Wyoming Law Journal

Volume 5 | Number 3 Article 7

December 2019

The Obliation of the Insurer to Defend All Suits Brought against the Insured

Wayne C. Hodson

tended to a grocery store,[10] a hotel,[11] a boarding house,[12] and a doctor's office.[13] In recent years, liability has been found in cases of a beer parlor and recreation hall,[14] beauty shop,[15] office building,[16] and business building.[17] Since the landlord's liability for injuries to lessee's invitees was extended to small shops in 1939,[18] a majority of the state courts who have had occasion to pass on the question have followed this rule.[19]

It might be contended that the exception could easily swallow the rule and that it places unlimited liability on the landlord of premises used for other than private purposes, but several practical limitations have been placed on the rule. The landlord is only liable for defective conditions which exist at the time of the lease[20] and his responsibility only extends to those parts of the premises that are thrown open to the public. Also, he is only liable for those uses contemplated by the lease.[21]

Wyoming has not decided this issue, but recent cases in surrounding states show a trend toward the more liberal view.[22]

GEORGE H. ROLLINS.

THE OBLIGATION OF THE INSURER TO DEFEND ALL SUITS BROUGHT AGAINST THE INSURED

The Hardware Mutual Casualty Company sued the executors of A. R. Shantz for a declaratory judgment to determine the rights of the parties under a policy of public liability or indemnity insurance issued to the decedent by the company. The suit was dismissed for lack of federal jurisdiction. At the time of this suit there was pending in the state court an action against the executors of Shantz. They had made demands on

10. Turner v. Kent, 134 Kan. 574, 7 P.(2d) 513; Senner v. Danewolf, 139 Ore. 93, 6 P.(2d) 240 (1932).
11. Colorado Mortgage & Investment Co. v. Giacomini, 55 Colo. 540, 136 Pac. 1039 (1913).
12. Stenberg v. Willcox, 96 Tenn. 163, 33 S.W. 917 (1896); See Note 34 L.R.A. 615.
13. Gilligan v. Blakesley, 93 Colo. 370, 26 P.(2d) 808 (1933).
14. Nelson v. Hokuf, 140 Nebr. 290, 299 N.W. 472 (1941).
15. Wood v. Prudential Ins. Co. of America, 212 Minn. 551, 4 N.W.(2d) 617 (1942).
16. Holm v. Investment & Securities Co., 195 Wash. 52, 79 P.(2d) 708 (1938); McCarthy v. Maxon, 134 Conn. 170, 55 A.(2d) 912 (1947).
17. Blumberg v. M. & T. Inc., — Calif. —, 209 P.(2d) 1 (1949).
18. Webel v. Yale University, supra; 24 Minn. L. Rev. 283, 284.
19. Olin v. Honstead, 60 Idaho 211, 91 P.(2d) 380 (1939); Nelson v. Hokuf, supra; Wood v. Prudential Ins. Co. of America, supra; Fletcher v. Sunel, 19 Wash. 596, 143 P.(2d) 538 (1943); McCarthy v. Maxon, supra; Blumberg v. M. & T. Inc., supra.
20. See Note 123 A.L.R. 870, 872.
21. Prosser, Torts, supra.
22. Olin v. Honstead, supra; Nelson v. Hokuf, supra; Blumberg v. M. & T. Inc., supra; Fletcher v. Sunel, supra.

the insurance company and there had been a refusal on the part of the insurance company to defend that action in the state court, and to indemnify the insured against any judgement rendered therein against the defendant's estate. *Held,* the purpose of the declaratory judgement act is to settle actual controversies before they ripen into violation of law or a breach of some contractual duty and that the insurance company may by declaratory judgement[1] determine its liability to defend. *Hardware Mutual Casualty Company v. Shantz et al,* 178 F. (2d) 779 (C.A. 5th, 1949).

In *Farm Bureau Mutual Insurance Company v. Hammer*[2] one Wagner was convicted of murder in the second degree for intentionally and maliciously causing the death of one of five persons by intentionally driving his truck into their car. The insurance company appeared in the civil suit in the state court and then withdrew when it determined the duty to defend no longer existed. The company now seeks a declaratory judgement to determine its rights under an assault and battery clause which stated that assault and battery shall be deemed an accident "unless committed by or at the direction of the insured." The court held the insurance company not liable, and the court said "a third party cannot be called upon to defend an action where his showing himself not to be liable will not necessarily result in a judgment in favor of the party asking him to defend." There was a dissent which stated that the clear purpose of the provision was to impose upon the company not only an obligation to pay any judgement against the insured, but also to bear the burden of defending any suit against him within the purview of the policy. The dissent was based on the feeling that the decision of the court in the civil suits was conclusive since the petition alleged negligence.

