The Obligations of an Insurer When the Claim Exceeds the Policy Limits*

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The problem dealt with in this article may be simply stated as follows: Circumstances may arise in the negotiations leading to settlement of a liability claim, or in the defence of a liability claim, which may result in the insurer becoming obligated to pay an amount in excess of the limits provided by the policy. Such circumstances may arise in connection with all forms of liability insurance, and they do so because of the protection which the law has provided for an insured who, by appropriate words contained in liability policies, has surrendered to the insurer the right to investigate and negotiate and the right to select his own counsel for the purpose of defending any action brought against him. The insured, by subordinating his position to that of his insurer in the important matters of investigation, negotiation and defence at a time when improper handling may result in a judgment in excess of the policy limits, has been afforded certain safeguards by the courts.

An example of the type of provision in which the insured so subordinates his position to that of the insurer is found in the standard automobile policy owner's form and the statutory conditions, which provide:

> The Insurer further agrees:—
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> (a) Upon receipt of notice of loss or damage caused to persons or damage caused to persons or property to serve any person insured by this policy by such investigation thereof or by such negotiations with the

*This subject was dealt with in part by Mr. L. St. M. Du Moulin in his report to the Insurance Section of the Canadian Bar Association at Toronto in 1944. Mr. Du Moulin's report on current insurance problems, decisions and legislation will be found at page 253 of the proceedings of the Canadian Bar Association, Volume 27, 1944. He dealt with this particular question commencing at page 257. Members of the Insurance Section believe that the rights and obligations of the insurer and the insured are of sufficient general interest to warrant a wider distribution, and I have been requested by the Dominion Chairman, Mr. Edson L. Haines, K.C., to bring Mr. Du Moulin's report up to date.

claimant or by such settlement of any resulting claims as may be deemed expedient by the Insurer; and

(b) To defend in the name and on behalf of any person insured by this policy and at the cost of the insurer any civil action which may at any time be brought against such person on account of such loss or damage to persons or property.

Statutory Condition 4(2):

The Insured shall not voluntarily assume any liability or settle any claim except at his own cost. The insured shall not interfere in any negotiation for settlement or in any legal proceeding but whenever requested by the insurer shall aid in securing information and evidence and the attendance of any witness and shall co-operate with the insurer except in a pecuniary way in the defence of any action or proceeding or in the prosecution of any appeal.

Wording similar to the foregoing is found in most liability policies.

It is curious that while there has been very wide-spread litigation in the United States because of an alleged failure on the part of the insurer properly to investigate, negotiate or settle actions brought against the insured by an injured claimant, there are no reported decisions in Canada enunciating the standards of care which must be observed by an insurer. However, the question being one arising out of contract and the contracts in both Canada and the United States being in the same or very similar form, one may confidently predict that the American decisions will have a persuasive effect upon the courts in Canada. Furthermore, the general principles which have been applied specifically to insurance contracts in the United States have been applied to other contracts in Canada. For example, the law of bailment imposes upon the bailee a duty, which may vary according to the type of bailment, to avoid damage to the subject matter of the bailment and thus to avoid loss to the bailor. I believe one could, without too much violence to legal logic and to the permissible bounds of analogy, regard the agreement contained in a liability policy as a bailment of rights. The insured has bailed his valuable right to investigate, negotiate and defend the claim into the hands of his insurer. The permitted use which the insurer is entitled to make of these rights is an open question in Canada. In the United States there are two distinctly discernible lines of judicial approach and, as they arrive at totally different results, the matter is of the greatest importance. The two rules followed in the United States are described as the "bad faith" rule and the "negligence" rule. I do not intend to convey, by using the analogy of the law of bailment, that the Canadian courts ought to follow the "negligence" rule. There are other avenues of judicial

reasoning which are just as appropriate and which, if followed, would favour the "bad faith" rule, for example, *Wallace* v. *Temiskaming and Northern Ontario Railway Commission.*[1] This is one of the line of cases where a party to a contract has constituted the other party or its employee a judge as to the sufficiency of performance. In that case the chief engineer, a defendant, was named as the person to certify the quality of ties to be delivered under the contract. Barron J.A. at pages 133-4 said:

