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Insurance Questions in Voir Dire

Kenneth S. Kabb*

THE PROBLEM OF SELECTING a fair and impartial jury is as old as the jury system itself¹ and is of particular importance today.² Throughout the centuries, trial before a jury of one's peers has been inexorably linked with the idea of fairness.³ While not without problems, this system remains one of the bulwarks of liberty in the United States.⁴ This note deals with one of these problems: the impact of the insurance business, with its rapid and substantial growth in recent years, upon the selection of a fair and impartial jury in negligence cases.⁵ Because of the tremendous burgeoning of the automobile industry, many of these cases involve automobile accidents; the principles, however, apply as well to any form of negligence action.

The scope of this article includes the voir dire examination in the federal courts, primarily in civil cases. The questions to be considered are: (1) how is the voir dire examination to be conducted; (2) what are the limitations imposed on the trial judge, counsel, and the parties with respect to the manner and conduct of the questioning; (3) what is the allowable scope of questions that may be asked prospective jurors; and (4) what will constitute reversible error, and who has the burden of proof.

The right of trial by jury existed at common law before the adoption of the Constitution,⁶ and in the federal courts in civil cases it is preserved by the Seventh Amendment.⁷ That the jury be impartial is in-

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¹ It was Cambyses II, King of Persia (now Iran), who inaugurated the "twelve-man jury" in 500 B.C. He contended it was necessary for all twelve—good men and true—serving on jury duty, each to have been born under one of the twelve Zodiacal signs. Each member would thereby have a different planetary influence, enabling them to render a just verdict. McCready, *Challenging Jurors*, 58 Dick. L. Rev. 334 (1954).

² See generally, J. Frank, *Courts on Trial, Myth and Reality in American Justice* (1949) 108-125.

³ "The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." *Strauder v. West Virginia*, 100 U.S. 303, 308. 25 L.Ed. 664, 666 (1880).

⁴ Frank, *op. cit. supra* note 2 at 126-145. See also, Palmer, *On Trial: The Jury Trial*, 20 F.R.D. 65 (1953).

⁵ See generally, Prosser, *Torts* § 84, pp. 568-577 (3rd ed. 1964).

⁶ The right is to, "... a trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted." *Patton v. United States*, 281 U.S. 276, 288, 50 S.Ct. 253, 254, 74 L.Ed. 854, 858 (1930).

⁷ U.S. Const., Amend. VII.

herent in the Fifth Amendment's requirement of "due process of law,"⁸ and it is the "constitutional purpose of the voir dire examination . . . to make sure that the jury is impartial."⁹ Perhaps the most effective means of securing a fair and impartial jury is through an intelligent and legitimate exercise of the right of challenge, both peremptory and for cause.¹⁰ During the voir dire examination,¹¹ prospective jurors are questioned in an effort to determine whether any reasons exist which would disqualify them from serving as jurors in that particular case. Jurors are rejected by means of the challenge, which may be for cause (for a reason), or may be peremptory (no reason at all required).¹² In the leading case of *Connors v. United States*,¹³ the Court said:

A suitable inquiry is permissible in order to ascertain whether the juror has any bias, opinion, or prejudice that would affect or control the fair determination by him of the issues to be tried. That inquiry is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion. This is the rule in civil cases, and the same rule must be applied in criminal cases. . .

Voir dire in the federal courts is governed by the Federal Rules of Civil Procedure.¹⁴ Wide discretion is given the trial judge, both in the manner in which the voir dire examination is conducted,¹⁵ and in its permissible substantive content.¹⁶ As a result of this broad discretion, a wide range of practice has been adopted by the various district

⁸ U.S. Const., Amend. V. Where a state, although not required to do so, does provide for juries, the Fourteenth Amendment's "equal protection" clause contemplates a fair and impartial jury. See also, Dowling, *Constitutional Law* 624, n. 3 (6th ed. 1959).

⁹ Report of the Judicial Conference Committee on the Operation of the Jury System, 26 F.R.D. 411, 465 (1960).

¹⁰ *Armbrorst v. Cincinnati Traction Co.*, 25 F.2d 240, 241 (6th Cir. 1928); *New Aetna Portland Cement Co. v. Hatt*, 231 F. 611, 617 (6th Cir. 1916).

¹¹ Voir dire means, literally, "to speak the truth." *Black's Law Dictionary* 1822 (3rd ed. 1933).

¹² "The traditional right of peremptory challenge recognizes that matters of bias or prejudice may be sensed or suspected without possibility of proof, and therefore permits counsel to exercise his inarticulate instinctive judgment, which he need not, if he could, attempt to justify." *Kiernan v. Van Schaik*, 347 F.2d 775, 779 (3rd Cir. 1965).

¹³ 158 U.S. 408, 413, 15 S. Ct. 951, 953, 39 L.Ed. 1033, 1035 (1895).

¹⁴ Fed. R. Civ. P., Rule 47 (a).

