C.I.A.J. NATIONAL SEMINAR ON

PROFESSIONAL LIABILITY

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MY LORDS & LADIES, MEMBERS OF THE JURY:

First, let me say that with so many Judges present I am grateful to have a jury.

I should say a word about your selection. You have no doubt read about new trends in jury selection. Psychologists prepare a profile of a jury that will decide the case in favour of your side. I was at a conference with Morris Manning -- the Canadian exponent of this technique. He having explained it to me I brought my psychologist with me. I have had to send him home because Mr. Justice McEachern has done it all -- he being a fair-minded individual -- I'm not going to object because I'm going to appeal to your common sense and any jury would do.

I said I was glad to have a jury. Why, because juries temper the law with good common sense. They don't have to give reasons. As for the subject with which we are dealing -- the law may be against my position but it makes no sense. The fact that it is up for discussion is good evidence that it is not a law that everyone is happy with.

If my friend tries to preach the law to you -- ask yourself the question -- does it make sense? If not, ignore it. Do not be swayed by the pleas of insurance companies -- their stocks are doing very well.

THE QUESTION BEFORE YOU IS:

RESOLVED THAT DETAILS OF INSURANCE SHOULD BE ADMISSIBLE IN DAMAGE ACTIONS

There is a rule that mention of insurance is a no, no. It was developed in a case tried by a Jury. See Loughead v. Collingwood Shipbuilding Co. (1908), 16 O.L.R. 64 (Div.Ct.). But apart from jury cases there is a notion (but no cases) that the existence of insurance and insurance limits is inadmissible in non-jury cases as well. Damage actions are tried by both Judge alone and Judge and Jury. I will support the resolution, first, in relation to jury cases, where it is thought by some, disclosure of insurance will do the greatest damage. There is not the same concern about Judges who are thought to be above all extraneous influence. If I persuade You, the Jury, that evidence of insurance should be allowed in a jury case -- then it follows it should be admitted in a non-jury trial.

But, in the alternative I will ask you for a favourable verdict if I persuade you that Judges should be allowed to have this evidence - i.e. if you think that your brothers and sisters on a real jury can't be trusted but Judges can.

The subject must be approached by asking two questions.

1. Is the fact of insurance and the amount relevant - not in a narrow legalistic sense - but in the sense - should it be a consideration in a damage case which is after all simply a determination as to who should bear the loss?

2. If it is relevant, is it so prejudicial that it ought to be excluded?

In England, Salmond on Torts states correctly that the criterion of liability in a tort action is not so much fault but on whom should the risk fall. He says "Once it was improper to inform the Court that a defendant was insured, and although occasional statements to this effect may still be found, the courts now openly recognize the impact of insurance." Post Office v. Norwich Union Fire Insurance Society Ltd., [1967] 2 Q.B. 363 at 368.

The basis or the main basis for admission of the evidence is that otherwise a false picture is given to the trier of fact as to who the real defendant is. No one would suggest that we should countenance a device that would conceal from a jury that the defendant is the Government of Canada, the Royal Bank of Canada or the Aga Khan - but we tolerate the charade that the entity which has hired the lawyers, drew the pleadings, defends the suit and will ultimately pay the judgment, should be concealed from the jury.

In the U.S., Wigmore on Evidence, points out this has led a few Courts to treat insurance as any other piece of evidence. Here is what Wigmore says on the subject:

> "To the extent of its policy, the insurer must be considered as at least one of the real parties in interest. In justice to opposing litigants, can we now grant the insurance companies the benefit of a 'benevolent judicial concealment' so that their identity, interest and presence may remain totally unknown to the jurors before whom the case is to be tried? If motives, bias and interest of witness, and the situation of witnesses, with respect to parties and the subject of litigation, are each a proper and

> necessary subject for the consideration of juries, examination must proceed upon the basis of actual facts of the case as to the real parties in interest who will be substantially affected by the outcome. Concealment is incompatible with an "open-count" and judgments publicly and openly arrived at. To compel and permit such proceeding is to countenance and participate in what is tantamount to a fraud."

Why should we in a given case allow a jury to conclude that a particular defendant is a penniless bum when the real defendant is a well-healed insurance company. We could change the practice to make the insurer the defendant. This concealment taken to its logical conclusion leads to some strange results.

In Hellinius v. Lees I acted for a young lad from B.C. who made the mistake of enrolling in the armed services in Ontario. He was involved in a serious accident resulting in quadriplegia. At his trial he presented a picture of unusual courage. He was unable to sit for more than 45 minutes because his limbs would swell up. We went through 2 weeks of this without a murmur of complaint. The defendant was one of his colleagues in the service -- the tires on his car were in terrible shape and they had a blow-out travelling on the 401.

When the jury dismissed our action the trial Judge was in tears. Although we will never know the reason for the jury's decision there was a concensus that a statement by counsel for the defendant that if they found against the defendant this young lad (same age as some of jury) would have to pay for it the rest of his life.

We could not lead evidence that in fact there was a form of compulsory insurance which everyone was obliged to carry.

The jury decided the case on a false premise. The Supreme Court of Canada rejected argument that if insurance was a no, no it worked both ways.

The Court said it is now common knowledge available to the jury that everyone is insured. How can we be sure especially when counsel tells them otherwise. This wouldn't have happened if the true state of affairs had been revealed.

The existence of insurance and the limits are now available to the plaintiff on discovery. See Ontario Rule 31.06. It is thought to be relevant to the parties. Obviously it is considered relevant in determination of the case at least by way of settlement. Shouldn't the Court have the same advantage.

QUESTION 2 - PREJUDICE

Is the fact of insurance so prejudicial as to require its exclusion notwithstanding its obvious relevance.

The argument in favour of exclusion is that a jury will be overly influenced by this fact so the true defendant must be concealed from them. Why not then allow the Bank of Canada or when an insurance company is a direct defendant to use a John Doe instead of its real name.

I had occasion to litigate a case, Kegal v. Canadian General Insurance, where an insured motorist sued on

a policy of insurance to recover the damage to his motor vehicle and for indemnity. The defence was that he was intoxicated at the time and therefore the policy didn't apply. The insurer was a direct defendant. Counsel for the defendant (John Fitzpatrick, now a Judge of the Supreme Court of Ontario) based his defence largely on the theme which he expressed as follows in his address:

> "This case which allows you to establish that even an insurance company can get justice from a jury."

The jury was so imbued with the idea that they could create a precedent that they found for the defendant.

The case that established the rule was Loughead v. Collingwood Shipbuilding Co. (1908), 16 O.L.R. 64 (Div.Ct.) stated in part:

> "defences by or on behalf of insurance companies are not favoured,"

At that time few people were insured. Now, Laskin said in Hellinius, juries are aware or assume that everyone is insured -- a statement repeated in other cases. See Didluck et al v. Evans (1968), 63 W.W.R. 555 (Sask. C.A.). One would expect therefore that jury verdicts are skyrocketing as a result. And yet it is not juries who have caused damage awards to sky rocket, it is Judges who are not said to be subject to the influence of insurance. Indeed, there is a danger that juries may speculate and assume that limits are much higher than they are. Why not advise them of the true state of affairs.

In any event, if juries are thought to be a problem, fewer and fewer cases are being tried by juries. That, plus the

absence of evidence that knowledge of insurance has led to inflated awards leads to the irresistible conclusion that we can no longer tolerate justice in the dark. Lets have all the facts on the table.