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## THE DEFENDANT INSURANCE COMPANY IN AUTOMOBILE CASES

JAMES E. COLEMAN

LITIGATION arising from automobile accidents has grown in recent years with the increase in the use and in the number of automobiles, so that now it occupies a large part of the time of trial and appellate courts. A majority of the suits instituted are settled before trial; but those which it is impossible to settle usually involve jury trials, which of necessity last a number of days. A fair portion of these cases are appealed, with the result that a number are reversed and new trials are granted the appellants. As a consequence, the courts have in the past been most solicitous to avoid the delay, expense and injustice involved in such results, by doing all that is possible to insure a correct and impartial trial in the first instance. It is recognized that the chance for passion and prejudice to taint the result of a jury verdict is great in any kind of case and to avoid that probability strict rules of procedure and evidence have been evolved. To insure a fair and impartial trial and to promote the administration of justice, the courts have tried to work out these rules of evidence so that their application in any particular case will eliminate all irrelevant and immaterial matter which might be prejudicial or which might result in an unfair trial for either party.

### I.

It is well established that in a personal injury action arising out of an automobile accident, evidence or statements that the driver of the automobile, who has caused injury to another, carried insurance, are

prejudicial and irrelevant where there is no issue involving insurance coverage.

As a matter of good business foresight, many owners of motor vehicles carry liability insurance, whereby an insurance company obligates itself by a contract with the assured to pay any judgment entered against him as a result of the negligent operation of his automobile.<sup>1</sup> However, that ultimate liability, if found to exist, will fall upon an insurance company is altogether irrelevant to the issues of negligence or damages between the parties; and a placing of that fact before the jury, in the trial of a personal injury case, by whatever means, is held to be prejudicial and irrelevant, but not reversible error where the trial court promptly instructs the jury to disregard such matter. The experienced trial lawyer realizes that the jury, even though properly instructed, still retains the information and that it does not cease to be prejudicial to the defendant.<sup>2</sup>

<sup>1</sup> The purpose of the policy of insurance is one of indemnity to protect the insured against loss in the event liability is imposed upon him by law. The policy is a bilateral contract in which a third party has no interest as there is no privity of contract between the insurer and a third party; thus any rights or benefits which a third party may have are subject to the terms and conditions of the policy, as construed in the light of the statutes affecting it. *Buckner v. Buckner*, 207 Wis. 303, 241 N.W. 342 (1932); *Watkins v. Watkins*, 210 Wis. 606, 245 N.W. 695 (1933).

In Wisconsin it is required by statute that the policy insure not only the owner of the automobile, but also anyone operating it with his consent. Wis. Stats. (1933) § 204.30 (3). Likewise the policy must provide that the insolvency or bankruptcy of the insured shall not release the insurer, and that in all cases where execution on the judgment against the insured (or driver) has been returned unsatisfied, the third party shall have the right to maintain an action to recover the amount of such judgment from the insurer. Wis. Stats. (1933), § 204.30 (1).

In recent years the policy has also provided in a clause included at the instance of the insurer, that it shall be necessary for the third party to obtain a judgment against the insured (or driver), before such third party has a cause of action against the insurer. (See footnote 7, *infra*, for the reason why such clause has been included.) The following is a typical so-called "no action" clause:

"No action shall lie against the company to recover upon any claim or for any loss under Insuring Agreement IV unless brought after the amount of such claim or loss shall have been fixed and rendered certain either by final judgment against the Assured after trial of the issue or by agreement between the parties with the written consent of the Company, nor in any event unless brought within two years after such final judgment or agreement."

<sup>2</sup> *Kellner v. Christiansen*, 169 Wis. 390, 172 N.W. 796 (1919); *Smith v. Yellow Cab Co.*, 173 Wis. 33, 180 N.W. 503 (1920); *Kemmel v. Czaja*, 183 Wis. 503, 198 N.W. 266 (1924); see Note, 56 A.L.R. 1418, 1419, 1422 (1928), where it is stated: "Jurors as a class are thought to be prejudiced against insurance companies; and consequently, if they are told in effect that an insurance company, rather than the individual defendant of record, must bear the final loss consequent upon a verdict in favor of the plaintiff, they will be less inclined to return a verdict for the plaintiff, because of an unfair prejudice against the insurer. \* \* \* Such evidence, the courts argue, has a manifest and strong tendency to carry the jury away from the real issue, and to lead them to regard carelessly the legal rights of the defendant, on the ground that someone else will have to pay the verdict."