¹⁵ *Ibid.* "Examination of Jurors. The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper." Rule 24(a) of the Rules of Criminal Procedure is identical except for the necessary change in the reference to criminal proceedings.

¹⁶ *Connors v. United States*, *supra* note 13.

courts.¹⁷ The examination of jurors may, within the discretion of the court, be conducted by the court itself,¹⁸ or by the parties or their attorneys.¹⁹ If the court conducts the examination, it must permit the parties or their attorneys to supplement the examination by such further questions as it deems proper, or it may itself submit additional questions. In a recent case²⁰ a Circuit Court of Appeals has held that the trial court, having questions asked of the jury through its clerk, together with additional inquiries from counsel approved by the court, did not abuse its discretion, although the better practice would have been for the trial judge to have conducted the voir dire examination personally, including the reading of queries from counsel. This is "... a portion of the unescapable burden of judges," whose "immediate responsibility" is for the court's sound functioning.²¹ A more cautious trial court has been sustained in its practice of inquiring of all the jurors, on the first day of the adjourned term before the trial term, "... whether they were stockholders, officers, agents, or employees of any insurance company."²² In the Fifth Circuit case of *Martin v. Burgess*,²³ Judge Sibley recommended that, with respect to "... defendant's insurance and the qualifications of the jurors, the court should privately ascertain whether an insurance company would be affected by the result, and if so, without needlessly publishing the fact of insurance, should on plaintiff's request exclude jurors interested in behalf of the insurer."²⁴ Whatever the method used, its purpose is to insure that the voir dire is actually effective in obtaining an impartial jury, and with reasonable expedition.²⁵

The voir dire examination of jurors rests largely in the discretion

¹⁷ *Duff v. Page*, 249 F.2d 137 (9th Cir. 1957); For a discussion of the principles of federal voir dire, and a survey of methods used in the district courts, see, *The Jury System in the Federal Courts—Report of the Judicial Conference Committee on the Operation of the Jury System*, 26 F.R.D. 411, 465 (1960).

¹⁸ *Langley v. Turner's Express, Inc.*, 375 F.2d 296 (4th Cir. 1967); *Pope v. United States*, 372 F.2d 710, 726 (8th Cir. 1967), *reh. den.* March 14, 1967; *Ross v. United States*, 374 F.2d 97 (8th Cir. 1967); *Spells v. United States*, 263 F.2d 609, 612 (5th Cir. 1959); *Duff v. Page*, *supra* note 17; *Braman v. Wiley*, 119 F.2d 991, 993 (7th Cir. 1941); *Cleveland Nehi Bottling Co. v. Schenk*, 56 F.2d 941, 942 (6th Cir. 1932).

¹⁹ *Lentner v. Lieberstein*, 279 F.2d 385 (7th Cir. 1960), *reh. den.* July 22, 1960; *Bass v. Dehner*, 103 F.2d 28 (10th Cir. 1939), *reh. den.* May 1, 1939, *cert. den.* 308 U.S. 580, 60 S. Ct. 100; *Wagner Electric Corp. v. Snowden*, 38 F.2d 599 (8th Cir. 1930); *Armbrorst v. Cincinnati Traction Co.*, *supra* note 10; *New Aetna Portland Cement Co. v. Hatt*, *supra* note 10, at 617-619; *Stewart v. Brune*, 179 F. 350 (8th Cir. 1910).

²⁰ *United States v. Woods*, 364 F.2d 481 (3rd Cir. 1966), *reh. den.* Sept. 1966.

²¹ *Ibid.*

²² *City Ice & Fuel Co. v. Dankmer*, 52 F.2d 929, 930 (4th Cir. 1931).

²³ *Martin v. Burgess*, 82 F.2d 321 (5th Cir. 1936).

²⁴ *Id.* at 324.

²⁵ *Duff v. Page*, *supra* note 17.

of the trial court, subject to the essential demands of fairness.²⁶ Courts have viewed the problem of whether to allow voir dire examination to determine the possible interest of jurors in insurance companies or the insurance business, as a matter of "... balancing the interest of one party in having disinterested and unprejudiced jurors against possible prejudice to another party . . . by revealing the financial interest of . . . an insurance company in the suit."²⁷ An alternative approach to the problem is a balancing of "... the probability of danger to plaintiffs that someone sympathetic to insurance companies may remain on the jury and the danger to defendants that the jury may award damages without fault if aware that there is insurance coverage to pay the verdict."²⁸ The problem of ascertaining the qualifications of jurors was distinguished from that of examining witnesses in the case of *New Aetna Portland Cement Co. v. Hatt*,²⁹ in 1916, although it appears to have been disregarded in at least one later case.³⁰ In *New Aetna*, the court laid down what is the majority rule today: questions concerning the possible connection of prospective jurors may be asked on voir dire if they are asked (1) in "good faith" and (2) "... for the purpose only of ascertaining the fitness of persons summoned as jurors." The court reasoned that

