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VOIR DIRE II LIABILITY INSURANCE

THOMAS A. VETTER*

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I. INTRODUCTION

There are two reasons for allowing preliminary inquiries of jurors. First, trial counsel may discover the partiality or interest of the jurors, and thereby gain grounds for challenge for cause; secondly, facts may be revealed which will enable counsel to intelligently exercise peremptory challenges. However, it is commonly known that one of the most important "fringe benefits" of voir dire is that it offers an opportunity for plaintiff to call to the jury's attention the existence of liability insurance and that any loss will fall on the insurance company.

No other aspect of voir dire examination has resulted in as many appeals as has the plaintiff's questioning about possible relationships between the jurors and defendant's insurance company.¹ The reason is clear. As the courts have pointed out: "It seems to be the impression of the bar that the fact that the liability of a defendant in a tort action is covered by insurance will, in the minds of the average juror, not only justify a verdict for plaintiff but a very generous assessment of damages as well. The verdicts in many cases warrant that view."²

This "impression of the bar" is shared equally by the bench. The courts have frankly acknowledged that the mere asking of such questions is equivalent to giving direct information to the jurors that an insurance company is obligated to pay any judgment rendered.³ And, as such information is "so irrelevant and prejudicial"⁴ as to warrant discharging the jury, the courts have condemned voir dire tactics which have such an effect as their deliberate purpose and result as tending to "poison the minds of the jurors."⁵

II. THE STARTING POINT

We must begin with the basic proposition that a litigant is entitled to a fair and impartial jury. "Under our system of jurisprudence there is no feature of a trial more important and more necessary to the pure and just administration of the law than that every litigant shall be accorded a fair trial before a jury of his countrymen, who enter upon the trial

1. See Annot. 4 A.L.R.2d 761 (1949).

2. *Hannah v. Butts*, 330 Mo. 876, 51 S.W.2d 4 (1932); *Henry v. Tinsley*, 240 Mo. App. 163, 218 S.W.2d 771 (Spr. Ct. App. 1949).

3. *Burrows v. Likes*, 180 Mo. App. 447, 166 S.W. 643 (Spr. Ct. App. 1914).

4. *Id.* at 456, 166 S.W. at 646.

5. *Chambers v. Kennedy*, 274 S.W. 726, 729 (Mo. 1925).

totally disinterested and wholly unprejudiced."⁶ If the defendant's insurer will bear the ultimate loss then any connection between a juror and that company may serve to cast a shadow on that total disinterest or whole unprejudice. As Judge Stone of the Springfield Court of Appeals has aptly phrased it "[W]e remain mindful of the eternal verity that, whatever else may change in this changing world, the impelling self interest, motivating emotions and besetting frailties of members of the human family abide unchanged."⁷

Thus, in *Murphy v. Cole*,⁸ when it was revealed on voir dire that a juror was the local agent for defendant's insurance company, counsel for plaintiff challenged for cause. The juror said he had not written the policy involved; that he had never heard of the case before; that he did not know the plaintiff and had no prejudice in the case. The challenge was overruled and plaintiff excepted. The Supreme Court reversed the case on that point stating: "If for any reason, whether statutory or not, a prospective juror is not in a position to enter the jury box with an open mind, free from bias or prejudice against either party to the cause, and decide the case upon the evidence adduced and the law as contained in the court's instructions, he is not a competent juror."⁹

Since counsel for plaintiff has a legitimate interest in inquiring as to the possible relationships between the jurors and defendant's insurer, to deny counsel such inquiry has been held to be reversible error.¹⁰

III. HISTORICAL DEVELOPMENT

Laying emphasis on the fundamental right to an impartial jury, the courts have tolerated voir dire on the subject of insurance even where the inquiry seems to have been designed to accomplish the very results which have been so strongly deplored. An examination of judicial opinions from a historical standpoint may provide a better understanding of the present law on the subject.

6. *Theobald v. St. Louis Transit Co.*, 191 Mo. 395, 416-17, 90 S.W. 354, 359 (1905).

7. *Ozark Border Elec. Coop. v. Stacy*, 348 S.W.2d 586, 591 (Spr. Mo. App. 1961).

8. 338 Mo. 13, 88 S.W.2d 1023 (1935).

9. *Id.* at 19, 88 S.W.2d at 1024.

10. *Jenkins v. Chase*, 53 S.W.2d 21 (Mo. 1932); *Decker v. Liberty*, 39 S.W.2d 546 (Mo. 1931); *Galber v. Grossberg*, 324 Mo. 742, 25 S.W.2d 96 (1930); *Smith v. Star Cab Co.*, 323 Mo. 441, 19 S.W.2d 467 (1929).

A. Laying the Foundation

*Boten v. Sheffield Ice Co.*¹¹ is the earliest leading case where the problem under discussion arose. In *Boten* plaintiff knew that an insurance company was interested in the outcome of the case but did not know the specific name of the company, apparently because defendant's counsel had not so informed him. On voir dire plaintiff asked the jurors about their relations with any liability insurance company. Defendant objected and moved to discharge the jury. Out of the hearing of the jury defendant admitted that an insurance company was defending the case "to a certain extent" but he argued that questions on voir dire were proper only when made with reference to a *specific* company. Under questioning from the court plaintiff said that defendant's counsel, in telling him of the insurance company did not tell him the company's name.¹² The court thereupon overruled the objection. On appeal it was held that the question was not erroneous if the inquiry was made in good faith and was not "conducted beyond reasonable limits." The court concluded that in this case it could not be said that the question was asked in bad faith. It is significant to note the court's comment that the question asked "did not tell [the jury] anything more than they would have known as intelligent men, *i.e.*, that in all probability defendant carried liability insurance."¹³

It appears from the *Boten* case that plaintiff's counsel had, prior to voir dire examination, asked defendant if he was insured. This was the established and approved way of laying the foundation for voir dire questions relating to insurance. Such inquiry was considered to be evidence that plaintiff's questions were intended to be consistent with the legitimate ends of voir dire.