This rule is subject to certain qualifications which make it proper on cross-examination to examine the defendant's witness upon the question of insurance in order to show interest, bias, or motive on the part of the witness, notwithstanding that such examination will disclose to the jury that the defendant is protected by insurance.<sup>3</sup> Also on the voir dire examination, it has been held proper to ask if any juror is employed by or has any stock in, or is a member of a particular insurance company, in order to ascertain each one's qualifications to serve, and to enable counsel to exercise intelligently his right of challenge, although such questioning is usually for the purpose of disclosing to the jury that the company referred to is the defendant's insurer.<sup>4</sup> However, it is always highly improper for counsel, in either his opening statement or his closing argument, to make statements or arguments inferring that the defendant carries liability insurance, or to state that he will not have to pay the judgment rendered, or, as was recently heard, to thank the Almighty that the defendant carried insurance.<sup>5</sup>

## II.

The recent amendment to Section 260.11 of the Wisconsin Statutes in effect permits prejudicial and irrelevant matter to be brought to the attention of the jury.<sup>6</sup>

In 1931 the Legislature, by Chapter 375, Laws of 1931, amended Section 260.11 of the Wisconsin Statutes,<sup>7</sup> so as to authorize joinder of

<sup>3</sup> *Martell v. Kutcher*, 195 Wis. 19, 216 N.W. 522 (1928). The answers in this case actually disclosed an interest, on the part of the witnesses questioned, in the insurance company covering the risk; it would seem that these questions must be asked in good faith and only where there is good reason to believe an interest or bias in fact exists.

<sup>4</sup> *Faber v. C. Reiss Coal Co.*, 124 Wis. 554, 102 N.W. 1049 (1905) where it was held that such questions were proper only if asked in good faith for the purpose of ascertaining the qualifications of jurors. Also see *Lozon v. Leamon Bakery Co.*, 186 Wis. 84, 202 N.W. 296 (1925); *Martell v. Kutcher*, note 3, supra; and *Walker v. Ponnush*, 206 Wis. 45, 51, 238 N.W. 859 (1931), where it is said: "This (rule) seems to imply that if counsel had any reason to believe or suspected that any juror has stock in or was insured in the insurance company named, it was proper to make the inquiry here made, but if no such reason or suspicion existed the inquiry was improper." Cf. *Dixon v. Russell*, 156 Wis. 161, 164, 145 N.W. 761 (1914), where the Supreme Court, in upholding the trial court's refusal to permit jurors to be examined as to their pecuniary interest in certain named insurance companies, stated: "Time should not be wasted, nor prejudice injected into the case, by an examination of jurors to determine their qualifications on a subject that is not even claimed to be relevant and which can not be seen or presumed by the court to be so."

<sup>5</sup> *Loughlin v. Brassel*, 187 N.Y. 128, 79 N.E. 854 (1907); Note 56 A.L.R. 1419, 1453 (1928).

<sup>6</sup> For a complete discussion of the Wisconsin Statutes and decisions relating to joinder of insurance companies as defendants in cases arising out of automobile accidents, see McKenna, *Joining the Insurer and Insured in Automobile Cases*, 17 Marq. Law Rev. 114 (1933).

<sup>7</sup> The amendment provides as follows: "\* \* \* In any action for damages caused by the negligent operation, management or control of a motor vehicle, any insurer of motor vehicles, which has an interest in the outcome of such controversy adverse to the plaintiff or any of the parties to such controversy,

the company insuring the defendant's automobile. It has been held that this amendment will not permit joinder as defendant of an insurance company whose policy was issued before the effective date of the amendment, June 30, 1931, and contained a clause postponing action against the insurer until final judgment has been secured against the assured (commonly known as a "no action clause").<sup>8</sup> Subsequently,

or which by its policy of insurance assumes or reserves the right to control the prosecution, defense or settlement of the claim or action of the plaintiff, or any of the parties to such claim or action, or which by its policy agrees to prosecute or defend the action brought by the plaintiff or any of the parties to such action, or agrees to engage counsel to prosecute or defend said action, or agrees to pay the costs of such litigation, is by this section made a proper party defendant in any action brought by plaintiff on account of any claim against the insured.