. . . the most effective means of securing the right to trial by an impartial jury is through an intelligent and legitimate exercise of the right of challenge, both peremptory and for cause . . . The circumstances that the question has the additional effect of suggesting the existence of a fact irrelevant to the merits of the case (indemnity in this instance) is not an uncommon occurrence; this, however, is to be remedied through precautionary instructions of the court. . .³¹

With this last statement, however, not all courts agree. "The removal of the fly does not restore an appetite for the food into which it has fallen."³²

The source of much confusion is the large discretion which the courts have as to the propriety and good faith of questions propounded to jurors upon their voir dire. An early case³³ took the position that insurance questions on voir dire could not be other than prejudicial as

²⁶ *Ross v. United States*, *supra* note 18; *Pope v. United States*, *supra* note 18; *Louisville & Nashville Railroad Co. v. Williams*, 370 F.2d 839, 841 (5th Cir. 1966); *United States v. Napoleone*, 349 F.2d 350, 353 (3rd Cir. 1965); *Kiernan v. Van Schaik*, *supra* note 12; *Spells v. United States*, *supra* note 18; *Aldridge v. United States*, 283 U.S. 308, 51 S.Ct. 470 (1931).

²⁷ *Louisville & Nashville Railroad Co. v. Williams*, *supra* note 26, at 842.

²⁸ *Langley v. Turner's Express, Inc.*, *supra* note 18, at 297.

²⁹ *New Aetna Portland Cement Co. v. Hatt*, *supra* note 10.

³⁰ *Pickwick Stage Lines v. Edwards*, 64 F.2d 758 (10th Cir. 1933).

³¹ *New Aetna Portland Cement Co. v. Hatt*, *supra* note 10 at 617-619.

³² *Stewart & Co. v. Newby*, 266 F. 287, 295 (4th Cir. 1920).

³³ *Stewart v. Brune*, *supra* note 19.

indirect attempts to get before the jury extraneous matter or issues that were foreign to the case. The same court later distinguished the case on the ground that, in the earlier case, counsel had asked a question concerning a specific company without laying a foundation for the question, and without any reasonable cause to believe that the company was interested in the case. In the later case of *Wagner Electric Co. v. Snowden*,³⁴ counsel for the defendant had, without objection, stated the fact and the name of an insurance company interested in the action. The *Wagner* case was followed in the Tenth Circuit in *Bass v. Dehner*,³⁵ which sustained the right of counsel for plaintiff to question prospective jurors as to any interest or connection with an insurance company "... apparently interested in the result of the case," but denied counsel the right to interrogate defendant's counsel as to whether an insurance company was interested in the case, as a basis for questioning jurors on voir dire. These cases suggest that one judicial interpretation of the "good faith" and "proper purpose" tests imposes upon plaintiff the burden of showing that an insurance company is interested in the suit, while denying him the use of disclosure to establish the fact.

Another test of good faith and proper purpose that the courts have used is that of relevancy. In *Smedra v. Stanek*,³⁶ the trial court refused to question jurors on voir dire with respect to any possible interest in a named insurance company. This refusal was held not to be an abuse of discretion where there was no showing on the record that any juror knew that the company was interested in the suit or defending it. A difficult burden was placed on the plaintiff, in that he was required to prove the subjective state of a juror's mind without being allowed the right to inquire into that which he must prove until he had proven it—a difficult task indeed. Other cases have not been quite so stringent. In *Strickland v. Perry*,³⁷ the trial court was held not to have abused its discretion in limiting inquiry by plaintiff's counsel where the purpose of examination was "... to condition prospective jurors by placing before them certain of plaintiff's contentions of fact and law, rather than to inquire into the competency and qualifications of prospective jurors."³⁸ Again, in *Hebron v. Brown*,³⁹ the test of relevancy was applied. The trial court was upheld in excluding questions on voir dire as to whether any jurors were indebted to a bank, of which the senior member of the firm of attorneys defending the action was president, and where he did not appear in court. The bearing of the question on the impartiality of the

³⁴ *Wagner Electric Corp. v. Snowden*, *supra* note 19.

³⁵ *Bass v. Dehner*, *supra* note 19, at 36.

³⁶ *Smedra v. Stanek*, 187 F.2d 892, 895 (10th Cir. 1951).

³⁷ *Strickland v. Perry*, 244 F.2d 24, 25 (5th Cir. 1957), *reh. den.* May 23, 1957.

³⁸ *Ibid.*

³⁹ *Hebron v. Brown*, 248 F.2d 798 (4th Cir. 1957).

jurors was considered “. . . too remote for serious consideration.”⁴⁰ The last in this line of “strictly oriented” appellate level cases is *Lentner v. Lieberstein*,⁴¹ where the court imposed the burden on plaintiff of showing the subjective state of a juror’s mind by affidavits or the testimony of witnesses, and out of the presence of the jury and when the asserted need for asking about insurance company connections was “based on something more than mere surmise,” thus following the state rule in the Illinois case of *Wheeler v. Rudek*.⁴² In *Lentner*,⁴³ the court assumed that a federal court could apply the state rule. Whatever may have been the state of the law at the time *Lentner* was decided, however, that assumption has been invalid since *Hanna v. Plumer*⁴⁴ was decided by the Supreme Court in 1965. Federal courts are under no duty to apply state laws of procedure.

