook and diminishes his estate . . . it does not harm his person or his personality." Brown v. Guarantee Ins. Co., 155 Cal. App.2d 679, 695, 319 P.2d 69, 79 (1957).

22. See Coons v. McKees Rock Boro, 243 Pa. 340, 90 Atl. 141 (1914); Maxon v. Chaplin, 9 Pa. D.&C.2d 649 (C.P. 1956).

23. 207 Pa. Super. at 2, 214 A.2d at 635.

24. Cowden v. Aetna Cas. & Sur. Co., 389 Pa. 459, 134 A.2d 223 (1957).

the assignment theory urged in *Gray*, however, the insured loses all financial interest in the outcome of the action against the insurer. The only person with anything to gain is the assignee.

The *Gray* court felt that if the assignment were allowed, it would give the injured-claimants in general an "unfair bargaining weapon" to influence settlement negotiations.[25] The threat of later suit by the injured-claimant might force an insurer to accept a settlement offer. This argument, however, is somewhat specious since the injured-claimant already possesses this "unfair bargaining weapon." Even without the right of assignment, the claimant during negotiations can assert that the insurer may later be liable to the *insured* for refusing to settle. The "unfair bargaining weapon," if it be such,[26] was actually conferred when the insured was given this cause of action.

The decision in *Gray* may lead to injustice. When the insured is execution-proof, satisfaction of the injured-claimant's judgment will depend on the arbitrary willingness and financial ability of the insured to maintain an action against the insurer. If the insured were to bring an action against the insurer for refusal to settle, any recovery would no doubt be attached by the injured-claimant while still in the hands of the insurer. An execution-proof insured may well prefer, and indeed may be forced by lack of funds, to forego the expense and trouble of litigating a claim which in essence is brought in and for the interests of the injured-claimant. On the other hand, the insured may well be willing to assign his cause of action to the real party in interest, the injured-claimant, thereby satisfying the outstanding judgment with little or no effort. Allowing the assignment assures just compensation for those injured on the highways,[27] and avoids circuity of action.

In conclusion, it would appear that whether the insured's cause of action be in tort or contract or both, no valid reason exists to prevent the assignment urged in *Gray*. Moreover, an interesting question arises whether the *Gray* rationale will be applied when a party other than the injured-claimant is seeking to recover on the insured's cause of action. When the insured has already paid the excess verdict, his creditors should be permitted to maintain the action. In such a case the creditor's chances of collection have

25. 207 Pa. Super. at 3, 214 A.2d at 636 (supporting opinion).

26. The question of an unfair bargaining weapon appears diminished by the objective factors used in determining the insurer's liability. Also the burden of proof on the claimant is so difficult that insurer's need have no great fear. This is aptly demonstrated by the fact that even the jury verdict over the policy limits is not indicative of insurer's bad faith since the test is the merits of the claim at the time settlement was refused. See Cowden v. Aetna Cas. & Sur. Co., 389 Pa. 459, 134 A.2d 223 (1957).

27. It has been held that the injured motorist is a third-party beneficiary to the extent of the policy coverage. For some reason the courts have not extended this analogy to the claim involved in *Gray*. But *cf.* Canal Ins. Co. v. Sturgis, 114 So.2d 469, 472 (Fla. 1959) (concurring opinion).

been diminished by the assets paid to satisfy the judgment. The same reasoning seems applicable as to whether the claim passes to the trustee in bankruptcy.[28] The outstanding judgment, even if not paid by the insured, may have been one of the factors entering into the insured's bankruptcy. Finally the question arises whether the cause of action passes to the insured's estate.[29] To disallow creditors or the insured's estate access to the cause of action is to shift the loss occasioned by the insurer's bad faith onto the innocent creditors or heirs.

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28. See Palmer v. Travelers Ins. Co., 319 F.2d 296 (5th Cir. 1963); Brown v. Guarantee Ins. Co., 155 Cal. App.2d 679, 319 P.2d 69 (1957) (the cause of action passes to the trustee in bankruptcy). *Contra,* Harris v. Standard Acc. & Ins. Co., 297 F.2d 627 (2nd Cir. 1961); Schueler v. Phoenix Assurance Co., 223 F. Supp. 643 (E.D. Mich. 1963).