"(2) When any insurer shall be made a party defendant pursuant to this section and it shall appear at any time before or during the trial that there is or may be a cross-issue between the insurer and the insured or any issue between any other party and the insurer involving the question whether the insurer would be liable if judgment should be rendered against the insured, the court may, upon motion of any defendant in any such action, cause the person, who may be liable upon such cross-issue, to be made a party defendant to said action and all the issues involved in said controversy determined in the trial of said action. Nothing herein contained shall be construed as prohibiting the trial court from directing and conducting first a trial as to whether or not the insured is liable to the plaintiff or other party and directing a separate trial on the issues involving the question whether under its policy the insurer is liable for the payment in whole or in part of any judgment against the insured or the amount of such liability."

The history of the struggle previous to 1931 to make insurers parties defendant may be briefly traced as follows:

The first statute to permit joinder of insurance companies was passed in 1925, Wis. Stats. (1925) § 85.25. This act was held to apply to the form of the policy, the provisions of the statute becoming a part of the policy and making the insurer directly liable to third persons. The insurer could thus be properly joined as a defendant. *Ducommun v. Inter-State Exchange*, 193 Wis. 179, 212 N.W. 289, 214 N.W. 616 (1927). However, under this statute the insurer could not be joined if it were not liable by the terms of its policy to the assured for the damages he caused. *Fanslau v. Federal Mutual Auto Ins. Co.*, 194 Wis. 8, 215 N.W. 589 (1927); nor could the insurer be joined if its policy contained a "no action" clause, postponing action against it until final judgment against the assured. *Morgan v. Hunt*, 196 Wis. 298, 220 N.W. 224 (1928). But see, *Heinzen v. Underwriters Cas. Co.*, 208 Wis. 512, 243 N.W. 448 (1932) where the particular "no action" clause in question was held only to bar the assured and not third parties from suing before final judgment against the assured. In 1929 § 85.25 was renumbered 85.93 and amended to make the insurer liable to third persons "irrespective of whether such liability be in praesenti or contingent and to become fixed or certain by final judgment against the insured." But this amendment was held not to destroy the efficacy of the "no action" clause, which had by then become a standard provision of all automobile policies. *Bergstein v. Popkin*, 202 Wis. 625, 233 N.W. 572 (1930). However, it was held that the insurer, under a policy which did not have a "no action" clause, could be sued directly by the injured third party without joining the representative of the estate of the deceased insured. *Elliott v. Indemnity Ins. Co.*, 201 Wis. 445, 230 N.W. 87 (1930).

<sup>8</sup> *Pawlowski v. Eskofski*, 209 Wis. 189, 244 N.W. 611 (1932). The only question raised in this case was whether the amendment to § 260.11, permitting joinder of the insurer, was constitutional when applied to policies, which contained "no action" clauses and were issued before the passage of the amendment. The court held the "no action" clause had value and that the amendment impaired the obligation of policies issued prior to its enactment and was therefore unconstitutional and of no effect as to them. At page 195 of the official

however, the Wisconsin Court held that the amendment rendered ineffective provisions of a policy, issued since June 30, 1931, postponing the time for commencement of an action against the insurer until final judgment has been entered against the insured;<sup>9</sup> so that today the insurer is a proper party defendant even in cases where jurisdiction can not be obtained over the assured, whose negligence allegedly caused the accident.<sup>10</sup>

Since the amendment and the decisions which sanction joinder of the insurer, the trial court in many cases has permitted the plaintiff to point out to the jury the defendant insurance company's interest in the

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reports, there is found this significant statement: "The many criticisms of counsel for injecting the fact of insurance on the trial contained in the opinions of this court have been based upon the idea that the court considered it prejudicial to have the fact called to the jury's attention. Our reversals for not dismissing and our criticisms were all pointless if the basis of them did not prejudicially affect the rights of the parties. And if it did prejudicially affect the rights of the parties, a provision of the contract securing that right is of value and must be upheld against a statute enacted subsequent to the execution of the contract."

