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Evidence--Introduction of Insurance at a Trial

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Harbor Act²⁸ under which the defendants were being prosecuted. In that case, defendants had a criminal action brought against them for discharging waste materials into part of the waters of New York Harbor. The court rejected defendants contention, stating that the F.W.P.A. applies to pollution abatement and control, but does not provide for criminal prosecution as does the New York Harbor Act. Also, the F.W.P.A. specifically states that it "shall not be construed as (1) superseding or limiting the function, under any other law, . . . of any other officer or agency of the United States relating to water pollution."²⁹ Applying this reasoning to the Refuse Act, the courts would be compelled to find that the F.W.P.A. does not supersede or supplant the Refuse Act, nor can it be used to defeat the purposes of the Refuse Act.

D. Conclusion

The Refuse Act is a useful tool for the protection of water resources endangered by pollution. The Act can be made sterile by a limited definition of the term "tributary." With a liberal definition of this term the public may be offered an excellent source of protection. It cannot be said that Congress has intended to eliminate the Refuse Act by the establishment of a comprehensive pollution program. On the contrary, Congress has supplemented the Refuse Act by passage of the F.W.P.A. giving additional environmental protection to waterways. To limit the prosecutorial power of the government under the Refuse Act by a limited definition of "tributary" would be to thwart Congress' legitimate purposes and intentions.

David Jeffrey Millstone

²⁸ 33 U.S.C. § 441 (1970). This act deals exclusively with the dumping or discharge of refuse into New York Harbor, Harbor of Hampton Roads and Harbor of Baltimore.

²⁹ 33 U.S.C. § 1174 (1970).

Evidence—Introduction of Insurance at a Trial

It remains a settled principle in West Virginia that "[t]he jury should not in any manner be apprised of the fact that the defendant is protected by indemnity insurance, and such action on the part of plaintiff or his counsel will ordinarily constitute reversible error."¹

¹ Wilkins v. Schwartz, 101 W. Va. 337, 340, 132 S.E. 887, 889 (1926). See generally Annot., 4 A.L.R.2d 761 (1949).

Our law is replete with instances in which judgments rendered in trial courts have been reversed because of tacit violations of this principle.² This West Virginia view is in accord with the overwhelming majority of jurisdictions.³

²*E.g.*, *Walters v. Appalachian Power Co.*, 75 W. Va. 676, 84 S.E. 617 (1915). Counsel for Walters called the defendant's attorney as a witness. The witness was required to state that he was employed by an insurance company and that the defendant had a policy with that company. The admission was held reversible error. *Adams v. Cline Ice Cream Co.*, 101 W. Va. 35, 36, 131 S.E. 867 (1926). Counsel for Adams, during *voir dire* examination of the jury, stated to the court in the presence of the jury, "I have information to the effect that the Cline Ice Cream Company carries insurance in the Standard Accident Company. I would like to have the jury qualified as to whether any member of this panel is a stockholder, officer, director, or employee of the Standard Accident Company, if it is true that they carry casualty insurance with that company." *Adams v. Cline Ice Cream Co.*, *supra* at 36, 131 S.E. at 867. Held, reversible error. *Wilkins v. Schwartz*, 101 W. Va. 337, 340, 132 S.E. 887, 888 (1926). Plaintiff's counsel asked the defendant, "Have you or your lawyer, or the insurance company, had doctors to examine this little girl in the last few weeks?" This was reversible error even though the court instructed the jury to disregard the reference to insurance. *Fleming v. Hartrick*, 105 W. Va. 135, 138, 141 S.E. 628, 629 (1928). Fleming's counsel cross-examined a defense witness in an effort to show that the witness expected to be compensated by an insurance representative for his services and expenses. The court, in reversing a judgment for Fleming, said counsel's questioning established "a deliberate and premeditated purpose and design on the part of counsel to appraise the jury of the fact that the defendant was protected by indemnity insurance." *Jones v. Smithson*, 119 W. Va. 389, 193 S.E. 802 (1937). It was not error for the trial court to *refuse* to allow the plaintiff to ask the veniremen, upon their *voir dire*, if they were interested in defendant's insurance company. *Lynch v. Alderton*, 124 W. Va. 446, 450, 20 S.E.2d 657, 659 (1942). It was reversible error to ask the whole jury panel, "Are any of you officers, employees, agents or stockholders in any liability insurance company?" *Bradfield v. Board of Educ.* 128 W. Va. 228, 229, 36 S.E.2d 512, 513 (1945). "A declaration in an action for wrongful death against a county Board of Education . . . which contains an allegation that such Board . . . carried insurance . . . is demurrable." *Flanagan v. Mott*, 145 W. Va. 220, 229, 114 S.E.2d 331, 337 (1960). Counsel for Flanagan in his closing argument stated, "What is it going to take to teach this insurance company a lesson?" Held, reversible error. *Graham v. Wriston*, 146 W. Va. 484, 491, 120 S.E.2d 713, 719 (1961). Counsel for Wriston implied that he was *not* insured. The court stated that "the fact that such defendant does or does not carry insurance . . . is immaterial, and is not a proper subject of inquiry, either by the court or by counsel, at any stage of the trial."

