

Admissibility in New York of Evidence Alluding to the Fact that the Defendant Is Insured

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NOTES AND COMMENT

ADMISSIBILITY IN NEW YORK OF EVIDENCE ALLUDING TO THE FACT THAT THE DEFENDANT IS INSURED.

I. *General Rule of Exclusion.*

As a general rule, evidence in a negligence action that the defendant is insured against liability is inadmissible.¹ This is in accord with the fundamental exclusionary rule of the law of evidence that matters which are for the most part irrelevant and which tend to unduly prejudice the defendant are not admissible.² Such evidence is irrelevant since the fact that the defendant is insured can give rise to no legitimate inference that he was negligent on the occasion in question; it is prejudicial for it tends to influence the jury by imparting to them information that the verdict to be rendered by them, whatever the amount may be, will be immaterial to the defendant, since it will not be paid by him, but by the insurance company.³ The rule is not limited to positive evidence that the defendant carries insurance, but applies to *any* reference, whatever form it may take, implying that the defendant is insured against liability.⁴ Thus, it has been held that questions put to a witness inquiring whether the defendant is insured,⁵ arguments, comments, or statements made by counsel on summation or otherwise,⁶ or comments made by the trial judge on the fact of in-

¹ *Cosselmon v. Dunfee*, 172 N. Y. 507, 65 N. E. 494 (1902); *Simpson v. Foundation Co.*, 201 N. Y. 479, 95 N. E. 10 (1911); *Akin v. Lee*, 206 N. Y. 20, 99 N. E. 85 (1912); *Rodzborski v. American Sugar Refining Co.*, 210 N. Y. 262, 104 N. E. 616 (1914); *Notes* (1928) 56 A. L. R. 1418; (1935) 95 A. L. R. 388; (1936) 105 A. L. R. 1319.

² O'TOOLE, *CASES AND MATERIALS ON THE LAW OF EVIDENCE* (2d ed. 1937) 197.

³ *Akin v. Lee*, 206 N. Y. 20, 99 N. E. 85 (1912) ("Such evidence, almost always, is quite unnecessary to plaintiff's case and its effect cannot but be highly dangerous to the defendant's; for it conveys the insidious suggestion to the jurors that the amount of their verdict for the plaintiff is immaterial to the defendant. It was a highly improper attempt on the plaintiff's part to inject a foreign element of fact into his case which might affect the jurors' minds, if in doubts upon the merits, by the consideration that the judgment would be paid by an insurance company"); see note 1, *supra*.

⁴ *Hordern v. Salvation Army*, 124 App. Div. 674, 109 N. Y. Supp. 131 (1st Dept. 1908) (It is improper to suggest "by way of argument or by way of questions to the jury, or in any other way, that the defendant was protected by insurance").

⁵ *Cosselmon v. Dunfee*, 172 N. Y. 507, 65 N. E. 494 (1902) ("Do you know whether they carry insurance for accident to their employees?"); *Manigold v. Black River Traction Co.*, 81 App. Div. 381, 80 N. Y. Supp. 861 (4th Dept. 1903) ("Didn't Dr. Rockwell go there to try and settle with Manigold [the plaintiff] and wasn't he representing the insurance company back of this company?"); *Frahm v. Siegel-Cooper Co.*, 131 App. Div. 747, 116 N. Y. Supp. 90 (1st Dept. 1909) ("How soon did you communicate with your attorneys in regard to this accident or the Casualty Company of American?").

⁶ *Loughlin v. Brassil*, 187 N. Y. 128, 79 N. E. 854 (1907) (Plaintiff's coun-

surance,⁷ are improper. The New York Court of Appeals has said:⁸ "Evidence that the defendant in an action for negligence was insured in a casualty company, or that the defense was conducted by an insurance company, is incompetent and so dangerous as to require a reversal even when the court strikes it from the record and directs the jury to disregard it, unless it clearly appears that it could not have influenced the verdict."

The admission of such evidence, therefore, where an objection thereto is made and overruled,⁹ or where the objection is sustained but no instruction is given to the jury to disregard the matter, is ground for a reversal of judgment.¹⁰ But even if the court sustains the objection and instructs the jury to disregard the matter, a new trial may still be ordered if it appears that the substantial harm which resulted could not be cured by the subsequent instructions to disregard it.¹¹ Thus, where the violation of the rule is wilful, it would seem that a new trial should be ordered as a matter of course.¹² The

sel in summing up said: "There is no evidence that he [the defendant] was insured, most of these people are" and "many people get insured, but there is no evidence of any such thing in this case at all." This was held reversible error); *Haigh v. Edelmeyer & M. Hod Elevator Co.*, 123 App. Div. 376, 107 N. Y. Supp. 936 (1st Dept. 1908); *Ritacco v. City of New Rochelle*, 180 App. Div. 559, 168 N. Y. Supp. 190 (2d Dept. 1917) (In an action against the city for a fall on an icy sidewalk, plaintiff's counsel on summation said: "You don't imagine for a moment the city is going to pay; you know well enough who is going to pay." A new trial was granted); *Kent v. Lajotee*, 103 Misc. 486, 170 N. Y. Supp. 545 (1918).

⁷ *Branoner v. Traitel Marble Co.*, 144 App. Div. 569, 129 N. Y. Supp. 761 (1st Dept. 1911); *Lipschultz v. Ross*, 84 N. Y. Supp. 632 (1903).

⁸ *Simpson v. Foundation Co.*, 201 N. Y. 479, 95 N. E. 10 (1911).

⁹ *Haigh v. Edelmeyer & M. Hod Elevator Co.*, 123 App. Div. 376, 107 N. Y. Supp. 936 (1st Dept. 1908); *Donnelly v. Younglove Lumber Co.*, 140 App. Div. 846, 125 N. Y. Supp. 689 (3d Dept. 1910); *O'Brien v. Hencken & W. Co.*, 172 App. Div. 142, 158 N. Y. Supp. 200 (1st Dept. 1916); *Dietz v. Dinkel*, 230 App. Div. 699, 246 N. Y. Supp. 623 (3d Dept. 1930); *Stringer v. Guggenheim*, 117 N. Y. Supp. 978 (1909); *Horan v. Altman*, 176 N. Y. Supp. 433 (1919).