In *Hill v. Jackson*,¹⁴ plaintiff, without prior inquiry, asked the jurors: "Are any of you gentlemen employed by the Medical Protective Association? Are any of you stockholders in that insurance company?"¹⁵ Defendant objected to both questions and the court overruled both objections. On appeal the court did not pass on the prejudicial nature of these two

11. 180 Mo. App. 96, 166 S.W. 883 (K.C. Ct. App. 1914).

12. In light of defendant's argument it would appear that he had refused to divulge the name although it is possible that he merely neglected to do so or even that plaintiff had not so specifically inquired.

13. *Supra* note 11, at 109, 166 S.W. at 888.

14. 272 S.W. 105 (K.C. Mo. App. 1925).

15. *Id.* at 107.

questions¹⁶ but did point out that plaintiff had made no inquiry to find out whether defendant was insured by the company named, and further that there was nothing in the record to indicate that the company was involved. The court observed that the "proper" procedure would be for plaintiff to inquire, out of the jury's presence and before voir dire, whether any insurance company is connected with the case. "It is then the duty of defendant's counsel to state the true facts to the court and if it appears that there is a liability insurance company in the case, its name should be stated, and the interrogation of the jurors as to their relation with the company would be proper."¹⁷

In *Chambers v. Kennedy*,¹⁸ the first Supreme Court decision in this area, the requirement of a proper foundation was strongly noted. In *Chambers*, plaintiff, without conducting any preliminary inquiry, asked one of the jurors "if he was interested in any manner, as a stockholder or otherwise, in the Continental Casualty Company or any other insurance company engaged in issuing policies of insurance to indemnify persons against claims for damages on account of personal injuries."¹⁹ Defendant objected and moved to discharge the jury. The objection was overruled and defendant excepted. On appeal the court reversed and remanded, strongly condemning as "highly prejudicial" voir dire on the subject of insurance in the absence of good faith. They observed that in view of the remoteness of drawing a juror actually connected with an insurance company interested in the defense that counsel should have shown their good faith prior to asking such questions.²⁰

Six months later however, the Kansas City Court of Appeals approved a nearly identical question in *Balderson v. Monaghan*.²¹ The court specifically distinguished *Chambers* by pointing out that prior to the voir dire the defendant had admitted that he was insured with the company about which the inquiry was made and that plaintiff's good faith had been established.

B. Good Faith

The use of prior inquiry to establish a foundation for voir dire was not a procedural requirement, but was regarded as evidence of the ques-

16. There was ample evidence of prejudice in plaintiff's cross-examinations during which the subject of liability insurance also arose.

17. *Supra* note 14 at 107.

18. *Supra* note 5.

19. *Id.* at 727.

20. *Id.* at 729.

21. 278 S.W. 783 (K.C. Mo. App. 1926).

tioner's good faith. And as good faith was the element stressed by the courts, it is not surprising that soon circumstances other than prior inquiry were considered to be equally satisfactory evidence of good faith.

In *Planett v. McFall*²² counsel for plaintiff, without any prior inquiry to establish a proper foundation, asked "whether any member of the panel did business with the Maryland Casualty Company or was acquainted with any of its officers or agents."²³ Defendant objected and moved to discharge the jury. Out of hearing of the jury, defendant's attorney stated that the named company had insured defendant, but that the company had denied all liability and had withdrawn from the case because of alleged lack of cooperation from the defendant. The trial judge suggested that the defendant be sworn and examined on this point but his counsel refused. Thereupon defendant's objection was overruled and he excepted. On appeal the court indicated that the better practice would be for plaintiff's counsel, through prior questioning, to lay a foundation for his voir dire but "the real test as to the propriety of such examination is whether the inquiry is made in good faith."²⁴ The court found the good faith of plaintiff's counsel in his subsequent discussion with the court especially in view of defense counsel's refusal to permit testimony regarding possible insurance coverage.

The Supreme Court ruled on the "laying a foundation" requirement in the leading case of *Maurizi v. Western Coal & Mining Co.*²⁵ Plaintiff, without first asking defendant about his insurance, asked the jurors as to their connection with "United States Fidelity and Guaranty Company or Thomas McGee & Sons, agents of that company in Kansas City."²⁶ Defendant objected and moved to discharge the jury. Then, out of the hearing of the jury, defendant's counsel was asked if he represented that company and if it was interested in the case. He admitted that he was an attorney for the company but did not answer whether or not he was representing the company in this case, or whether or not the company was interested. His objection was overruled. On appeal he contended that no foundation had been laid for the question, either outside of the presence of the jury or at any other time.

The court noted that defendant had not claimed at trial that the

22. 284 S.W. 850 (St. L. Mo. App. 1926).

23. *Id.* at 853.

24. *Id.* at 854.

25. 321 Mo. 378, 11 S.W.2d 268 (En Banc 1928).

26. *Id.* at 396, 11 S.W.2d at 274.

insurance company was not interested in the case nor did he so claim on appeal. The court then said:

We know of no rule requiring a foundation for the examination of members of the panel as to their qualifications to serve as jurors. The foundation is the right of a litigant to know the relation of the members of the panel to the parties and those interested in the result of the case. Counsel for plaintiff is not required to prove that an insurance company, or insurance agency, is interested before inquiring of the members if they are connected with either. He is presumed to be acting in good faith when he makes the inquiries. If it appears from the record that counsel had reasonable cause to believe an insurance company, or an insurance agency was interested, and that he acted in good faith in making the inquiries, the sound discretion of the court in controlling and directing the examination will be sustained. On the other hand, if it should appear from the record that counsel has abused the privilege, and the inquiries were not for the purpose of being able to intelligently make peremptory challenges, the action of the court in permitting the inquiries would not be sustained. The court should require counsel for plaintiff to inquire of defendant's counsel, out of the hearing of the jury, whether or not the insurance company is interested in the case, and, if so, the name of the company. However, it does not follow that a failure to do so would result in convicting the court of error.²⁷