In contrast to the cases discussed above, another line of decisions emanated from *New Aetna Portland Cement Co. v. Hatt*,⁴⁵ representing a kind of “polarity”⁴⁶ in the development of the law. *New Aetna*⁴⁷ was decided in 1916, six years after *Stewart v. Brune*.⁴⁸ *Eppinger & Russell Co. v. Sheely*⁴⁹ sustained the right of a plaintiff to inquire in good faith into the possible interest in or business connections with an insurance company, reasoning that if “. . . a surety be in fact the real party interested in defending the action, it hardly would be contended that one who is interested in such surety, as its agent or because of other business connections, would be an impartial juror . . . In many cases the truth can only become known by making inquiry on the voir dire.”⁵⁰ In *Armbrorst v. Cincinnati Traction Co.*,⁵¹ decided the same year as the *Eppinger* case,⁵² plaintiff’s counsel was denied the request that inquiry be made of the prospective jurors whether they were stockholders “. . . in any traction or steam railroad company.” The denial was held to be reversible error. What is significant about this case is that (1)

⁴⁰ *Id.* at 799.

⁴¹ *Lentner v. Lieberstein*, *supra* note 19.

⁴² *Wheeler v. Rudek*, 397 Ill. 438, 74 N.E.2d 601 (1947).

⁴³ *Lentner v. Lieberstein*, *supra* note 19.

⁴⁴ *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965).

⁴⁵ *New Aetna Portland Cement Co. v. Hatt*, *supra* note 10.

⁴⁶ “The idea of polarity involves the assumption that every force meets with a resistance, or contrary force; that all action is necessarily accompanied by a contrary reaction, so that when anything persists we must find opposite forces in it.” Cohen, *The Meaning of Human History* 273 (2d ed. 1961).

⁴⁷ *New Aetna Portland Cement Co. v. Hatt*, *supra* note 10.

⁴⁸ *Stewart v. Brune*, *supra* note 19.

⁴⁹ *Eppinger & Russell Co. v. Sheely*, 24 F.2d 153 (5th Cir. 1928).

⁵⁰ *Id.* at 155.

⁵¹ *Armbrorst v. Cincinnati Traction Co.*, *supra* note 10.

⁵² *Eppinger & Russell Co. v. Sheely*, *supra* note 49.

the question refers, not to a specific company "apparently interested in the suit,"⁵³ but to *any* company,⁵⁴ and (2) that the Court of Appeals accorded plaintiff's counsel the presumption⁵⁵ that "... the information was desired for the proper purpose of testing the qualifications of the jurors, to enable an intelligent exercise of the right of at least peremptory challenge." A case decided by the Seventh Circuit Court of Appeals in 1941, holding that the trial court's, "... large discretion as to the propriety and good faith of questions propounded jurors upon their voir dire,"⁵⁶ is "... limited only by the good faith of the lawyer propounding the question,"⁵⁷ illustrates the thrust of the later cases in the direction of a more liberal attitude toward the mention of insurance during the voir dire examination.

A leading case is *Kiernan v. Van Schaik*,⁵⁸ decided in 1965. This was an action for damages for personal injuries arising from a fall on the sidewalk entrance to the defendant's gas station. Plaintiff's counsel requested that the trial judge put three questions to prospective jurors on voir dire, pertaining to present or prior associations with casualty insurers, and two further questions pertaining to the jurors' experience and opinions with respect to insurance rates and the size of verdicts in personal injury cases. The trial court refused to propound these questions to the prospective jurors, apparently on three grounds: (1) the practice in state and federal courts in Delaware was not to conduct any extensive voir dire; (2) Delaware counsel, who appeared in this case, obtained information on prospective jurors through the use of an investigating agency; and (3) a *prima facie* showing of prospective jurors' connections with the insurance business was required before the questions would be considered.⁵⁹ (The fourth and fifth questions were held to have been properly refused within the discretion of the Court,⁶⁰ and are relatively less important for the purposes of this article.)

Restating the general rule that the manner of conduct, and the substantive content of the voir dire examination are within the broad discretion of the trial court, subject to the essential demands of fairness,⁶¹ the appellate court held that the trial court abused its discretion in refusing to put the first three questions to the prospective jurors.⁶² The

⁵³ *Armbrorst v. Cincinnati Traction Co.*, *supra* note 10 at 241.

⁵⁴ See also, *Cleveland Nehi Bottling Co. v. Schenk*, *supra* note 18.

⁵⁵ *Armbrorst v. Cincinnati Traction Co.*, *supra* note 10 at 241.

⁵⁶ *F. W. Woolworth Co. v. Davis*, 41 F.2d 342, at 346 (10th Cir. 1930).

⁵⁷ *Braman v. Wiley*, *supra* note 18 at 993.

⁵⁸ *Kiernan v. Van Schaik*, *supra* note 12.