¹⁰ *Frahm v. Siegel-Cooper Co.*, 131 App. Div. 747, 116 N. Y. Supp. 90 (1st Dept. 1909).

¹¹ *Cosselmon v. Dunfee*, 172 N. Y. 507, 65 N. E. 494 (1902); *Simpson v. Foundation Co.*, 201 N. Y. 479, 95 N. E. 10 (1911); *Akin v. Lee*, 206 N. Y. 20, 99 N. E. 85 (1912); *Rodzorski v. American Sugar Ref. Co.*, 210 N. Y. 20, 99 N. E. 85 (1914); *Manigold v. Black River Traction Co.*, 81 App. Div. 381, 80 N. Y. Supp. 861 (4th Dept. 1903); *Hordern v. Salvation Army*, 124 App. Div. 674, 109 N. Y. Supp. 131 (1st Dept. 1908); *Rothenburg v. Collins*, 161 App. Div. 387, 146 N. Y. Supp. 762 (3d Dept. 1914). But see *Adler v. Lesser*, 110 N. Y. Supp. 196 (1908).

¹² *Frahm v. Siegel-Cooper Co.*, 131 App. Div. 747, 116 N. Y. Supp. 90 (1st Dept. 1909) ("The references to the Casualty Company were highly improper and, as is shown by the repetition thereof, were deliberate, and not the result of ignorance or inadvertence, and we cannot say, in the light of the evidence, that the verdicts may not have been induced thereby. Upon this ground alone, therefore, the judgments must be reversed"); *Cunningham v. Heideberger*, 48 Misc. 614, 95 N. Y. Supp. 528 (1905) ("The question asked by plaintiff's counsel in the course of his examination of jurors: 'Do you know Mr. Frank V. Johnson, attorney for the Fidelity Insurance Company in this

asking of a question which counsel must be assumed to know is improper has been well termed "highly reprehensible",¹³ so that where it appears that it was deliberate, the court should not speculate as to whether the jury did in fact disregard it, but should reverse the judgment. As was said in *Hordern v. Salvation Army*:¹⁴ "As counsel in cases of this kind have been so often admonished as to the impropriety of suggesting either by way of argument or by way of questions to the jury, or in any other way, that the defendant was protected by insurance, it seems to be unnecessary to say more than that such a suggestion in the presence of the jury will render any verdict that has been obtained by the plaintiff valueless, as a violation of the rule will require a reversal of the judgment. * * * Counsel has been so often admonished that such practice will not be tolerated, that where it appears from the record that the rule has been violated we think there should follow as a penalty a reversal of the judgment and the direction of a new trial." The ultimate test, however, would seem to be whether or not the jury might have been influenced by the evidence, in spite of the fact that it was subsequently stricken out.¹⁵ In this connection, it would appear that the burden of showing that the evidence had no prejudicial effect on the jury is on the plaintiff.¹⁶ The courts are so solicitous of the defendant's rights in this matter, that even where the reference to insurance is voluntarily brought out by a

case, was most prejudicial in character, and the objectionable matter having been introduced in such a way as to negative any legitimate purpose a new trial should be had in the interests of substantial justice").

¹³ *Cosselmon v. Dunfee*, 172 N. Y. 507, 65 N. E. 494 (1902) ("We affirm this judgment without opinion, but feel constrained to refer to an occurrence on the trial that has become too frequent in negligence cases. Counsel for plaintiff asked a witness for defendants this question: 'Do you know whether they carry insurance for accident to their employees?' This question was objected to as incompetent and objection sustained. While the learned trial judge made a proper disposition of the matter, nevertheless, the propounding of the question was calculated to convey an improper impression to the jury. The inquiry into the matter of insurance is not material and the practice of asking a question that counsel must be assumed to know cannot be answered is highly reprehensible, and where the trial court or Appellate Division is satisfied that the verdict of the jury has been influenced thereby it should, for that reason, set aside the verdict").

¹⁴ 124 App. Div. 674, 109 N. Y. Supp. 131 (1st Dept. 1908).

¹⁵ *Akin v. Lee*, 216 N. Y. 20, 99 N. E. 85 (1912) ("While frequently in the exercise of the authority conferred upon this court, we disregard technical errors, when we see that they do not affect the merits of the controversy, the error committed in this case is of too repeated instances, judgments have been reversed for its commission and counsel must take notice that we shall adhere to our rule and that we shall order a new trial in all cases, where, in such actions, a verdict may have been influenced by the consideration of such unauthorized evidence"); see note 11, *supra*.

Where there is a close question of fact, the judgment probably will be reversed. *Simpson v. Foundation Co.*, 201 N. Y. 262, 104 N. E. 616 (1911); *Levy v. J. L. Mott Iron Works*, 143 App. Div. 7, 127 N. Y. Supp. 506 (1st Dept. 1911).

¹⁶ *Manigold v. Black River Traction Co.*, 81 App. Div. 381, 80 N. Y. Supp. 861 (4th Dept. 1903).

witness in an unresponsive answer which could not be anticipated by counsel, a new trial will be ordered.¹⁷ "If the answers were unexpected, as claimed, it was the duty of the plaintiff's counsel himself to move to strike out the evidence and to ask the court to instruct the jury to disregard it. * * * A prompt withdrawal of the evidence by the counsel for the plaintiff would go farther toward correcting the evil than any motion made by the attorney for the defendant."¹⁸ But where the examining counsel does promptly move to strike out the evidence and the court instructs the jury to disregard it (assuming, of course, that it clearly appears that the answer was unexpected), it would seem that he has done all that is within his power to cure the error, and the judgment should be allowed to stand.¹⁹ To hold otherwise would be to sanction a rule that would permit an irresponsible witness to destroy the plaintiff's case, no matter how strong it might be.²⁰ In any case, however, if it clearly appears that the jury was in fact not influenced by the improper reference to insurance, the judgment will not be reversed, for it would then be a mere technical error not affecting the merits of the controversy.²¹

¹⁷ *Pritz v. Carnot*, 179 N. Y. Supp. 164 (1919) (Plaintiff's counsel while cross-examining the defendant, asked him what he had paid for repairs to his automobile, to which the defendant unexpectedly answered: "The insurance company took care of that." Though no motion was made to strike out the evidence, a new trial was granted). Cf. *Chernick v. Independent American I. C. Co.*, 66 Misc. 177, 121 N. Y. Supp. 352 (1910) (Defendant's president was asked on cross-examination: "When you got these papers, what did you do with them, the summons and complaint?" Defendant's counsel objected, but the witness was allowed to answer: "I sent it to the company because I am insured for that." It was held that defendant's motion for the withdrawal of a juror should have been granted).

