Marquette Law Review

Volume 17
Issue 2 *February 1933*

Article 3

Joining the Insurer and Insured in Automobile Cases

J. Walter McKenna

JOINING THE INSURER AND INSURED IN AUTOMOBILE CASES

J. WALTER MCKENNA*

MAY the insurance company be joined as co-defendant with the insured who is being sued by an injured person as a result of an automobile accident? This question faces the plaintiff's attorney at the outset of his action. Its answer is of vital importance not only to the plaintiff but also to the insurance company.

Viewed as a strictly pleading problem, the question concerns the joinder of parties defendant. The noticeable tendency of the code pleading system in respect to this matter is to be extremely liberal in permitting joinder as witness the sections of the Wisconsin Code relating to joinder of parties, relief against alternative defendants, bringing new parties into pending actions, joining claims of all persons against same defendant arising out of same transaction. In fact, the whole spirit of all codes is one of liberality and emphasis placed on speed in litigation, preventing multiplicity of actions, diminishing costs, and prohibiting useless quibble over form which characterized the common law system of pleading. It would appear from this viewpoint that joining the insurance company as co-defendant with its insured with whom it has such a close relationship, would be proper in order to carry out further the intent of the legislature in adopting the liberal code pleading system.

However, the practical effect of forcing the insurance company to appear openly in court and become known to the jury as the defendant who must pay any verdict or at least part of it, has probably been the undisclosed but nevertheless the true reason for the constant and bitter fight against legislation of this kind. The attitude of the insurance companies appears to be that they would rather be like the ghost of Hamlet's father whose presence was felt but who was not seen. It cannot be denied that knowledge of the fact that a defendant is insured has effect upon juries. Many trial attorneys are as anxious for the jury to know of the company's presence in the case as is the attorney for the insurance company to keep it a secret. The reason is obvious. Experience teaches that juries will render verdicts for larger sums if the insurance company rather than the individual insured must pay. Likewise, on close questions of negligence a jury is apt to feel that because the insurance company has such large resources, the insurance company should pay in case of doubt. The reason for such attitude is difficult to explain. Perhaps, it grew out of the early feeling of fear

* Professor of Law, Marquette University.

that the public felt when it observed the growth in power and resources of corporations. Another reason may be the distrust in the honesty and fairness of insurance corporations in view of some of the corrupt practices that many engaged in before the state began to regulate and control their actions. How far has this attitude of the jury been overcome by changing ideas about the corporate form of doing business and the educational method used by many corporations to build up public good will? Maybe there has been a change for the better but evidently, from a study of the attempts by insurance companies to evade legislative mandates that they appear in open court as visible defendants, the insurance companies still feel that they cannot be considered on a par with the individual defendant as far as equal treatment by juries is concerned.

Prior to the time of the passage of statutes concerning the right to join the insurance company with the insured, the cases in Wisconsin and in other states, too, clearly show the fear of bias and prejudice being aroused in the minds of the jury by permitting them to know that somewhere in the background of the case hovered an insurance company as the undisclosed party. A few examples of Wisconsin cases will illustrate this statement.

The case of *Howard* v. *Beldenville Lumber Co.*, 129 Wis. 98, 108 N.W. 48, involved an action for personal injuries. During the impaneling of the jury plaintiff's attorney remarked, "I don't know if this is the proper time and place to mention anything with reference to the fact of a casualty insurance company being interested in this case." Then followed a long colloquy between court and counsel, on both sides, as to the propriety of examining the jury respecting whether they were interested in any casualty company concerned in the litigation and whether or not defendant's attorney represented such a company. The Supreme Court criticized plaintiff attorney's statement as well as the long colloquy following and stated that it came dangerously close to being prejudicially erroneous. It was further stated that the remark and the proceedings following it had a tendency to create impressions in the minds of the jurors prejudicial to a proper consideration of the case in hand. Of course, the right of plaintiff's attorney to examine jurors as to their interest in any casualty insurance company as a basis for challenge was recognized but the remarks prior to such a question were improper.

In *Faber* v. *C. Reiss Coal Co.*, 124 Wis. 554, 102 N.W. 1049, upon examination of a juror on the voir dire, he was asked by plaintiff's counsel whether he was a stockholder in the Traveler's Insurance Company. Defendant's counsel objected. Further talk occurred concerning the matter between counsel and court. During it the plainti's counsel re-

marked thta the insurance company had undertaken to pay any judgment that might be recovered and he therefore deemed it proper to press the inquiry. Upon appeal, the Court stated that while it was proper to inquire of a juror whether or not he was pecuniarily interested in an insurance company, yet counsel must not communicate improper matters to the jurors or to the court within their hearing in connection with such inquiry. The reason was that such improper matters might convey prejudicial information to the jurors. However, the circumstances of this case and the instruction of the trial judge prevented the remarks of counsel from constituting prejudicial error.