⁵⁹ *Id.* at 777.

⁶⁰ *Id.* at 783.

⁶¹ *Id.* at 778.

⁶² *Id.* at 779. "The rejection of appropriate questions on voir dire for such erroneous reasons amounts to an abuse of discretion."

trial court's reliance on an existing practice of a limited voir dire examination, which denied ". . . its use to assist counsel in the exercise of the right of peremptory challenge . . . and drastically curtailed it in aid of the right of challenge for cause . . . amounted to an abuse of discretion."⁶³ "The Court below exercised no discretion, but applied a supposed and erroneous principle of general application."⁶⁴ Investigation reports are an inadequate substitute for voir dire, because the jurors impartiality should be tested under the control of the court rather than by the unsupervised activity of investigators, with all the undesirable possibilities which such surveillance inevitably presents.⁶⁵ Because it may not be assumed without inquiry that a jury is impartial, litigants have the right, at the least, to some surface information regarding the prospective jurors. Such information may uncover ground for challenge for cause, and if not it will be available in the intelligent use of the peremptory challenge.⁶⁶ The requirement of a *prima facie* showing of some connection between a prospective juror and the business of insurance was rejected, as was the requirement of good faith.⁶⁷

The problem as the court defined it was to protect the right to an adequate voir dire "without any crippling limitations" and, at the same time, to ". . . safeguard . . . the principle which restricts disclosure that a defendant is insured."⁶⁸ Underlying this problem is the "fundamental fact of human character" that bias, by its very nature, goes beyond ". . . a crudely direct financial interest in the result."⁶⁹ The approach of this court would be to permit inquiry relevant in ascertaining bias, and not bar it from the courtroom because it deals with insurance. Rather than leave the existence of insurance to speculation, a frank and open airing of the subject, together with an adequate explanation by the court of the purpose of the voir dire and the bearing of insurance on it, are the best means of preventing prejudice to either party.⁷⁰ The rule laid down by this court is that:

. . . a plaintiff in an accident case may make reasonable inquiry whether prospective jurors are or have been connected with the business of investigating or paying accident claims, either as employees, agents or stockholders of insurance companies or claims agencies without suggesting the existence of insurance in the case. An adequate caution should be given by the court to make it clear to the jury that these questions do not imply either that any de-

⁶³ *Id.* at 778.

⁶⁴ *Id.* at 780.

⁶⁵ *Ibid.*

⁶⁶ *Id.* at 779.

⁶⁷ *Id.* at 780, 781.

⁶⁸ *Id.* at 781.

⁶⁹ *Ibid.*

⁷⁰ *Id.* at 782.

fendant is insured or that the matter of insurance or lack of insurance is to be considered in reaching a verdict.⁷¹

Thus, *Kiernan v. Van Schaik* stands for the principle that parties may have wide latitude in questioning prospective jurors on their voir dire to uncover bias, subject to the limitations of "reasonableness" or "relevancy," and that such prejudicial mention of insurance as may occur should be neutralized by proper instructions to the jury from the court. The requirement of good faith has been rejected.

It will be of some use to investigate the development of the cases in the circuits *vis a vis* *Kiernan v. Van Schaik*,⁷² in order to assess the state of the law and the impact of the departure of this case from the usual requirements of good faith and showing of a need for interrogating jurors concerning insurance business associations. The Second Circuit Court of Appeals, in the case of *Stephan v. Marlin Firearms Co., Inc.*,⁷³ sustained the trial court's refusal to permit inquiry into the experiences of prospective jurors with guns in this hunting accident case, where the trial judge had permitted plaintiff to ask whether any prospective juror was a member of any national gun organization, or of any gun club. Commenting the counsel's question was ". . . general and imprecise," the court held that, in light of the questions allowed, there was no evidence that plaintiff had been denied information necessary to exercise an intelligent use of peremptory challenges, therefore, there was no abuse of discretion as required in the *Kiernan* case for reversal.

The principles of the *Kiernan* case were extended to criminal actions in the case of *United States v. Napoleone*.⁷⁴ In a dissent in *Hutton v. Fisher*,⁷⁵ *Kiernan* was cited as authority for the right of a party to participate in the selection of a jury.⁷⁶ The same court⁷⁷ later extended the *Kiernan* case to the examination of witnesses, commenting that the mention of insurance in a trial is not necessarily fatal, but that the context in which it is laid is of controlling importance. District courts in the Third Circuit have differed on the issue of pretrial discovery of the existence and amount of insurance coverage, one case⁷⁸ allowing it and another⁷⁹ denying it. The latest case,⁸⁰ decided in June, 1967, by the District Court for the Eastern District of Pennsylvania,

⁷¹ *Ibid.*

⁷² *Supra* note 12.

⁷³ 353 F.2d 819 (2d Cir. 1965), *cert. den.*, 384 U.S. 959, 86 S.Ct. 1584.

⁷⁴ *Supra* note 26.

⁷⁵ 359 F.2d 913 (3d Cir. 1966), *reh. den.* May, 1966.