The court observed that if the insurance company was interested then the defendant could not claim prejudice merely because plaintiff did not make a prior inquiry, and in view of defendant's evasion of the questions put to him, it could be assumed that the insurance company was interested and that plaintiff's inquiry was legitimate.²⁸

Chambers v. Kennedy was distinguished by observing that the record in that case did not disclose that the specific insurance company inquired about, or any other insurance company, was interested in the defense and that there was no indication that plaintiff had any reasonable cause to so believe. However subsequent decisions have considered the *Maurizi* decision as overruling *Chambers*.²⁹

27. *Id.* at 396-397, 11 S.W.2d at 274. *Accord*, *Dooley v. Dooley*, 290 S.W.2d 856 (K.C. Mo. App. 1956). For a case where the court intervened to obtain the name of the defendant's insurer see *Payne v. Stott*, 181 S.W.2d 161 (K.C. Mo. App. 1944).

28. Supporting the court's holding was the fact that a juror did acknowledge that he was acquainted with the insurer's agents; that he carried liability insurance with them, and that he might be prejudiced if they were interested in the case.

29. *Smith v. Star Cab Co.*, *supra* note 10.

C. *The Maurizi Test*1. Reasonable Cause for Belief that an Insurance Company
is Interested in the Case

When plaintiff's counsel conducts his voir dire on insurance without any prior foundation the court in *Maurizi* said, "He is presumed to be acting in good faith when he makes the inquiries."³⁰ Will this presumption, standing alone, be sufficient evidence of counsel's reasonable belief of an insurer's interest?

The question was considered by the Springfield Court of Appeals in *Henry v. Tinsley*.³¹ In that case counsel for plaintiff, without any prior foundation, inquired of the panel: "Do any of you gentlemen hold insurance with the Car and General Insurance Company of New York?"³² Defendant objected and asked that the jury be discharged. The court overruled the objection but after a verdict for plaintiff, defendant's motion for a new trial was sustained on the basis that error was committed in not discharging the jury after the voir dire question of plaintiff's counsel.³³ On appeal it was noted that the record gave no indication that plaintiff's counsel ever undertook to find out if the insurance company was interested in the case nor was there anything that indicated reasonable grounds for asking the question. The appellate court found that the trial judge was justified in the exercise of his discretion to award a new trial. "We find that as far as the record in this case was concerned there was not the slightest excuse or justification for plaintiff's counsel to inquire of the jury on voir dire examination about an insurance company."³⁴

The dissenting opinion in *Henry* would sustain a presumption of good faith. After noting that the trial judge had concluded that he had committed error in refusing to discharge the jury, the dissent quoted *Maurizi*, pointing out that in circumstances such as the *Henry* case, "the court should require counsel for plaintiff to inquire of defendant's counsel . . . whether or not the insurance company is interested in the case. . . . However, it does not follow that a failure to do so would result in convicting the court of error."³⁵

If *Henry* is strictly followed plaintiff might find himself in an awk-

30. *Supra* note 25, at 396, 11 S.W.2d at 274.

31. 240 Mo. App. 163, 218 S.W.2d 771 (Spr. Ct. App. 1949).

32. *Id.* at 166, 218 S.W.2d at 773.

33. The trial judge's decision was also based upon the injection of insurance during plaintiff's examination of a witness.

34. *Supra* note 31, at 175, 218 S.W.2d at 779.

35. *Supra* note 31, at 179-180, 218 S.W.2d at 782 (Opinion of Blair, J.).

ward situation. If he has not laid any foundation and if the court simply overrules defendant's objection to the voir dire examination then plaintiff should make some sort of record about his knowledge of the insurer's interest. If he does not then the record will lack "the slightest excuse or justification for the inquiry."

2. Good Faith in Making the Inquiries

If the first part of the test is adequately met, that is, assuming plaintiff has proved reasonable cause for belief that an insurance company is interested, will this constitute sufficient evidence of the propriety of his motives or at least raise a presumption of propriety so as to satisfy this second part of the test and allow counsel to conduct his inquiry regardless of his actual motive?

This question was first considered by the Kansas City Court of Appeals in *Wendel v. City Ice Co.*³⁶ Plaintiff had, prior to the voir dire, determined that a specific company had insured defendant. On voir dire plaintiff inquired as to the jurors' relationship with the company and its attorney in fact. On appeal defendant contended that plaintiff had acted in bad faith. On the question of what constitutes good faith or bad faith the court said:

If the record affirmatively shows that there was no excuse for injecting the name of the insurance company into the case, bad faith will be presumed. If the record shows that the insurance company is interested in the result, good faith is presumed. If it shows that there was good reason to believe that an insurance company was interested in the result, again good faith will be presumed. In any event, good or bad faith depends upon the question as to whether or not the questions on the voir dire concerning the insurance company were legitimate subjects of inquiry. It has nothing to do with the motive of an attorney who asks such questions in a proper case.³⁷

Under such a standard if an insurance company is actually interested in the result, then plaintiff may inquire about what connections prospective jurors have with that company. And if there is reasonable cause to believe that an insurance company is interested but plaintiff has been unable to obtain the specific name, then he may ask prospective jurors if they are connected with *any* insurance company. And "it is not

36. 224 Mo. App. 152, 22 S.W.2d 215 (K.C. Ct. App. 1929).

