South Carolina Law Review

Volume 15 | Issue 4 Article 9

1963

Recent Decisions

RECENT DECISIONS

TRIAL — FURTHER INSTRUCTIONS TO JURY — Failure of Judge to Explain Statute and Delegating His Duty to Jurors. — *Pennsylvania v. Zeger* (Pa. 1962).

The Commonwealth of Pennsylvania brought suit against the defendant for violation of the Anti-Macing Act[1] which prohibited any political party to directly or indirectly demand any money from state employees to be used for political purposes. The trial judge in his charge read pertinent portions of the act to the jury but did not attempt to define or explain how the language might be interpreted. After some deliberation the jury returned, requested further instructions and a copy of the act, and asked to have it explained. The foreman explained that a juror was a college professor who could understand the wording of the statute sufficiently so that it would not be misinterpreted. The court made no reply but read the act in full to the jury after which it retired and later rendered its verdict against the defendant. The defendant appealed, assigning among other errors that the trial judge committed a fundamental error in failing to explain the act and apparently permitted the jury to be instructed by one of the jurors as to the meaning and interpretation of the act. HELD: reversible error. It is the duty of the judge to clarify the issues so that the jury may comprehend all questions of law applicable and to assist them in applying the proper principles to the issues. The trial judge should in no way delegate his duty to give the law and explain it or abdicate his power to do so. *Pennsylvania v. Zeger*, 186 A.2d 922 (Pa. 1962).

Since the independent jury emerged in 1670 with *Bushell's Case*,[2] the giving of instructions to the jury after they have retired has usually been in the discretion of the trial judge.[3] In some states the practice of further instructions directed by the trial court at the jury's request is governed by statute holding it mandatory that the questions receive answers.[4]

1. 25 PA. STAT. ch. 12, §2374 (1939).

2. Vaughn, 135 Eng.Rep. 1006 (1670). Discussed in BLUME, *Origin and Development of the Directed Verdict*, 49 MICH. L. REV. 555 (1950).

3. Allis v. United States, 155 U.S. 117, 39 L.Ed. 91 (1894); Allen v. United States, 186 F.2d 439 (9th Cir. 1951), *cert. denied*, 341 U.S. 948, 95 L.Ed. 1372 (1950); Monday v. Millsaps, 37 Tenn.App. 371, 264 S.W.2d 6 (1953); State v. Wilson, 169 Kan. 659, 220 P.2d 121 (1950).

4. People v. Malone, 173 Cal.App.2d 243, 343 P.2d 333 (1959), CAL. PEN. CODE ANN. §1138; Hubbuch v. City of Springfield, 63 Ohio App.

In the jurisdiction of the instant case further instructions have been considered a "practice well settled" without the requirement of statutes or fact that the question may have been answered previously in the original charge.[5]

The obvious purpose of giving the jury instructions is to assist them in understanding their specific duty, in applying the proper relationship between the facts and the law, and to obviate the danger of arriving at wrong conclusions.[6] Since the trial judge by training and education possesses the capacity to understand the issues, the theories advanced by the parties, and the applicable law in the matter under litigation, it is expected that he will do all things which in his opinion will enable the jury to gain an unclouded understanding of the law and issues in order to form a valid judgment.[7] The jury members, however, are not expected to possess this understanding derived from their individual experience, training, education, or general knowledge alone. Courts, consequently, are charged with the duty of presenting these issues in the form of clear, concise, direct, and simple instructions[8] and, if necessary, of further explaining bothersome points.[9] It has been held that after the jury has retired,

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329, 26 N.E.2d 773 (1939); OHIO GEN. CODE ANN. §11420-6; People v. Gezzo, 30 N.Y. 385, 121 N.E.2d 380 (1954); N.Y. CODE CRIM. PROC. §427. Later interpreted to be discretionary depending on specific question asked. People v. LaMarca, 3 N.Y.2d 452, 144 N.E.2d 420 (1957), see 32 ST. JOHN L. REV. 110 (1958).

5. Pennsylvania v. Smith, 221 Pa. 552, 70 Atl. 850 (1908).

6. Pennsylvania v. McManus, 143 Pa. 64, 21 Atl. 1018 (1891); 1 BRANSON, INSTRUCTIONS TO JURYS, §§1, 4 (3d ed. Reid repl. 1960).