29. Carne v. Maryland Cas. Co., 208 Tenn. 403, 346 S.W.2d 259 (1961) (cause of action did not pass to insured's estate).

INSURANCE—ACCIDENTAL MEANS OR ACCIDENTAL RESULTS AS A MEASURE OF INSURER'S LIABILITY

Beckham v. Travelers Ins. Co., 206 Pa. Super. 488, 214 A.2d 299 (1965)

The Pennsylvania Superior Court, in *Beckham v. Travelers Ins. Co.*,[1] has again approved the oft-litigated distinction between the terms "accidental means" and "accidental result of intended means," found in accident insurance policies and double indemnity clauses. It is a well recognized principle that an injury is accidental if it is merely the unforseen and unexpected result of a voluntary act. According to one view, however, the injury is not effected by "accidental means" unless the act which produced the injury is involuntary and unexpected.[2] This is the view followed in Pennsylvania.[3] Some jurisdictions deny that such a distinction exists holding that either term is descriptive of the layman's concept of accident.[4]

The plaintiff was the beneficiary under a group insurance policy taken out by the insured's employer. The policy insured against death or bodily injury "effected directly and independently of all other causes *through accidental means* . . . ."[5] Decedent died of a

1. 206 Pa. Super. 488, 214 A.2d 299 (1965).

2. *E.g.*, Landress v. Phoenix Mut. Life Ins. Co., 291 U.S. 491 (1934); United States Mut. Acc. Ass'n v. Barry, 131 U.S. 100 (1889); Ogilvie v. Aetna Life Ins. Co., 189 Cal. 406, 209 Pac. 26 (1922); Rooney v. Mut. Benefit Health & Acc. Ass'n, 74 Cal. App. 885, 170 P.2d 72 (1946); John Hancock Mut. Life Ins. Co. v. Plummer, 181 Md. 140, 28 A.2d 856 (1942); Mitchell v. New York Life Ins. Co., 136 Ohio St. 551, 27 N.E.2d 243 (1940). The distinction is clearly expressed in Pledger v. Business Men's Acc. Ass'n of Texas, 197 S.W. 889 (Tex. Civ. App. 1917) wherein the court said that "accidental death is an unintended and undesigned result; arising from acts done; death by accidental means is where the result arises from acts unintentionally done." *Id.* at 890.

3. *E.g.*, O'Neill v. Metropolitan Life Ins. Co., 345 Pa. 232, 26 A.2d 898 (1942); Arnstein v. Metropolitan Life Ins. Co., 329 Pa. 58, 196 Atl. 491 (1938); Urian v. Equitable Life Assur. Soc'y, 310 Pa. 342, 165 Atl. 388 (1933); Hesse v. Travelers Ins. Co., 299 Pa. 125, 149 Atl. 96 (1930); Pollock v. United States Mut. Acc. Ass'n, 102 Pa. 230 (1883); Zulinsky v. Prudential Ins. Co., 159 Pa. Super. 363, 48 A.2d 141 (1946); Camp v. Prudential Ins. Co., 107 Pa. Super. 342, 163 Atl. 320 (1932); Trau v. Preferred Acc. Ins. Co. of New York, 98 Pa. Super. 89 (1930); Semancik v. Continental Cas. Co., 56 Pa. Super. 392 (1914).

4. Travelers Protective Ass'n v. Stephens, 185 Ark. 660, 49 S.W.2d 364 (1932); O'Neil v. New York Life Ins. Co., 65 Idaho 722, 152 P.2d 707 (1944); Bukata v. Metropolitan Life Ins. Co., 145 Kan. 858, 67 P.2d 607 (1937); Murphy v. Travelers Ins. Co., 141 Neb. 41, 2 N.W.2d 576 (1946); Provident Life & Acc. Ins. Co. v. Green, 172 Okl. 591, 46 P.2d 372 (1935); Goethe v. New York Life Ins. Co., 183 S.C. 199, 190 S.E. 451 (1937); Griswold v. Metropolitan Life Ins. Co., 107 Vt. 367, 180 Atl. 649 (1935); Newsoms v. Commercial Cas. Ins. Co., 147 Va. 471, 137 S.E. 456 (1927).