⁷⁶ *Id.* at 919.

⁷⁷ *Corbett v. Borandi*, 375 F.2d 265 (3d Cir. 1967).

⁷⁸ *Slomberg, Adm'r, v. Perma-baker*, 42 F.R.D. 8 (3d Cir. 1967).

⁷⁹ *Gangemi v. Moore*, 268 F.Supp. 19 (D.C. Del. 1967).

⁸⁰ *Tabor v. Miller*, 269 F.Supp. 647 (D.C. E.D. Pa. 1967).

cited *Kiernan* as indicating “. . . a trend by the courts toward a liberalization of the rule which rigidly precludes the mention of insurance in personal injury actions.”⁸¹ The Fourth Circuit Court of Appeals assumed a posture contrary to *Kiernan v. Van Schaik* in the recent case of *Langley v. Turner's Express, Inc.*⁸² The court sustained the trial court's refusal to interrogate jurors concerning insurance connections, absent a showing of compelling need to propound such questions. Thus, in the Fourth Circuit, restriction of the right to an adequate voir dire is not error without a showing of prejudice, whereas in the Third Circuit no such showing is required. The bone of contention is the danger that the jury may award damages without fault if aware that there is insurance coverage to pay the verdict.⁸³ A later district court case⁸⁴ in the same Fourth Circuit, however, quoted with approval the following from *Kiernan v. Van Schaik*:⁸⁵

The word “insurance” is not outlawed from the courtroom as a word of magical evil. Jurors are not unaware that insurance is at large in the world and its mention will not open to them a previously unknown realm.

The Fifth Circuit adheres to the majority rule requirements of good faith⁸⁶ and proper purpose,⁸⁷ but apparently somewhat more latitude is allowed in criminal⁸⁸ than in civil⁸⁹ actions in the scope of interrogation on voir dire. The Sixth Circuit Court of Appeals has, since 1916, been in substantial agreement with *Kiernan v. Van Schaik*.⁹⁰

In the recent case of *Fosness v. Panagos*,⁹¹ the Supreme Court of Michigan, affirming by an equally divided court, cited *Kiernan v. Van Schaik* as authority for the right to make reasonable inquiry into prospective jurors' connections with the insurance business, subject to later cautionary instructions by the court. A Seventh Circuit Court of Appeals case⁹² has held that the examination of jurors, within the discretion of the court, was “. . . limited only by the good faith of the lawyer propounding the question.”⁹³ In a later case,⁹⁴ the same court imposed a

⁸¹ *Id.* at 649.

⁸² *Langley v. Turner's Express, Inc.*, *supra* note 18.

⁸³ *Kiernan v. Van Schaik*, *supra* note 12, at 781.

⁸⁴ *Vaughan v. Southern Bakeries Co.*, 247 F.Supp. 782 (D.C. S.Car. 1965).

⁸⁵ *Kiernan v. Van Schaik*, *supra* note 12 at 782.

⁸⁶ *Eppinger & Russell Co. v. Sheely*, *supra* note 49.

⁸⁷ *Strickland v. Perry*, *supra* note 37.

⁸⁸ *Spells v. United States*, *supra* note 18.

⁸⁹ *Louisville & Nashville R.R. Co. v. Williams*, *supra* note 26.

⁹⁰ *Kiernan v. Van Schaik*, *supra* note 12.

⁹¹ 376 Mich. 485, 138 N.W.2d 380 (1965).

⁹² *Braman v. Wiley*, *supra* note 18.

⁹³ *Id.* at 993.

⁹⁴ *Lentner v. Lieberstein*, *supra* note 19.

heavy burden upon the plaintiff, ". . . to show, by affidavits or the testimony of witnesses, or both, . . . that the asserted need for asking prospective jurors about insurance company connections is based on something more than mere surmise."⁹⁵ The Eighth Circuit Court of Appeals has followed *Kiernan v. Van Schaik* in two recent cases involving criminal actions,⁹⁶ but has not decided any case strictly in point since 1930.⁹⁷ The Ninth Circuit rule is that an interrogation of prospective jurors may be made in good faith, and for the purpose of ascertaining the qualifications of jurors, but not for the purpose of informing them that there is insurance in the case.⁹⁸ The plaintiff, however, has the burden of proving that denial of the right to question jurors is ". . . inconsistent with substantial justice under Rule 61 of the Federal Rules of Civil Procedure."⁹⁹ The Tenth Circuit rule is that questions may be asked in good faith and for the purpose of ascertaining the interests of jurors in insurance companies apparently connected with the case, but discovery is not available to the plaintiff for the purpose of showing that apparent interest.¹⁰⁰ An older case¹⁰¹ decided by the Circuit Court of Appeals for the District of Columbia appears to follow the old Eighth Circuit rule of *Stewart v. Brune*,¹⁰² long since abandoned by that court,¹⁰³ of strictly limiting the right of inquiry. In view of the development of the law since that case was decided in a contrary direction, the precedent value of the case is doubtful.