In *Lee v. Aetna Casualty and Surety Company,*[3] where both parties appealed from a summary judgement, the court held that the insurer ought to defend an action where there is doubt as to the liability for defending, until it appears that the claim is not covered by the policy. The court did not concern itself with the rule that the insurer once it assumes the defense of the suit, will be estopped to deny its liability.

Which of these three recent decisions lend themselves to stability of rights? The principal case would allow a separate suit adjudicating the issue of the obligation to defend, so that the insured may be called upon to defend such additional suits. Under the *Hammer* decision the liability of the insurer to defend would be determined from the facts presented in

1. Title 28 U.S.C.A. 2201: In a case of actual controversy within its jurisdiction, except with respect to federal taxes, any court of the United States upon the filing of appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declarations, whether or not further relief is or could be sought. Any such declarations shall have the force and effect of a final judgement or decree and shall be reviewable as such.
2. Farm Bureau Mutual Automobile Insurance Company v. Hammer, 177 F. (2d) 793 (C.A. 4th, 1949)
3. Lee v. Aetna Casualty and Surety Company, 178 F. (2d) 750 (C.A. 2nd, 1949).

the pleadings, and by the *Lee* decision, the insured party purchases for himself a defense to every action brought, until the trial itself discloses freedom from liability on the part of the insured.

One may question the right of the insurer to bring a declaratory judgement under the facts presented in the principal case. Some courts hold that this is the type action for which the declaratory judgements act was passed *i.e,* to determine if there might be a possible breach of contract by a refusal of the insurance company to defend the action brought by the injured party. Other courts hold that there can be no suit brought upon these facts since there exists other adequate remedies[4] and the declaratory judgement cannot be used to supplant these remedies;[5] that the insurer's liability could be determined in the pending action since made a party by statute;[6] that the declaratory judgment should not be used in an effort to avoid sending issues of insurance to the jury.[7] When damage suits are brought neither the company nor the insured knows for certain that they are within the policy's coverage. This could in some cases only be ascertained at the end of the litigation and doubtless the likelihood that such a situation might arise is what induced the making of a contract requiring the company to investigate and defend, whether the action was groundless or not.[8]

One may question the propriety of bringing a declaratory judgement. The bringing of such a suit is not conducive to a reduction in the amount of litigation, an open and avowed policy of the courts. The insured may be called upon to defend additional suits when in fact under the policy of insurance,[9] he believed he was purchasing insurance which would effect a defense[10] to a suit brought for any accident in which he might be involved. The insurer has sufficient legal protection without the addition of a declaratory judgment which may or may not adjudicate the fundamental problem of the construction of the provision of the policy calling for the defense of any action brought against the insured. When the insurer desires to make the defense that the injuries are not within the coverage of the policy, it may take the risk of refusing to defend the suit against the insured, or it may be able to reserve the defense of non-coverage for a subsequent suit under a non-waiver agreement.[11] Of what effect is such

4. Aetna Life Insurance Company v. Richmond, 107 Conn. 117, 139 A. 702 (1927). Mesbitt v. Manufacturers' Casualty Insurance Company, 310 Pa. 374, 165 A. 403 (1933). Miller v. Siden, 259 Mich. 19, 242 N.W. 823 (1932).
5. Dover Boiler Works v. New Jersey Manufacurers Casualty Insurance Company, 18 N.J. Misc. 573, 15 A.(2d) 231 (1940).
6. Automobile Mutual Indemnity Company v. Moore, 235 Ala. 426, 179 So. 368 (1938).
7. Utica Mutual Insurance Company v. Beers Chevrolet Company, 250 N.Y. App. Div. 238, 294 N.Y. Supp. 82 (1937).
8. Union Indemnity Company v. Mostov, 41 Ohio App. 518, 181 N.E. 495 (1932).
9. The term liability as defined by the policy relates only to the satisfaction of any judgements recovered and not to the obligation to defend even if groundless.
10. The duty to defend is broader than the duty to pay. Goldberg v. Lumber Mutual Casualty Insurance Company, 297 N.Y. 148, 77 N.E.(2d) 131 (1948).
11. Klefbeck v. Douis, 302 Mass. 383, 19 N.E.(2d) 308 (1939).