³*E.g.*, *Sars, Inc. v. Nichols*, 275 Ala. 17, 151 So. 2d 739 (1963); *Ward v. Bergschneider*, 94 Ariz. 21, 381 P.2d 568 (1963); *Strahan v. Webb*, 231 Ark. 426, 330 S.W.2d 291 (1959); *Crawford v. Alioto*, 105 Cal. App. 2d 45, 233 P.2d 148 (1951); *Douglas v. Galvin*, 130 So. 2d 282 (Fla. 1962); *Lanier v. Lee*, 111 Ga. 876, 143 S.E.2d 469 (1964); *Bott v. Wendler*, 203 Kan. 212, 453 P.2d 100 (1969); *Sales v. Bradley*, 356 S.W.2d 588 (Ky. 1962); *Calver v. Lavigne*, 160 Me. 414, 205 A.2d 159 (1964); *Capiah Dairies Inc. v. Addikson*, 247 Miss. 327, 153 So. 2d 689 (1963); *Turner v. Caldwell*, 349 S. 2d 493 (Mo. Ct. App. 1961); *Dalton v. Gesser*, 72 N.J. Super. 100, 178 A.2d 64 (1962); *Fincher v. Rhyne*, 266 N.C. 64, 145 S.E.2d 316 (1965); *Falkner v. Martin*, 74 N.M. 159, 301 P.2d 660 (1964); *Walton v. Bennett*, 376 P.2d 240 (Okla. 1962); *Sherrick v. Landstrom*, 229 Ore. 415, 367 P.2d 432 (1961); *Patton v. Franc*, 404 Pa. 306, 172 A.2d 297 (1961); *Harrod v. Ciampiarulo*, 95 R.I. 504, 188, A.2d 459 (1963); *Crocker v. Weathers* 240 S.C. 412, 126 S.E.2d 335 (1962); *Colwell v. Jones*, 48 Tenn.

Notwithstanding the general rule prohibiting introduction of insurance into a trial, several West Virginia cases have recognized certain well-defined exceptions to the rule. More particularly, it was decided in *Covington v. Navarre*⁴ that the disclosure of indemnity insurance would not precipitate reversible error if it was shown that examining counsel had neither solicited nor could have anticipated the objectionable disclosure, provided that the jury was properly instructed to disregard it. Similarly, in *Ambrose v. Young*,⁵ a witness's volunteered statement with regard to the defendant's automobile insurance was determined not to be a basis for reversal.⁶ A substantial number of jurisdictions in the United States has adopted this exception.⁷ However, in *Atkins v. Bartlett*,⁸ the volunteered statements of the plaintiff, while testifying in his own behalf, mentioned that the defendant was insured. This was held to justify reversal, especially since the trial court had previously admonished the witness concerning the impropriety of such testimony. Care was also taken to distinguish that case from the *Covington* and *Ambrose* decisions in that in *Atkins* "it

App. 353, 346 S.W.2d 450 (1960); *Rhoden v. Booth*, 344 S.W.2d 481 (Tex. Civ. App. 1961); *Hill v. Cloward*, 14 Utah 2d 55, 377 P.2d 186 (1962); *Sawyer v. Ewen*, 125 Vt. 196, 212 A.2d 628 (1965).

⁴ 99 W. Va. 431, 129 S.E. 313 (1926).

⁵ 100 W. Va. 452, 130 S.E. 810 (1926).

⁶ The Court was careful to recognize the general rule but reasoned that since the statement was volunteered by the witness and unresponsive the general rule was rendered inapplicable.