The problem of insurance can arise in many different ways. The independent variables in this analysis are: (1) the existence of insurance coverage; (2) the jury's knowledge or belief as to its existence in the case; (3) the actual policy limits if coverage exists; (4) the jury's state of knowledge or belief as to the amount of coverage; (5) whether insurance coverage is required by law; and (6) the jury's knowledge or belief as to legally required insurance coverage. The dependent variables are: (1) whether the finding of liability would tend to be greater or less; and (2) whether the amount of damages awarded would be greater or less than a "just amount."

It is widely believed that the existence of insurance, without more, tends to destroy the concept of fault as the basis of liability. This is a tenuous conclusion at best. The question whether the waning of fault as

⁹⁵ *Id.* at 443.

⁹⁶ *Ross v. United States*, *supra* note 18; *Pope v. United States*, *supra* note 18.

⁹⁷ *Wagner Electric Corp. v. Snowden*, *supra* note 19.

⁹⁸ *Duff v. Page*, *supra* note 17.

⁹⁹ *Id.* at 140; *Fed. R. Civ. P.* 61.

¹⁰⁰ *Bass v. Dehner*, *supra* note 19.

¹⁰¹ *Hoagland v. Chestnut Farms Dairy*, 72 F.2d 729 (D.C. Cir. 1934).

¹⁰² *Stewart v. Brune*, *supra* note 19.

¹⁰³ See, *Wagner Electric Corp. v. Snowden*, *supra* note 19.

a basis of liability is a result of the increased incidence of insurance coverage, or whether the increase coverage is a result of wider findings of liability is difficult at best. Certainly the thrust of the law has been in the direction of greater liability, as in the fields of workmen's compensation, product liability, medical malpractice, and the like. It is far more reasonable to assume that prudent businessmen and professionals have adapted to the demands of higher population density, rapid technological and industrial changes, and greater awareness of the need for compensating injuries through greater use of insurance, than to assume that the reverse is true. The more probable explanation is that greater liability has caused a rise in insurance coverage, rather than that greater insurance coverage has resulted in liability with less or without fault.¹⁰⁴ Many fear that juries are more free with damage awards if they believe that an insurance company rather than an individual defendant will pay. Perhaps at one time this was true; it is not so today. Most jurors have had sufficient experience with liability insurance to be aware that needlessly high verdicts will eventually result in higher insurance rates for everyone—themselves included. Further, it is hardly fair to assume that most people who serve on juries will be irresponsible in their verdicts. On the contrary, many judges feel that juries are, by and the large, quite fair.¹⁰⁵ If in the face of this it be contended that defendants who are in fact uninsured may pay excessive verdicts, then the answer is that it may serve as an inducement for tortfeasors to carry insurance, and thus carry their fair share of society's burden. That this is of considerable importance is attested to by the widespread adoption of automobile financial responsibility statutes,¹⁰⁶ and by recent proposals of compensation plans for automobile accident victims regardless of fault.¹⁰⁷ Most people tend to assume the existence of insurance in a case, and reasonably so. Insurance is an everyday fact of life.

The commonly held notion that where a jury believes the defendant is insured the verdict will be higher than a fair amount, can also work to the detriment of a plaintiff. Most automobile financial responsibility laws require far less insurance coverage than the damages in a serious personal injury case. It is likely that a jury will assume the statutory amount of coverage in many cases. Thus, in a serious case, it might be the defendant's desire to make the jury believe that the amount of coverage is only \$5,000/\$10,000, or some similarly low figure, in the hope that any verdict will be limited by that amount. The same rationale would

¹⁰⁴ See generally, Prosser, Torts 562-591 (3d ed. 1964).

¹⁰⁵ See, Botein, Trial Judge, 196-210 (1952).

¹⁰⁶ See generally, note Auto Insurance, The Great Debate, 3 Trial Mag. (6) Oct.-Nov. 1967.

¹⁰⁷ *Id.*; see also, "Trial," Vol. 3, No. 5, Aug.-Sept. 1967.

tend to favor plaintiff in cases where the damages ought to be less than the policy limits.

It ought to be transparently obvious that the court's preoccupation with prejudice is not the real problem, but only an attempt by judges to solve a larger social problem within the ambit of their own special talents. Assuming the worst—that juries are prejudiced against insurance companies and for plaintiffs—is their attempt not reasonable and desirable? What is the function of insurance, if not to distribute the risk of injury and loss among all those deriving benefits from our highly industrialized society? The real problem is that courts and juries have been trying their best to make do with a system for compensating injuries that has been woefully inadequate for many years. What is needed more than anything else is a system for adequately compensating injuries regardless of fault, based on the assumption that the wealthiest country in the history of the world can afford to guarantee its injured citizens a minimum standard of living and medical care.¹⁰⁸ Insurance can be provided by the government or by government-regulated insurance companies. Higher insurance premium rates, fines, or suspension of certain privileges would discourage and deter negligent tortfeasors. That is largely a job for the legislatures. The system for compensating injuries, as it is, cannot work with any real degree of fairness.