Again in *Dixon* v. *Russel,* 156 Wis. 161, 145 N.W. 761, in a case in which plaintiff was suing defendant for personal injuries, the trial court refused to permit the jurors to be examined as to their business relations with the Royal Insurance Company or with the Casualty Company of America. On appeal, the Court held such ruling was correct in view of the fact that there appeared to be no connection between case on trial and these insurance companies. In the opinion this statement was made by the Court: "Time should not be wasted, nor prejudice injected into a case, by an examination of jurors to determine their qualifications on a subject that is not even claimed to be relevant and which cannot be seen or presumed by the court to be so." Note in this quotation the words, "nor prejudice injected into a case."

Then, in *Lozon* v. *Leamon Bakery Company,* 186 Wis. 84, 202 N.W. 296, an automobile collision case, on voir dire of the jurors, plaintiff's counsel asked ten of the jurors whether he or she had any business relations with casualty or indemnity insurance companies carrying insurance on automobiles. There was no further inquiry along this line. Defendant's counsel in his brief pointed out the serious abuses which are practiced when counsel for the plaintiff in personal injury cases, improperly attempt to prejudice jurors by indirectly suggesting that a rich corporation and not the defendant will be called upon to pay any judgment which may be rendered. On appeal, the Court refused to consider counsel's inquiry as prejudicial in view of circumstances of this case.

But, in the case of *Smith* v. *Yellow Cab Co.,* 173 Wis. 33, 180 N.W. 125 an automobile collision case, plaintiff's counsel attempted by repeated questions to a witness to find out of the defendant was insured in the company he represented and if so, for injury to person as well as to property. Objection was sustained to all such questions. On appeal it was held that such persistent effort on part of counsel to prejudice the jury against defendants by attempting to show that they were insured was error. The case was not reversed for this error because other reasons saved it.

In *Remmel* v. *Czaja,* 183 Wis. 503, 198 N.W. 266 another collision case, plaintiff's unnecessary, improper, and repeated questions to defendant's driver and another witness referring to the fact of an insurance company not a party to this action, being liable over for payment of any damages which plaintiff might recover against the defendant was condemned. But for the failure of defendant's counsel to object, the case would probably have been reversed.

A reference by plaintiff's attorney in *Papke* v. *Haerle,* 189 Wis. 156, 207 N.W. 261, to an insurance company in an attempt to impress the jury with the fact that defendant was insured, was declared by the Court to be improper and unethical.

The first Wisconsin statute which was aimed at permitting the disclosure of the presence of an insurance company in automobile cases is found in Chapter 341 of Laws of 1925, creating section 85.25. This section provided as follows:

"Any bond or policy of insurance covering liability to others by reason of the operation of a motor vehicle shall be deemed and construed to contain the following conditions: That the insurer shall be liable to the persons entitled to recover for the death of any person, or for injury to person or property, caused by the negligent operation, maintenance, use or defective construction of the vehicle described therein, such liability not to exceed the amount named in said bond or policy."

The reasons for its enactment were stated by the Court in *Fanslon* v. *Federal Mutual Insurance Co.,* 194 Wis. 8, 215 N.W. 589, in the following words: "We have no doubt that 85.25 was enacted in response to a widespread belief that inasmuch as insurance of this nature inures in a large measure to the benefit of those who are injured by the operation of automobiles, and inasmuch as by the terms of such policies, generally speaking, the insurance company reserves the right to control the defense of actions arising by reason of such injuries, good public policy should permit the person injured, where the liability of the owner of such automobile is covered by liability insurance, to make the insurance company which insured or indemnifies the owner a party to the action; thus not only revealing to the court and jury the true parties in interest to the litigation, but preventing such injustice as resulted in *Glatz* v. *General Acc., F & L. Assur. Corp.,* 175 Wis. 42, 183 N.W. 683."

In the case of *Ducommun* v. *Inter-State Exchange,* 193 Wis. 179, 214 N.W. 616, we find an attempt to make use of the right granted under this section. In this case the plaintiff, Robert Ducommun, brought action to recover for injuries to person and damage to property sustained in an automobile accident against the defendant, William Strong.