> Contracts containing similar provisions in which the plaintiff has agreed to submit his claim to the determination of an officer in the employment of the defendants have frequently come before the Courts, indeed in large contracts that may almost be said to be now the common form. And the peculiar, almost sinister, circumstance that the quasi judge is in the employment of the defendants has never yet in itself been held to be sufficient to relieve the plaintiff from the terms of his contract deliberately entered into: But while he may be said to have agreed to the risk of the natural bias created by the situation — see per Bowen, L.J., in *Jackson* v. *Barry R.W. Co.* (1893) 1 Ch. 238, at p. 246 — he is entitled to have at the hands of the official, good faith, and the expression of his own honest opinion, and not merely that of his employers.

In discussing the basis of the liability of the insurer to its insured beyond the policy limits the American courts have used the expressions "bad faith" and "negligence". In *Hilker* v. *Western Automobile Insurance Co.*,[2] a case which is frequently referred to, an attempt was made to reconcile these two terms:

> Terms which are not strictly convertible or synonymous have been used by different courts to indicate the same thing. Negligence has been used by some courts to mean the same thing that the Courts have designated as bad faith. . . .
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> We have concluded that we can best indicate the circumstances under which the insurer may become liable to the insured by failure to settle by giving with some particularity our conception of the duty which the written contract of insurance imposes upon the carrier.

The court then goes on to describe the duty imposed:

> . . . a duty on the part of the insurer to the insured arises. It arises because the insured has bartered to the insurance company all of the rights possessed by him to enable him to discover the extent of the injury and to protect himself as best he can from the consequences of the injury. He has contracted with the insurer that it shall have the exclusive right to settle or compromise the claim, to conduct the defence, and that he will not interfere except at his own cost and expense. It is quite apparent that this right was given to the insurance company to induce it to enter into the contract of insurance, and that it is a necessary right to be possessed by it if it is to write the insurance upon the terms stipulated. . . .

[1] (1906), 12 O.L.R. 126; affirmed by the Supreme Court of Canada for the reasons given by the Ontario Court of Appeal (1906), 37 S.C.R. 687.
[2] (1931), 235 N.W. 413.

But because it has taken over this duty, and because the contract prohibits the insured from settling, or negotiating for a settlement, or interfering in any manner except upon the request of the insurer, such as assisting in the securing of witnesses, etc., its exercise of this right should be accompanied by considerations of good faith. Its decision not to settle should be on an honest decision. It should be the result of the weighing of probabilities in a fair and honest way. If upon such consideration it decides that its interest will be better promoted by contesting than by settling the claim, the insured must abide by whatever consequences flow from that decision. He has so agreed. But, as already stated, such decision should be an honest and intelligent one. . . . In order that it be honest and intelligent it must be based upon a knowledge of the facts and circumstances upon which liability is predicated, and upon a knowledge of the nature and extent of the injuries so far as they reasonably can be ascertained.

This requires the insurance company to make a diligent effort to ascertain the facts upon which only an intelligent and good-faith judgment may be predicated. If it exhausts the sources of information open to it to ascertain the facts, it has done all that is possible to secure the knowledge upon which a good-faith judgment may be exercised. But we do not go so far as to say that, in order to characterize its judgment as one of good faith, it is necessary that it should absolutely exhaust all sources of information. We go only so far as to say that it should exercise reasonable diligence in this behalf, which means such diligence as the great majority of persons use in the same or similar circumstances. . . .

In addition to this a further duty plainly devolves on the insurer. After it has made an investigation of the accident and the injury, and faces the probability that a recovery will exceed the indemnity, it plainly becomes the duty of the insurer to indicate such facts to the insured, to the end that he may take such steps as may be open to him for his own protection. . . . The company owes this duty to the insured because it has taken over all of the rights which formerly belonged to the insured, which could be exercised by him to place him in possession of the fact suggesting the possibility or probability of a recovery beyond the limit of the indemnity. . . .