<sup>9</sup> *Lang v. Baumann, et al.*, 213 Wis. 258, 251 N.W. 461 (1934). In this case, action was brought to recover damages for the death of an automobile guest caused by the alleged negligent driving of the defendant host. The Employers' Mutual Indemnity Co., the insurance carrier on the host's car, was joined as defendant. The case was tried and judgment entered for the plaintiff after the insurance company's plea in abatement had been overruled. In affirming this judgment, the court referred to *Bergstein v. Popkin*, note 7, supra, pointing out that the court had said in that case with reference to § 85.93 (page 266):

"The act which was passed \* \* \* related wholly and solely to 'liability,' while the bill which was refused passage related distinctly to who might be made parties defendant. The Legislature quite evidently was willing to make the liability of the insurer to the injured person as absolute as possible, but was not willing to deprive the insurer of the right to postpone suit against it until the amount of the damage had been ascertained as provided;" and then continued (page 267): "The court plainly indicated the sort of amendment that it considered necessary to render ineffective clauses postponing actions against the insured. The Legislature has followed the precise method suggested by the court, and the amendment immediately followed the decision in this case. We entertain no doubt that the Legislative intent was to change the doctrine of the *Morgan* and *Bergstein* cases. If there is any basis for doubt, it is dissipated by the provisions of subdivision (2) of § 260.11, which provides in detail for the situation created where the insurer who has been joined has a cross-issue with the insured."

<sup>10</sup> *Oertel v. Williams, et al.*, (Wis. 1934) 251 N.W. 465. In this case the action was brought as the result of an accident which happened in Indiana. The plaintiff was a resident of New York, and the defendant Williams, was a resident of Pennsylvania. The insurance carrier on William's car was joined as defendant under a policy issued by the company on February 12, 1932, in Wisconsin, which was then Williams' residence. The policy contained a "no action" clause, and there was no service on Williams nor any appearance by him. The Supreme Court, in sustaining plaintiff's demurrer to the company's plea in abatement, held that the insurer was a proper party defendant and could be sued directly without bringing in the assured. Chief Justice Rosenberg dissented: (page 466): "Under the law as declared in the opinion of the court, the insurer now becomes a principal and is now compelled at his risk to defend the insured without the aid, co-operation, or even the presence of the insured. If recovery is had against the insurer, the insured is not bound thereby. Further, the insurer is not permitted to litigate the question of its liability under the policy, as that could only be done in the presence of the insured; he being a necessary party thereto."

case. During the trial, evidence sometimes is permitted to be offered as to the defendant's being insured, and upon argument the plaintiff has been allowed to advise the jury that the insurance company was made a party because it had insured the automobile which caused the injury to the plaintiff. It is but a step further to intimate to the jury that an insurance company is the real party in interest who will be called upon to pay any damages that may be awarded to the plaintiff. All this in spite of the fact that the Wisconsin Court has held that any reference to an insurance company, beyond the exceptions previously noted,<sup>11</sup> is improper, as tending to cause the jury to ignore the testimony on the real issues between the parties to the accident. Prior to the passage of Section 260.11, such practice had been disapproved and held to be highly prejudicial and improper even where the insurance company was a party defendant to the action.<sup>12</sup>

Although the act amending Section 260.11 may appear to be a simple change in procedure and harmless in actual practice, nevertheless it has created a situation where trial courts are now ruling that evidence and statements as to insurance coverage are admissible. Recently a trial court, when asked to withhold the fact of insurance from the jury, stated that the name of the insurance company would appear in the caption to the paper containing the questions of the special verdict, and that the court had no authority to withhold the names of defendants from the jury. No individual defendant, who is insured, would object if it were not for the fact that this prejudice of the jury might cause it to find him guilty of negligence when in fact he was not negligent. No honest insurance company would have any objection to being made a defendant, if it were not for the fact, as recognized by the courts, that prejudice is aroused which causes the jury to disregard the evidence as to negligence and find all issues in favor of the plaintiff as well as to increase the amount awarded as damages.

Many attorneys profess a firm conviction that in cases in which the insurance company is named as a party, the attorney for the defense enters the trial with an unfair handicap, sometimes too great for him to overcome. Neither the insured, his insurance company, nor the attorney who is retained as defense counsel should, in fairness, be subjected to that handicap.