a declaratory judgement when rendered prior to the adjudication of the suit between the injured and the insured, if the plaintiff in that suit changes his theory of pleading, or changes his petition so that the policy now covers the claim?[12] Will this in turn subject the insured party to another suit brought by the insurer? The possibilities of such activities by an insurance company are almost limitless; and as equally unnecessary in the future were the Wyoming court to adhere to rule 14a of the Wyoming proposed rules.[13] If the declaratory judgement is brought after an adjudication of the first suit, of what value is it? The insurer could simply wait until suit was brought on the satisfaction of the first judgement without incurring any additional liability. To solve this problem of extra litigation by deciding the question in the first suit would not be without its procedural difficulties, but as the courts seek a reduction in the amount of litigation here is an open question still to be conclusively determined. Now that financial responsibility laws are being enacted in many states, Wyoming included,[14] and insurance becomes more the accepted rule than the exception among car owners, there would be no need for the present attempts of injured plaintiffs to influence the jury by subvertive mention of insurance or of questioning prospective jurors on insurance, instead the insurance company's liability could be determined in the suit brought by the injured party.

The more desirable solution appears in decisions under Federal Rule 14a. The purpose of third party practice is to avoid circuity of action and permit determination in a single action of rights and liabilities of parties growing out of facts that relate to the same transaction where it appears that the third party may be liable to the defendant or to the plaintiff for the claim asserted against the defendant, impleader should be allowed.[15]

---

12. Wyoming Compiled Statutes 1945, section 3-1704.

13. Rule 14. Third Party Practice. (A) When defendant may bring in third party. Before the service of his answer a defendant may move *ex parte* or, after the service of his answer, on notice to the plaintiff, for leave as a third party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third party defendant, shall make his defenses to the third party plaintiff's claim as provided in Rule 12 and his counter claims against the third party plaintiff and cross claims against other third party defendants as provided in Rule 13. The third party defendant may assert against the plaintiff any defenses which the third party plaintiff has to the plaintiff's claim.

    The third party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff. The plaintiff may assert any claim against the third party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff, and the third party defendant thereupon shall assert his defenses as provided in Rule 12, and his counter claims and cross claims as provided in Rule 13. A third party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third party defendant.

14. Wyoming Compiled Statutes 1945, section 60-1605.

15. Carbola Chemical Company Incorporated v. Trundle Engineering Company, 7 F. R. Service 14a 11, 3 F.R.D. 500 (S.D.N.Y. 1942).

In an action for negligence the defendant may implead an insurance company which had contracted with the defendant to pay loss from liability imposed by law upon the defendant and to defend litigation against the defendant where the insurer has refused to defend the action in spite of the fact that the policy provides that no action shall lie against the insurer unless the claim has been fixed and rendered certain either by judgment or by agreement between the parties with the written consent of the insurer.[16]

Under such procedures as adopted by some courts the insurer may defend the insured and still reserve its defense on the policy in respect of forfeiture for non-coverage and where it does so no waiver or estoppel may be invoked to preclude the company from asserting non-liability. If the insurer were impleaded to defend every suit until freedom from liability was shown there would be no possible opportunity for a second suit upon the liability under the policy or of the obligation to defend.

WAYNE C. HODSON

TORT LIABILITY OF CHARITIES

Action by Mary Foster against the Roman Catholic Diocese of Vermont to recover for injuries sustained in a fall on ice which had allegedly formed on the public sidewalk as a result of negligent construction of the church premises. Plaintiff was leaving the morning services when the accident occurred. The defendant answered that due care had been used and the defendant should be exempt from liability on the ground that it was a charitable institution. The plaintiff's demurrer was overruled, the answer said to be sufficient, and the case came before the Supreme Court of Vermont on the plaintiff's exceptions to the court's overruling the demurrer. *Held,* order overruling the demurrer reversed and the cause is remanded. The defendant charity is not entitled to immunity from liability merely because it is a privately conducted charitable institution. *Foster v. Roman Catholic Diocese of Vermont,* 70 A. (2d) 230 (1950).

Action by Harold E. Haynes against the Presbyterian Hospital Association for injuries resulting from the alleged negligence of the defendant's servants. The defendant is a non-profit corporation organized under the laws of the State of Iowa. The plaintiff was a paying patient in the defendant's hospital when he received the injuries complained of. *Held,* the incorporated charity should respond as do private individuals, business

16. Jordan v. Stephens v. Standard Accident Insurance Company, 9 F. R. Service, 7 F.R.D. 140 (W.D. Mo. 1945).