7. Order of United Commercial Travelers v. Nicholson, 9 F.2d 7 (2d Cir. 1925); see SWAIN, J., *Common Sense in Jury Trials*, 30 CAL. S. BAR J. 405, 412 (1955), commented on in WINSLOW, *The Instruction Ritual*, 13 HASTINGS L. J. 456, "One of the greatest fictions known to the law is that a jury of 12 laymen can hear a judge read a set of instructions once, then understand them, digest them, and apply them to the facts in the case. It has taken the judge and the lawyers years of study to understand the law as stated in those instructions."

8. State v. Loveles, 80 S.E.2d 442 (W. Va. Sup. Ct. 1954); Archer v. Pennsylvania R. Co., 166 Pa. Super. 538, Ramer v. Hughes, 131 S.C. 490, 127 S.E. 565 (1924).

9. A Pennsylvania court declared, "Juries are brought together from the body of the country and generally composed of individuals unused to each others' mode of thinking, and unaccustomed to collating and recollecting testimony. They take no notes of the evidence, and, after listening to the arguments of counsel and charge of the court, often retire no doubt with rather confused recollections of the evidence, and it is not surprising that they should differ. We can perceive no well-founded objection, therefore, that the court should refresh their memories when they request it, or instruct them further at their request, in relation to the law." Quoted in Pennsylvania v. Smith, 221 Pa. 552, 70 Atl. 850 (1908) from Cummingham v. Patton, 6 Pa. 355 (1847).

further instructions can be given on the court's own motion,[10] at the jury's request,[11] or at the request of the parties.[12]

The standard applied to the juror is that he is a man of understanding and intelligence.[13] Due to the rise in the level of education most jurors now have a high school education and many have college degrees; this fact, coupled with the availability of mass communication, provide a much better informed juror today than his counterpart from "the body of the country"[14] in the early part of the century.[15] Still, the need for clear instructions on the relationship of the facts, the law, and the legal consequences must be conveyed to the jury to insure just and valid verdicts.

In the instant case the failure of the judge to explain the act and present an understandable charge regarding its interpretation clearly left the jury in a confused state. Their subsequent request included not only a copy of the act but also further instructions and explanations. It is usually the express duty of the court to explain, interpret, and declare the meaning of a statute for the jury.[16] Courts vary on how this is to be accomplished but most concur that it is the court's explicit duty.

It has been held that the court can substitute language embodying the meaning of a statute without requiring a reading of it[17] or can describe the offense using the language

10. Charlton v. Kelly, 156 Fed. 433 (9th Cir. 1907); Hofrichter v. Kiewit-Condon-Cummingham, 147 Neb. 224, 22 N.W.2d 703 (1946); People v. Perry, 65 Cal. 568, 4 Pac. 572 (1884); Kesley v. United States, 47 F.2d 453 (5th Cir. 1931); State v. Hough, 97 S.C. 24, 81 S.E. 187 (1924); *but see* Davenport v. State, 121 Miss. 548, 83 So. 738 (1920). Law forbids the judge to give an instruction not requested by the parties.

11. Tillson v. State, 32 Ala.App. 397, 27 So.2d 41 (1946); Spurr v. United States, 174 U.S. 728, 43 L.Ed. 1150 (1899).

12. Donahue v. George, 329 S.W.2d 836 (Tenn. App. 1959); *but see* Gilbur v. State, 78 Miss. 300, 29 So. 477 (1901). Further instructions can only be given at the request of the party.

13. Harris v. Harris, 178 N.C. 7, 100 S.E. 125 (1919); Matthews v. Caldwell, 5 Ga.App. 336, 63 S.E. 250 (1908). In commenting on jurors' qualifications courts said that jurors are presumed to possess not only uprightness, but also intelligence, which includes a high degree of experience and knowledge as to the ordinary things of life. Consequently, they are quasi experts on all matters of issue except issues of law.

14. *Supra* note 8.

15. WHITE, *Some Approaches to the Instructional Problem*, 40 NEB. L. REV. 413, 421 (1961).

16. South Ottawa v. Perkins, 94 U.S. 260, 24 L.Ed. 154 (1876); Parker v. Granger, 39 P.2d 833 (Cal. App. 1934); Winchell v. Canillus, 109 App.Div. 341, 95 N.Y.S. 688 (1905).