The insurance company, Inter-State Exchange, which had issued a policy of insurance to Strong, was made a party defendant. The insurance company demurred to the complaint on the ground that it did not state a cause of action against it. The trial court overruled the demurrer and appeal was taken from that order. The Supreme Court upheld the right of the plaintiff to join the insurance company with the insured in this action. The major argument of the insurance company that its policy was one of indemnity only which imposed no direct liability was not successful. It was stated in the opinion that in passing such legislation as section 85.25 there was a valid exercise of police power over insurance companies on the basis of that well-known theory of a business "affected with a public interest." And further, it was said that section 85.25 imposed direct liability on the defendant insurance company as if it had incorporated the provisions of the section into the body of the policy. The Court said: "Sec. 85.25 applies to any—that is, to all—policies of insurance covering liability to others by reason of the operation of a motor vehicle."

Any argument that section 204.30 of the Statutes which in effect requires every policy of insurance against personal injury or property damage caused by any motor-driven vehicle to contain a provision that the insolvency or bankruptcy of the person insured who is liable for the loss or damage sustained shall not release the insurance carrier and that in all cases where execution on the judgment has been returned unsatisfied, the insured shall have a right to recover of the insurance company the amount of the judgment secured in the action against the negligent driver of the automobile, was in conflict with 85.25 was dispelled by this decision. Section 204.30 was held to apply to special situations such as found in *Glatz* v. *General Acc., F. & L. Assur. Corp.,* 175 Wis. 42, 183 N.W. 683, while section 85.25 applies generally. One section supplements the other to assure recovery. A similar situation is found when Section 263.04 relating to joinder of causes of action in the same complaint is compared with Section 260.11 which permits joinder in the alternative of defendants. A study of these sections will show that they are in obvious conflict. Yet it was held in *DeGroot* v. *People's State Bank of Reeseville,* 183 Wis. 594, 198 N.W. 614, that Section 263.04 relating to joining of causes of action applied generally but Section 260.11 concerning joining defendants in the alternative applied to peculiar situations and therefore, there was no conflict between the two sections.

The idea of a consistent legislative scheme to assure recovery of damages to those injured in the negligent sue of motor vehicles is seen in the passing of Sections 85.25, 204.30 as well as 85.15, sub. 3, relating to service of process on non-resident owners of automobiles.

The next case that called for added construction of Sec. 85.25 was *Fanslau, Administrator,* v. *Federal Mutual Auto. Ins. Co.,* 194 Wis. 8, 215 N.W. 589. The facts of this case distinguished it from the Ducommun case (supra) and prevented the joining of the insurance company as co-defendant with the insured. The facts were that the deceased, Fred Fanslau, was riding as an invited guest in an automobile owned and driven by Halvor Rogan when due to the alleged negligence of the defendant driver it plunged off an embankment, causing fatal injuries to Fanslau resulting in his death. Rogan was insured in the defendant insurance company against loss or expense arising or resulting from claims against loss or operation of his automobile. The insurance company was made a party defendant pursuant to 85.25. However, the policy contained this provision: "This policy does not cover under Section 1 against loss or expense arising or resulting from claims upon the assured for damages if such claims are made on account of damages, bodily injuries or death accidently suffered or alleged to have been suffered by any person riding in or upon the automobile described in statement 3 of the schedule of statements, nor by any employees of the assured while engaged in the course of the trade, business, profession or occupation of the assured, nor for the liability of others assumed by the assured under any contract or agreement." The trial court felt that section 85.25 enlarged the terms of the policy and thus permitted the joinder, overruling the demurrer of the insurance company. On appeal, the Supreme Court denied that the section enlarged the policy terms so as to deprive an insurance company of the right to limit their coverage or to issue such contracts of insurance or indemnity as they may choose. The quoted clause of the policy excluded any possibility of liability here on part of the insurance company and consequently the complaint stated no cause of action against the insurance company who was wrongly joined.

In other words, the accident must be covered by the issued policy. Therefore, here is found the first limitation on the right to join the insurance company with the insured, namely, if by the terms of the policy the insurer is not liable to the owner of the automobile for the damages which may be recovered in the action, it may not be joined.

An added illustration of this limitation on joinder of the insurance company with the insured is found in the case of *Bro, Special Adm.* v. *Standard Accident Insurance Company,* 194 Wis. 293, 215 N.W. 431. The facts were that an action was brought by Hattie Bro as administratrix to recover for the death of her husband caused by injuries inflicted by an automobile owned by T. W. Moran and driven by Floyd Nicol. The insurance company had issued a policy to T. W. Moran and was made a party defendant by reason of section 85.25. The policy

contained a provision which in effect did not provide coverage for the policy holder if the automobile mentioned in the policy was driven without permission of the named assured. In the trial court a judgment was obtained against the company. On appeal the judgment against the company was dismissed because there was insufficient evidence to go to the jury on the question of express or implied permission by policy holder for driver to use the car.

