

# INTRODUCTION: FAVORITE INSURANCE CASES SYMPOSIUM

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Insurance law scholars and teachers sometimes feel, with a mixture of paranoia and justification, that insurance law simply does not receive its proper respect in the hierarchy of legal education and law generally.

Consider the law school curriculum. In none of America's nearly 200 ABA-approved law schools is insurance law a required course. Nor is it considered a course that, although not required, prudent students "must" be sure to take before they graduate (e.g., Evidence, Corporations). Enrollments may be respectable but the class is seldom oversubscribed, even where the law school is located in an insurance hub city. Although others undoubtedly disagree, I am confident this reflects a major shortcoming of legal education and misperception by legal educators (and law students). Insurance pervades the law, substantially impacting not only tort litigation but virtually all litigation, as well as regulatory schemes and the risk management practices that affect the dispute resolution climate.

Consider the legal literature. For the most part, insurance law is not the staple diet of law reviews or point-counterpoint debates in other legal periodicals. The law review audience is often treated to in-depth analysis of the very latest and most obscure developments in constitutional law or a "law and" topic but serious examination of insurance seldom dominates the page. To repeat a comment from the always quotable Judge Richard A. Posner, "many legal scholars who today are breathing the heady fumes of deconstruction, structuralism, moral philosophy, and the theory of the second best would be better employed . . . synthesizing the law of insurance."<sup>1</sup>

Consider the notable cases – the cases that every literate lawyer knows of before he or she even leaves law school. Constitutional law has *Marbury v. Madison*;<sup>2</sup> Contracts has *Hadley v. Baxendale*;<sup>3</sup> Torts has *Palsgraf v. Long*

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<sup>1</sup> See Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 777 (1987). I could not resist using this comment in my treatise as well. See JEFFREY W. STEMPEL, *LAW OF INSURANCE CONTRACT DISPUTES* (1st ed. 1994, 2d ed. 1999 & Supp. 2002). See also Peter Nash Swisher, *Judicial Rationales in Insurance Law: Dusting of the Formal for the Function*, 52 OHIO ST. L.J. 1037 (1990) (also using Posner quote to illustrate similar point).

<sup>2</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>3</sup> 9 Ex. 341, 151 Eng. Rep. 145 (1854).

*Island Railroad*;<sup>4</sup> Civil Procedure has *Hickman v. Taylor*;<sup>5</sup> Criminal Procedure has *Miranda v. Arizona*.<sup>6</sup> Property has the Rule in *Shelley's Case*,<sup>7</sup> even if no one any longer has any idea about *Shelley's Case*<sup>8</sup> itself.<sup>9</sup> Criminal Law actually has a made-up case (Lon Fuller's *Speluncean Explorers*)<sup>10</sup> that is probably better known than any actual criminal law decision, and certainly better known than any actual insurance law decision. Now you know why insurance law professors feel like the Rodney Dangerfields of the academy. Insurance Law just doesn't get enough respect.

Of the lamentations described above, Situation One (insurance law is not a required or "must-take" course) will probably never change. Situation Two (insurance law scholarship is considered less sexy than constitutional law, legal theory, or other more current, "cutting edge" topics) will probably also remain the norm. Certainly, no single law journal symposium could hope to make a dent in these walls of legal tradition. One can, however, at least begin to address Situation Three, the absence of focus on key, interesting, or cutting edge insurance cases. The Symposium authors and the *Nevada Law Journal* have made a significant start in attempting to add insurance law cases to the common legal vocabulary.

This Symposium brings together leading teacher-scholars of insurance as well as prominent practitioner-scholars, each relating his personal favorite insurance case. Some have made their selection based on personal involvement, enjoyment, or accomplishment. Others have selected cases based on the case's precedential importance or unusual factual circumstances. One author has even crafted a mythical case to illustrate substantive points of insurance law, perhaps the insurance scholar's answer to the *Speluncean Explorers*.