17. Field v. Gregory, 230 S.C. 39, 94 S.E.2d 15 (1956); Therrell v. Freeman, 256 N.C. 522, 124 S.E.2d 522 (1962); Morris v. Fitzwater, 187 Or. 191, 210 P.2d 104 (1949).

of the statute itself.[18] This approach would apply when the court defines the offense charged against the defendant in the language of the applicable statute.[19] A charge which presents the substance of the statute to the jury will, however, ordinarily suffice.[20] It has been held that the court cannot refer the jury to the statute alone as this would require the jury to take the statute and interpret it for themselves without any assistance from the trial judge.[21]

In the instant case, when the jury returned and received only a reading of the act unaccompanied by any explanation, the court in essence allowed them to interpret it themselves regardless of their collective understanding at that moment. The jury foreman's comment that a particular juror was a college professor and could understand the statute should not have had any bearing on the jury's request or subsequent action by the judge.[22]

In our traditional approach to jury verdicts, it has been said that the verdict should represent the collective thinking of individual judgments,[23] and certainly individual jurors can apply their knowledge to the case based on their own observations and experience as intelligent persons.[24] But a trial judge can never assume that the jury is already familiar with the law or use this as an excuse for failing to charge the jury.[25] Even if only one of the jurors needs further explanation and instruction the court should re-instruct the jury.[26]

Thus, the duty of the trial judge to make instructions as clear and understandable as possible is not carried to the

18. People v. Fortch, 13 Cal.App. 770, 110 P. 823 (1910).
19. People v. Marion, 5 Cal.App.2d 550, 42 P.2d 713 (1935); State v. Woods, 189 S.C. 281, 1 S.E.2d 190 (1939); People v. Lyons, 4 Ill.App.2d 396, 122 N.E.2d 809 (1954), "Whether an instruction in the language of the statute is misleading depends upon the *facts* of the particular case." at 812 (emphasis added); *but see* Leonard v. People, 369 P.2d 54 (Sup. Ct. Colo. 1962).
20. People v. Hill, 2 Cal.App. 141, 37 P.2d 849 (1934); State v. Clary, 24 S.C. 116 (1886).
21. Butler v. Gill, 34 Okl. 814, 127 Pac. 439 (1912).
22. Pennsylvania v. Zeger, 186 A.2d at 925, "Your Honor, may I add something? If there is any doubt about our understanding, I understand one of the jurors is a college professor and I am sure he can understand the wording sufficiently enough so that it won't be misinterpreted." The court made no reply but read the act in full.
23. People v. Faber, 199 N.Y. 256, 92 N.E. 674 (1910).
24. Chicago, M. & St. P. R. Co. v. Moore, 166 Fed. 663 (8th Cir. 1909).
25. Wolfe v. Ives, 83 Conn. 174, 76 Atl. 526 (1910).
26. *Supra* note 11.

extreme of interpreting common sense propositions, but it is incumbent on the court to declare the meaning of statutes when the jury so requests. Unless such functions are observed by the trial court, verdicts may very well be based on misunderstanding and confusion and not the interrelationship of facts and the law.

STEPHEN S. BOYNTON

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — State Statute Against Solicitation of Legal Business Violates First Amendment Freedoms. — *National Association for the Advancement of Colored People v. Button* (U. S. Supreme Court 1963).

The Virginia State Conference of the NAACP was engaged in the practice of advising Negro parents and children of the legal steps necessary for the achievement of desegregation. NAACP attorneys attended meetings and distributed printed forms authorizing NAACP attorneys to represent signers in legal proceedings to achieve desegregation. NAACP attorneys, elected by the conference's annual convention, must agree to abide by the policies of the NAACP which limit the types of litigations the NAACP will assist. The NAACP defrays all expense of litigation, and the legal staff decides whether a litigant is entitled to NAACP assistance. In 1956 the Virginia legislature amended the provision of the Virginia Code forbidding solicitation of legal business by a "runner" or "capper." The amendment was achieved by the addition of Chapter 33 which included, in the definition of "runner" or "capper," an agent for an individual or organization which retains a lawyer in connection with an action to which it is not a party and in which it has no pecuniary right or liability.[1] The NAACP brought suit against the Attorney General of Virginia and others for a declaration that Chapter 33 is unconstitutional. The Circuit Court of the City of Richmond entered a decree against the NAACP which the Supreme Court of Appeals of Virginia affirmed, holding that the chapter's purpose "was to strengthen the existing statutes to further control the evils of solicitation of legal business," and that the Virginia Conference and its lawyers fell within, and could constitutionally be proscribed by, the chapter's expanded definition of improper solicitation of legal business.[2] On appeal, HELD: reversed. The activities of the NAACP and its attorneys are modes of political expression and association protected by the First and Fourteenth Amendments which Virginia may not prohibit through its power to regulate the legal profession and