37. *Id.* at 159, 22 S.W.2d at 219.

necessary for the plaintiff to prove his motive or lack of motive for asking the questions."³⁸ As the court indicated:

To hold otherwise would mean that if two attorneys represented a plaintiff in a case where the defendant was injured, and one attorney harbored a fear that a biased juror might get upon the panel, but had no thought of what the effect would be upon disinterested jurors if they learned of the interest of the insurance company, but the other attorney did not entertain any serious apprehension that a biased juror would be chosen, but was anxious that all the jurors know the interest of the insurance company in the case, then the question as to whether or not error was committed by asking the jurors whether or not they had any connection with the insurance company would depend upon which attorney asked the question.³⁹

But in *Garter v. Rock Island Bus Lines*⁴⁰ the Supreme Court said it would not adopt a rule which would base good faith solely on the existence of a reasonable belief that defendant was insured. The sole ground for appeal concerned the propriety of the voir dire. Plaintiff, out of the hearing of the jury, said he had been informed that American Fidelity & Casualty Company was defending the cause and he asked defendant if that was true. Defendant denied that it was. Plaintiff then said that the Public Service Commission had informed him that the defendant had a policy of that company on file in its offices. Defendant stated that the policy in question did not cover the vehicle involved in the accident. Plaintiff then offered to introduce a letter purporting to be from the Secretary of the Public Service Commission which included the number of the policy of the insurance company mentioned and the statement that "the policy on file here covers any accident occurring while the insured is operating pursuant to the certificate of convenience and necessity issued to him by this Commission . . . [and the operator] is not permitted to operate unless an insurance policy is filed, insuring that payment of any judgment against him will be made by the insurance company."⁴¹ Defendant objected, claiming among other things, that the Public Service Commission could not by letter determine who was interested or liable; that the letter was not the best evidence of coverage; and that it was hearsay. The court sustained the objection. Two of plain-

38. *Id.* at 158, 22 S.W.2d at 218.

39. *Id.* at 159-160, 22 S.W.2d at 219.

40. 345 Mo. 1170, 139 S.W.2d 458 (1940).

41. *Id.* at 1173, 139 S.W.2d at 460.

tiff's counsel were then sworn and testified as to conversations regarding settlement of the suit with one Monroe who said that he was with the American Fidelity & Casualty Company. Defense counsel reiterated that there was no insurance company interested in the outcome of the case and no coverage on the vehicle and that there was no showing that the person who talked with plaintiff's attorneys really represented the insurance company.

The court denied plaintiff's request to examine the panel on this point and he excepted. On appeal the holding was affirmed. The court held that in matters such as this, where the trial court has the opportunity "to see and hear and know counsel,"⁴² that much must be left to the sound discretion of the trial court who "is in closer touch with the proceedings than we can be from the cold printed record."⁴³ It observed that ". . . even if the court believed that the plaintiff's counsel was acting in the honest belief that he had the right to interrogate the jury panel . . . does that conclude the court and make it mandatory that it allow the interrogation? We think not."⁴⁴ The court concluded by holding that "where full hearing has been accorded, even though the plaintiff's evidence may indicate good faith on his part, yet if the trial court is convinced, on all the evidence heard and the facts and circumstances shown that in the interests of justice the proposed interrogation should not be allowed its ruling should not be interfered with by an appellate court unless there appears from the record a palpable abuse of discretion."⁴⁵

The decision in *Carter* indicates that the good faith required of counsel is more than that which would be presumed to exist from a reasonable belief of an insurance company's interest which *Wendel* held to be sufficient. The court acknowledged that counsel's good faith was indicated by such belief but clearly held that this alone was insufficient. The decision in *Wendel* was not referred to nor was the problem raised in it discussed. However, the court's references to the trial judge's ability "to see and hear and know counsel" indicates that the propriety of any question concerning insurance might depend not only "upon which attorney asked the question" but also on the manner in which the question was asked.

With such a subjective test and with the wide latitude that the *Carter* decision gives to the discretion of the trial court, any attempt

42. *Id.* at 1177, 139 S.W.2d at 462.

43. *Id.* at 1176, 139 S.W.2d at 462.

44. *Ibid.*

45. *Id.* at 1177, 139 S.W.2d at 462.

to compile examples of bad faith motives from the "cold printed record" would be of questionable value.

IV. ATTEMPTS OF DEFENDANT TO PREVENT INQUIRY

A. Defendant's Failure to Disclose

Coincident with the expanding freedom given plaintiff in conducting his voir dire has been a consistent frustrating of attempts by defendants to prevent insurance inquiries. The refusal of defendant to answer plaintiff's questions about insurance will result in the assumption that an insurance company is interested;⁴⁶ an evasion of the question⁴⁷ or disclaimer of knowledge⁴⁸ will produce the same result.

B. Coverage in Question

Plaintiff's right to inquire about insurance is not defeated by defendant's questionable coverage. In *Kaley v. Huntley*⁴⁹ counsel stated that defendant's policy was effective only in the Chicago area. Defendant moved to Kansas City without notifying the company thus raising a question of coverage in the latter city. Counsel did admit, however, that he had been employed by another lawyer who he assumed was acting for the company and who indicated that the defense was being made under the policy. It was held that plaintiff had a right to question the jurors about the company.

But in *Bennett v. Cauble*⁵⁰ counsel for defendants admitted that there was a policy with a specific company but said that the company had given notice that it was not liable and would take no part in the defense and that he was representing the defendants personally. He admitted that if judgment was against defendants he expected to recover from the insurance company. Plaintiff was permitted to question the jurors as to their relationships with the company and defendant excepted. The appellate court held that inasmuch as the insurance company was not conducting the defense of the case that it was "highly prejudicial and improper to propound to the jury questions which tended to show that

46. *Glick v. Arink*, 58 S.W.2d 714 (Mo. 1932); *Schuler v. St. Louis Can Co.*, 322 Mo. 765, 18 S.W.2d 42 (1929); *Smith v. Scudiero*, 204 S.W. 565 (K.C. Mo. App. 1918).

47. *Melican v. Whitlow Const. Co.*, 278 S.W. 361 (Mo. 1925); *Gerran v. Minor*, 192 S.W.2d 57 (St. L. Mo. App. 1946); *Maurizi v. Western Coal Co.*, *supra* note 25.

48. *Galber v. Grossberg*, *supra* note 10.

49. 88 S.W.2d 200 (K.C. Mo. App. 1935).