Bob Jerry, co-author of a leading casebook<sup>11</sup> and a treatise used by many students and carried into practice,<sup>12</sup> leads off the Symposium with an example of what might be termed "Insurance Gothic," in discussing *Lakin v. Postal Life and Casualty Co.*,<sup>13</sup> a case where life insurance appears to have been procured as part of a murder for profit scheme.<sup>14</sup> Unfortunately, such cases are not all that rare. But this one has more plot twists than most, as ably retold by Professor Jerry.

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<sup>4</sup> 162 N.E. 99 (N.Y. 1928).

<sup>5</sup> 329 U.S. 495 (1947), *superceded by rule as stated in* *Graham v. Gielchinsky*, 599A.2d 149 (N.J. 1991).

<sup>6</sup> 384 U.S. 436 (1964).

<sup>7</sup> Even if the Rule is fading, having been abolished in all but a handful of the states. See John Orth, *Observation-Requiem for the Rule in Shelley's Case*, 67 N.C. L. REV. 681, 686 (1989). But see William A. Reppy, Jr., *Judicial Overkill in Applying the Rule in Shelley's Case*, 73 NOTRE DAME L. REV. 83 (1997).

<sup>8</sup> 1 Co. Rep. 93b (1579-81).

<sup>9</sup> See, e.g., Alan K. Simpson, *Humor, Politics, and the Practice of Law*, 42 ARIZ. L. REV. 1 (2000) (attorney and former U.S. Senator refers to Rule as example of legal arcana).

<sup>10</sup> See Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949).

<sup>11</sup> See ROGER C. HENDERSON & ROBERT H. JERRY II, *INSURANCE LAW: CASES AND MATERIALS* (3d ed. 2001).

<sup>12</sup> See ROBERT H. JERRY II, *UNDERSTANDING INSURANCE LAW* (2d ed. 1996).

<sup>13</sup> 316 S.W.2d 542 (Mo. 1958).

<sup>14</sup> See Robert H. Jerry II, *May Harvey Rest in Peace: Lakin v. Postal Life and Casualty Co.*, *infra*.

Kenneth Abraham, author of the reputedly best-selling insurance law casebook in the world,<sup>15</sup> provides an examination of *Gaunt v. John Hancock Mutual Life*,<sup>16</sup> perhaps the closest insurance law equivalent to *Marbury v. Madison*.<sup>17</sup> *Gaunt*, written by noted Second Circuit Judge Learned Hand, determined that a conditional receipt issued to a life insurance applicant provided temporary insurance under the facts of the case and the realities of insurance contracting. In the course of the opinion, Hand also provided important guideposts for assessing insurance contract documents.

My own contribution to the Symposium, an examination of *Lachs v. Fidelity & Casualty Co. of New York*,<sup>18</sup> takes a positive view of a case involving airline flight insurance from a vending machine; a case that is often described as result-oriented and unduly pro-policyholder. Upon further examination, *Lachs* appears as a much more moderate, mainstream case with lessons for legal construction of all types of insurance policies.<sup>19</sup>

Jack Dobbyn, author of a nutshell that has probably saved the academic standing of many an insurance law student,<sup>20</sup> assesses what he sees as the pro-policyholder sleight of hand in *Perl v. St. Paul*,<sup>21</sup> a case involving a law firm's efforts to obtain insurance coverage in the wake of a financial setback and public relations embarrassment.<sup>22</sup>

Peter Swisher, co-author of a leading insurance law casebook,<sup>23</sup> examines *Bird v. St. Paul Fire & Marine Insurance Co.*,<sup>24</sup> an opinion authored by Benjamin Cardozo that rivals *Gaunt* as an arguably well-known insurance case. Professor Swisher uses the case as a springboard for a searching inquiry into the issue of causation under insurance law.<sup>25</sup>

Tom Baker's article on teaching torts through the "back door" of insurance law considerations<sup>26</sup> serves not only as a superb educational suggestion, but a demonstration of the pervasive but probably underappreciated manner in which insurance drives so many aspects of litigation and tort law. As is so often the case, Professor Baker fuses insurance and non-insurance considerations in a most illuminating way.<sup>27</sup>

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<sup>15</sup> See KENNETH S. ABRAHAM, *INSURANCE LAW AND REGULATION* (3d ed. 2000).