1. CODE OF VA., §§54-74, 54-78, 54-79 (1950), as amended, ch. 33 (1956) (Repl. Vol. 1958).
2. NAACP v. Harrison, 202 Va. 142, 116 S.E.2d 55 (1962).

improper solicitation of legal business. Any Virginia statute which proscribes an arrangement whereby prospective litigants are advised that their rights have been infringed and are referred to a particular attorney or group of attorneys violates the First Amendment, protected against state action by the Fourteenth Amendment. Justice Douglas concurred, adding that Chapter 33 was part of Virginia's plan of massive resistance to the integration of schools and that it reflected a legislative purpose to penalize the NAACP because of its promotion of desegregation of the races. Justice White, concurring in the result but dissenting in part, objected to the majority opinion in that it would not prohibit a narrowly drawn statute proscribing the actual day-to-day management and dictation of the tactics, strategy, and conduct of litigation by a lay entity such as the NAACP. Such a management of litigation, Justice White thought, would be an unauthorized practice of law. Justice Harlan dissented, contending that Virginia had a proper interest in the regulation of conduct concerning litigation and that the state interest outweighed any foreseeable harm to the furtherance of protected freedoms. *NAACP v. Button,* 83 Sup. Ct. 311, 9 L.Ed. 2d 405 (1963).

In reaching its decision, the Court had to decide two basic issues; were petitioner's constitutionally protected rights of freedom of expression and association infringed by the Virginia statute; and, if so, was a sufficient state interest shown to justify the regulation of petitioner's activities? The Court first recognized petitioner's activities as modes of political expression and association. In reaching this conclusion the Court relied upon the very sound constitutional principle that the First Amendment protects vigorous advocacy of lawful ends against governmental intrusion.[3] This principle, combined with the Court's sound reasoning that litigation, in the context of NAACP objectives, "is a means of achieving the lawful objective of equality of treatment by all government,"[4] seems to justify the Court's conclusion. That these rights of expression and association extend to orderly group activity was decided in *NAACP v. Alabama, ex rel. Patterson.*[5]

3. Thomas v. Collins, 323 U.S. 516, 89 L.Ed. 430 (1944); Herndon v. Lowry, 301 U.S. 242, 81 L.Ed. 1066 (1936).
4. NAACP v. Button, 83 Sup.Ct. 328, 9 L.Ed.2d 405 (1963).
5. 357 U.S. 460, 2 L.Ed.2d 1488 (1958).

Next the Court turned to the problem of the impact of the Virginia statute, as interpreted by the Virginia court,[6] upon First Amendment freedoms. The Virginia court held that the NAACP could advise persons of their legal rights, advise them to assert their rights by commencing or further prosecuting a suit, and contribute money to assist them in litigation. On the other hand, the Virginia court held that the NAACP could not refer possible litigants to NAACP attorneys or to any other particular attorneys.[7] The Supreme Court ruled that this interpretation of the statute must fall because the Virginia statute applies to attorneys or their agents and defines "agents" as anyone who represents another in his dealings with a third person. Under such a broad definition of agent, the Court reasoned that the statute would limit First Amendment freedoms in that NAACP lawyers and members would hesitate to do what the decree allows, namely advise persons of their legal rights, and advise them to commence litigation. For if the lawyers and members also appeared in, or were connected with, litigation supported with NAACP funds contributed as the Virginia decree allows, the lawyers would risk disbarment proceedings. Lawyers and non-lawyers alike would risk criminal prosecution for the offense of "solicitation."

At this point we have, first of all, NAACP activity which is protected by the First Amendment. But, as Justice Harlan points out in his dissent, litigation is conduct, and conduct is something more than speech—it is speech plus. Secondly, we have conduct being limited, not directly prohibited, but indirectly limited, by a Virginia statute.

Next the Court decided that Virginia had no sufficiently compelling subordinating interest to justify the regulation of the activities of the NAACP. This conclusion was reached mainly on the ground that the Virginia statute was not the same as common-law barratry, maintenance, and champerty, which regulated the legal profession, in that the common-law actions required malice or pecuniary gain. The matter of a compelling state interest, it seems, deserved a somewhat broader coverage than the Court allowed. But even if the Virginia statute did not coincide with common-law barratry,

6. NAACP v. Harrison, *supra* note 2.
7. *Ibid.*

maintenance, and champerty, does it necessarily follow that there was no compelling state interest? It is clear that speech may be regulated to some extent and that the First Amendment does not guarantee an unlimited license to talk. The laws relating to libel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, and conspiracy[8] are sufficient to make this point. Such regulations of speech are permissible when they are justified by a subordinating valid governmental interest.[9] Also, when balancing freedom of speech against a valid state interest, it follows that as the restriction of speech lessens, the area of legitimate governmental interest expands. So, in this case, as Justice Harlan pointed out, as we move away from speech into the sphere of conduct, or speech plus, the area of legitimate governmental interest expands.