50. 167 S.W.2d 959 (St. L. Mo. App. 1943).

the insurance company was in fact conducting the defense or was a party to the pending suit."⁵¹ The plaintiff's questions were held to not be legitimate subjects of voir dire inquiry and the trial court erred in permitting them to be asked.

The Supreme Court was confronted with a similar situation in *Murphy v. Graves*.⁵² Counsel for defendants admitted the existence of a liability insurance policy but denied that the company was interested in the case. He said that the company had denied liability and that he was representing the defendants personally. Nevertheless, the trial judge allowed plaintiff to ask the jurors about their connections with the company. On appeal the court reversed on other grounds and did not rule on the propriety of the plaintiff's voir dire. However, in commenting on the voir dire, the court cited *Bennett*, and observed that inasmuch as defendant had categorically denied any coverage that the plaintiff had the affirmative of showing the existence of coverage and that they were "inclined to the view plaintiff should have adduced evidence on the issue. . . ."⁵³

However, if the company, while denying liability for the amount of the judgment, does participate in the case to the extent of paying the costs of the defendant then the plaintiff has the right to question the jurors in regard to the company.⁵⁴

C. Jurors' Alleged Disinterest

Defendants, while admitting the interest of the insurance company, have on occasion attempted to show that no one on the panel was connected in any way with the insurer and that there was no need, in good faith, for plaintiff's counsel to make his own inquiry.

In *Smith v. Star Cab Co.*,⁵⁵ defendant argued, in support of the trial judge's refusal to allow plaintiff to conduct inquiry on this topic, that the trial judge might have become so acquainted with the character of the jurors that he knew that none of the jurors had any possible connection with any insurance company. The court, in reversing, disposed of this contention by pointing out that even if the trial judge had such knowledge it would be "no excuse for a denial of plaintiff's right to search the consciences of the members of the panel as to their qualifications to serve as jurors in the case."⁵⁶

51. *Id.* at 961.

52. 294 S.W.2d 29 (Mo. 1956).

53. *Id.* at 33.

54. *Jedlicka v. Shackelford*, 270 S.W. 125 (St. L. Mo. App. 1925).

55. *Supra* note 10.

56. *Supra* note 10, at 446, 19 S.W.2d at 469.

In *Tucker v. Kollias*⁵⁷ a statement by counsel for defendant that “[N]o members of this panel or their families are in any way connected or interested in the Southern Surety Company”⁵⁸ did not serve to bar plaintiff’s inquiry. It was noted that the statement was not made under oath nor was any showing made as to the basis for the statement. And while this language might seem to indicate that a statement fulfilling those requirements might preclude the plaintiff’s voir dire, later decisions indicate that even this would not be sufficient.

In *Smith v. Lammert*⁵⁹ defendant tendered a list of all “members” of the insurance company who were eligible for jury duty in the county where the trial was held. Plaintiff refused to accept this list. Defendant objected to plaintiff’s proposed voir dire. The objection was sustained and plaintiff excepted. On appeal the ruling was held to be erroneous and that the law was settled that plaintiff was entitled to have the jurors’ answer under oath as to their qualifications.

In *Dillinden v. Weeks*⁶⁰ defendant offered an affidavit from the insurance company that only two members of the panel carried policies with the company or were in any way connected with the company. The court refused to accept the affidavit.

That such efforts of defendant will be fruitless is conclusively shown in *Fawkes v. National Refining Co.*⁶¹ Defendant introduced an affidavit of a special deputy commissioner for the State of Michigan stating that he was the custodian and manager of the insurance company concerned by virtue of a court order of that state; that he had examined the records of that company and that there was no record of any stockholder being a resident of Jackson County⁶² and that the company maintained no office and had no employees in that county. A defense attorney stated under oath that the company had concluded all of its business in the area; that this was the only claim pending on any policy; and that all other litigation had been settled and concluded. The trial court however permitted plaintiff to question the jurors regarding their relationships with the insurance company and the defendant excepted. On appeal the court noted that there was little likelihood of any member of the panel being connected in any manner with the insurance company but that on

57. 16 S.W.2d 649 (St. L. Mo. App. 1929).

58. *Id.* at 651.

59. 41 S.W.2d 791 (Mo. 1931).

60. 50 S.W.2d 152 (St. L. Mo. App. 1932).

61. 235 Mo. App. 433, 130 S.W.2d 684 (K.C. Ct. App. 1939).

62. Trial was in the Circuit Court of Jackson County.

the other hand there was no evidence of insolvency and the employment of counsel to defend the case indicated that the company was a live concern. The plaintiff was entitled to have the members of the jury panel answer under oath as to their specifications.⁶³

V. THE RANGE OF PERMISSIBLE INQUIRY

A. *The Particular Insurance Company*

The range of possible connections between the jurors and an insurance company is an extensive one. Thus counsel have propounded, and the courts approved, questions as to whether a juror is an officer,⁶⁴ employee,⁶⁵ agent,⁶⁶ policyholder,⁶⁷ stockholder,⁶⁸ or claims agent of the company.⁶⁹ Courts have also approved questions designed to elicit whether jurors have any financial interest in the company,⁷⁰ or have done business with the company⁷¹ or are in any way connected with⁷² the company.

Jurors have been properly asked if any members of their family or relatives are employees,⁷³ stockholders,⁷⁴ have a financial interest,⁷⁵ or

63. In accord as to "out-of-state" or "non-local" companies see *Davis v. Quermann*, 22 S.W.2d 58 (St. L. Mo. App. 1929).

64. *Glasco Electric Co. v. Union Elec. Light & Power Co.*, 332 Mo. 1097, 61 S.W.2d 955 (1933); *Wack v. F. E. Schoenberg Mfg. Co.*, 331 Mo. 197, 53 S.W.2d 28 (1932).