¹⁸ *Rodzborski v. American Sugar Ref. Co.*, 210 N. Y. 262, 104 N. E. 616 (1914). In commenting upon this case, the court in *O'Brien v. Hencken & W. Co.*, 172 App. Div. 142, 158 N. Y. Supp. 200 (1st Dept. 1916), said: "In the case cited the question of plaintiff's counsel conveyed no hint of any insurance company indemnifying defendant, and the statement that an employer's liability company was insuring the defendant came from the witness in the course of a lengthy answer in response to a question as to what directions he was given by defendant. Still the Court of Appeals felt called upon to reverse the judgment upon that ground (as well as another) as it did not clearly appear that the error was harmless."

¹⁹ *Goodman v. Guida*, 150 Misc. 677, 269 N. Y. Supp. 811 (1934).

²⁰ Note (1928) 56 A. L. R. 1418, 1517.

²¹ *Hager v. Bushman*, 255 App. Div. 934, 8 N. Y. S. (2d) 725 (4th Dept. 1939); *Anderson v. Standard Plunger Elevator Co.*, 113 N. Y. Supp. 593 (1908).

It has also been held that where reference to the fact of insurance is first brought out by defendant's own counsel, subsequent reference to it by plaintiff's counsel cannot occasion such serious injury to the defendant so as to require a new trial. *Lanti v. William F. Kenny Co., Inc.*, 225 App. Div. 129, 232 N. Y. Supp. 103 (2d Dept. 1928), *aff'd*, 250 N. Y. 621, 166 N. E. 347 (1929); *McTague v. Dowst*, 51 App. Div. 206, 64 N. Y. Supp. 949 (2d Dept. 1900) ("The defendant refers to the fact that the jury awarded the full amount of the damages demanded in the complaint, and contends that 'The continual injection into the case of the fact that the defendant was insured in an accident insurance company may in some measure account for this fact.' But the fact of insurance in a casualty company was first brought to light on the counsel's own cross-

II. When Admissible.

It is not to be assumed, however, that evidence that a defendant in a negligence action is insured is inadmissible in all cases, for although this is the general rule, it is, like most other rules, subject to various exceptions. Accordingly, where the fact that the defendant is insured is relevant in that it tends to prove some material issue in the case, such evidence is admissible, and the mere fact that it may also tend to prejudice the defendant in that the jury may infer that he will not have to pay the judgment, is not ground for its exclusion.²² This is in accord with the general rule of evidence that evidence which is competent upon one issue is admissible, "even though it is not admissible to prove another issue and is prejudicial upon such latter issue."²³ Thus, where the action is predicated on the doctrine of *respondeat superior*, and the defendant denies that he was in fact the master, it is held that evidence that he carries insurance for injuries

examination of Dr. Webster, who testified that the defendant or someone in his office, in answer to a message to him over the telephone, informing the defendant of the injury to the plaintiff, said he was insured and that the matter did not interest him much. After this fact was brought out by the defendant, subsequent references to it by the plaintiff could not have occasioned any serious injury to the defendant"). Cf. *Rodzborski v. American Sugar Ref. Co.*, 210 N. Y. 262, 104 N. E. 616 (1914) ("The error here is sought to be defended on the ground that it could not have influenced the verdict. The main reliance in this respect is that in the cross-examination of this same witness, prior to the evidence complained of, the defendant's counsel drew answers from him to the effect that *upon some other occasion and in connection with another accident the witness had dealt with an insurance company.* [Italics ours.] Whether these answers led the jury here to assume that the defendant was insured is of course purely conjectural. If the jury had any suspicions of that fact, we cannot say that the evidence may not have suggested the result. In some cases it is true the courts have sustained judgments where such evidence has been elicited. A perusal of them will show that there was reason to believe that the evidence could not have influenced the verdict. In this case the plaintiff's case against the defendant depended upon his own interested version, which barely measured up to the requisite degree of proof, and was contradicted in every material particular by defendant's witnesses. When we consider these circumstances in connection with the bald reference to the insurance company made by the witness, we cannot say that the error was harmless").

²² *Whitman v. Carver*, 337 Mo. 1247, 88 S. W. (2d) 885 (1935) ("There are instances when it is proper to prove that a defendant has liability insurance but such a case only arises when such evidence is relevant and material to some issue involved"); Note (1928) 56 A. L. R. 1418, 1432. But see *Culp v. Repper*, 78 F. (2d) 221 (1935), holding that only in extreme cases where it becomes necessary to establish some decisive issue will evidence relating to the defendant's insurance be admitted. Cf. *Hodern v. Salvation Army*, 124 App. Div. 674, 109 N. Y. Supp. 131 (1st Dept. 1908) (question as to insurance carried by the defendant was excluded although "the avowed purpose of asking the question here was to meet the objection that the defendant was a charitable corporation and that its funds should not be diverted from charitable uses in paying an amount due to the plaintiff because of his injuries").

²³ *Boten v. Sheffield Ice Co.*, 180 Mo. App. 96, 166 S. W. 883 (1914). Cf. *Bennett v. Nazzaro*, 144 Misc. 450, 258 N. Y. Supp. 829 (1932) (defendant's registration application for his automobile was received in evidence though the reverse side indicated that the defendant was insured).

to the alleged servant is admissible, for it has some relevant bearing on the fact of whether or not he was the master.²⁴ Again, where the defendant denies that he was the owner of the instrumentality which caused the injury, evidence that the defendant had procured a liability insurance policy on that particular instrumentality is admissible, since it tends to show that he was in fact the owner.²⁵ Furthermore, evidence of insurance may even be relevant, and therefore admissible, on the very issue of negligence. While it is true that the mere fact that one is insured against liability should give rise to no inference that he would be likely to exercise less care under the circumstances than if he were not insured,²⁶ yet when by his own words he discloses that such in fact is his attitude, such evidence undoubtedly becomes competent on the question of negligence.²⁷ Thus, where the defendant makes statements disclosing a reckless attitude based on the fact that he is insured against liability, evidence of such insurance is held to be admissible on the question of negligence. In a New Hampshire case²⁸ it appeared that the plaintiff, while riding with the defendant in his automobile, requested the defendant to be more careful, whereupon the defendant answered: "Don't worry, I carry insurance." The court held, and properly so, that the evidence was admissible, saying: "His attitude as disclosed by his words imply that he would be likely to exercise a less degree of care in operating his automobile for the reason that an insurance company would be called upon to pay for any damages occasioned to others by his negligence and reckless conduct."

