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INTRODUCTION

The following article is an attempt to ascertain the Virginia rule in respect to the admissibility of the fact that a defendant, in a tort action, is insured against loss, and the effect of such admission in the presence of the jury.

The leading Virginia decisions covering this particular problem are discussed in an effort to formulate with some degree of clarity the rule and reasoning of the Virginia courts in respect to this problem of evidence.

PROBLEM IN GENERAL

The various states have taken conflicting views as to the admissibility of evidence of the insurance coverage of a defendant in a tort action. There are actually three views in respect to this evidence problem. In some jurisdictions, courts feel that such evidence is always admissible; as pointed out by the Virginia Supreme Court of Appeals on p. 671 of *Highway Express Lines* v. *Fleming*.[1] It was there stated:

> The Courts in other jurisdictions are divided as to the admissibility of evidence establishing the fact that a defendant in a tort action carries liability insurance. A few courts, among them Nebraska, take the view that such evidence is always admissible. The reasoning of these courts may be summarized as follows: The standard provisions of a liability insurance contract require the insured to notify the insurance carrier of the accident. Thereafter the carrier assumes full responsibility for the defense; sends its investigators to view the scene of the accident and to interview the witnesses; and employs attorneys who determine whether to settle the case or defend a law suit. The

[1] 185 Va. 666, 40 S.E. 2d 294 (1946).

> insured is required to render the insurance company only such assistance as it may demand. Actually, the real defendant is the insurance carrier and this fact should be known to the court and jury, otherwise the court becomes a party to "benevolent judicial concealment." If this class of evidence is not admitted, then the presence and interest of the actual defendant is never made known. The exclusion of such evidence is incompatible with an open court and judgments openly and publicly arrived at. To compel and permit such proceedings is to countenance and participate in what is tantamount to fraud.

Other jurisdictions hold that if the jury is informed that defendant carries casualty insurance it is sufficient to warrant the trial court awarding a mistrial. For example, in West Virginia, the jury should not in any manner be appraised of the fact that the defendant owner in an action for the negligent operation of an automobile is protected by indemnity insurance, and such action on the part of the plaintiff or his counsel will ordinarily constitute reversible error, notwithstanding the fact that the court may instruct the jury not to consider the same in arriving at a verdict.[2]

Virginia has not adopted this hard and fast rule. The Virginia Supreme Court of Appeals feels that although it is improper for the jury to be informed that a defendant is insured against accident in an action for negligence against him, such error under the particular circumstances of each case can be harmless and therefore will not constitute grounds for reversal if substantial justice has been done. The latest and most significant Virginia decision laying down the Virginia rule in respect to this problem is the controversial case of *Simmons* v. *Boyd*,[3] decided in 1958. Before discussing this decision in detail, it is important to review briefly the more important prior cases by the Virginia Supreme Court of Appeals involving the admissibility of the insurance coverage.

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[2] Fleming v. Hartrick, 105 W. Va. 135, 141 S.E. 628 (1928).

[3] 199 Va. 806, 102 S.E. 2d 292 (1958).

LEADING VIRGINIA CASES

On page 681 of *Virginia-Carolina Chemical Co.* v. *Knight*,[4] the Court quotes with approval the Supreme Court of Maine in 90 Me. 368, as follows:

> . . . to allow juries in cases of this kind to take into consideration the fact that an employer has insured against accident would do no more harm than good, and would increase the already strong tendency of juries to be influenced in cases of personal injury, especially where a corporation is defendant, by sympathy and prejudice.

This was a 1907 decision which helped formulate the Virginia view that a jury with knowledge that a defendant in a negligence action is insured against loss would give a verdict for the plaintiff based on the fact that a corporation and not the individual defendant would sustain the loss.