65. *Haley v. Edwards*, 276 S.W.2d 153 (Mo. 1955); *McCaffery v. St. Louis Public Service Co.*, 363 Mo. 545, 252 S.W.2d 361 (En Banc 1952); *Glasco Electric Co. v. Union Elec. Light & Power Co.*, *supra* note 64; *Dooley v. Dooley*, *supra* note 27; *Schraedel v. St. Louis Pub. Serv. Co.*, 248 S.W.2d 25 (St. L. Mo. App. 1952); *Gerran v. Minor*, *supra* note 47; *Hatton v. Sidman*, 169 S.W.2d 91 (St. L. Mo. App. 1943); *Faust v. East Prairie Milling Co.*, 20 S.W.2d 918 (Spr. Mo. App. 1929).

66. *Wack v. F. E. Schoenberg Mfg. Co.*, *supra* note 64; *Johnston v. Owings*, 254 S.W.2d 993 (K.C. Mo. App. 1952).

67. *Schuler v. St. Louis Can Co.*, *supra* note 46; *Wendel v. City Ice Co.*, *supra* note 36; *Duncan v. City Ice Co.*, 25 S.W.2d 536 (K.C. Mo. App. 1929); *Gerran v. Minor*, *supra* note 47; *Schraedel v. St. Louis Pub. Serv. Co.*, *supra* note 65; *Johnston v. Owings*, *supra* note 66.

68. *Craven v. Halpin-Boyle Const. Co.*, 15 S.W.2d 853 (K.C. Mo. App. 1929); *Faust v. East Prairie Milling Co.*, *supra* note 65; *Wendel v. City Ice Co.*, *supra* note 36; *Duncan v. City Ice Co.*, *supra* note 67; *Haley v. Edwards*, *supra* note 65; *Bullock v. Sklar*, 349 S.W.2d 381 (St. L. Mo. App. 1961).

69. *Wack v. F. E. Schoenberg Mfg. Co.*, *supra* note 64.

70. *Foulks v. Lehman*, 17 S.W.2d 994 (St. L. Mo. App. 1929); *Wendel v. City Ice Co.*, *supra* note 36; *Duncan v. City Ice Co.*, *supra* note 67; *Hatton v. Sidman*, *supra* note 65; *Schraedel v. St. Louis Pub. Serv. Co.*, *supra* note 65; *McCaffery v. St. Louis Pub. Serv. Co.*, *supra* note 65; *Bullock v. Sklar*, *supra* note 68.

71. *Plannett v. McFall*, *supra* note 22.

72. *Wendel v. City Ice Co.*, *supra* note 36.

73. *Schraedel v. St. Louis Pub. Serv. Co.*, *supra* note 65; *Haley v. Edwards*, *supra* note 65; *Bullock v. Sklar*, *supra* note 68.

74. *Bullock v. Sklar*, *supra* note 68.

75. *Ibid.*

whether they are connected with⁷⁶ the company. And it has been held proper to inquire if the jurors are acquainted with any officers,⁷⁷ employees,⁷⁸ agents,⁷⁹ claims adjusters,⁸⁰ attorneys in fact,⁸¹ or anybody connected with⁸² the company.

In those situations where defense counsel has attempted to keep out any reference to a specific company by refusing to name the company or evading the question as to the company's interest or disclaiming knowledge of facts indicating the company's interest, evidence by plaintiff's counsel as to the interest of the company has been sufficient to allow inquiry as to the specific company.⁸³

If so many possible connections are valid subjects of inquiry it would logically follow that a series of questions as to each of these relationships would also be valid. Thus in *Jones v. Missouri Freight Transit Corp.*⁸⁴ plaintiff asked the jurors:

If any of them were acquainted with Sam E. Busler & Company insurance dealers, . . . with H. P. Howard a salesman for that company and N. E. LaTish whose office is in the same suite with the Busler Company; if they have any relatives or close friends employed by that organization; if they have ever had any business dealings with that organization, or any of their close friends ever had any business dealings with that organization. If they ever had any business dealings with the Western Insurance Companies; if they had any policies in any of these companies, have had any business dealings with any of the companies, or have any relatives or close friends employed by any of the companies.⁸⁵

The court "fail[ed] to see . . . any evidence from which might be inferred a lack of good faith . . ."⁸⁶

76. *Duncan v. City Ice Co.*, *supra* note 67.

77. *Plannett v. McFall*, *supra* note 22.

78. *Hatton v. Sidman*, *supra* note 65; *Schraedel v. St. Louis Pub. Serv. Co.*, *supra* note 65.

79. *Plannett v. McFall*, *supra* note 22.

80. *Schuler v. St. Louis Can Co.*, *supra* note 46.

81. *Ibid.*; *Wendel v. City Ice Co.*, *supra* note 36.

82. *Foulks v. Lehman*, *supra* note 70; *Hatton v. Sidman*, *supra* note 65.

83. *Schuler v. St. Louis Can Co.*, *supra* note 46; *Glick v. Arink*, *supra* note 46; *Melican v. Whitlow Const. Co.* *supra* note 47; *Gerran v. Minor*, *supra* note 47; *Galber v. Grossberg*, *supra* note 10.

84. 225 Mo. App. 1076, 40 S.W.2d 465 (K.C. Ct. App. 1931).

85. *Id.* at 1083, 40 S.W.2d at 470.