Again, it has been held that where the defendant has made an admission of liability wherein he also discloses the fact that he is insured, the plaintiff is entitled to have the admission as a whole come into evidence.²⁹ Thus, in *Flieg v. Levy*,³⁰ plaintiff brought an action

²⁴ 1 JONES, EVIDENCE (4th ed. 1938) 282, nn.14, 15.

²⁵ *Sibley v. Nason*, 196 Mass. 125, 81 N. E. 887 (1907); Note (1928) 56 A. L. R. 1418, 1435. See *Flieg v. Levy*, 148 App. Div. 781, 133 N. Y. Supp. 249 (2d Dept. 1912), *aff'd without opinion*, 208 N. Y. 564, 101 N. E. 1102 (1913), cited *infra* note 30. Cf. *Akin v. Lee*, 206 N. Y. 20, 99 N. E. 85 (1912) (where evidence that the defendant was insured was held not competent on the grounds that it tended to prove ownership of an automobile, where the defendant's ownership of the car was admitted).

²⁶ *Walters v. Appalachian Power Co.*, 75 W. Va. 676, 84 S. E. 617 (1915).

²⁷ *Sims v. Martin*, 33 Ga. App. 486, 126 S. E. 872 (1925).

²⁸ *Herschensohn v. Weisman*, 80 N. H. 557, 119 Atl. 705 (1923).

²⁹ Note (1928) 56 A. L. R. 1418, 1448.

³⁰ 148 App. Div. 781, 133 N. Y. Supp. 249 (2d Dept. 1912), *aff'd without opinion*, 208 N. Y. 564, 101 N. E. 1102 (1913). Cf. *Tincknell v. Ketcham*, 78 Misc. 419, 139 N. Y. Supp. 620 (1912) (Defendant on cross-examination was asked: "Didn't you tell me that you would have to refer to your insurance company?" not for the purpose of showing insurance protection, but to establish that, when defendant was charged with causing plaintiff's injuries he failed to deny that charge, thereby tacitly admitting his connection with the accident. This was held reversible error, the court saying: "But for its involving this question of insurance, defendant's failure to deny the charge laid against him would have been competent; it was not, however, conclusive, being simply one of many facts which the jury might consider. It would seem that where two

for personal injuries received when he was kicked by a horse allegedly owned by defendant. The defendant denied ownership of the horse, and plaintiff, in order to establish such ownership, called a witness who testified as to a conversation she had with defendant as follows: "He [the defendant] said to me his horse is insured and I should take a physician and the child will be cured, and I shall be paid for it." Plaintiff's counsel then asked: "Did Mr. Levy [the defendant] say anything about the horse?" The witness replied: "That is what he said, 'My horse is insured.'" This was held not to be error, the court saying: "It was incumbent upon the plaintiff to establish the appellant's ownership of the horse. * * * The question called for proper and competent testimony, to wit, appellant's admission that the horse was his, and was material. It was a statement made by the appellant to the mother of the injured boy, and the fact that in the admission of ownership the appellant also said the horse was insured, does not deprive the plaintiff of the right to the conversation."³¹

rules so conflict and offered testimony necessarily involves matter which is specifically prohibited, its otherwise competency must give way; the positive harm flowing to defendant therefrom overbalances the probative advantage to plaintiff of an admission based solely upon failure to deny").

³¹ It has also been held that where the plaintiff was subjected to cross-examination with reference to a statement made by him, he is entitled to give all the circumstances surrounding its making, notwithstanding that it is shown to have been procured by the insurance company insuring the defendant. *Shane v. National Biscuit Co.*, 102 App. Div. 188, 92 N. Y. Supp. 37 (4th Dept. 1905), *aff'd without opinion*, 186 N. Y. 514, 72 N. E. 112 (1906) (In an action to recover damages for personal injuries sustained by plaintiff due to defendant's negligence, plaintiff testified that a few days after the accident he was called upon by an attorney, who according to the plaintiff, told him that he had been sent by the plaintiff's employer in regard to the insurance, and that he wanted to get a statement from plaintiff. Plaintiff was then asked, over objection and exception by defendant, a number of questions with reference to the statement as to the insurance. This was held not to be error, the court saying: "The intimation was not that the insurance company was defendant, but that the employer of the plaintiff desired a statement with reference to the insurance. It is well known that employers are in the habit of carrying employer's liability insurance, or insurance against injury to their employees through their negligence, and the statement of the plaintiff was to the effect that it was on behalf of his employers that the statement was desired, not for the defendant, nor for an insurance company connected in any way with the defendant; and the plaintiff having been questioned with reference to the statement and the manner of obtaining it, was entitled to give the circumstances at the time the statement was procured. If the statement was not to the advantage of the defendant the plaintiff was in no wise to blame, and so long as the testimony was proper, the fact that it was injurious to the defendant was not a sufficient ground for its exclusion. There was no claim or intimation that an insurance company was behind the defendant, but the entire incident is covered by the statement that the plaintiff understood that the person applying to him represented his employer with reference to insurance in which it was interested. Whether this was true or not does not affect the competency of the proof, but it was received as a part of the transaction with reference to the statement, and we can see no error in the reception of the testimony").

a. To Affect Witnesses' Credibility.