The argument that injuries ought to be compensated by the tortfeasor at their real worth is appealing on the surface. That injuries ought to be compensated is certainly true. That the person responsible for the injury ought to assume the burden of it is also true. That one tortfeasor has prudently carried insurance, while another has not, ought not to affect the money value placed on the plaintiff's injury, but it does. Juries are not unaware that an extremely large verdict can ruin the individual defendant. The matter becomes worse when the defendant will never be able to satisfy the judgment. Then the result of the lawsuit is an injured and only partly compensated plaintiff, and a financially ruined defendant. The sense of fairness is strained further when both or neither of the parties are at fault, but one only must bear the loss. The doctrine of comparative negligence may at times operate to mitigate the severity of the rule, but not adequately. If an injury is not fully compensated in the courts then either the financial burden must be borne by someone else, or the injured person must be left to rot at society's expense. If the amounts of verdicts are influenced, as they almost certainly are, by the existence and amount of insurance coverage, then uninsured defendants are rewarded by lower judgments while prudently insured defendants are penalized by higher verdicts. Thus, the only real answer is a system of adequate, universal, and compulsory insurance. The relevant ques-

¹⁰⁸ See, Fuchsberg, "Can We Afford Justice?," *op. cit. supra* note 106, at 49.

tions then can be determined by the courts: is there a compensable injury to the plaintiff, and is the defendant liable?

Conclusion

Since an adequate system of universal insurance coverage does not exist, the immediate problem of insurance questions on voir dire must be faced. Any jury member having a connection with a company or industry affected by the outcome of the suit can hardly be presumed to be impartial. The same is true if a juror holds an opinion or belief which may tend to influence his decision in the case. Facts may exist, of which the juror may be himself unaware, rendering an impartial decision on his part unlikely. Wise and experienced lawyers regard the selection of an impartial jury as the cornerstone of a fair trial. Lawyers attempt to exclude jurors likely to be unsympathetic to their client's cause, and to retain sympathetic jurors. The result is ideally a jury panel with no strong preconceived attitudes for or against either party, but often is a practical balancing of the prejudices of the individual jurors. The courts have correctly framed the problem in terms of prejudice. Prejudice by its very nature implies pre-formed attitudes, consciously or unconsciously held. The most effective means of dispelling prejudice is frank and open discussion of its elements. In this situation, the elements are a juror's possible connection or his identification with the insurance business. Where a juror be connected with an insurance company, for example, as an employee, agent, or claims adjustor, or interested as a stockholder or policy holder, his impartiality cannot be assumed. These are fit subjects for inquiry on voir dire in a proper case. If the mention of insurance in voir dire is prejudicial per se, then it ought not to be mentioned at all. That, however, is not the case. A distinguished trial lawyer has said:¹⁰⁹

Words, like living things, are chemical. A word in one context will be soothingly unimportant. The same word in another context will have an explosive effect on the emotions. It is the sequence and the mixture which turn the benign chemical into a volcanic force.

Context is all important. The tests of good faith, purpose of ascertaining qualifications of jurors, relevance, and reasonableness have all attempted to delimit that wide area of context within which inquiry will be allowed, and beyond the pale of which it will not.

The tests of good faith and proper purpose refer to a standard of conduct for counsel. Supposedly, the object of the questions asked must be to ascertain the qualifications of jurors, and not to suggest to the jury that there is an insurance company standing in the background ready to pay the verdict. For reasons already discussed, the jury will wonder

¹⁰⁹ Nizer, *The Jury Returns*, 137 (1966).

about the existence of insurance anyway, and will probably assume that the defendant is covered. The tests of good faith and proper purpose are thereby rendered nugatory. Whatever may have been the case fifty years ago, jurors cannot be expected to be ignorant of the fact of insurance today. Since bias can arise whether an insurance company is interested in the suit or not, plaintiff's counsel should not be made to show the existence of an insurance company interested in the suit before being allowed to inquire on voir dire. If the right of challenge is to be effective, particularly the right of peremptory challenge, plaintiff ought not be placed under the heavy burden of having to prove prejudicial error in being denied the information necessary to an intelligent exercise of the right of challenge. If those facts could be shown, peremptory challenge would be unnecessary, challenge for cause would have been allowed, and the whole matter would not be before the court. Therefore, the denial or impairment of the right of challenge by unnecessarily limiting voir dire should be reversible error without a showing of prejudice, as held in the *Kiernan* case. Finally, the proper test of the scope of inquiry ought to be reasonableness. It is within the judge's discretionary powers to limit the voir dire examination to information reasonably necessary to discover bias. Under the *Kiernan* holding, the balance is tipped in favor of a liberal voir dire, subject to the limits of reasonableness. Any prejudice that might result from the inquiry can be most effectively dealt with through instructions by the court. An intelligent and reasoned explanation by the court is most certainly preferable to the unconfirmed speculation of the jury room. The principles of *Kiernan v. Van Schaik* are sound, and should exert more influence in the future.