5. 206 Pa. Super. at 489, 214 A.2d at 299. (Emphasis added.)

self-administered overdose of narcotics, which was admitted by the insurer to be an accident.[6] The trial court found the death to be by accidental means and granted judgment for the plaintiff. In reversing, the superior court held that the test was not whether the *result* was accidental, but whether the *means* were. The court reasoned that the means were the decedent's intentional acts and, without some unintended slip or mischance in the doing of these acts, they could not be accidental means.[7]

Presumably, if it could have been shown that the deceased's arm slipped during the injection, causing the fatal overdose, or that he misread the graduation on the syringe, his death would have been by accidental means. The burden of proof, however, was on the plaintiff, who was understandably unable to produce such evidence. It is evident from the *Beckham* case and from the considerable litigation on the subject that the distinction between accidental results and means is rather technical and often confusing.

Much of the widespread confusion stems from a jury charge in *United States Mut. Acc. Ass'n v. Barry*.[8] The insured jumped from a platform and the shock of his landing caused internal hemorrage and death. The trial judge instructed the jury:

> [I]f a result is such as follows from ordinary means voluntarily employed in a not unusual or unexpected way, then, I suppose, it cannot be called a result effected by accidental means.
>
> But if in the act which precedes the injury something unforeseen, unexpected, unusual occurs, which produces the injury; then the injury has resulted—through accidental means.[9]

The jury found that an *involuntary* twist of decedent's body was the cause of death. On appeal the defendant argued that the evidence was insufficient to show accident, but the jury's finding was upheld. It does not appear that the validity of the attempted distinction between accidental means and result was ever in issue. Nevertheless, the case provided the impetus for numerous other jurisdictions to adopt the distinction.[10] That trend reached its peak when the United States Supreme Court followed the distinction in *Landress v. Phoenix Mut. Life Ins. Co.*[11] The insured died of sunstroke while playing golf. His beneficiary was denied recovery on a policy providing benefits for death or injury by accidental means,

6. "The defendant did not introduce any evidence and specifically admitted that the death was accidental, that it was not homicide and that it was not suicide." *Id.* at 490, 214 A.2d at 300.

7. *Id.* at 492, 214 A.2d at 301. See also Smith v. Aetna Life Ins. Co., 24 Tenn. App. 570, 147 S.W.2d 1058 (1941).

8. 131 U.S. 100 (1889).

9. *Id.* at 109.

10. Smith v. Travelers Ins. Co., 219 Mass. 147, 106 N.E. 607 (1914); Ashley v. Agricultural Life Ins. Co. of America, 241 Mich. 441, 217 N.W. 27 (1928).

11. 291 U.S. 491 (1934).

because the means—*voluntary* exposure to the sum—was not accidental. A vigorous dissent stated that the attempted distinction would "plunge this branch of the law into a Serbonian Bog."[12] This dissent has become the basis of the present trend toward abolition of the distinction.[13]

This distinction appears to be alien to at least one basic concept of insurance law: An insurance policy should be construed in the manner that it would be understood by the average man reading it.[14] In *Mansbacher v. Prudential Ins. Co.*[15] the insured had died from a self-administered overdose of veronal. The court refused to make a distinction between accidental results and means, observing that

> insurance policies upon which the public rely for security in death, sickness, or accident should be . . . free from fine distinctions which few can understand until pointed out by lawyers and judges . . . . '[A]ccidental means' . . . is the same as death occurring 'by means of an accident.'[16]

It would seem that this is the way the average person would interpret the term "accidental means."[17] Many laymen would probably refuse a policy containing such a clause if they were aware of the interpretation given it by many courts. Such an interpretation permits the insurer to avoid liability in many situations in which the insured reasonably believes he is covered. This distinction would seem to be a trap for those untrained in the subtleties of the law.