⁷ See, e.g., *Clark v. Hudson*, 265 Ala. 630, 93 So. 2d 138 (1957); *Peters v. Benson*, 425 P.2d 149 (Alas. 1967); *Muchleback v. Mercer Mortuary & Chapel, Inc.*, 93 Ariz. 60, 378 P.2d 741 (1963); *Ragon v. Day*, 228 Ark. 215, 306 S.W.2d 687 (1957); *Lord v. Poore*, 48 Del. 595, 108 A.2d 366 (1954); *Douglass v. Galvin*, 130 So. 2d 282 (Fla. 1961); *Steinmetz v. Chambley*, 90 Ga. App. 519, 88 S.E.2d 318 (1954); *Barry v. Arrow Transp. Co.*, 83 Idaho 41, 358 P.2d 1041 (1960); *Schaffer v. Dorsey*, 70 Ill. App. 2d 390, 217 N.E.2d 19 (1966); *Kelly v. Hocutt*, 125 Ind. App. 617, 128 N.E.2d 879 (1955); *Stewart v. Hilton*, 247 Iowa 988, 77 N.W.2d 637 (1956); *Parnell v. Security Elevator Co.*, 174 Kan. 643, 258 P.2d 288 (1953); *Dayoc v. Johnson*, 427 S.W.2d 569 (Ky. 1968); *Ostrowski v. Mockridge*, 282 Minn. 265, 65 N.W.2d 185 (1954); *Jackson v. Reed*, 233 Miss. 280, 102 So. 2d 342 (1958); *Beckett v. Kripe*, 369 S.W.2d 258 (Mo. Ct. App. 1963); *Segebart v. Gregory*, 160 Neb. 64, 69 N.W.2d 315 (1955); *Sleeper v. World of Mirth Show, Inc.*, 100 N.H. 158, 121 A.2d 799 (1956); *Runnacles v. Doddrell*, 59 N.J. Super. 363, 157 A.2d 836 (1960); *Halstead v. Sansky*, 48 Misc. 2d 586, 265 N.Y.S.2d 426 (Sup. Ct. 1960); *Anderson v. Schreiner*, 94 N.W. 2d 294 (N.D. 1959); *Oney v. Needham*, 10 Ohio App. 2d 15, 225 N.E.2d 280 (1966); *John W. Simmons Trucking Co. v. Briscoe*, 373 P.2d 49 (Okla. 1962); *Richardson v. Wilkes-Barre Transit Corp.*, 172 Pa. Super. 636, 95 A.2d 365 (1963); *Norton v. Ewaskio*, 241 S.C. 557, 129 S.E.2d 517 (1963); *Scheutle v. Nash-Finch Co.*, 72 S.D. 588, 38 N.W.2d 137 (1949); *Texas & New Orleans R.R. v. Flowers*, 336 S.W.2d 907 (Tex. Civ. App. 1960); *Robinson v. Hreinson*, 177 Utah 2d 261, 409 P.2d 121 (1965); *State Farm Mut. Auto. Ins. Co. v. Futrell*, 209 Va. 266, 163 S.E.2d 181 (1968); *Lyster v. Metzger*, 68 Wash. 2d 216, 412 P.2d 340 (1966); *Marken v. Empire Drilling Co.*, 293 P.2d 406 (Wyo. 1956).

⁸ 101 W. Va. 263, 132 S.E. 885 (1926).

was the *plaintiff himself*, and not a *third party*, that brought the question of insurance into the case. . . ."⁹

The case of *Moorefield v. Lewis*¹⁰ may have further qualified the West Virginia rule. The facts showed that after the jury had been selected and sworn, counsel for the plaintiff, in the course of an opening statement to the jury, said, "I might say that the defendant, Mr. Lewis, has insurance."¹¹ A more flagrant infraction would be difficult to find. On objection by the defendant, the trial court ruled that the statement was improper and not subject to jury consideration. The defendant moved to discharge the jury because of the remark but his motion was overruled. On appeal, the West Virginia Supreme Court of Appeals affirmed a judgment for the plaintiff. It was conceded that "[t]he trial court should have sustained the motion to discharge the jury because of counsel's effort to inject into the trial a matter so plainly erroneous and highly prejudicial."¹² Even so, it was felt that reversal was not warranted since the lower court had acted promptly with regard to the adverse statement. The court emphasized that "a plain case for recovery [had] been established by the whole evidence."¹³ On the other hand, there continues to be ample authority in West Virginia supporting the proposition that in certain instances even a trial court's attempted remedial instruction will not suffice to eradicate a prejudicial statement from the purview of the jury.¹⁴ In fact, our court has held that an instruction will at times serve no function other than to impress more strongly upon the minds of the jury that insurance is involved in the litigation.¹⁵

The 1932 decision of *Oldfield v. Woodall*¹⁶ determined that it was ordinarily proper to allow counsel for the plaintiff to ask

⁹ *Id.* at 267, 132 S.E. at 887 (emphasis added).