### III.

The power of the court to make rules of evidence and to prescribe the proper conduct of a trial is impaired by the amendment to Section 260.11.

If the right to have a fair and impartial trial in the administration

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<sup>11</sup> See footnotes 3 and 4, *supra*.

<sup>12</sup> *Sweet v. Underwriters Casualty Co.*, 206 Wis. 447, 453, 240 N.W. 199 (1932).

of justice impelled the court to establish the rule that evidence, statements or insinuations that the defendant is insured are prejudicial, improper, and not to be countenanced,<sup>13</sup> then an act of the Legislature, which vitiates this rule and in effect denies a litigant's right to a fair and impartial trial, is unconstitutional as an invasion of the judicial power vested in the courts.<sup>14</sup>

The Wisconsin court in the past has guarded against any usurpation of its power by the Legislature. Chapter 31, Laws of 1923 (Section 2857a, as amended, Wis. Stats., 1923), which provided that in no case, where a jury has been selected and testimony taken or evidence introduced, shall a verdict be directed by the trial judge, was held void as a violation of Section 2, Article VII of the Wisconsin Constitution.<sup>15</sup> It was stated in the *Thoe* case<sup>16</sup> that it has been of the very essence of judicial power from time immemorial in the common law courts of this country and in England, to determine the legal sufficiency of the evidence and the rights of parties properly before the court. It would seem that this power would be abrogated no less by a rule of practice which in effect permits and encourages prejudice to become a determining factor in a trial, than by a rule which takes from the court the right to direct a verdict in proper cases. In both cases, the hands of the court are tied and the court's effort to insure justice to the litigants is frustrated.

The reverse of the situation which presently confronts the courts in Wisconsin arose in an adjoining state recently. In Michigan it is the

<sup>13</sup> See, *Walker v. Pomush*, 206 Wis. 45, 50, 51, 238 N.W. 859 (1931).

<sup>14</sup> Wis. Const. Art. II, § 2 provides: "The judicial power of this state, both as to matters of law and equity, shall be vested in a supreme court, circuit courts, courts of probate, and in justices of the peace."

<sup>15</sup> *Thoe v. Chicago, M. & St. P. R. Co.*, 181 Wis. 456, 195 N.W. 407 (1923). The Constitution vested in the courts all the powers exercised by a court under the common law. *Kiley v. C. M. & St. P. R. Co.*, 138 Wis. 215, 225, 119 N.W. 309, 120 N.W. 756 (1909). An act of the legislature purporting to restore to a named person the license to practice law (Chapter 480, Laws of 1931), which had been previously revoked by a judgment of the Supreme Court, was held to be in violation of the clause of the Constitution conferring judicial power upon the court. *In re Cannon*, 206 Wis. 374, 240 N.W. 441 (1932). The court stated (pages 382, 383):

"Under our constitution the judicial and legislative departments are distinct, independent and co-ordinate branches of the government. Neither branch enjoys all the powers of sovereignty, but each is supreme in that branch of sovereignty which properly belongs to its department. Neither department should so act as to embarrass the other in the discharge of its respective functions. This was the scheme and thought of the people in setting up the form of government under which we exist. \* \* \*

"The judicial department of government is responsible for the plane upon which the administration of justice is maintained. Its responsibility in this respect is exclusive. By committing a portion of the powers of sovereignty to the judicial department of our state government, under a scheme which it was supposed rendered it immune from embarrassment or interference by any other department of government, the courts cannot escape responsibility for the manner in which the powers of sovereignty thus committed to the judicial department are exercised."

<sup>16</sup> *Thoe v. Chicago, M. & St. P. R. Co.*, 181 Wis. 456, 459, 195 N.W. 407 (1923).

rule, as in Wisconsin, that on voir dire the jury may be examined as to interest in any insurance company, if such questioning is done in good faith.<sup>17</sup> In 1929, the Michigan Legislature passed an act prohibiting joinder of the insurer as a party defendant as well as any reference during the course of the trial to an insurance company or to the question of carrying insurance.<sup>18</sup> The Supreme Court regarded this act as abrogating the rule permitting on the voir dire the naming of an insurance company when such is done in good faith, and as a consequence held it void as an interference with the judicial power vested in the courts by the State Constitution.<sup>19</sup> The same reasoning should impel the Wisconsin Court to hold unconstitutional a statute, the practical effect of which is to nullify well established rules pertaining to the proper conduct of a trial.