<sup>16</sup> 160 F.2d 599 (2d Cir. 1947), *cert. denied*, 331 U.S. 849 (1947).

<sup>17</sup> See Kenneth S. Abraham, *Interpretation or Regulation? Gaunt v. John Hancock Mutual Life Insurance Co.*, *infra*.

<sup>18</sup> 118 N.E.2d 555 (N.Y. 1954).

<sup>19</sup> See Jeffrey W. Stempel, *Lachs v. Fidelity and Casualty Co. of New York: Timeless and Ahead of Its Time*, *infra*.

<sup>20</sup> See JOHN F. DOBBYN, *INSURANCE LAW IN A NUTSHELL* (3d ed. 1996).

<sup>21</sup> 345 N.W.2d 209 (Minn. 1984).

<sup>22</sup> See John F. Dobbyn, *Judicial Broken-Field Running: Perl v. St. Paul Fire & Marine Ins. Co.*, *infra*.

<sup>23</sup> See EMRIC FISCHER & PETER NASH SWISHER, *PRINCIPLES OF INSURANCE LAW* (2d ed. 1994).

<sup>24</sup> 120 N.E. 86 (N.Y. 1918).

<sup>25</sup> See Peter Nash Swisher, *Insurance Causation Issues: The Legacy of Bird v. St. Paul Fire & Marine Ins. Co.*, *infra*.

<sup>26</sup> Tom Baker, *Teaching Real Torts: Using Barry Werth's Damages in the Law School Classroom*, *infra*.

<sup>27</sup> See, e.g., Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237 (1996) (discussing concept as applied to insurance and other areas of law and policy).

Leo Martinez, co-author of another leading insurance law casebook,<sup>28</sup> takes a look at a chestnut case regarding bad faith liability of insurers, *Gray v. Zurich Insurance Co.*<sup>29</sup> He finds the case, authored by noted California Supreme Court Justice Matthew Tobriner, “unparalleled as a teaching tool” as well as seminal in the development of the law of insurance bad faith.<sup>30</sup>

Jeff Thomas, an authority on the First Amendment<sup>31</sup> as well as insurance, addresses another California Supreme Court case commonly viewed as ushering in the modern era of bad faith law. *Crisci v. Security Insurance Co.*,<sup>32</sup> which followed *Gray v. Zurich* by a year, literally involved a “little old lady” policyholder with an insurer acting like Snidely Whiplash, engendering the court’s wrath and significant legal pronouncements.<sup>33</sup>

Jay Mootz, in creating an optimal, mythical bad faith opinion, *Patsy v. Family Insurance Bureau*,<sup>34</sup> suggests that modern bad faith law, despite all the insurance industry and tort reform criticism, remains largely toothless when faced with the economic and contracting realities of the typical insurer-policyholder-claimant relationship.<sup>35</sup> Although best known as an expert in insurance and employment matters,<sup>36</sup> Professor Mootz displays additional expertise and great creativity in this facet of insurance law as well. His project is not entirely academic as he is in large part arguing for the reinstatement of *Royal Globe v. Superior Court*,<sup>37</sup> which was overruled by *Moradi-Shalal v. Fireman’s Fund Insurance Co.*<sup>38</sup>

Gene Anderson, perhaps the dean of the policyholder’s insurance bar and the co-author of a leading treatise,<sup>39</sup> describes the history and significance of *Keene Corp. v. Insurance Co. of North America*,<sup>40</sup> a case prosecuted by Mr. Anderson. *Keene* is too recent to be *Marbury v. Madison* but is viewed by

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<sup>28</sup> See LEO P. MARTINEZ & JOHN W. WHELAN, CASES AND MATERIALS ON GENERAL PRACTICE INSURANCE LAW (4th ed. 2001).