A 1923 decision, *Rinehart & Dennis Co., Inc.* v. *Brown*,[5] discussed the insurance problem in great detail and did much to lay down the present Virginia rule and the reasoning behind it. In that case the plaintiff, a carpenter employed by the defendant, a general contractor, was injured while attempting to swing from the roof of one building to the roof of another after a sudden storm had blown away the ladders of descent.

In the opening argument to the jury, the plaintiff's counsel *deliberately* stated that the real defendant in the case was an insurance company. The defendant objected and asked that the jury be discharged. The Court refused to discharge the jury but instructed it to disregard the statement of the plaintiff's counsel. Later, during the cross examination of one of the defendant's witnesses, plaintiff's counsel asked if the defendant was insured. The defendant again objected and the court emphatically instructed the jury to disregard the question and at the same time warned counsel for the plaintiff not to

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[4] 106 Va. 674, 56 S.E. 725 (1907).

[5] 137 Va. 670, 120 S.E. 269 (1923).

pursue that line of questioning. In the closing argument the plaintiff's counsel again attempted to bring out the point of the defendant's insurance. A judgment for the plaintiff was reversed by the Virginia Supreme Court of Appeals which made the following statement on page 676:

> Generally a new trial will be denied where improper argument has been checked by the court and the jury has been instructed to disregard the improper statements. If, however, counsel persists in such arguments after the admonition of the court or if it appears that the infavorable influence of the argument was probably not wholly removed by the court's action, a new trial may be allowed.

Another important statement was made on page 677 of this same case when the court stated as follows:

> In *inadvertent* cases, and cases where no serious harm seems to have been probably done, we have given controlling effect to the judgment of the trial court. [Emphasis added]

In this same case on page 679, the Virginia Supreme Court of Appeals quoted with approval the Supreme Court of Kansas in 19 Kan. 556, as follows:

> . . . all that can be safely laid down is, that whenever in the exercise of a sound discretion it *appears to the court that the jury may have been influenced as to their verdict by such extrinsic matters, however thoughtlessly or innocently uttered*, or that the statements were made by counsel in a conscious and defiant disregard of his duty, then the verdict should be set aside. [Emphasis added]

The words inadvertent and unintentional play an important part in the Virginia rule on this problem and it should be noted that in the *Rinehart* case the court stated that even if the question of insurance was brought to the attention of the jury innocently and there was evidence that they were influenced by this improper evidence in deciding upon a verdict, then the verdict should be set aside.

In the 1931 case of *Lanham* v. *Bond*,[6] plaintiff's counsel in his opening statement told the jury that he intended to prove that the defendant had stated to the plaintiff at the time of the accident that he had insurance and that the insurance company would pay for all of the damages. The defendant asked for but was refused a mistrial. The plaintiff then testified that the defendant had admitted fault on his part and that his, the defendant's insurance company, would pay for any damage. The defendant then admitted that he had said he would have his insurance company take care of the matter *if* he were at fault. The court instructed the jury to disregard the matter of insurance coverage. The Virginia Supreme Court of Appeals held that this evidence constituted error regardless of the instructions. On page 175 the court stated, quoting the Cyclopedia of Automobile Law, vol. 4, p. 1521:

> The jury should not be informed of the fact that the defendant in a negligent operation of an automobile is protected by indemnity insurance, and such action on the part of the plaintiff or his counsel will ordinarily constitute reversible error, notwithstanding the court may instruct the jury not to consider the same in arriving at a verdict, *at least if such information is given to the jury by the deliberate and premeditated purpose and design of counsel.* [Emphasis added]

In this case the court also pointed out that it has been argued that evidence that the defendant in a negligence action had casualty insurance should be admissible based on the fact that the awareness of such insurance might cause the owner to operate his car recklessly and regardless of the consequences. But this argument was rejected since it is in the best interest of the public for automobile owners to be insured for the benefit of others and observation and experience have shown that the responsible and prudent purchase automobile insurance.

In the 1934 case of *Irvine* v. *Carr*,[7] counsel for plaintiff accidentally brought out the fact that the defendant was

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[6] 157 Va. 167, 160 S.E. 89 (1931).