#### IV.

Section 260.11, without change, can be construed so as to afford a proper remedy without doing injustice to either party.

Courts have always been hesitant, and rightfully so, to declare an act of the legislature unconstitutional.<sup>20</sup> As a consequence, although this statute as it works out today is clearly unconstitutional, it can easily be administered so as to carry out its avowed and only legitimate purpose, that is, to avoid multiplicity of suits.<sup>21</sup> The Wisconsin Court can and should adopt a rule making the insurance company a party only for the limited purpose of making it a party to the judgment, and set up a system of pleading whereby the purpose of the statute will be carried out by an ancillary proceeding somewhat in the nature of garnishment.<sup>22</sup> In this proceeding, the insurer could litigate whether or not it is liable to the insured under the terms of its policy for the damages

<sup>17</sup> *Church v. Stoldt*, 215 Mich. 469, 184 N.W. 469 (1921); *Holman v. Cole*, 242 Mich. 402, 218 N.W. 795 (1928).

<sup>18</sup> Mich. Comp. Laws (1929), Sec. 12460.

<sup>19</sup> *Harker v. Bushhouse, et al.*, 254 Mich. 187, 236 N.W. 222 (1931).

<sup>20</sup> See, Doar, *The Power of the Courts to Declare Laws Unconstitutional* (1933) 23 Reports of the State Bar Association 29.

<sup>21</sup> The plaintiff after recovering a judgment against the insured should not be compelled to start a separate action against the insurer with the attendant delay and inconvenience. See, *Glatz v. General Acc., F. & L. Assur. Co.*, 175 Wis. 42, 183 N.W. 683 (1921). It is submitted that if an examination of the court records was made it would be found that in not more than one per cent of the cases was the plaintiff compelled to start a second action against the insurance company after having obtained final judgment against the assured. A final judgment is always paid immediately by an honest insurance company unless there has been a substantial breach of policy coverage.

<sup>22</sup> It is to be noted that the very words of the amendment to § 260.11 contemplate that such action might well be taken by the court. Subsection (2) provides in part: "Nothing herein contained shall be construed as prohibiting the trial court from directing and conducting first a trial as to whether or not the insured is liable to the plaintiff or other party and directing a separate trial on the issues involving the question whether under its policy the insurer is liable for the payment in whole or in part of any judgment against the insured or the amount of such liability."

caused by his negligence. The name of the insurance company could be kept out of the case until the trial on the issues of liability and damages had been completed.<sup>23</sup> The court would then be in a position to reaffirm, without mockery, the established rule that evidence and statements as to insurance are inadmissible because of their patent irrelevancy and prejudicial effect.

#### V.

May it be stated in conclusion that the effect of the amendment to Section 260.11 is to penalize the automobile owner who insures his car, by denying to him a fair and impartial trial. This can not continue without great detriment to the processes of justice and to the welfare of the public as a whole. Unfair discrimination between the owner who is insured and the one who is not will cause the one insured to lose confidence in the administration of justice. Higher premiums, necessitated by the increased losses, will cause many drivers to drop their insurance.

One must recognize, of course, that a certain amount of prejudicial matter is bound to creep in, but the opening of the doors to a wholesale influx of elements causing prejudice and passion leads inevitably to a lessening of respect for and a consequent decrease in the efficiency of the machinery set up for administering justice. No act of the Legislature should be permitted to produce results which stand in the way of exact justice for all who come under the jurisdiction of the court.<sup>24</sup>

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<sup>23</sup> To make this procedure as completely successful as possible the rule should provide that the name of the insurance company as defendant shall not be printed on the calendar of the court nor in the title of case on any of the pleadings or papers which might come to the jury's attention. This would go far to keep the fact that an insurance company is interested in the case from being constantly impressed on the jury.

<sup>24</sup> The writer wishes to make clear that this article is not intended in any way to decry trial by jury. It is his opinion that in the ordinary automobile case a jury is a most satisfactory judge of all issues of fact. However, it is up to the courts and the attorneys to see that only relevant, competent, and material facts are admitted for consideration by the jury; and that the issues of the particular case are correctly and clearly defined.