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Trials: Questioning Jurors on Voir Dire Concerning Relationship to Insurance Companies (*Avery v. City of Anaconda*, 428 P.2d 465, 1967)

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In order to justify such an imposition of liability, it would be necessary to decide that the insurer's exclusive right to control the litigation carries with it a correlative duty to accept every offer to settle within the policy limit. Charging an insurer with a strict duty may be justifiable in view of the unequal bargaining positions of insurance companies and the individual insured parties. However, it appears to be stretching the insurance contract to the breaking point if strict liability is to be based on an insurance clause which does not express any duty to consider the insured's interests. In effect the insurance contract would be judicially rewritten so that its effect would be diametrically opposed to its literal meaning.

PETER MICHAEL KIRWAN

TRIALS: QUESTIONING JURORS ON VOIR DIRE CONCERNING RELATIONSHIP TO INSURANCE COMPANIES. Plaintiff sued the City of Anaconda for damages for injuries sustained as a result of a fall on a sidewalk maintained by the city. Counsel for the plaintiff requested the court to permit the following question during the *voir dire* examination of jurors: "Are you or is any other member of your family, a stockholder in the Glacier Insurance Company, a Montana corporation, with its main office in Missoula, Montana?" The court sustained the defendant's objection to that question, but allowed general questions involving prospective jurors being investors in any insurance company. When these questions were asked, the defendant objected and moved for a mistrial. The motion was denied and *voir dire* questioning continued. *Held*, this type of questioning on *voir dire* was prejudicial and constituted reversible error. *Avery v. City of Anaconda*, 428 P.2d 465 (Mont. 1967).

The right of trial by an impartial jury is secured to each citizen of the State of Montana.¹ The determination of whether a juror is qualified is usually made during the *voir dire* examination of the prospective jurors.² In the majority of jurisdictions, courts recognize the need for allowing counsel wide latitude in ascertaining jurors qualifications³ and counsel is generally allowed to question prospective jurors concerning their relationship with insurance companies.

The decision in the *Avery* case reflects the very restricted view that any injection of the issue of insurance into a trial is reversible error.⁴

¹MONT. CONST. art. 3, §§ 16, 23; *Shane v. Butte Electric Ry. Co.*, 37 Mont. 599, 97 P. 958, 959 (1908). "The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to a trial by jury guaranteed by the Constitution."

²*State v. Russell*, 73 Mont. 240, 235 P. 712, 715 (1925).

³*Kiernan v. Van Schaik*, 347 F.2d 775 (3rd Cir. 1965).

⁴*Avery v. City of Anaconda*, 428 P.2d 465 (Mont. 1967).

This is consistent with the general rule announced in 1934 by *Vonalt v. O'Rourke*, that in damage actions the fact that the defendant is insured cannot be injected, directly or indirectly, into the trial; to do so would be prejudicial error.⁵

In support of this proposition it is argued that the presence of insurance coverage of the defendant is immaterial or incompetent.⁶ The injection of that issue into the trial is said to have a prejudicial effect on the jury,⁷ which will result in an award of excessive damages or an improper determination of liability.⁸ Both of these effects are based on the supposition that the juror would rather err against an insurance company than the injured plaintiff.⁹

In the *Avery* case, conduct of counsel was cited as reversible error; the court said only that the questioning on *voir dire* concerning insurance was prejudicial.¹⁰ It does not appear that the court considered whether the damages were excessive, despite the fact that an earlier Montana case declared that misconduct of counsel does not often constitute reversible error unless the charge is coupled with a claim of excessive damages.¹¹

The Montana rule excluding reference to insurance during the trial was first introduced as *dictum* in 1922 in *Wilson v. Blair*.¹² In 1928, *Wilson v. Thurston* became the first Montana decision to apply the rule to effect a reversal.¹³ The Supreme Court specifically denounced the prac-

⁵97 Mont. 92, 33 P.2d 535 (1934).

⁶*Robinson v. F. W. Woolworth Co.*, 80 Mont. 431, 261 P. 253, 257 (1927). See *Robinson v. Hreinson*, 17 Utah 2d 261, 409 P.2d 121, 123 (1965). The question of insurance is immaterial and should not be injected into the trial.

⁷*Wilson v. Thurston*, 82 Mont. 492, 267 P. 801, 802 (1928).