[7] 163 Va. 662, 177 S.E. 208 (1934).

insured. The court held that in this case there had been a fair trial on the merits and that *the mere mention of the insurance coverage of the defendant,* inadvertently, in itself, was not sufficient error to warrant a mistrial. The court pointed out that error which does not affect the substantial rights of the parties should be disregarded. This is based on Virginia's doctrine of harmless error. Statute 8-487 of the Virginia Code of 1950 states in part:

> No judgment or decree shall be arrested or reversed: . . . (8) For any other defect, imperfection, or omission in the record, or for any error committed on the trial when it plainly appears from the record and the evidence given at the trial the parties have had a fair trial on the merits and substantial justice has been reached . . .

Norfolk, Etc. Belt Line v. *Jones,*[8] (1945) is an interesting decision in view of the prior Virginia cases, which certainly provided a method of circumventing the rule against the admission of insurance coverage. The court on page 544 stated:

> . . . The motion for judgment was brought in the name of T. Helm Jones, administrator of the estate of Albert H. Reynard. On motion of the defendant, the court ordered that the style of the plaintiff be amended to read: 'T. Helm Jones, Administrator of the estate of Albert H. Reynard, and for the benefit of American Mutual Liability Ins. Co., as its interest may appear.'
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> Counsel for the plaintiff, in the opening statement said that it was for the benefit of the widow and son. That was the truth but not the whole truth: it was also for the benefit of the insurance company. Ordinarily we keep from the jury the fact that the plaintiff was insured, but we are of the opinion that one has a right to tell the jury what the record shows. It might be that a widow and child had received complete pecuniary compensation. In such circumstances it

[8] 183 Va. 536, 32 S.E. 2d 720 (1935).

> would not be fair to tell the jury that the action was for their benefit and so appeal to its sympathy. It should know the facts.
>
> It was error to withhold this information from the jury but it was incidental error and had little to do with the final judgment.

In substance the court was stating the same view as was laid down later in *Highway Express Lines* v. *J. C. Fleming Adm'r., Etc.*, 185 Va. 666.

However, this case was in a sense overruled by *Miller* v. *Tomlinson*,[9] and by the 1948 Amendment of 8-96 of the 1950 Code of Virginia. In the *Miller* case the plaintiffs delivered their trucks to defendant's garage for repairs. The garage burned and the trucks were destroyed. The plaintiffs filed their notice of motion to recover the value of the trucks. Before the jury was empanelled to try the case the defendants moved that plaintiffs be required to endorse upon the notices that any recovery would be for the benefit of the plaintiffs and the insurance company which had insured the trucks. The effect of introducing the insurance company in this manner was held to be prejudicial to the rights of the plaintiffs in this case. The court on page 373 states:

> At the 1948 session 8-96 of the 1950 Code was amended by the addition of this sentence: 'Nothing in this section shall be construed to permit the joinder, or addition as a new party, of any insurance company on account of the issuance to any party to a cause of any policy or contract of liability insurance, or on account of the issuance by any such company of any policy or contract of liability insurance for the benefit of or that will inure (to) the benefit of any party to any cause.'

Statute 8-96 covers the subject of nonjoinder and misjoinder of parties.

In the previously mentioned case of *Highway Express Lines* v. *Fleming*, a witness, who was called primarily to dis-

[9] 194 Va. 367, 73 S.E. 2d 378 (1952).

credit the testimony of some of the plaintiff's witnesses, was a paid employee of the defendant's insurance company. He denied that he had any interest in the outcome of the litigation. Evidence of his employment was then held to be admissible to show the interest, bias or prejudice of a hostile witness.