86. *Ibid.*

B. Any Insurance Company

Where plaintiff knows that the defendant is insured but has been thwarted in his attempts to determine the name of the company it is possible to question the jurors concerning their relationships with any insurance company. *Boten v. Sheffield Ice Co.*⁸⁷ indicated that if defense counsel admits that an insurance company is interested but refuses to name the company in response to a request by plaintiff's counsel then a question as to the jurors' relationships with any company would be proper. A similar result was reached in *Hannah v. Butts*.⁸⁸ Counsel for defendant admitted that a policy had been issued but stated that he did not know the name of the company involved. The court authorized the plaintiff to inquire as to any insurance company.⁸⁹

But in *Pilkerton v. Miller*⁹⁰ it was held reversible error to allow plaintiff to question the jurors concerning their connection with any insurance company that writes liability insurance to protect automobile operators when the record disclosed no reason for believing that any man on the jury panel had such a connection. The basis for the decision does not seem sound. If the court had based its decision on the fact that there was no indication that any insurance company was even interested in the case the holding would be on stronger ground. Clearly, to allow a question such as was asked based on a simple assumption that the defendant was insured would be most prejudicial to the uninsured defendant and would violate the first part of the *Maurizi* test, that is, "reasonable cause for belief that an insurance company is interested in the case."⁹¹

VI. THE UNDERINSURED DEFENDANT AND THE NON-INSURED CO-DEFENDANT

So far this article has been concerned only with the basic situation where the plaintiff and the interested insurance company are the sole parties concerned with the effect of the voir dire on the jurors. The plaintiff hopes that the existence of liability insurance will be sufficient to give him the verdict on a close factual situation or to increase the amount of damages awarded him. The insurance company would like to keep its interest concealed for exactly opposite reasons. The Missouri decisions clearly assist the plaintiff's cause.

87. *Supra* note 11.

88. *Supra* note 2.

89. See also *Smith v. Scudiero*, *supra* note 46 (defendant refused to answer whether he was representing an insurance company).

90. 283 S.W. 455 (Spr. Mo. App. 1926).

91. *Supra* note 25, at 396, 11 S.W.2d at 274.

If the cases were confined to this plaintiff-insurer conflict of interest it might be argued that any possibly prejudicial burden placed on the insurer which results in a judgment adverse to it merely reflects the basic notion of the public that the loss should be borne by the insurer who will be able to spread the loss among thousands of policy holders. From such a standpoint disclosure of liability insurance through voir dire might be viewed as a cost of doing business as an insurer. But there are two situations where the jury's verdict, or its measure of damages, if influenced to any degree by the presence of a liability insurer brings about a completely inequitable result. These involve the problems of the underinsured defendant and the uninsured joint tortfeasor.

A. *The Underinsured Defendant*

The fact that the plaintiff claims damages in excess of the amount of the defendant's coverage is no bar to the right of plaintiff to question the jurors as to their relationships with the insurer.⁹² The underinsured defendant is thus confronted with the situation where, as a result of voir dire, the jury realizes the existence of his coverage but not its extent. And if the jury awards an excessive verdict the individual defendant must carry the burden.

A possible solution may be found in the case of *Rytersky v. O'Brine*.⁹³ Plaintiff's attorney had inquired fully as to the jurors' relationships with the defendant's insurer. Counsel for defendant on his voir dire questioned the jury as follows:

There has been some reference to the Commonwealth Casualty and Insurance Company. I want to be absolutely frank with you gentlemen about that feature of the case. To a limited extent, I represent the Commonwealth Casualty Company. That is, Mr. O'Brine had an insurance policy in the Commonwealth Casualty Company to a certain limit, providing that this Company would indemnify him against loss sustained by reason of his negligence in the operation of his automobile. Of course, if there is no negligence on his part, then, of course there is no liability on the part of the insurance company. In other words the rule of law is not changed just because there is an insurance company interested to a limited extent. Now, would the fact that he does carry insurance to a limited degree, as I have indicated, cause you gentlemen to have any feeling of prejudice in favor of the plaintiff?⁹⁴

92. *Jones v. Missouri Freight Transit Corp.*, *supra* note 84.

93. 335 Mo. 22, 70 S.W.2d 538 (1934).

94. *Id.* at 25-26, 70 S.W.2d at 539.

While no objection was made at the time of the statement and question, counsel for plaintiff used this as an excuse to inject insurance into the closing argument. In commenting on defendant's voir dire the court found nothing improper and that any objection to it "would have been properly overruled." The court observed that the defendant was entitled to determine if any juror would be influenced or prejudiced in favor of plaintiff because of the existence of an insurance policy. As to the critical element of the question—the "limited extent" of the insurance—the court said: "Whether the policy was large or small was wholly immaterial. Defendant's attorney mentioned the policy as being limited in amount but how could that harm plaintiff?"⁹⁵

If the only purpose of voir dire questioning concerning relationships with an insurance company is to obtain an impartial, disinterested jury then it seems clear that the side of the policy is, indeed, "wholly immaterial," and to describe it as being "limited" theoretically should not harm the plaintiff. Counsel for an underinsured defendant may find that a course similar to that set out in *Rytersky* will be the only possible way to minimize the effect of the disclosure of insurance coverage.

B. *The Uninsured Joint Tortfeasor*

A second difficult situation is that involving joint tortfeasors where only one is insured. The earliest case passing on this problem is *Malone v. Small*.⁹⁶ Malone was a passenger in an automobile owned by Clymer and driven by Clymer's wife which collided with the automobile of Small. Plaintiff brought action against both the Clymers and Small.

Prior to voir dire counsel for plaintiff was informed that the Clymers were insured and the insurer was defending them. He then indicated his intent to question the jurors as to their relationships with the insurer. Counsel for defendant Small argued that the question should not apply to his client as he was uninsured and in no way connected with the company involved. He requested that if the question was asked then he should be allowed to inform the jury as to his position. Counsel for the Clymers objected to this request on the basis that such a statement would be prejudicial to his clients. The objection was sustained and Small excepted. Plaintiff proceeded to question the jurors. He recovered a judgment for \$5,000 and all the defendants appealed. On appeal the court observed that the purpose of voir dire by the plaintiff was to enable

95. *Id.* at 30, 70 S.W.2d at 541.