The argument might be advanced that abolition of this distinction would force the insurer to assume liability for a host of injuries against which it is unwilling to insure. A simple solution to this problem is to place upon the insurer the burden of specifically exempting such situations either by list or by general description sufficient to apprise insured that limitations exist. Even if the putative purchaser of such a policy does not understand the limita-

12. *Id.* at 499 (Cardozo, J., dissenting).

13. *E.g.* Equitable Life Assur. Soc'y v. Hemenover, 100 Colo. 231, 67 P.2d 80 (1937); Goethe v. New York Iife Ins. Co., 183 S.C. 199, 190 S.E. 451 (1937); Zinn v. Equitable Life Ins. Co. of Iowa, 6 Wash. 2d 379, 107 P.2d 921 (1940).

14. Lincoln Nat'l Life Ins. Co. v. Erickson, 42 F.2d 997 (8th Cir. 1935); Fitzpatrick v. Metropolitan Life Ins. Co., 15 Cal. App. 2d 155, 56 P.2d 199 (1936); Tomavoli v. United States Fid. & Guar. Co., 75 N.J. Super. 192, 182 A.2d 582 (1962); Simoneau v. Prudential Ins. Co., 89 N.H. 402, 200 Atl. 385 (1938); Blue Anchor Overall Co. v. Pennsylvania Lumbermens Mut. Ins. Co., 385 Pa. 394, 123 A.2d 413 (1956). "In an insurance policy the words are to be judged in the light of the understanding of the average man who procures such a policy." Berkowitz v. New York Life Ins. Co., 256 App. Div. 324, 328, 10 N.Y.S.2d 106, 109 (1939).

15. 273 N.Y. 140, 7 N.E.2d 18 (1937).

16. *Id.* at 143, 7 N.E.2d at 20.

17. Equitable Life Assur. Soc'y v. Hemenover, 100 Colo. 231, 67 P.2d 80 (1937); Burr v. Commercial Travelers Mut. Acc. Ass'n, 295 N.Y. 294, 67 N.E.2d 248 (1946).

tions, he is at least aware that his coverage is not complete and that further explanation should be sought to ascertain the exact extent of his coverage. In short, use of the term "accidental means" provides the insurer with a method of avoiding liability for accidental results, while presenting the misleading impression to the layman that the policy covers all accidents.

In *Beckham*, the court expressed disfavor with the law by which it was bound:

> Were this a case of first impression in Pennsylvania, we might be inclined to follow the apparant trend of the recent decisions in other jurisdictions but we are bound by the decisions of our Supreme Court.[18]

The supreme court might be well advised to heed the misgivings of the superior court and, when the opportunity presents itself, abolish this artificial rule of construction.

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18. 206 Pa. Super. at 497, 214 A.2d at 303.

PRACTICE—IMPOSITION OF COURT COSTS ON ACQUITTED DEFENDANT RULED UNCONSTITUTIONAL

Giaccio v. Pennsylvania, 381 U.S. 923 (1966).

In *Giaccio v. Pennsylvania*[1] the Supreme Court of the United States held a Pennsylvania statute[2] which allowed a jury to impose costs on a defendant found *not guilty* in a misdemeanor action unconstitutional. Petitioner, Jay Giaccio, was indicted on two counts of unlawfully and wantonly pointing and discharging a firearm, a misdemeanor under Pennsylvania law.[3] At trial a verdict of not guilty was returned on one bill with costs on the county. On the second bill the verdict was not guilty but costs were placed on the defendant. Defendant then filed a motion requesting that he be relieved of costs contending that the statute allowing the jury to impose costs was unconstitutional.[4] The court of quarter sessions for Chester County granted petitioner's motion and vacated the costs imposed.[5] On appeal the superior court reversed.[6] The Pennsylvania Supreme Court affirmed the superior court.[7] The Supreme Court of the United States then reversed declaring the statute unconstitutional.