The general rule that questions alluding to the fact that the defendant in a negligence action carries insurance is further subject to the right of the plaintiff to cross-examine witnesses to show their bias and interest, and this right is not to be denied because as an incident thereto matters which are irrelevant and prejudicial to the main issue are elicited.³² As was said in *Grant v. National Railway Spring Co.*:³³ "Suppose an insurance company is interested in the action and a witness is sworn by the defense and gives important evidence, and he is a stockholder in the insurance company, may not these facts be shown on cross-examination as bearing upon the credibility of the witness, and can such evidence be excluded because of any ulterior motives of counsel to disclose the fact that the insurance company is interested in the case? Clearly not. No court has ever held any such doctrine." Thus, the credibility of a witness may be attacked and his bias and interest shown by establishing on cross-examination that he is connected with the insurance company that has insured the defendant, and this in spite of the fact that the jury is indirectly informed that the defendant is insured and will therefore not have to pay.³⁴ Accordingly, a physician testifying in behalf of a defendant may be impeached by showing that he is in the employ of the insurance company insuring the defendant.³⁵ Counsel, however, will not be permit-

³² *DiTommaso v. Syracuse University*, 172 App. Div. 34, 158 N. Y. Supp. 175 (4th Dept. 1916), *aff'd*, 218 N. Y. 640, 112 N. E. 1072 (1916); *Grant v. National R. Spring Co.*, 100 App. Div. 234, 91 N. Y. Supp. 805 (4th Dept. 1905); *Wood v. New York State Electric & Gas Corp.*, 257 App. Div. 172, 12 N. Y. S. (2d) 947 (3d Dept. 1939) ("Also plaintiff's counsel very properly showed the interests of the investigator for the defendant's insurance company when such investigator was offered as a witness by the defendant").

³³ 100 App. Div. 234, 91 N. Y. Supp. 805 (4th Dept. 1905).

³⁴ See note 32, *supra*.

³⁵ *DiTommaso v. Syracuse University*, 172 App. Div. 34, 158 N. Y. Supp. 175 (4th Dept. 1916), *aff'd*, 218 N. Y. 640, 112 N. E. 1072 (1916) (Physician who examined the defendant was asked in whose interest he made the examination and replied: "The insurance company." This was held proper, the court saying: "While I think the learned trial judge was entirely justified in concluding that plaintiff's counsel expected the answer which he elicited to his question, and that it was deliberate purpose to have the fact appear that the doctor made the examination in the interest of the insurance company, I am of the opinion that the question was proper. While the courts have quite uniformly frowned upon the practice of getting before the jury the fact that an insurance company is defending the action, where that is done for the purpose of prejudicing the jury * * * [yet] the inquiry here was proper, as I think, to show the bias or interest of the witness. * * * We do not intend to hold that if a jury is prejudiced by such an inquiry the verdict may not be set aside, even though the inquiry may have been proper, or even that a trial may not be interrupted and a juror withdrawn and retrial be had where it is apparent during the progress of the trial that the jury has become or will be prejudiced." Merrell, J., concurring, said: "The questions were entirely proper. In weighing his testimony the jury was entitled to know whether the witness was entirely disinterested or whether he was a paid employee of some one vitally interested in the result of the trial. Such information clearly would be of inestimable benefit in aiding the jury in

ted in the guise of attacking a witness's credibility, to introduce the irrelevant fact of insurance for the purpose of prejudicing the defendant.³⁶ Extreme caution should be taken, therefore, in framing a proper question which may be asked a witness in order to determine his bias, and yet which will not, if answered in the negative, leave an innuendo that the defendant is insured.³⁷

determining the credibility of the witness and the weight to be given his testimony. It is of secondary importance that the replies to the questions asked might unexpectedly disclose facts prejudicial to the defendant's rights. Any resulting prejudice might easily be taken care of by a watchful court in its charge, or by way of instruction to the jury at the time the prejudicial matter appeared. In a case beyond the control of the court, any verdict resultant from such prejudice could and would be set aside"). Cf. *Toombs v. Texas Oil Co.*, 260 N. Y. Supp. 773 (1932), where the witness was asked who asked him to come. He replied: "A gentleman from the U. S. Casualty." This was held improper and a new trial was granted. It is to be noted, however, that the question asked by counsel had no effect on the witness' credibility, for merely asking one to come is not improper, unless, in addition thereto, some fee was paid to him.

³⁶ *Levy v. J. L. Mott Iron Works*, 143 App. Div. 7, 127 N. Y. Supp. 506 (1st Dept. 1911); *O'Brien v. Hencken & W. Co.*, 172 App. Div. 142, 158 N. Y. Supp. 200 (1st Dept. 1916); *Pearlman v. I. Blyn & Sons*, 155 App. Div. 888, 139 N. Y. Supp. 1082 (1st Dept. 1913). Cf. *Shaier v. Broadway Improvement Co.*, 22 App. Div. 102, 47 N. Y. Supp. 815 (1st Dept. 1897), *aff'd without opinion*, 162 N. Y. 641, 57 N. E. 1124 (1900), where the rule was violated, but the court found no prejudicial effect. In that case an expert, who was appointed by the court to examine the plaintiff before trial, had testified upon cross-examination that he expected to be paid for his services, and he was asked whether he was to be paid by defendant or by an insurance company. The question was objected to and plaintiff's counsel consented to withdraw it. The court then instructed counsel not to say anything more about insurance. Counsel, however, subsequently asked the witness whether or not he had been retained by the lawyers of the Casualty and Fidelity Company in the case. The witness answered that he had not heard of the company in the case. The court instructed the jury to disregard the question. This was held not reversible error, the court saying: "It certainly was not error to ask him by whom he was to be paid; and while the counsel had no right to disregard the instruction of the court and refer to the insurance company after the court had directed him not to, the mere fact that he asked a question of a witness as to who was to compensate him for his expert testimony, whether it was the defendant or some other person, was certainly not such legal error as would justify us in reversing the judgment or justify the court in allowing a juror to be withdrawn. The court did all that it was bound to do to protect the defendant. The jury were instructed not to regard it, and the witness swore positively that he knew nothing of the insurance company. There was no statement made to the jury that as a fact this insurance company had anything to do with the case, nor does it appear that this statement did as a fact influence the jury."

³⁷ Thus, the question "Did you tell somebody out in the corridor a couple of days ago you had been promised a job with the Aetna Insurance Company if you testified here?", *Levy v. J. L. Mott Iron Works*, 143 App. Div. 7, 127 N. Y. Supp. 506 (1st Dept. 1911), "You are the physician for the insuring company in this case?", *O'Brien v. Hencken & W. Co.*, 172 App. Div. 142, 158 N. Y. Supp. 200 (1st Dept. 1916), "Are you connected with the insurance company in this case?", *Pearlman v. I. Blyn & Sons*, 155 App. Div. 888, 139 N. Y. Supp. 1082 (1st Dept. 1913), if answered in the negative would be irrelevant and prejudicial and grounds for a mistrial, while if answered in the affirmative would be admissible as affecting the credibility of the witness. As

b. On "Voir Dire" Examination of Jurors.