The plaintiff knew nothing about his liability except as he learned it from the insurer, to whom the plaintiff and his family made full disclosure of what they knew about the accident, or at least their version of it. He had the assurance of the insurer that it would take care of the matter and that he need give no attention to it. He knew nothing about the possibilities of a recovery in excess of the indemnity. He knew nothing about the extent of the injuries. He was warned to keep hands off. In fact he was advised to keep out of the State of Illinois. Under such circumstances there was no occasion for the insured to attempt to make settlement even though he had the right to do so. Nothing was brought to his attention to suggest even the possibility of a recovery beyond the limit of the indemnity. . . .

We can see no room to quibble upon the proposition that the insurer made an inadequate, a careless, if not shiftless, investigation of the facts with reference to the accident and injury, that it never at any time was in position to exercise a sound or good-faith judgment, and that in none

of these respects did it meet the duty which it owed to the plaintiff. As a result of its dereliction in these respects, it never in good faith determined for itself whether the claim should be compromised or settled, nor did it place the insured in possession of facts suggesting liability on his part which would enable him to take any steps to protect himself.

American Cases on the Negligence Rule

Delay in accepting an offer of $1,500 put forward by the claimant, resulting in the offer being withdrawn and a verdict of $13,500, has been held to be a failure to exercise due care for the interests of the insured, and the insurer was held liable.[3]

Failure properly to investigate the facts in order to evaluate the probable extent of liability will render an insurer liable beyond the policy limits.[4] The fact that counsel for the insurer is of the opinion that the claimant's action will be dismissed or, alternatively, that the damages will be kept below the policy limits has been held in the State of Texas, in *Highway Insurance Underwriters* v. *Lufkin-Beaumont Motor Coaches Inc.*,[5] not to afford a defence to the insurer. In that case one Alexander was repairing his motor vehicle on or near the right-hand edge of the highway upon which a bus, the property of Lufkin-Beaumont Motor Coaches, was lawfully travelling when it struck Alexander's vehicle and caused severe personal injuries, consisting of a broken pelvis and two broken legs. It would appear obvious from these injuries, and in any event the court found, that the "insurer ought to have reasonably anticipated that the jury trying the Alexander case would in all probability assess Alexander's damages at a sum substantially higher than the five thousand dollar limit of insured's policy". During the trial discussions of settlement were conducted between counsel and an offer of settlement of $4,500 was made. This offer was repeated throughout the trial but was rejected by the claims manager of the insurer upon the advice of counsel for the insurance company. The jury brought in a verdict of $11,000 with costs. The bus company then instituted action against its insurers for the amount of the excess beyond the policy limits and a judgment favourable to it was rendered. The evidence on behalf of the bus company in defence of the original action consisted of that of the driver, and of four passengers who corroborated the evidence of the driver, to the effect that Alexander was parked on the pavement without

[3] *Douglas* v. *United States Fidelity and Guarantee Company* (1924), 81 N.H. 371, 127A, 708.
[4] *Maryland Casualty Co.* v. *Elmira Coal Company* (1934), 69 F. 2d 616.
[5] (1948), 215 S.W. 2d 904.

lights and further that Alexander's vehicle was obscured from the bus driver's view by the lights of an approaching vehicle. There was also some evidence that the people in Alexander's vehicle had been drinking. Liability in these circumstances was vigorously contested by the insurers on behalf of their insured and it is therefore not surprising to find this decision described as "startlingly significant" in an article entitled "Preventing Liability in Excess of Policy Limits", by James Dempsey, contained in the Insurance Council Journal.[6] The decision was that of the Court of Civil Appeals of Texas, which affirmed its decision upon two re-hearings. The following excerpts from the judgment point out the logical distinction between negligence and bad faith:

> Standard of conduct to be followed by insurer is due care. This is not the same standard of conduct as exists in those jurisdictions which profess to determine by insurer's good faith insurer's liability for rejecting offers of settlement. Good faith apparently implies no more than an absence of an improper motive and some basis in reason for insurer's act . . . which is much stricter than is the standard of good faith. . . good faith was but a circumstance relevant to the issue of negligence.
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> It seems to us that there is proof in these matters tending to show that the jury sitting on the trial of Alexander's case was more likely to find that insured was liable to Alexander than that insured was not and thus that a judgment against insured in excess of the policy limits was more likely than any other. Under these circumstances would an ordinarily prudent person in the position of the insured in the exercise of that care which he employed in the management of his own business, have accepted Alexander's offer to settle for $4,500.00 rather than take the chance of being charged with a substantially larger verdict? We think the matter was for the jury.