⁸*Id.* See also *Dunipace v. Martin*, 73 Ariz. 415, 242 P.2d 543, 545 (1952).

⁹Kalvin, *The jury, the law, and the personal injury damage award*, 19 OHIO ST. L. J. 158, 171 (1958). See also U. OF MICHIGAN, CONFERENCE ON AIMS AND METHODS OF LEGAL RESEARCH 169 (1957). The preliminary research in the Chicago Jury Project showed that where no insurance was mentioned the mean verdict was \$33,000. Where insurance was mentioned but no notice of the mention was taken by the court, the mean of the verdicts rose to \$37,000. Where insurance was mentioned and the jury was told to disregard it, the mean award was \$46,000. These figures were based on a moot case presented before 30 selected juries. The final findings of the civil portion of the Chicago Jury Project are to be published in 1968. But see PIERSON, *THE DEFENSE ATTORNEY AND BASIC TACTICS* § 147 (1956). "Inquiries among jurors almost universally established that any deliberate attempt on the part of the attorney representing the plaintiff to prejudice the minds of the jurors by the injection of insurance into the trial of the lawsuit boomerangs against him."

¹⁰*Instant case* at 467.

¹¹*Doheny v. Coverdale*, 104 Mont. 534, 68 P.2d 142, 148 (1937).

¹²65 Mont. 155, 211 P. 289 (1922). The defendant mentioned during argument and cross-examination that there was a bonding company involved in the suit. The decision was reversed on other grounds but the court referred to the conduct of counsel and said that it wasn't to be commended. See also *Robinson v. F. W. Woolworth Co.*, *supra* note 6. The defendant made reference to insurance on *voir dire* examination of the jury. No objection was made when insurance was first mentioned. The court held that if the objection had been made when insurance was first mentioned it would have been prejudicial error not to sustain the objection.

¹³*Supra* note 7. Defendant's counsel asked the prospective jurors on *voir dire* whether they had any immediate relatives employed in any liability insurance company in the City of Butte. The trial court allowed the question over plaintiff's objection. This was held to be reversible error.

tice of asking questions concerning insurance on *voir dire* examination of jurors, saying "[I]t is manifest that the sole purpose of such interrogation was to prejudice the jury against the defendants in the action; whether they were insured in fact or not."¹⁴

The Montana court has recognized several exceptions to the general rule excluding the issue of insurance. Exceptions now allow admission where statements of defendant's insurance coverage were part of an admission of responsibility which would be otherwise admissible,¹⁵ where unresponsive answers during cross-examination disclose the fact of defendant's insurance,¹⁶ where the defendant admits insurance coverage before the jury,¹⁷ and where statements were made at the time of the accident disclosing the presence of insurance.¹⁸ Aside from these exceptions, the Montana court will apparently hold any mention of insurance prejudicial *per se*.

The majority of jurisdictions in the United States do not admit evidence of insurance coverage during the trial, but do allow questions during *voir dire* relating to insurance.¹⁹ These courts, while recognizing that the jury may be prejudiced by reference to insurance, also recognize the right of the plaintiff to obtain an impartial jury.²⁰ Most courts follow the view that a stockholder in an insurance company that is providing the defendant's coverage is incompetent to serve as a juror.²¹ The rationale for such a rule lies in the principle that a man cannot be a juror for his own case.²² The right to examine the jurors on *voir dire* should be broad enough to allow both parties to acquire sufficient information for an intelligent use of their jury challenges.²³ Thus, in the majority of jurisdictions, the plaintiff would have been allowed to ask the questions that were deemed reversible error in the *Avery* case.

The majority rule requires that such a question be asked in good

¹⁴*Id.* at 801.

¹⁵*Supra* note 5, at 543, 544. "All of this to the end that this really extraneous matter may only be called to the attention of the jury in instances where the insurance feature is unequivocally a part of an admission of liability and actually incidental to and connected with the admission."

¹⁶*Meinecke v. Intermountain Transportation Co.*, 101 Mont. 315, 55 P.2d 680 (1935).

¹⁷*Francis v. Heidel*, 104 Mont. 580, 68 P.2d 583 (1937).

¹⁸*Tanner v. Smith*, 97 Mont. 229, 33 P.2d 547 (1934).

¹⁹*Annot.*, 4 A.L.R.2d 761 (1949). This annotation contains a very exhaustive listing of authority.