Section 452 of the Civil Practice Act³⁸ permits the interrogation of jurors on their *voir dire* examination in a negligence action with respect to their connection with insurance companies. That section provides:

"The fact that a juror is in the employ of a party to the action; or, if a party to the action is a corporation, that he is an employee thereof or a shareholder or a stockholder therein; or in actions for damages for injuries to person or property, that he is a shareholder, stockholder, director, officer or employee, or in any manner interested, in any insurance company issuing policies for protection against liability for damages for injury to persons or property, shall constitute a good ground for a challenge to the favor as to such juror."

The theory behind the statute was stated in *Grant v. National Railway Spring Co.*,³⁹ as follows: "This kind of insurance against loss by employers, by reason of injuries to their employees has become very general. Innumerable companies and corporations are engaged in this kind of business, and it is not a rare thing for such an insurance company to be interested in negligence actions. Its stockholders and employees, therefore, would be objectionable as jurors to plaintiffs in such actions. May not inquiry be made in any case whether any of the jurors are stockholders or employees of such insurance companies? Is not such an inquiry perfectly proper, competent and material? It cannot be doubted." Thus, the general rule that evidence of defendant's insurance in a negligence action is inadmissible, does not prohibit the interrogation of jurors in respect to their connection with insurance companies.⁴⁰ The only difficulty that

was said in *Levy v. J. L. Mott Iron Works*, *supra*: "It would have been proper to have asked the witness, if counsel had information warranting it, whether he had been promised anything for testifying, and, if he denied it, it would have been proper to direct his attention to a particular admission claimed to have been made by him, but there is nothing in the record accounting for these questions except on the theory of getting it before the jury that the action was being defended by an accident insurance company." Therefore, if counsel has no positive information as to whether or not the witness is connected with the insurance company, the best procedure would be to inquire "Who paid you to make the examination?" or words of similar import wherein "insurance company" is omitted. In such case, if the witness answers "No one did" then there can be no ground for a mistrial since the defendant has not been prejudiced, there being no reference to any insurance company. But if the witness answers "The insurance company", then the questioning is proper since it has a legitimate bearing on the witness' credibility.

³⁸ This was derived from N. Y. CODE CIV. PROC. § 1180, last sentence, as amended by N. Y. Laws 1877, c. 243, N. Y. Laws 1901, c. 243, N. Y. Laws 1911, c. 206.

³⁹ 100 App. Div. 234, 91 N. Y. Supp. 805 (4th Dept. 1905).

⁴⁰ *Grant v. National R. Spring Co.*, 100 App. Div. 234, 91 N. Y. Supp. 805

arises hereunder is whether or not counsel is limited to general questions inquiring into their interest in "any" insurance company, or whether he may also interrogate the jurors as to their interest in a "specific" insurance company. In this connection, we must bear in mind that the statute does not change the general rule that evidence relating to the fact that the *defendant* is insured is inadmissible.⁴¹ Therefore, interrogations of jurors with respect to their interests in insurance companies, whether the questions are general or specific in form, which leave an inference that the defendant is insured, are improper.⁴² It would seem, therefore, that questions referring to

(4th Dept. 1905); *Blair v. McCormack Constr. Co.*, 123 App. Div. 30, 107 N. Y. Supp. 750 (2d Dept. 1907); *Rinklin v. Acker*, 125 App. Div. 244, 109 N. Y. Supp. 125 (2d Dept. 1908); *O'Dell v. Genesee Constr. Co.*, 145 App. Div. 125, 129 N. Y. Supp. 122 (4th Dept. 1911). In *Grant v. National Spring Co.*, *supra*, plaintiff's counsel, when selecting the jury, asked: "Are any of the jurymen interested as agents or stockholders in any insurance company insuring corporations against liability for negligence?" This was held proper, the court saying: "The inquiry was not made as to any company interested in this case but to any and all such insurance companies. If there was no such insurance company in the case, it could do no harm certainly. If some insurance company was interested in the case, then there was good reason why the plaintiff's counsel should inquire and be certain that no juror interested in that particular insurance company or any other like company was on the jury. It may be claimed that counsel often make these inquiries when they have no reason to suppose there are any persons among the jurors interested in these insurance companies. The answer is they do not know, and inquire for information. It is not safe to assume in these times that men summoned upon petit jurors may not be interested as stockholders in any companies that are likely to make money and pay good dividends. Men do not disclose to the public where their money is invested. The only safe way is to ask if they have such interests. The questions are proper and competent and the court may not exclude answers to such inquiries or charge counsel with bad faith or improper motives in making the inquiries. If the questions are proper, it is not important what the motives of counsel may be; only where the questions are clearly incompetent and immaterial can bad faith be alleged and the counsel and his client be punished therefor. In this case the question was clearly competent and proper and, therefore, regardless of the motives of counsel, the answer should have been received."

⁴¹ *O'Brien v. Hencken & W. Co.*, 172 App. Div. 142, 158 N. Y. Supp. 200 (1st Dept. 1916) ("It is quite true that some of these cases were decided before the amendment to section 1180 of the Code of Civil Procedure [now N. Y. Civ. Prac. Act § 425] * * * But this is a general proposition, the only effect of which is to ascertain if talesmen are interested in any casualty company and to make their interest a ground for challenge, presumably because such interest might bias them against any recovery in an accident case, whether defendant was insured or not. It does not give the right to otherwise suggest or state directly that the defendant in a particular case is insured against loss by reason of accidents caused by him"); *Galotti v. Deansboro Supply Co.*, 248 App. Div. 20, 289 N. Y. Supp. 535 (3d Dept. 1936).