The question now to be considered is whether Virginia's interest in the regulation of the legal profession is sufficient to justify the indirect limitation of speech plus. The state interest here need not fall because of the absence of malice or pecuniary gain. For, perhaps even deeper in the desire to regulate solicitation is the desire to protect the individual relationship between attorney and client. Thus, a nonprofit association designed to mount an attack on the constitutionality of certain tax rolls was held in contempt for engaging in the unauthorized practice of law.[10] The matter was well stated by the New York Court of Appeals,

> The relation of attorney and client is that of master and servant in a limited and dignified sense, and it involves the highest trust and confidence. It cannot be delegated without consent, and it cannot exist between an attorney employed by a corporation to practice law for it, and a client of the corporation, for he would be subject to the directions of the corporation, and not to the directions of the client.[11]

Here it is evident that an NAACP attorney's allegiance to his organization could prevent him from being able to advise his client properly in every situation. As Justice Harlan

8. Konigsberg v. State Bar, 366 U.S. 36, 6 L.Ed.2d 105 (1961).
9. *Ibid.*
10. People ex rel. Courtney v. Ass'n of Real Estate Taxpayers, 354 Ill. 102, 187 N.E. 823 (1933).
11. In re Co-op. Law Co., 198 N.Y. 479, 483-484, 92 N.E. 15, 16 (1910).

pointed out, a client might, in the midst of litigation, decide that it would not be to his advantage to press for the integration of schools at that particular time because of the possibility of the schools being closed for an extended time. In such a case, an NAACP attorney, bound by the objectives of his organization, would not be free to wisely advise his client. This is one of the evils that the Virginia statute regulates and that has been recognized as being a legitimate state interest.[12]

So, in the final analysis, we have, not freedom of speech directly prohibited by a state statute, but something more than speech, or speech plus, indirectly limited by a state statute. It seems that a state interest which has been recognized as being legitimate should certainly justify such an indirect limitation of First Amendment freedoms.

MICHAEL D. GLENN

12. *Informative Opinion of the Committee on Unauthorized Practice of the Law*, 36 A.B.A.J. 677 (1950).

INSURANCE — Insurer's Liability to Assured in Excess of Policy Limits for Failure to Settle Within Policy Limits — Assured Must Allege and Prove Lack of Good Faith on Part of Insurer. — *Slater v. Motorists Mut. Ins. Co.* (Ohio 1962).

In a personal injury action, assured suffered a verdict and judgment of $20,000. Plaintiff in that case made several offers before the trial to settle for an amount within the assured's policy limits, but the insurer refused to inform officially the plaintiff of the actual amount of the policy limits. On the day of the trial, the insurer attempted to settle for the full amount of the policy ($5,000) plus costs. Plaintiff refused and the jury subsequently brought in its verdict for $20,000.

In the present case, Slater's action against the insurer was to recover the difference between the judgment ($20,000) and the maximum policy limits ($5,000)—that sum which he had to pay due to the insurer's failure to settle. Slater's complaint alleged "bad faith" on the part of the insurer.

In the trial court, plaintiff recovered a verdict and judgment against the defendant for $15,000. The jury, in answer to an interrogatory, made a special finding of "bad faith." The intermediate appellate court affirmed with no written opinion. The Supreme Court of Ohio in a four-to-three decision reversed the judgment of the court of appeals, and entered final judgment for the defendant insurer. *Slater v. Motorists Mut. Ins. Co.*, 174 Ohio St. 148, 187 N.E. 2d 45 (1962).

The court held that, under its decision in *Hart v. Republic Mut. Ins. Co.*,[1] Slater was required "to allege and prove that his insurer's behavior was of such a reprehensible and intolerable nature as to constitute 'bad faith.'"