It was not contended in this case that the insurers acted from improper motives, or that there was any failure on the part of the insurers in the matter of investigation and trial preparation, or in the conduct of the trial of the action brought by Alexander against the bus company. It appears to the writer that the case pushes the liability of the insurer for excess recoveries beyond all reasonable limits. The effect of it is that in every case where the damages, if awarded, will probably exceed the policy limits, the insurer is placed in grave danger notwithstanding that there is a serious question of liability to be tried.

The insurer may be held guilty of negligence in omitting to allege or plead all grounds of defence.[7]

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[6] January 1950, p. 39. See also F. J. Canty, Liability of Insurer for Loss above Policy Limits, Insurance Council Journal, April 1950, p. 178, where the decision is described as "the subject of much discussion".

[7] *Ballard* v. *Ocean Accident and Guarantee Company* (1936), 86 Fed. 2d 449; *Anderson* v. *Southern Surety Company* (1920), 107 Kan. 375, 191 P. 583.

In determining whether there has been negligence the court or jury will review the conduct of the insurer on all matters pertaining to investigation, negotiations for settlement, preparations for trial and the trial itself.[8]

American Cases on the Bad Faith Rule

In the New York case of *Best Building Company Inc.* v. *Employers Liability Insurance Corporation* the court stated:[9]

> We may ask what would constitute negligence in the failure to settle a case, as distinguished from bad faith. Even where there was little likelihood of recovery many reasonable persons would think it wise to settle rather than to take any chance with a jury. In most of the cases disputed questions of fact arise. Is the Insurance Company to determine at its peril whether reasonably minded men would believe the plaintiff's witnesses in preference to its own? Again, even on conceded facts as frequently happens a serious question of law arises as to the nature and extent of liability, if any. Is a jury to say that an insurance company was guilty of negligence in choosing to try out such a question in the Courts rather than to settle? These questions suggest the wisdom of adhering to the contract of insurance which the parties have made.

This case has received widespread approval.[10]

In *City of Wakefield* v. *Globe Indemnity Co.*[11] an offer of settlement for $4,325 was refused by the insurers. The policy limits were $10,000 and judgment was given against the insured for $15,000. The Court of Appeal enunciated the "bad faith" rule as follows:

> It is not bad faith if counsel for the insurer refuses settlement under the bona fide belief that they might defend the action, or, in any event, can probably keep the verdict within the policy limit.
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> Undoubtedly the insurer does not act in bad faith if it refuses settlement in the honest belief that it has a fair chance of victory, or of keeping the verdict within the policy limit, or, upon reasonable grounds, that the compromise amount is excessive, or if it has legal defences, as yet undetermined by a court of last resort, which seem fairly applicable.
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> On the other hand, arbitrary refusal to settle for a reasonable amount, where it is apparent that suit would result in a judgment in excess of the

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[8] *Anderson* v. *Southern Surety Company, supra* footnote 7; *Brassil* v. *Maryland Casualty Company* (1914), 210 N.Y. 235, 104 N.E. 622; *Johnson* v. *Hardware Mutual Casualty Company* (1938), 109 Vt. 481, 1A 2nd 817.

Other cases applying the negligence rule are *Cowan* v. *Travellers Insurance Company* (1940), 114 F. 2d 1015; *Noshey* v. *American Automobile Insurance Company* (1934), 68 F. 2d 808.

[9] (1928), 247 N.Y. 451, 160 N.E. 911.