²⁰*Supra* note 3, at 781.

²¹*Hess' Adm'r v. Louisville & N.R. Co.*, 249 Ky. 624, 61 S.W.2d 299 (1933); 50 C.J.S. *Juries* § 213 (1947). In 1965, an unsuccessful attempt was made during Montana's Thirty-ninth Legislative Session to allow challenges for cause to extend to anyone interested in any insurance company. S. Bill 116, Montana Senate, 39th Sess. (1965). This provision would not seem necessary however, since the Montana Supreme Court has said that if a juror is found to be incompetent because of prejudice, the lack of a statutory ground for challenge for cause would not bar the challenge. The constitutional guaranty of an impartial jury is the determinant. *Watson v. City of Bozeman*, 117 Mont. 5, 156 P.2d 178, 181 (1945).

²²*Mitchell v. Vann*, 278 Ala. 1, 174 So. 2d 501, 504 (1965).

²³*Supra* note 3, at 781.

faith.²⁴ But since good faith has been defined as a state of mind, it is difficult to determine whether good faith is present when the question is asked.²⁵

One method of showing good faith was first recognized in *Safeway Cab Service Co. v. Minor*²⁶ and has since been gathering support.²⁷ Counsel must first ask general background questions concerning employment and investments of the jurors which might eliminate the need for asking specific questions dealing with insurance. If it is found that the juror does have investments, then specific questions can be asked to determine whether the investments are in insurance companies.²⁸ The circuitous route required by this method would of necessity consume much time.

As a result of the difficulties noted in determining good faith, that determination is usually left to the discretion of the trial court.²⁹ If good faith is established, the court usually explains to the jury that insurance is being mentioned only for the purpose of *voir dire* examination³⁰ and that no insurance company is a party to the action.³¹

Even with limitations imposed on the method of showing good faith, the main fault of the majority approach is apparent. The subject of insurance is considered inadmissible because of its highly prejudicial nature, but if counsel acts in good faith he is entitled to ask questions from which an inference can arise that the defendant is protected by insurance. It does not seem reasonable to say that the prejudice resulting from mention of insurance, which most courts feel is present,³² is obviated when the knowledge is imparted to the jury in good faith. When this information is then restated by the court in an attempt to explain to the jury its permissible limits, a very real question arises as to whether the jury has been prejudiced.³³ Thus the majority approach solves only a part of the problem, even when used under close supervision by the court.

Some textwriters³⁴ have advocated that the issue of insurance coverage be introduced into trial, and a few decisions support this approach.³⁵ It is maintained that juries assume that the defendant is protected by liability insurance,³⁶ especially in automobile accident cases occurring since the adoption of the Financial Responsibility Acts.³⁷

²⁴*Supra* note 19, at 792.

²⁵PIERSON, *supra* note 9, § 141.

²⁶180 Okla. 448, 70 P.2d 76 (1937).

²⁷*Dunipace v. Martin*, *supra* note 8. See also *Ruth v. Reeves*, 340 P.2d 452 (Okla. 1959).

²⁸*Supra* note 26, at 78.

²⁹*Supra* note 3, at 778.

³⁰*Id.* at 782.

³¹*Causey v. Cornelius*, 164 Cal. App. 2d 269, 330 P.2d 468, 471 (1958).

³²*Supra* note 19, at 767.

³³*Supra* note 9.

³⁴PIERSON, *supra* note 9. See also 2. WIGMORE, EVIDENCE § 282(a) (3d ed. 1940).

³⁵*Supra* note 31. See also *Rust v. Watson*, 215 N.E.2d 42 (Ind. 1966).

³⁶*Id.* See also *annot.*, *supra* note 19, at 817.

³⁷REVISED CODES OF MONTANA, 1947, §§ 53-418 to 53-458.

The prevalence of insurance in today's world implies that it is considered in many jury deliberations without mention of it during the trial.³⁸ This assumption of insurance coverage may be particularly harmful to the uninsured defendant. The present rules excluding evidence of insurance also operate to exclude any evidence showing that the defendant is not insured.³⁹ Some courts have gone as far as to exclude evidence that the defendant was not insured although there was already evidence in the case that implied that the defendant was insured.⁴⁰

The present Montana rule, as affirmed by the instant case, had its origin in the 1920's. Since that time, public awareness of liability insurance has increased substantially.⁴¹ Within recent years, the insurance companies have conducted advertising campaigns designed to show the effects of high verdicts upon insurance premiums.⁴² If a prospective juror has been exposed to this type of advertisement, it does not seem likely that he would favor excessive damages or be prejudiced against the defendant in any other way. Rather the converse would probably be true, and the only way that this prejudice against the plaintiff could be discovered would be by asking insurance questions during *voir dire*.