¹⁰ 96 W. Va. 112, 123 S.E. 564 (1924).

¹¹ *Id.* at 115, 123 S.E. at 565.

¹² *Id.* at 116, 123 S.E. at 565.

¹³ *Id.*

¹⁴ *Wilkins v. Schwartz*, 101 W. Va. 263, 132 S.E. 885 (1926); *Christie v. Mitchell*, 93 W. Va. 200, 116 S.E. 715 (1923).

¹⁵ *Leftwich v. Wesco Corp.*, 146 W. Va. 196, 119 S.E.2d 401 (1961).

¹⁶ 113 W. Va. 35, 166 S.E. 691 (1932). The following testimony was elicited from defendant's witness on cross-examination: "Q. What is your business, Mr. Evans? Objection; overruled as going to the credibility of the witness, and for no other purpose. Exception. A. What is my business? Q. Yes, sir. A. I am in the automobile body works business. Q. Is that your main business? A. Yes, it is. Q. What other business have you besides that? A. I don't have any. Q. What was your business at the time of this accident and a short time thereafter? A. I was in the insurance business. Q. You were an insurance adjuster, were you not? A. No, sir, I never have been. I have been an insurance agent but no adjuster." *Id.* at 38, 166 S.E. at 693.

the defendant's witness whether or not he was an insurance adjuster. This question, which concerned the credibility of the witness, was permitted because the court was cognizant of the fact that "an adjuster might unwittingly be prejudiced against a plaintiff in such a case."¹⁷ It should be emphasized that the legitimate interpretation afforded to such testimony went solely to the credibility of the witness. The good faith intent of such an inquiry could not be designed nor could it be used to disclose defendant's insurance coverage indirectly.

The case of *Butcher v. Stull*,¹⁸ suggests an extension of the *Oldfield* principle. In *Butcher*, the plaintiff sought damages for personal injuries sustained in an automobile collision. A witness for the defendant gave testimony which was markedly contradictory to the plaintiff's evidence. Questioning by defendant's counsel created the impression that the witness was totally disinterested. However, on cross-examination the witness was constrained to reveal that he was an insurance adjuster employed by the defendant's insurer, and that he went to the scene of the collision at the direction of the defendants.¹⁹ The trial court then promptly instructed the jury that the previous line of questioning could be considered solely for the purpose of determining whether the witness had any interest in the outcome of the case. The West Virginia Supreme Court of Appeals affirmed the jury verdict for the plaintiff and said:

This Court is firmly committed to the rule that a plaintiff in a personal injury or wrongful death case may not . . . improperly inform the jury of the fact that the defendant is protected by indemnity insurance. Thus, a shield has been provided for the protection of insurance

¹⁷ *Id.* at 40, 116 S.E. at 693.

¹⁸ 140 W. Va. 31, 82 S.E.2d 278 (1954), *commented on*, 57 W. Va. L. Rev. 104 (1955).

¹⁹ The following testimony was elicited on cross-examination:

"Q. Mr. Haggerty, by whom are employed? A. I am employed by Haggerty Insurance Service. Q. And what is your position with Haggerty Insurance Service? A. I am an insurance adjuster. Q. On whose behalf were you summoned to this court to testify? A. Mr. Stull's. Q. At whose direction did you go to the scene of the accident. A. With Mr. Stull. Q. At whose request did you go to the scene of the accident? A. That was my own idea. I mean that is part of the investigation. Q. You work independently, then, on these investigations? A. That's right. Q. What interest did you have in investigating this accident? A. That was my job, to investigate accidents. Q. Your job was to investigate accidents, and you were employed to do so by the Haggerty Insurance Agency; is that right? A. Haggerty Insurance Service, yes, that's right. Q. What interest do they have in this case? A. They, of course, insure Mr. Stull." *Id.* at 40, 82 S.E.2d at 284.