⁴² *Rothenberg v. Collins*, 161 App. Div. 387, 146 N. Y. Supp. 762 (3d Dept. 1914) (Plaintiff's counsel in examining the jury asked: "I ask the jury to tell us if any of them are shareholders, stockholders, directors, officers, employees, or in any way interested in any insurance company issuing policies for protection against liability for damages for injury to person or property?" Defendant objected to the question and the court inquired of counsel if the action was one in negligence, and was informed that it was a quasi-negligence action—malpractice.

specific insurance companies should be excluded for the natural inference to be drawn therefrom would be that the defendant is insured

The court then said: "If it is a malpractice action, you ought to ask them if they were stockholders or interested in any company insuring against malpractice." Counsel replied: "I tried to ask them in accordance with the statute." The court responded: "Of course that section is intended to apply to cases where there is a practice of insuring against liability for negligence. I have never heard of any practice that any company exists anywhere that insures a doctor against the results of his malpractice." Plaintiff's counsel replied: "I have." The court then said: "Anybody that is a stockholder in an indemnity company raise your right hand." Defendant's counsel objected to "all this proceeding before this jury" and asked to withdraw a juror, which motion was denied. The court then said to the jury: "You are not to infer, gentlemen, from anything you have heard here this afternoon in reference to indemnity companies, that there is any indemnity company at all interested in this case. The law permits that kind of questions to be put to jurors because it is thought that sometimes jurors who have financial interests in companies insuring against accidents or injuries have a bias in their minds in that class of cases, and so it is thought proper that parties should know whether jurors are of that type of mind, or their business is such that they might have a prejudice in that class of cases." This was held reversible error, the Appellate Division saying: "But the prejudice to the defendant is not to be found not so much in the question of whether any jurors were interested in indemnity insurance companies but in the suggestion conveyed to the jurors by the assertion of counsel for plaintiff that he knew of corporations insuring doctors against malpractice; that the defendant was thus protected—that the burden of a verdict would fall upon a corporation rather than upon the individual who was before them—and this point was not cleared up before the jury by the remarks of the court * * * This was getting before the jury 'by suggestion and indirection' that which plaintiff's counsel had no right to do, and in a close case of this character it cannot be presumed that it did not have its influence upon the jury, and the instructions of the court did not operate to relieve the plaintiff from the error"; *Davis v. Saltser*, 192 App. Div. 921, 183 N. Y. Supp. 108 (2d Dept. 1920) ("In the interests of justice a new trial should be had. Counsel in examining a juror who was in the insurance business remarked, 'Then you issue policies such as this thing here,' which suggested that defendants had insurance protection"); *Kent v. Lajotte*, 103 Misc. 497, 170 N. Y. Supp. 545 (1918) (Plaintiff's counsel in the examination of jurors, asked: "Is there any gentleman who owns any stock of an accident insurance company?" Defendant's counsel then moved for the withdrawal of a juror and a new panel of jurors. Plaintiff's counsel then said: "I do not ask that question to lead the jurors to believe that the defendant is insured in an accident insurance company. I have the right to ask it on general grounds * * * I will concede on the record that this defendant is not insured and there is no insurance company in this case." Again, in summing up, plaintiff's counsel said: "I do not know whether the defendant carried any insurance against accidents caused by his horse and wagon; but I do know that he is too busy making money in his butcher business uptown on Fourteenth Street to take the time to attend court or show any interest in this trial. If he did not carry accident insurance he could have come here and testified that he had none. In view of his refusal to come here, I now withdraw the concession that I made earlier in the trial as to accident insurance." This was held improper, the court saying: "This statement of counsel I think amounted practically to a statement that defendant did carry accident insurance and constituted reversible error. * * * The rule laid down * * * has not been changed by the amendment to the Code in 1911 (now N. Y. CIV. PRAC. ACT § 452) authorizing certain questions to the jurors in reference to their interest in accident insurance and casualty companies"; *Lassig v. Barsky*, 87 N. Y. Supp. 425 (1904) ("In view of the information conveyed by plaintiff's counsel to the jurors, under the guise of inquiring

in that specific company.⁴³ It is generally held, however, that questions referring to specific insurance companies are not improper in themselves,⁴⁴ unless counsel "overreaches the limit" and asks the question in such a way as to leave an innuendo that the defendant is insured.⁴⁵ Thus, in *Dulberger v. Gimbel Brothers*,⁴⁶ the court, in hold-

into their qualifications, that the defendant was insured against loss in the event of a recovery against him, and a repetition of this reprehensible practice in the course of the cross-examination of one of defendant's witnesses, the judgment should be reversed and a new trial ordered").

⁴³ *Hoyt v. Davis Manufacturing Co.*, 112 App. Div. 755, 98 N. Y. Supp. 1031 (3d Dept. 1906); *Note* (1928) A. L. R. 1418, 1464.

⁴⁴ *New Aetna Portland Cement Co. v. Hatt*, 231 Fed. 611 (C. C. A. 6th, 1916); *Ex parte Woodward Iron Co.*, 212 Ala. 220, 102 So. 103 (1924); *Pekin Stave & Mfg. Co. v. Ramsey*, 104 Ark. 1, 147 S. W. 83 (1912); *Eldridge v. Clark & H. Constr. Co.*, 75 Cal. App. 516, 243 Pac. 43 (1925); *Tatarsky v. Smith*, 78 Colo. 491, 242 Pac. 43 (1925); *Church v. Stoldt*, 215 Mich. 469, 184 N. W. 469 (1921); *Carlson v. Bernier*, 169 Minn. 517, 211 N. W. 683 (1927); *Blair v. McCormack Construction Co.*, 123 App. Div. 30, 107 N. Y. Supp. 750 (2d Dept. 1907) (Plaintiff, while examining jurors, asked: "Are any of the jurors officers or stockholders in the Travelers' Insurance Company?" Defendant's objection was sustained, and the court charged: "Gentlemen, counsel seems to apprehend that mention of the Travelers' Insurance Company may in some way prejudice your minds, and prejudice the defendant's case. Now, the court charges you that has no bearing in this case whatever—any mention of an insurance company should not have any influence in your minds at all, whether the Travelers' Insurance or the Equitable Life Insurance Company, or any other insurance company—no consequence whatever in this case; should not influence you in the least, or any juror in the room." The court, however, refused defendant's motion to discharge the panel. On appeal, held, no error. The court said that a question relating to a specific insurance company was not improper, at least where the jury is instructed that they are not to be influenced by the question); *Rincken v. Acker*, 125 App. Div. 244, 109 N. Y. Supp. 125 (2d Dept. 1912) (Plaintiff's attorney in examining the jury, asked: "Are any of you gentlemen insured in the Fidelity and Casualty Company?" The jurors replied, "No." Counsel then asked: "Is any one of you interested in any way in the Fidelity and Casualty Company?" The jurors again replied, "No." The court held this was not improper, saying: "The form of the question did not disclose to the proposed jurors that the Fidelity and Casualty Company was an insurance company. * * * I confess I can see no valid distinction between a question which embraces all insurance companies and one which refers to but one, the greater includes the less; if in answer to the more general question a juror should answer in the affirmative, no one would deny that the question relating to the specific company would then be material; and if it may be asked after an affirmative reply to the general question, why may not counsel go at once to the specific?"); *Anderson v. Standard Plunger Elevator Co.*, 113 N. Y. Supp. 593 (1908) (Plaintiff's counsel asked the jury: "Are any of these gentlemen interested or stockholders in the Travelers' Insurance Company?" Defendant moved for a mistrial, which motion was denied. This was affirmed, the court saying: "In my opinion there was no error committed in the denial of the defendant's motion * * * but it is unnecessary to decide the point, because even if the question was not strictly proper the matter was not referred to at any later stage of the case, and I am satisfied that the jury were not influenced by the incident, as the verdict was abundantly sustained by the evidence and was for a small amount considering the extent of the injuries").