[10] See also *Stowers Furniture Co.* v. *American Indemnity Co.* (1927), 295 S. W. 257; *New Orleans and Carrollton R. Co.* v. *Maryland Casualty Company* (1905), 114 La. 154, 38 So. 89; *Traders and General Insurance Co.* v. *Rudco Oil & Gas Co.* (1942), 129 Fed. 2d 621; *Auto Mutual Indemnity Co.* Co. v. *Shaw* (1938), 134 Fla. 815, 184 So. 852.

[11] (1929), 246 Mich. 645, 225 N.W. 643.

> policy limit, indifference to the effect of refusal on the insured, failure to fairly consider a compromise and facts presented and pass honest judgment thereon, or refusal upon grounds which depart from the contract and the purpose of the grant of power, would tend to show bad faith.

Courts, in considering the question of bad faith, have dealt with the following points.

It is not bad faith to place credence in the insured's witnesses as opposed to the claimant's witnesses or to refuse on a belief honestly held to settle a case within the policy limits.[12]

Bad faith is not to be presumed from an error in judgment, nor from a failure to prophesy with certainty the degrees of fault which will be attributed to the parties, *Georgia Casualty Company* v. *Mann*,[13] where the court said:

> The gift of prophesy has never been bestowed on ordinary mortals and as yet their vision has not reached such a state of perfection that they have the power to predict what will be the verdict of the jury on disputed facts in a personal injury case. The verdict represents the composite judgment of the assenting jurors and often times is but the resultant expression of conflicting views. Common experience teaches us that even when the injuries would justify a more substantial verdict some of the jurors, doubting whether there is any liability at all, are not willing to go that far but insist on the verdict as returned.

It is bad faith to decline to settle because the insurer does not make a practice of paying the full policy limits.[14] It is also bad faith to represent to the insured that trial will result in a judgment which would cause him a greater loss than the cost of settlement in order to induce the insured to contribute to the amount of the settlement.[15]

Negligence versus Bad Faith

"Negligence" has been described by Lord Macmillan in *Donoghue* v. *Stevenson* in these terms:

> The cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care, and that the party complaining should be able to prove that he has suffered damage in consequence of a breach of that duty,[16]

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[12] *Best Building Inc.* v. *Employers Liability Insurance Corporation, supra* footnote 9; *Auto Mutual Indemnity Company* v. *Shaw* (1939), 134 Fla. 815, 184 So. 852.

[13] (1932), 242 Ky. 447, 46 S.W. 2d 777. See also *Mendota Electric Co.* v. *New York Indemnity Company* (1928), 175 Minn. 181, 221 N.W. 61.

[14] *McCombs* v. *Fidelity & Casualty Co.* (1936), 231 Mo. App. 1206, 89 S.W. 2d 114.

[15] *Brown and McCabe Stevedores Inc.* v. *London Guarantee and Accident Company* (1915), 232 F. 298.

[16] [1932] A.C. 562, at p. 618.

and *per* Lord Atkin:

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

"Bad faith" as used in reference to the conduct of insurers has been described as "the intentional disregard of the insured's financial interests, in the hope of escaping the full responsibility imposed upon the insurer by the policy".[17]

It is of course apparent that it is easier to establish negligence than to establish bad faith. There is no doubt that the insurers and counsel in the *Lufkin* case (*supra*) were inspired by proper motives and held the deepest conviction as to the correctness of their position. If the bad faith rule had prevailed the insurers would have been absolved from liability. Bad faith has been regarded as synonymous with fraud and the courts will insist upon a high degree of proof before finding the taint of fraud in a transaction. I suggest that this would be particularly so in Canada where reputable insurers who have acted throughout on the advice of counsel come before the courts.

Again it must be remembered that both the insured and the insurer have a common interest in seeing that any judgment against the insured is for as small a sum as possible, as was pointed out by the Master of the Rolls in *Groom* v. *Crocker*.[18] It must however be admitted that the common interests diverge when the only offer of settlement made by the claimant is one close to or in excess of the policy limits. In such a case it might be alleged that the insurer, in disregard of the interests of the insured, felt it had "nothing to lose" and "took a chance" on obtaining a favourable verdict.