The most recent decision covering the problem under discussion in Virginia is the case of *Simmons* v. *Boyd*, which was mentioned previously. This is a 1958 decision in which the plaintiff was injured when the car in which she was a passenger was struck by that driven by the defendant. In the course of the trial the specialist who had treated the plaintiff was asked by counsel for the defendant whether the doctor who had referred the case wished him to see her from time to time. To answer this the specialist read the letter of referral, which included the statement "This is an insurance case." At this point counsel for the defendant moved for a mistrial. The court refused this request, and counsel for the defendant did not request that the jury be instructed but excepted to the court's ruling. The jury gave a verdict of $20,000 to the plaintiff, which was the full amount asked for, after only a short period of deliberation and without any positive evidence that permanent damage had been suffered by the plaintiff. The trial judge set aside the verdict on the basis that the jury might have been improperly influenced by the mention of insurance. At a second trial the question of insurance was not brought out in the evidence and the jury awarded the plaintiff a verdict of $6,500. The Virginia Supreme Court of Appeals in a four to three decision reversed the lower court and reinstated the first verdict for a $20,000 recovery. In reaching its decision the Court of Appeals on page 813 quoted *Bourne* v. *Barlar*, 17 Tenn. App. 375, 379, 67 S. W. 2d 751 (1933) as follows:

> We think all these statements about insurance were improper, but did they or were they liable to affect the verdict? We think not. In this enlightened age it is common knowledge, and everybody knows, that almost every owner of an automobile carries liability insurance, hence everybody knows how it is obtained

> and the manner of protection. Each juror knows that it is unjust and wrong to award a verdict against a defendant simply because he may have insurance and when he does so he stultifies himself and is unworthy to sit as a juror. Each juror who has intelligence enough to be a juror knows that when he, by his verdict, unjustly takes money from a defendant, he does him a very great wrong.

The court then states again on page 813:

> While it is improper for the jury to be informed that a defendant is insured against accident in an action for negligence against him, yet such error is harmless *if the statement is unintentionally made and it appears that substantial justice has been done in the case.* [Emphasis added]

The above statement very clearly lays down the Virginia rule that when it is applied to the particular facts of the *Simmons* case there arises doubt as to whether the first verdict should have been reinstated. The result of the second trial in which there was no mention of insurance suggests strongly that the first jury might have been influenced improperly. In the dissenting opinion on page 815 it is said:

> There are three elements which I think clearly justified the court in setting aside the first verdict: (1) The admission of evidence showing that the defendant carried insurance; (2) the verdict was for the full amount sued for when there was no proof that plaintiff had sustained permanent injuries as alleged; and (3) the immediate return of the verdict showed a lack of deliberation.
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> While no one of these elements may be sufficient, considered together they justified the trial judge (in the exercise of the sound discretion vested in him) in setting aside the verdict.

CONCLUSION

In conclusion the Virginia rule on this evidence problem at the present time seems fairly clear in view of the statements made by the Virginia Supreme Court of Appeals in deciding the various cases under discussion.

First of all, in Virginia, the fact that a defendant in a negligence action is insured, is irrelevant and improper evidence to be before a jury. If such evidence should be brought to the attention of the jury the question then arises as to whether it results in hamless error or prejudicial error which prevents substantial justice from being done and thus constituting reversible error.

Secondly, if the question of insurance is brought out accidentally and substantial justice has been done in the case, then harmless error has been committed which will not warrant a reversal. However, even if insurance has been brought to the attention of the jury inadvertently or innocently, and there is an indication that the jury was improperly influenced thereby, then reversible error has been committed.

It appears that the same rules would govern even though the insurance question be deliberately brought out as long as there is a clear indication that substantial justice has been done. However, the courts would find prejudicial error more easily in cases of this type.

In view of the *Simmons* v. *Boyd* case and the fact that it is common knowledge that practically all of the motor vehicles in Virginia are insured, as a result of 46.1-167 of the 1950 Code of Virginia requiring all insured motorists to pay the sum of $15.00 to the State, it is felt that the admission of insurance coverage will not constitute reversible error except in clear cases of improper influence upon a jury.

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