The history of this statute may be traced from an 1805 statute[8] which provided for the levying of costs upon an innocent party. An 1860 statute modified the Pennsylvania common law which had placed the costs on the defendant in all instances.[9]

This statute at first glance appears to be rather anomalous

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1. 381 U.S. 923 (1966).
2. PA. STAT. ANN. tit. 19, § 1222 (1963), provides in part:
   In all cases of acquittals by the petit jury . . . the jury trying the same shall determine, by their verdict, whether the county, or the defendant shall pay the costs.
3. PA. STAT. ANN. tit. 18, § 4716 (1963). The firearm which Giaccio fired was a starter's pistol which fired only blanks. The persons at whom he fired were walking toward his yard and apparently frightened by the firing of the pistol. In the superior court the majority said "He [Giaccio] was fortunate to have been acquitted, but substantial justice was done to all concerned by the imposition of the costs upon him." 202 Pa. Super. 294, 309, 196 A.2d 196, 197.
4. Giaccio argued that the statute was unconstitutional because (1) it was too vague; (2) it allowed an improper delegation of legislative power; (3) it violated due process; and (4) it discriminated against defendants in misdemeanor actions.
5. 30 Pa. D.&C.2d 463 (C.P. 1963).
6. 202 Pa. Super. 294, 196 A.2d 189 (1963).
7. 415 Pa. 139, 202 A.2d 55 (1964).
8. 4 SMITH'S LAWS 204 (1805).
9. See Commonwealth v. Tilghman, 4 S. & R. 126 (Pa. 1818); Commonwealth v. Giaccio, 30 Pa. D.&C. 466 (C.P. 1963).

since it allows a jury to impose costs on a party found not guilty. Should the defendant not pay these costs, he is jailed. Despite this anomaly the statute has gone almost unchallenged during the many years in which it has been in effect.[10] One of the first cases determining the constitutionality of the statute was *Commonwealth v. Tilghman.*[11] The court in construing the 1805 statute said that the act would "prove beneficial" even though "at first view it might appear unjust."[12] One hundred years later in *Commonwealth v. Cohen*[13] the court, in holding the law constitutional, echoed these sentiments when it said: "However anomalous the course may appear to jurisdictions unfamiliar with our procedure, it is the law of the Commonwealth, and it works substantial justice."[14]

The decision on *Commonwealth v. Franklin,*[15] decided ten years before *Giaccio,* seemed to cast some doubt on the constitutionality of the statute. The *Franklin* court held unconstitutional the practice of placing acquitted defendants on a bond to keep the peace. The *Giaccio* majority in the superior court, however, noted differences in the two procedures.[16] Nonetheless, the result is much the same—an innocent party is punished. The constitutional basis of the *Franklin* decision was that the statute was too vague. Because of this vagueness, the defendants lacked adequate notice of the charge against them; there was a clear violation of due process. In those cases which required a peace bond, the basis of liability was that the person was "not of good fame." The superior court said that this was not a sufficiently definite standard.[17] The standard used in imposing costs on acquitted defendants was that they were "guilty of conduct reprehensible in some respects."[18] This standard seems to be no more definite than the

10. Judge Woodside, in the majority opinion of the superior court, made much of this in upholding the statute. At one point he said that "we know of no Pennsylvania statute whose validity has been attacked after so many years of constant application." 202 Pa. Super. at 297, 196 A.2d at 193.

11. 4 S.&R. 126 (Pa. 1818).

12. *Id.* at 127. It should be noted that this case was heard before the fourteenth amendment was adopted. Subsequent cases upholding the statute would tend to show, however, that this made no difference in the mind of the court. See, *e.g., Commonwealth v. Cohen,* 102 Pa. Super. 397, 157 Atl. 32 (1931).

13. 102 Pa. Super. 397, 157 Atl. 32 (1931).

14. *Id.* at 398; 157 Atl. at 33.

15. 172 Pa. Super. 152, 92 A.2d 272 (1952).

16. 202 Pa. Super. at 299, 196 A.2d at 194. There are three distinctions between the two procedures. First, a person held on bond cannot avoid jail by insolvency proceedings while a party required to pay costs may. Secondly, there was no statute allowing for the bond in Pennsylvania law. Thirdly, the bond was imposed by the judge, not the jury.