96. 291 S.W. 163 (St. L. Mo. App. 1927).

him to secure a fair and impartial jury and that under these circumstances "there was no harm done, theoretically at least, to defendant Small."⁹⁷

This rule was approved by the Supreme Court in *Smith v. Star Cab Co.*, "Plaintiff cannot be denied the right to qualify the members of the panel for this reason; and if a defendant without insurance is prejudiced thereby he is without remedy."⁹⁸

VII. SUMMATION

Under the present state of the Missouri law the proper procedure for plaintiff to follow is first to inquire if defendant is represented by a liability insurer. If he is given an affirmative answer including the name of the insurance company, he may proceed to inquire as to the jurors' relationships with that company.⁹⁹ If defendant gives an affirmative answer but refuses to name the company, plaintiff's independent knowledge as to the identity of the company will be sufficient to permit an identical line of questioning. If defendant gives an affirmative answer but refuses to name the company and the plaintiff has been unable to determine the identity of the company, then he may inquire as to the jurors' connections with any insurance company.¹⁰⁰

If defendant refuses to answer or evades the question or disclaims knowledge of the facts, then an assumption will be made that an insurance company is interested.¹⁰¹

If defendant denies that an insurance company is interested, then plaintiff should be prepared to *prove* that he has reasonable cause for belief of such an interest.¹⁰²

Finally, if plaintiff has not made a prior inquiry of defendant, then he should, at the minimum, inform the court as to his belief of the insurer's interest.¹⁰³

The plaintiff who has reasonable cause for belief that an insurance company is interested in the case has an impressive list of legitimate

97. *Id.* at 165.

98. *Supra* note 10, at 446, 19 S.W.2d at 469. In accord see *Joyce v. Biring*, 226 Mo. App. 162, 43 S.W.2d 845 (St. L. Ct. App. 1931); *Clayton v. Wells*, 324 Mo. 1176, 26 S.W.2d 969 (1930); *Clayton v. Hydraulic Press Brick Co.*, 27 S.W.2d 52 (St. L. Mo. App. 1929).

99. Text at note 17 *supra*.

100. Text at note 87 *supra*.

101. Text at note 46 *supra*.

102. *Carter v. Rock Island Bus Lines*, *supra* note 40.

103. *Henry v. Tinsley*, *supra* note 31.

questions which he may address to the jurors. While the appellate courts have occasionally expressed the opinion that "the better practice is to ascertain whether any panel member is interested by asking one general question,"¹⁰⁴ it is apparent that counsel rarely follow "the better practice" preferring instead a line of multiple questioning with its inherent emphasis on the existence of liability insurance.

The main obstacle to plaintiff's approach is the latitude given to the trial court under the *Carter* decision in determining the good faith nature of the inquiry. Thus, where trial judges have expressed their opinions as to what constitutes good faith conduct, the questioning should be confined to the indicated limits. Only a palpable abuse of their discretion will merit a reversal.¹⁰⁵

As for defendants, their bitter complaints¹⁰⁶ will fall on deaf appellate ears.

VIII. CONCLUSION

The ultimate purpose of voir dire is to enable the parties to obtain a fair and impartial jury. But a juror's partiality toward the ordinary defendant cannot be said to exist merely because the jurors may have some connection with an insurance company. The element of prejudice only comes into existence when the juror has some such connection *and* he *believes* or *knows* that the insurer with which he is connected has insured the defendant. It would seem wholly unreasonable to suppose that a juror will allow his judgment to be influenced by conjecture that a) an insurance company is involved and b) that company is the very one in which he has an interest. If a juror, on voir dire, is shown to be unacquainted with the parties of record or their counsel and further, to be totally unfamiliar with the subject matter of the cause before him, then he cannot be said to be prejudiced if he is unaware of the interest of an unknown insurance company.

It is unfortunate that the liberal attitude of the Missouri courts in this area has probably led to a situation where, contrary to its time-honored purpose, voir dire results in establishing partiality in the minds of the jurors rather than exposing it.

The recent case of *Gooch v. Avsco, Inc.*¹⁰⁷ clearly indicates the situa-

104. *Bunch v. Crader*, 369 S.W.2d 768, 771 (Spr. Mo. App. 1963).

105. *Supra* note 45.

106. *Bunch v. Crader*, *supra* note 104.

107. 340 S.W.2d 665 (Mo. 1960).

tion created by this attitude. Plaintiff asked three questions concerning the subject of stockholding, employment, and policy holding with the defendant's insurer. There followed several other questions on other topics. Then counsel asked, "Is there any member of the jury panel or any of your immediate family that is a claim adjuster or handles claims or investigations for any insurance companies?"¹⁰⁸ (Emphasis added). Defendant objected and moved to discharge the jury. The trial court refused and the defendant excepted. On appeal the Supreme Court held:

While it was undoubtedly proper on voir dire to determine whether any member of the panel was employed as a claims investigator or adjuster, it perhaps would have been desirable to have inquired generally rather than to have limited the question to insurance company adjusters. It seems apparent, however, that the adjuster question as asked could not have injected the matter of insurance any more surely into the case than had been done by three prior questions which defendants concede were proper and to which no objection was made.¹⁰⁹

But, of course, if the questions were proper then no objections should have been made. They would have been promptly overruled and would have only served further to point out to the jury the relationship between the defendant and the insurance company.

Any procedure which may unnecessarily implant the seeds of prejudice in the minds of the jurors should from time to time be carefully scrutinized to determine whether the point has been reached where the treatment is worse than the disease. Perhaps voir dire has reached this point, at least where the question of liability insurance is involved. If so, the time may be at hand when the search for some alternative solution should begin. The potential framework for such a solution may be found in section 498.130 of the Missouri Revised Statutes which provides that the jury commissioner of the City of St. Louis may "require any person to answer, under oath . . . all such questions as he [the commissioner] may address to such person, touching his name, age, residence, occupation, and qualifications as a juror. . . ." Under the authority of this provision of the statute it would seem that a procedure could be developed whereby the commissioner could be given the names of the specific insurance companies interested in causes on the docket and strike from the jury

108. *Id.* at 667.

109. *Id.* at 667-68.

lists any individuals who are connected with those companies so as to eliminate any necessity for counsel to inquire on voir dire on the topic of insurance.

If a procedure of this nature could be adopted, and if it were given state-wide application, then voir dire might once again have as its *sole* purpose the securing of a fair and impartial jury.