The real party in interest principle provides another reason for allowing the issue of insurance to be brought into the trial.⁴³ In the typical case, the insurance company's counsel handles the investigation and controls the litigation.⁴⁴ This appears to be the only type of case where the trier of fact is not entitled to know the identity of one of the parties in interest.⁴⁵

If the fact of insurance was allowed in the open court, counsel would be able to gain sufficient information in minimum time to allow intelligent use of challenges.⁴⁶ In addition, extensive maneuvering to evade the non-admissibility rule would be eliminated.⁴⁷

CONCLUSION

Montana is applying an old rule to modern situations. The majority of jurisdictions have adopted a rule which allows both parties, within

³⁸PIERSON, *supra* note 9.

³⁹King v. Starr, 43 Wash. 2d 115, 260 P.2d 351 (1953).

⁴⁰*Id.* at 353. "Indeed some courts have even excluded evidence that the defendant is not insured although there is already evidence in the case from which it may be inferred that he is insured."

⁴¹Pinkerton v. Oak Park Nat'l Bank, 16 Ill. App. 2d 91, 147 N.E.2d 390, 394 (1958).

⁴²Barton v. American Auto Ins. Co., 132 Cal. App. 2d 317, 282 P.2d 559, 560 (1955). Advertisements which appeared in several nation-wide magazines were quoted. One example was "Next time you serve on a jury, remember this: When you are overly generous with an insurance company's money, you help increase not only your own premiums, but also the cost of every article and service you buy."

⁴³WIGMORE, *supra* note 34.

⁴⁴Rust v. Watson, *supra* note 35 at 53.

⁴⁵*Supra* note 31, at 472.

⁴⁶*Supra* note 3, at 779.

⁴⁷WIGMORE, *supra* note 31.

the limits of good faith, to determine the qualifications of the jurors. Some textwriters and a few decisions go further, suggesting that the proper approach would be to abolish all rules excluding evidence of insurance coverage. Few courts apply the strict standards that the Montana Supreme Court applied in the *Avery* case. Underlying each of these methods of approach is a different theory as to how much prejudice results from the mention of insurance during the trial. If juries are always prejudiced against the defendant by the mention of insurance during the trial, perhaps the Montana approach is the best. But, if such a prejudice does exist, it would seem questionable to allow the exceptions to the exclusionary rule that Montana has recognized. On the other hand, if juries presume that the defendant is insured, the better rule would probably be to allow evidence of that coverage, or lack thereof, to be freely brought into the trial. The trend of recent decisions, the insurance companies' advertising campaigns, and the adoption of the Financial Responsibility Acts all seem to indicate that the latter view is more reasonable in the insurance conscious world of today.

GARY L. GRAHAM.

SEARCH AND SEIZURE: SEIZURE OF PURELY EVIDENTIARY ITEMS HELD CONSTITUTIONAL. Petitioner was observed leaving the scene of an armed robbery. His description and whereabouts were relayed to police. Some five minutes after the suspect had entered his house, police officers knocked on the door and were admitted by his wife. The officers immediately began a search of the premises for the suspect, his weapons, and the stolen money. In the course of this search petitioner was arrested and clothing in a washing machine which fit the description given of the clothing worn by the suspect was seized. *Held*, that despite the fact that the articles of clothing were "of evidential value only," they were properly seized in a search incident to a lawful arrest and admissible in evidence. *Warden, Maryland Penitentiary v. Hayden*, 87 S. Ct. 1642 (1967).

The principle that a man ought to be free from unreasonable invasion of his privacy or seizure of his goods first appeared in Magna Charta. The framers of that document recognized that such seizures or invasions might be made under certain circumstances, but saw danger in allowing royal officials free rein to "seize a man's goods or proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land."¹ Ensuing years have witnessed continuing attempts to define the scope of the rights recognized in this early document.

¹Clause 39 of Magna Charta as translated in G.R.C. DAVIS, *MAGNA CHARTA* 21, published by the trustees of the British Museum.