On the other hand a sympathetic court or jury would have less difficulty in seizing upon some fact upon which to base a finding of negligence. The whole conduct of the case from the time of the accident to trial is under review. All the acts or possible omissions of numerous adjusters, claims managers, other company officials and the lawyers conducting the case are before them. More important is the cardinal fact that the record before the court or jury is a record of failure. The action brought by the insured in respect of the excess recovery only arose because the

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[17] *Johnson* v. *Hardware Mutual Casualty Co. supra* footnote 8.
[18] [1938] 2 All E.R. 394, at p. 400.

expectations, however confidently held, of the insurers and their counsel of keeping the claimant's recovery below the policy limits have failed. Hindsight is easier than foresight and in this record of failure the court or jury may be looking for negligence.

The present trend in the United States appears to favour the negligence rule. The American law in this respect has changed rapidly. Only four years ago Mr. Raymond A. Smith, a member of the Iowa bar, in an article entitled "Liability Beyond Policy Limits",[19] expressed the view that bad faith or fraud as the basis for compelling the insurer to pay in excess of its policy limits was still the majority rule. Mr. Dempsey in his article[20] quotes the recent case of *Dumas* v. *Hartford Accident and Indemnity Co.*[21] as stating:

> According to the old majority rule, the insured could recover the excess of a judgment above the policy limits from the insurer, because of its failure to effect a settlement for a smaller sum, only if the company was guilty of actual fraud or bad faith. It should be noted, however, that this bad faith rule is tending to become a minority rule, being displaced by the rule of negligence. . . .[22]

This trend in the United States has gone so far that legislation has been introduced, although as far as I know the bill has not yet become law. Bill No. 107 was introduced into the Ohio Senate recently and if it becomes law will provide that in the event an offer of settlement for an amount equal to, or less than the face value of the policy is rejected without the consent of the insured, the judgment creditor may recover the amount of the judgment over and above the value of the policy. The bill would provide further that if the judgment creditor failed to proceed against the insurer for the excess, the insured may bring an action to recover the excess. One can hardly imagine a more ill-advised piece of legislation. Presumably the purpose of it is to protect the insured against personal liability. Such legislation would, in my opinion, be automatically abortive, since the insurers would be compelled to insist upon very high limits on all liability policies, with attendant expense to the insuring public, and if those were insisted upon the situation contemplated by the bill would not then arise. Furthermore, such legislation would substitute a standard of perfection instead of the present standards which regulate insurers in the assessment of a claim. From

[19] Insurance Law Journal, March 1946.
[20] *Supra*, footnote 6.
[21] (1947), 94 N.H. 484.
[22] See also *Highway Insurance Underwriters* v. *Lufkin-Beaumont Motor Coaches Inc.*, *supra* footnote 5, and *Traders & General Insurance Co.* v. *Rudco Oil & Gas Co.*, *supra* footnote 10.

the time the offer was made the insurers would be obliged to assume all responsibility for excess recovery regardless of their honest belief that the offer was excessive.

What line of reasoning will be adopted in Canada when the problem comes before the courts? While it is impossible to predict which rule will be followed, I suggest, with some diffidence, that the following points may influence our jurisprudence on this subject:

1. The courts of this country and of England have not been as ready to push back the frontiers of liability as the American courts. The doctrine of the abuse of rights, which is now fairly well established in American jurisdictions and which is not without analogy to the problem under consideration, has not yet been accepted in the common-law provinces of Canada. This may lead to a more conservative approach favouring the bad faith rule.