The court approved the definition of "bad faith" as set forth in *Spiegel v. Beacon Participations, Inc.*[2]: " 'Bad faith' is a general and somewhat indefinite term. It has no constricted meaning. * * * It is not simply bad judgment. It is

1. 152 Ohio St. 185, 87 N.E.2d 347 (1949).
2. 297 Mass. 398, 8 N.E.2d 895 (1937).

not merely negligence. * * * It implies conscious doing of wrong. * * * It means 'with actual intent to mislead or deceive another.' * * *"

And in *Johnson v. Hardware Mut. Cas. Co.*[3]: " 'Bad faith' is an intentional tort of an active and affirmative nature. * * * It will not be imputed unless there is something in the particular transaction which is equivalent to fraud, actual or constructive."

The majority concluded, with the tacit agreement of the dissenting justices, that the crux of the case was whether the insurer's failure to make official disclosure of its maximum liability under the policy held by Slater could reasonably be classed as "bad faith" within the definition of "bad faith" and under the evidence.

The court split four to three on the answer to the question, the majority holding that "all factors considered its [insurer's] failure to do so [disclose policy limits] falls short of 'bad faith' as a matter of law."

The ordinary liability insurance contract usually contains an obligation on the part of the insurer to investigate claims and either to defend or settle suits arising out of them. In addition, there is usually a provision whereby the insurer disclaims all liability for settlements made by the assured without the consent of the insurer.[4] Obviously the assured is at the mercy of the insurer when an offer of settlement is made by the plaintiff in a case where the damages demanded exceed the policy limits. If the assured settles on his own, it will be at his own cost and with no contribution from the insurer. If the case goes to trial, the assured may lose a verdict which greatly exceeds his policy limits. Under these circumstances, the assured will, in most cases, leave the decision to settle to the insurer.

The question then arises as to what duty is owed the assured by the insurer in deciding whether to settle. It is certain that the mere refusal of an insurer to settle a claim for an amount within the policy limits does not, without more, make the insurer liable for a subsequent jurgment which exceeds the policy limits.[5]

3. 188 Vt. 269, 187 Atl. 788 (1936).
4. Annot., 34 A.L.R. 750 (1925).
5. 7A APPLEMAN, INSURANCE LAW AND PRACTICE 558 (1961).

Is the duty one to exercise only good faith, or one to use ordinary care in determining whether to settle? There is no definite answer. Not only are the decisions split on this question, but some of the courts which purportedly follow the "bad faith" rule interpret negligence as bad faith.

The proponents of the "negligence" rule reason that the insurer holds itself out as a professional defender of lawsuits, and like a fiduciary, is bound to use reasonable care in deciding whether to settle within the policy limits. The difficulty is in applying the standard.

"The gift of prophecy has never been bestowed on ordinary mortals."[6]

Under the negligence rule, a recovery can be made if the jury simply finds that to settle was the reasonable thing to do. "When the [insurer] assumed control of the claim, it then and there became its duty to do what the average man would do in a similar situation."[7] The leading case in South Carolina adopts this view.[8]

If the courts that follow the "bad faith" rule do not recognize any liability stemming from negligence in failure to settle, on what sort of factual situations do they find "bad faith"? An obvious case would be when the insurer admits that if a suit goes to trial the jury would return a verdict in excess of the policy limits, but refuses to settle within the policy limit unless the assured contributes to the settlement.[9]

In the majority of cases the insurer does not refuse to settle within the policy limits for the purpose of coercing the assured into contributing to the settlement, but its refusal amounts to more than just negligence.

This does not mean, however, that under the "bad faith" rule no recovery can be made. In the *Hart* case, the insurer's refusal to settle was considered possibly "capricious" and hence interpretable as bad faith by the jury.

6. Georgia Cas. Co. v. Mann, 242 Ky. 447, 46 S.W.2d 777 at 779 (1932).
7. Cavanaugh Bros. v. General Acc. Fire & Life Assur. Corp., 79 N.H. 86, 160 Atl. 604 (1919).
8. Tyger River Pine Co. v. Maryland Cas., 170 S.C. 286, 170 S.E. 346 (1933), followed in American Cas. Co. of Reading, Pa. v. Howard, 187 F.2d 322 (4th Cir. 1951).
9. Brown & McCabe Stevedores, Inc. v. London Guar. & Acc. Co., 232 Fed. 298 (D. Ore. 1915).

In some of the older cases, the bad faith rule is referred to as the majority view. Such a statement about either rule would now be inaccurate. The trend is probably toward a change to the negligence rule, or if the bad faith rule is unchanged, then toward an interpretation of negligence as "bad faith."

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