17. *Id.* at 298, 196 A.2d at 195.

18. Commonwealth v. Tilghman, 4 S.&R. 127 (Pa. 1818). See also King v. Commonwealth, 33 Pa. D.&C. 235 (C.P. 1963). Here the court

one declared to be unconstitutionally vague in *Franklin*. In both instances a defendant is punished, even though he has been acquitted of the charge brought against him.[19]

In *Giaccio* the Supreme Court based its decision on the "void for vagueness" concept:[20]

> A statute which neither forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.[21]

The *Giaccio* Court said that the Pennsylvania statute contained "no standards at all," thus violating the fourteenth amendment guarantee of due process.[22] The Court also refused to accept the state court's argument that case law interpreting the statute cured the deficiencies by further defining the statute. The Court said: "It would be difficult if not impossible for a person to prepare a defense against such general charges as 'misconduct, or reprehensible conduct.' "[23] There are other Supreme Court cases, however, which appear not to require this higher standard of definiteness. In *United States v. Petrillo*[24] the Court in upholding a pornography statute said that all that is required is language which conveys sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practice.[25] It might then be seen that the standards which the Court sets for drafters of legislation are in themselves quite vague.[26] Perhaps the best reason for *Giaccio* and like decisions is found in Justice Stewart's concurring opinion which states that "it is enough for me that Pennsylvania allows a jury to punish a defendant after finding him not guilty. That, I think, violates the most rudi-

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said: "The question might well be asked as to why the county should pay costs when the conduct of defendant has been such as to bring the case against him into a court." *Id.* at 237.

19. See also Chester v. Elam, 408 Pa. 350, 184 A.2d 257 (1962) (ordinance prohibiting "disorderly conduct" held to be unconstitutional because of vagueness).

20. 381 U.S. 923 (1966).

21. Lanzetta v. New Jersey, 306 U.S. 451 (1939).

22. 381 U.S. at 926.

23. *Ibid.*

24. 332 U.S. 1 (1947).

25. *Id.* at 7-8. In Nash v. United States, 229 U.S. 373 (1913), the Court said:

> The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death.

Id. at 377.

26. For an extensive discussion of the void for vagueness concept see Amsterdam, *The Void for Vagueness Doctrine in the Supreme Court,* 109 U. PA. L. REV. 67 (1960).

mentary concept of due process of law."[27]

As Justice Stewart indicates, the statute seems to be blatantly unconstitutional since it allows an innocent party to be charged with costs and possibly imprisoned should he not pay. The statute imports into the criminal law a vague third area lying somewhere between guilt and innocence. It can be said in favor of the statute that the jury imposing costs must have felt that the defendant was guilty of some misconduct which merited punishment. The imposition of costs allowed the jury to compromise by acquitting the defendant while still punishing him in a lesser way. Without the compromise there will probably be more guilty verdicts and more imprisonments. The question then becomes one of balancing the value of the statute against the possible abuse. The Court decision seen in this light would appear correct. If there is to be a compromise between guilt and innocence, this compromise should be achieved in a different manner and based on more definite standards.

GARY C. HORNER

27. 381 U.S. at 927.

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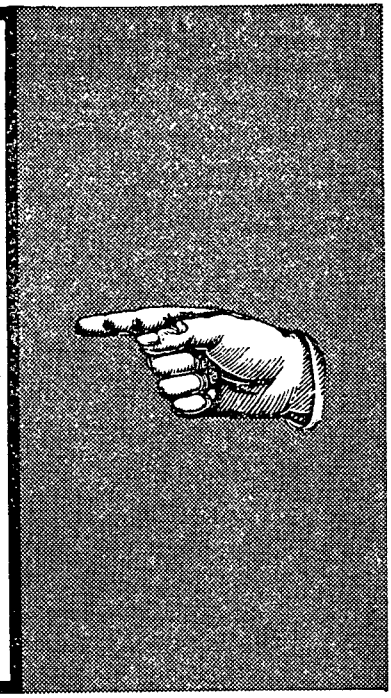

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