⁴⁵ See *Rincken v. Acker*, 125 App. Div. 244, 109 N. Y. Supp. 125 (2d Dept. 1912) where the court distinguishes *Hoyt v. Davis Manufacturing Co.*, 112 App. Div. 755, 98 N. Y. Supp. 1031 (3d Dept. 1906) where it was indicated that

ing that the interrogation of a juror as to whether he was "interested in the Pacific Coast Casualty Company" was permissible, said: "The appellant contends that this being a statutory right must be strictly construed as permitting simply a general question, and not a particular inquiry as to any specific casualty company. This seems to be a very strained construction of the statute. The general provisions as to challenge of jurors are intended to safeguard the litigant from any possible interest or bias on the part of a juror, and the recent amendment to section 1180 of the Code [now N. Y. Civ. Prac. Act § 452] must be deemed to have been enacted with this same purpose. General inquiry as to the jurors' interest in any casualty company having already been properly made in this case, it is difficult to see how the defendant could have been prejudiced by further inquiry as to a particular company. It would seem that the shield which has been thrown around casualty companies is already ample, and that there is no cause for extending the rule in that regard."

III. Conclusions.

The rule in New York concerning the admissibility of references to the fact of the defendant's insurance is a rigid one. The use of the

questions relating to a specific insurance company was bad form, as follows: "In that case, while examining the jurors as to their qualification, the plaintiff's counsel asked the following question: 'Are you interested as agent or stockholder in any insurance company insuring corporations against liability for negligence?' * * * The opinion of the court in the third department, which it may be remarked was the opinion of a minority of the justices sitting, did not undertake to decide whether the asking of such a question is legal error which calls for the reversal of the judgment. The opinion criticised the conduct of counsel in asking the question, and then said: 'but it should be understood that such questions are dangerous, and when asked without good reason may be very unprofitable to the party who asks them.' It was stated, however, that the judgment should be reversed because the verdict was against the evidence and was not fairly sustained by it. It is to be noted that the opinion distinctly says that this question is not decided and also states that 'when counsel [asks] such questions *overreaching the limit*; with a hope to gain a benefit from them, it is but fair that he should take the risk, and in a close case the court may properly consider that such suggestion had the very effect which counsel intended it should have'"; *Kolacki v. American Sugar Refining Co.*, 164 App. Div. 417, 150 N. Y. Supp. 93 (2d Dept. 1914) (Plaintiff's counsel asked the jurors if they were interested in the Employers' Liability Insurance Company which is "defending this case." The court held this reversible error, saying: "The fact of a defense by the insurance company was thus pointedly injected into the trial at its threshold. It had even less excuse than the instances where the disclosure of such an interest by a casualty company came out in the course of the examination of a witness"); *Lipschultz v. Ross*, 84 N. Y. Supp. 632 (1903) (Plaintiff's counsel, in examining a juror, asked whether any of the jury were interested in the Travelers' Insurance Company of Hartford, Conn. Upon defendant's objection, plaintiff's counsel said: "I want to see whether any of the jury are connected with said insurance company. It now appears that one of the jurors is an agent of this very company, and I understand that this case is being defended by the Travelers' Insurance Company." This was held reversible error).

⁴⁶ 76 Misc. 225, 134 N. Y. Supp. 574 (1912).

word "insurance" in a negligence action may in itself be ground for the reversal of a judgment, and this notwithstanding that the jury has been instructed to disregard such reference.⁴⁷ In the majority of the cases where this rule was invoked, however, it was apparent that counsel injected the irrelevant reference to insurance with the deliberate purpose of prejudicing the defendant. In such instances the rule may be justified.⁴⁸ But where wilfulness is absent, it would seem that an instruction to the jury to disregard the statement is all that the defendant is entitled to for the safeguardment of his rights. To hold otherwise is a direct reflection on the intelligence of our jurors.⁴⁹

To summarize it may be said:

- (1) As a general rule any reference in a negligence action that the defendant is insured is improper; violation of the rule where it appears that the defendant has been prejudiced thereby, will result in a new trial in spite of the fact that the jury has been instructed to disregard the reference;
- (2) This rule does not exclude evidence of insurance where such evidence is relevant upon any material controverted fact;
- (3) Evidence of insurance may be admissible where it forms part of a competent admission;
- (4) Evidence of insurance may be admissible to show bias and interest of witnesses;
- (5) Evidence of insurance may be admissible to show the interest of jurors; questions relating to specific insurance companies are probably proper, providing they convey no inference that the defendant is insured.

LOUIS J. GUSMANO.

DUTY OF RELATIVES TO SUPPORT DEPENDENTS.

I.

More and more the problem of support of dependents by relatives has become recognized as a legal as well as a moral and social obliga-

⁴⁷ See note 11, *supra*.

⁴⁸ See notes 13, 14, *supra*.

⁴⁹ *Shaier v. Broadway Improvement Co.*, 22 App. Div. 102, 47 N. Y. Supp. 815 (1st Dept. 1897) ("It would be a severe reflection upon the integrity and intelligence of this jury for us to assume that because such a question was asked they disregarded the sworn testimony of the witness, and, in violation of the express direction of the court, assumed that the insurance company was interested in the case and allowed such an inference to affect their verdict").