2. In *Groom* v. *Crocker*[23] the English Court of Appeal used language from which one might conclude a preference for the bad faith rule. In that case the plaintiff was insured under an automobile policy and the defendants were the insurer and a firm of solicitors appointed by it to conduct, in the name of the plaintiff, the defence of an action brought against him and the owners of a lorry by a passenger in the plaintiff's car who was injured as a result of a collision between the car and the lorry caused solely by the negligence of the lorry driver. The defence of the action as against the plaintiff was left by him in the hands of these solicitors, as he was bound to do under the policy. Neither the insurer nor the solicitors ever at any time communicated with the plaintiff, and eventually the solicitors delivered a defence on behalf of the plaintiff admitting that the accident was caused solely by the negligence of the plaintiff and wrote a letter to this effect to the solicitors opposing them. Both insurers and their solicitors had conceded previously that the plaintiff was not guilty of any negligence. The purpose of the admission of liability was a desire to obtain an advantage altogether outside the litigation in question and with which the insured had no concern. The plaintiff then claimed damages against the solicitors and the insurer for breach of duty, negligence and libel. The Master of the Rolls (Sir Wilfrid Greene) said at page 400:

> The right given to the insurers is to have control of proceedings in which they and the insured have a common interest — the insured because he is the defendant and the insurers because they are contractually bound to indemnify him. Each is interested in seeing that any judgment to be

[23] *Supra*, footnote 18.

> recovered against the insured shall be for as small a sum as possible. It is the insured upon whom the burden of the judgment will fall if the insurers are insolvent. The effect of the provisions in question is, I think, to give the insurers the right to decide upon the proper tactics to pursue in the conduct of the action, provided they do so in what they bona fide consider to be the common interest of themselves and their insured. However, the insurers are, in my opinion, clearly not entitled to allow their judgment as to the best tactics to pursue to be influenced by the desire to obtain for themselves some advantage altogether outside the litigation in question with which the insured has no concern. This is what was done in the present case. . . . I am not surprised that the jury should have wished to express their emphatic disapproval.

3. The wording of policies by which the insured subordinates his position to the insurer may vary so that each case must be considered separately. However, generally speaking, the example set out at the beginning of this paper is typical. It will be noted that th insurer agrees to serve the insured "as may be deemed expedient by the insurer". These are certainly not the words one would choose for the purpose of imposing upon an insurer the onerous obligations which result from the negligence rule.

Prevention of Excess Recovery

In his report to the Insurance Section Mr. Du Moulin set out the following steps which should be taken if probable liability appears:-

A. If probable liability appears:
   1. inform insured
      (a) that the file is open for his inspection and suggestions for further investigation,
      (b) of demands for settlement,
      (c) of his right to settle any liability beyond coverage, but only under releases approved by the insurer.

B. If settlement is agreed upon:
   1. inform insured of terms of settlement, especially if other claims remain outstanding and the coverage as to them be reduced;
   2. obtain, if possible, insured's consent to settlement, especially if other claims remain outstanding and the coverage as to them will be reduced;
   3. obtain dismissal without prejudice, if action commenced, and permit entry of no judgment against insured because of the effect on other claims of an adjudication.

C. If suit is commenced:
   1. defend only under reservation of rights perfected by agreement or notice, any issue originally or later presented as to which coverage may be doubtful;
   2. inform insured of
      (a) amount of prayer, if in excess of coverage,
      (b) all defences which are, or during trial may become apparent,
      (c) his right to employ additional counsel at own expense,
      (d) co-operation with him and his counsel,
      (e) date of trial and necessity of his presence;
   3. present by proper pleadings all questions of jurisdiction and issues in defence;
   4. present all material testimony;
   5. obtain consent of insured to departure from usual procedure such as omitting evidence, admitting liability or confessing judgment.

In conclusion I should mention that special problems in connection with excess recovery arise when there are multiple claimants. I have refrained from dealing with them in this paper since they are sufficiently important to warrant separate treatment. For similar reasons I have refrained from commenting on the liability of counsel for the insurer.

Business Promotions and Solicitations for Charity

A judge should avoid giving ground for any reasonable suspicion that he is utilizing the power or prestige of his office to persuade or coerce others to patronize or contribute, either to the success of private business ventures, or to charitable enterprises. He should, therefore, not enter into such private business, or pursue such a course of conduct, as would justify such suspicion, nor use the power of his office or the influence of his name to promote the business interests of others; he should not solicit for charities, nor should he enter into any business relation which, in the normal course of events reasonably to be expected, might bring his personal interest into conflict with the impartial performance of his official duties. (From the Canons of Judicial Ethics of the American Bar Association)