Again, in *Bachhuber* v. *Boosalis and American Indemnity Company,* 200 Wis. 574, 229 N.W. 117 this limitation is well-stated. In this case when the insurance company was joined as co-defendant with the insured, Boosalis, who failed to appear, it defended on the ground that Boosalis the insured, had failed to carry out the terms of the contract of insurance by neglecting to give immediate notice when the accident happened and by failing to co-operate in defense of any action brought against him by reason thereof and therefore, the insurance company was discharged. The Supreme Court sustained the contention of the company saying: "The provisions in the policy as to notice of accident, claim for damages and co-operation in defense are conditions precedent, failure to perform which, the absence of waiver or estoppel constitute defenses to liability on the policy * * *. We have held recently that Sec. 85.25 creates no liability where none exists by the terms of the policy. It only provides direct liability and for joining the insurer with the insured in an action where there is an ultimate liability on the insurer on its contract of insurance. *Stransky* v. *Kousek,* 199 Wis. 59, 225 N.W. 401."

Up to this time the way seemed to be clear for carrying out the obvious intention of the legislature in enacting section 85.25. However, in 1928, the case of *Morgan* v. *Hunt,* 196 Wis., 298, 220 N.W. 224, was decided by the Supreme Court and as a result there is established a second limitation on the right to join the insurance company with the insured under 85.25.

This case was an automobile accident case. The defendant, Hunt, was the owner and driver of an automobile which in an accident caused personal injuries to the plaintiff. The defendant, Hunt, was insured in the General Casualty Company which was made a co-defendant by virtue of 85.25. The policy, insuring Hunt, unlike the policies mentioned in the preceding cases, contained this provision: "No action shall lie against the company until the amount of damages for which the assured is liable by reason of any casualty covered by this policy is determined either by final judgment against the assured or by agreement between the assured and the plaintiff with the written consent of the company." The insurance company contended that by reason of the above quoted clause in the policy that the action against them was

prematurely brought. On appeal, it was held that the plaintiff could not join the insurance company with the insured. It was said in the opinion that section 85.25 imposed upon the insurance carrier a direct liability to the injured person in all cases which came within the terms of the policy. The statement in *Bro* v. *Stan. Acc. Ins. Co.* (supra) that the section was a remedial statute which does not create a liability or confer any right of action where none existed under the policy itself was repeated here. The provision in the policy was likened to common provisions in policies that suit shall not be brought upon the policy until the expiration of a fixed period of time and therefore it did not conflict with 85.25 and was valid and enforceable. The decision held that the provision in question did not limit the liability of the carrier or provide that the injured person cannot enforce liability under the policy but that it simply fixed the time when such liability may be enforced.

This decision, it is submitted, was good from a strict legal viewpoint yet its practical effect was to allow insurance companies to evade the intent of the legislature in enacting 85.25. It would be a simple matter for the insurance company to insert in all its future policies and renewals a "no action" clause like the one in the Hunt case and thus prevent the injured person from bringing into the open the insurer and allowing the jury to be aware of its presence in the case. It is true that this decision did not in any way hamper the injured person in eventually collecting from the company for his injuries yet the reasons advanced in the Fanslau case (supra) for the enactment of 85.25 by the legislature do not appear to be limited to securing payment of any just claims of the injured by the insurance company but also to force the insurance company to appear openly in court.

However, this case made clear the second limitation on the right of an injured person to join as a co-defendant the insurer with the insured, namely, the presence in the policy of a "no action" clause.

Then, in 1929, the legislature decided to amend 85.25. The intent of the legislature in making this amendment, it is submitted, was caused by the Hunt case decision. By legislative act 85.25 was renumbered 85.93 and was amended to read as follows:

"Any bond or policy of insurance covering liability to others by reason of the operation of a motor vehicle shall be deemed and construed to contain the following condition: That the insurer shall be liable to the persons entitled to recover for the death of any person, or for injury to person or property *irrespective of whether such liability be in praesenti or contingent and to become fixed or certain by final judgment against the insured, when* caused by the negligent operation, maintenance, use or defective construction of the vehicle described

therein, such liability not to exceed the amount named in said bond or policy."

The portion in italics was new. The question that presented itself on reading the new portion of the section would be whether or not this new portion would plug up the hole caused by the Hunt case decision through which the insurance companies were escaping the requirement of 85.25 that they might be joined as defendants in open court with their insured.