companies. However, this shield must not be converted into an offensive weapon to be used for a purpose not contemplated by the rule. The unpleasant situation in which the insurance company found itself was not created by the plaintiff, her counsel, or witnesses. When [the witness] was placed upon the . . . stand by the defendant, under the circumstances revealed by the record, and in view of the admonition given to the jury by the trial court, it was not improper for the plaintiff to ask the questions . . . and to receive the answers made . . . so that the jury might consider that information in determining the [witness'] interest in the case, or bias in favor of the defendants in weighing his testimony.²⁰

The principal of the *Butcher* case comes within a well recognized exception to the general rule and permits facts which tend to show interest or bias on the part of a witness to be elicited on cross-examination, even though such examination may necessarily disclose that the defendant is protected by insurance.²¹ One rationale for this exception is that "[n]o witness, offered by either side, be he prince, potentate, physician, judge or private citizen is exempt from the right of fair cross-examination."²²

However, the recent holding in *Ellison v. Wood & Bush Co.* has left some uncertainty about the *Butcher* exception. In *Ellison* the plaintiff homeowner had instituted a suit against the defendant highway contractor to recover for damages allegedly caused to her dwelling by concussions resulting from the defendant's blasting operations. At the trial the defendant introduced a witness who testified that he had inspected the plaintiff's property before and after the blasting operations. His testimony indicated considerably less damage to the property than was described by the plaintiff and her witnesses. During cross-examination this witness was compelled to relate that he had been hired by the defendant's insurer for the purpose of making "pre-blast" inspections.²⁴ The Circuit Court of Cabell County entered a judgment on jury verdict for the plaintiff and the defendant appealed.

²⁰ *Id.* at 48, 82 S.E.2d at 288 (emphasis added).

²¹ See Annot., 4 A.L.R.2d 761 (1949); 2 J. WIGMORE, EVIDENCE § 282 (a) (3rd ed. 1940).

²² *Mississippi Ice & Utilities Co. v. Pearce*, 161 Miss. 252, 264, 134 So. 164, 167 (1931).

²³ 170 S.E.2d 321 (W. Va. 1969).

²⁴ The following testimony was deemed crucial when the case was reviewed on appeal:

"Q. So no walks are figured because you couldn't see any difference. Then why did you put these other things in if you couldn't see any difference?"

The West Virginia Supreme Court of Appeals reversed and awarded the defendant a new trial holding that the defendant's motion for a mistrial should have been granted by the lower court because the element of insurance had been improperly injected into the case.

The *Butcher* and *Ellison* cases had similar factual patterns. The differences in result are complicated by the fact that the *Butcher* principle is not referred to in the *Ellison* holding. Nevertheless, a careful study of the facts and circumstances of each case may assist in clarifying their distinctions.

The court in *Ellison* appeared to stress the fact that the witness gave no overt indication that he was biased or hostile, "other than the mere fact that his testimony differed materially from that of the plaintiff and her witnesses."²⁵ In *Butcher* the court noted that the witness appeared totally "disinterested" and there was no manifest indication that the witness was hostile or biased. The *Butcher* holding affirmed the propriety of revealing possible "hidden bias" or interest of a witness.

The witness in the *Butcher* case was an "insurance adjuster" whereas the witness in *Ellison* would perhaps be called a "pre-blast inspector." There might be some difference in the occupational descriptions, but both apparently perform similar duties. Their investigations are conducted for the purpose of ascertaining possible damage and subsequent liability.

The court in *Ellison* seemed to place substantial weight on the fact the previous testimony of the witness had made it evident that neither plaintiff nor defendant had requested his presence at the blasting area. Furthermore, it was shown that counsel for plaintiff had in his possession a copy of the witness inspection report. This report was prepared for the insurance company. These facts are probably mentioned to charge plaintiff's counsel with actual knowledge of the witness employer, and therefore extinguish all motive for extracting the prejudicial testimony except that of calculated design. In *Butcher*, however, *counsel* did have knowledge, direct

A. Because I was asked to., Q. By whom? Mr. Schaub [defendant's counsel]:

It was at my request. Q. Just a minute. By whom? A. (Pause). The Court: Who asked you? A. Can I say that, sir? The Court: Yes, answer A. Can I ask you a question? The Court: No, don't ask me any question. Answer the question and answer promptly, who told you to do that. A. The Travelers Insurance Company. But I thought you weren't supposed to say that. Is that all right? The Court: All right." *Id.* at 330.

²⁵ *Id.* at 331.