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INTRODUCTION

L. WAYNE SCOTT*

In the 1950's, and again in the late 1970's, the casualty insurance industry began an advertising campaign against "large" jury verdicts. The recent campaign, which included broad media exposure in several national publications, has created a great deal of controversy. Plaintiffs' attorneys charge that the ads constitute jury tampering and should be enjoined while defense attorneys and the insurance industry declare that the ads constitute political speech advocating tort law reform, and therefore are entitled to absolute protection by the first amendment.

The constitutional aspects of this controversy are indeed interesting. The dialogue which follows, however, will be directed at a question of more direct significance to practicing attorneys — the effect of these advertisements on the trial of future tort cases. The St. Mary's Law Journal has arranged a dialogue between two attorneys on the question:

SHOULD INSURANCE INDUSTRY ADVERTISING CORRELATING HIGH VERDICTS WITH RISING PREMIUMS AFFECT THE LAW PERTAINING TO *VOIR DIRE* EXAMINATION OF PROSPECTIVE JURORS IN PERSONAL INJURY CASES?

Texas courts have generally precluded the mention of insurance at any point in the trial. Only in the area of *voir dire* examination has any exception to this concept been entertained by Texas courts, and there is a split of authority among the courts of civil appeals on this issue.[1] Although conflict exists at the civil appeals level, the

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1. *Compare* South Austin Drive-In Theatre v. Thomison, 421 S.W.2d 933, 941 (Tex. Civ. App. — Austin 1967, writ ref'd n.r.e.) (good faith inquiry whether prospective jurors had any connection with insurance industry did not constitute error) *with* A.J. Miller Trucking Co. v. Wood, 474 S.W.2d 763, 766 (Tex. Civ. App. — Tyler 1971, writ ref'd n.r.e.) (question injected insurance into case and constituted reversible error). Several other courts of appeals have addressed the issue with varying results. *See* Shoppers World v. Villarreal, 518 S.W.2d 913, 920-21 (Tex. Civ. App. — Corpus Christi 1975, writ ref'd n.r.e.) (error but not reversible — no showing of harm); Hemmenway v. Skibo, 498 S.W.2d 9, 12 (Tex. Civ. App. — Beaumont 1973, writ ref'd n.r.e.) (discussed extensively but did not decide issue); Johnson v. Reed, 464 S.W.2d 689, 692-93 (Tex. Civ. App. — Dallas 1971, writ ref'd n.r.e.) (refusal of trial court to allow question not reversible error), *cert. denied*, 405 U.S. 981 (1972); McDonough Bros., Inc. v. Lewis, 464 S.W.2d 457, 464 (Tex. Civ. App. — San Antonio 1971, writ ref'd n.r.e.) (question did not infer insurance and was permissible — apparently overruling Lang v. Lawrence, 259 S.W. 261, 261-62 (Tex. Civ. App. — San Antonio 1924, writ

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Texas Supreme Court has never directly addressed the issue,[2] allowing the question to smoulder in a state of benign neglect for a number of years. The court's avoidance is not surprising considering the conflicting social, economic, and legal pressures that preclude an easy or even correct answer. The rise of the organized-specialized bars has only served to heighten the tension surrounding the question.

The issue, while stated narrowly for the purpose of these articles, is actually a complex evidentiary-procedural question. First, the rule against mention of insurance is founded upon factual preceptions arising from the evidentiary concept of judicial knowledge, an ill-explored, egalitarian creation of judicial necessity. Second, the resolution of the question is to be found in the evidentiary concept of relevancy, another subject that, for its importance, has received virtually no attention from the Texas courts except in the most specialized areas.[3] Finally, when one adds to these evidentiary precepts the procedural purpose of *voir dire* examination, legal analysis of the question stated becomes possible.

Questions asked during *voir dire* examination in a civil trial should relate to the panel members' qualifications to serve and to any experience, relationship, bias, or prejudice that would preclude the return of a fair verdict from the evidence properly weighed. *Voir dire* is not to be used to secure commitments on how a juror will vote, nor to elicit or impart improper information or ideas. *Voir dire* is a preliminary proceeding that is not to be turned into a trial of the merits, or worse, a collateral battle of opposing ideals and ideas.

All information that would bear on the prospective juror's performance would be relevant in the evidentiary sense to the *voir dire*

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dism'd) and Tarbutton v. Ambriz, 259 S.W. 259, 260-61 (Tex. Civ. App. — San Antonio 1924, writ dism'd)); Kollmorgan v. Scott, 447 S.W.2d 236, 238 (Tex. Civ. App. — Houston [14th Dist.] 1969, no writ) (question did not inject insurance into case); Brockett v. Tice, 445 S.W.2d 20, 22 (Tex. Civ. App. — Houston [1st Dist.] 1969, writ ref'd n.r.e.) (question was error because it conveyed impression defendant was insured); Kingham Messenger & Delivery Serv., Inc. v. Daniels, 435 S.W.2d 270, 273 (Tex. Civ. App. — Houston [14th Dist.] 1968, no writ) (if question was error, it was harmless); Green v. Ligon, 190 S.W.2d 742, 748-49 (Tex. Civ. App. — Fort Worth 1945, writ ref'd n.r.e.) (question asking about relation to a specific insurance company was reversible error).

2. The Texas Supreme Court has refused writ of error n.r.e. in at least two cases, *South Austin Drive-In* and *A.J. Miller Trucking Co.*, when that notation is tantamount to the approval of conflicting holdings. *See* Wilson, *Hints on Precedent Evaluation*, 24 TEX. B.J. 1037, 1089-90 (1961).

3. The Texas Court of Criminal Appeals has used a balancing test to determine relevancy of extraneous offenses—whether probative value outweighs inflammatory aspects. *See* Albrecht v. State, 486 S.W.2d 97, 99 (Tex. Crim. App. 1972).

examination. For lack of a better reference, resort to the Federal Rules of Evidence seems best to illustrate the problem. To paraphrase rule 401, relevant questions for *voir dire* examination are those necessary for the determination whether or not a potential juror is subject to challenge for cause, or should be stricken peremptively.[4] Using this analysis there is no doubt that a juror's knowledge and/or reaction to the insurance advertising is "relevant." Relevancy, however, *is not enough.* The significance of the knowledge gained by this questioning must be balanced with the dangers associated with its acquisition. Again a comparison to the Federal Rules of Evidence is helpful. Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[5]

In short, the questions discussed in the following articles can only be answered in the form of "judgment calls," or if you will, policy decisions, of who will suffer the greatest harm. Furthermore, the resolution of these questions raises additional questions including whether to apply one rule to all cases or to decide each case on a case-by-case basis. Whatever the decision, and certainly there will be one at least on the intermediate level, it will not simply affect this one issue, but will reach the entire problem of trial and the knowledge or lack of knowledge of insurance. Only time can tell how far the decision will go, but it is possible that the decision may reach seemingly disconnected areas such as the collateral source rule. However the question is decided is for the future. For now, the question remains: Should a jury panel be subject to questioning concerning advertising relating to the amount of jury verdicts?

4. FED. R. EVID. 401. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.*

5. *Id.* 403.