The answer was not long in coming. The effect of 85.93 on the Hunt case decision was squarely presented in the case of *Bergstein* v. *Popkin,* 202 Wis. 623, 233 N.W. 572. This case concerned an accident between an automobile and a horse and wagon. The plaintiff, the owner of the horse and wagon, sued the owner of the automobile and joined with him his insurance company as co-defendant. The insurance company promptly interposed a plea in abatement by reason of a "no action clause" in its policy like the one in the Hunt case. The Supreme Court held that the insurance company could not be joined with the insured by reason of the "no action clause" and that section 85.93 resulted in no change which nullified the usefulness of the "no action clause." The decision is upheld on the theory that the legislature did not intend to force the insurance company into open court where it might be treated with prejudice and bias by a jury but rather the amendment was aimed at a difficulty presented by *Barteck* v. *Rotter,* 197 Wis. 303. In that case the question was whether or not the section gave the plaintiff the right to maintain an action against both the defendant and insurance carrier where the carrier's liability is created by an indemnity policy, as distinguished from one which imposes direct liability. The Court stated that the amendment sets that queston at rest but in no way affects a contract which provides that the time for the commencement of the action against the insurer shall be postponed until the damages are ascertained. However, in a concurring opinion by Justice Fritz who was joined in it by Justice Fowler, it is stated by Justice Fritz that in his opinion the amendment to 85.25 was enacted for the very purpose of obviating the effect of the rule in *Morgan* v. *Hunt.* A quotation from his opinion follows: "In my opinion, the amendment in 1929 by Ch. 467 was enacted for the very purpose of obviating the effect of the rule in *Morgan* v. *Hunt,* supra. Its purpose was to impose upon an insurer liability which was immediately enforceable whenever injury and damages were sustained under circumstances and conditions which were within the coverage of its policy. Irrespective of policy provisions to the contrary, so far as those who sustained such damages were concerned, the right of recovery under the policy was not to be contingent, or to be deferred until liability, including the amount thereof, had be-

come fixed or certain by final judgment against the assured. The language used in Ch. 467, Laws of 1929, is fairly susceptible of construction consistent with that purpose, and as the statute is remedial it is to be construed liberally, to further its purpose, and thus suppress the mischief at which it was directed."

At this point the state of law on this problem of joining the insurance company with the insured appears to be as follows: the insurance company may be successfully joined as a co-defendant with the insured if the accident is covered by the policy issued to the insured and if the policy does not contain a "no action clause" such as is found in the *Morgan* v. *Hunt* case.

But, in 1931, the legislature again passed a statute which affects the problem of joinder of the insured with the insurance company. That statute is found in Section 260.11 and it reads 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, 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 on 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. (1931 c.375.)

This new section was published on June 30, 1931. A mere reading of this section will indicate that it has a much wider scope than either sections 85.25 or 85.93. Its text is clearer in meaning and right of joinder appears much broader in scope.

The problem arises at once as to its effect on the existing state of law in reference to joinder of the insured with the insuror. Does it nullify the "no action" clause like the one upheld in the Hunt case and the later Bergstein case? Does this new section affect the limitation on joinder which requires the accident to fall within the coverage of the policy? Has the insuror been finally forced to come into the open and reveal its presence to the court and jury in automobile cases by this new section?

At the time of writing this article no decision by the Supreme Court gives an answer to these questions. It is true that in the case of *Pawlowski* v. *Eskofski,* —— Wis. ——, 244 N.W. 611, an attempt was made to make use of this new section. In this case the plaintiff was injured in an accident which happened prior to the enactment in 1931 of this new section. The injured plaintiff joined the insurance company as a party defendant. The policy which covered the insured had been also issued prior to the time the new section went into effect. it contained a valid "no action" clause. The insurance company made a plea in abatement on the ground that the action was prematurely brought. The trial court overruled the plea and the trial proceeded. Upon appeal the insurance company contended that the new section had no application to the policy in question because the statute was not retroactive. This contention was upheld by the Supreme Court. It was stated that while the new section was constitutional, yet it had no effect upon any policies issued prior to June 30, 1931, the date of its publication.

Therefore, the questions presented in the preceding paragraphs must remain unanswered until a case is presented involving a policy issued subsequent to June 30, 1931.

Conclusions

(1) If the insurance policy was issued prior to June 30, 1931—the plaintiff may properly join the insurance company with the insured by virtue of section 85.93 unless (a) the policy contains a "no action" clause like the one in *Morgan* v. *Hunt,* 196 Wis. 298, or (b) the accident is not one covered by the policy in force.

(2) If the insurance policy was issued subsequent to June 30, 1931—the new section 260.11 seems broad enough to nullify any "no action" clause but it will probably make no change in the requirement that the accident must be one which falls within the coverage of the policy. However, conclusion (2) is conjecture and a decision by the Supreme Court must be awaited to settle these questions.