<sup>29</sup> 419 P.2d 168 (Cal. 1966).

<sup>30</sup> See LEO P. MARTINEZ, *Classic Insurance Law in a Postmodern World*, *infra*.

<sup>31</sup> See, e.g., JEFFREY W. THOMAS, *A Pragmatic Approach to Meaning in Defamation Law*, 34 WAKE FOREST L. REV. 333 (1999).

<sup>32</sup> 426 P.2d 173 (Cal. 1967).

<sup>33</sup> See JEFFREY E. THOMAS, *Crisci v. Security Ins. Co.: The Dawn of the Modern Era of Insurance Bad Faith and Emotional Distress Damages*, *infra*. Although perhaps unknown to younger readers, Snidely Whiplash was the comically classic villain of the old Dudley Do-Right cartoons, something of a bumbling Simon Legree, prone to wearing a stovepipe hat and stroking his long handlebar mustache and uttering “Ya-a-a” while doing something cruel, only to be subsequently foiled by Canadian Mountie Do-Right.

<sup>34</sup> The Patsy case, which of course has no official citation, is presented as the conclusion of Professor Mootz’s article. See *infra*.

<sup>35</sup> See FRANCIS J. MOOTZ III, *The Sounds of Silence: Waiting for Courts to Acknowledge that Public Policy Justifies Awarding Damages to Third-Party Claimants when Liability Insurers Deal with Them in Bad Faith*, *infra*.

<sup>36</sup> See, e.g., FRANCIS J. MOOTZ III, *Insurance Coverage of Employment Discrimination Claims*, 52 U. MIAMI L. REV. 1 (1997).

<sup>37</sup> 592 P.2d 329 (Cal. 1979).

<sup>38</sup> 758 P.2d 58 (Cal. 1988).

<sup>39</sup> See EUGENE R. ANDERSON, JORDAN S. STANZLER & LORELIE S. MASTERS, *INSURANCE COVERAGE LITIGATION* (2d ed. 2000).

<sup>40</sup> 667 F.2d 1034 (D.C. Cir. 1981).

many policyholders as akin to *Brown v. Board*<sup>41</sup> or *Roe v. Wade*<sup>42</sup> in its liberating effect, with perhaps similar controversy and significant insurer opposition.<sup>43</sup>

Tom Newman, arguably Mr. Anderson's counterpart of the insurance counsel bar and co-author of perhaps the leading treatise in the area,<sup>44</sup> also provides discussion of a case in which he was personally involved, but one where insurance considerations stood in the background of an internal dispute in a New York City co-operative. His co-author and wife, Maro Goldstone, shouldered the additional burden of being a party to the dispute.<sup>45</sup>

Walter Andrews and Michael Levine, insurer counsel of similar prominence and frequent contributors to the legal literature,<sup>46</sup> also discuss a case on which they were involved, *Ellett Bros., Inc. v. U.S.F. & G.*<sup>47</sup> The case is one in the cutting edge area involving gun sales liability and insurance coverage (or lack of insurance coverage) for sellers of firearms.<sup>48</sup>

Without doubt, the following Symposium brings together the observations of some of the nation's most able insurance lawyers and scholars. Even for those who do not practice in the field, it promises provocative and enjoyable reading. For the insurance law attorney, it provides a ready source of reference and insights. It also provides a promising first step in raising the profile of insurance law precedent. We hope *Nevada Law Journal* readers will enjoy this Symposium.

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<sup>41</sup> 347 U.S. 483 (1954).

<sup>42</sup> 410 U.S. 113 (1973).

<sup>43</sup> See Eugene R. Anderson, A "Keene" Story, *infra*.

<sup>44</sup> See BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK OF INSURANCE COVERAGE DISPUTES (10th ed. 2000).

<sup>45</sup> See Thomas R. Newman & Maro A. Goldstone, *The Saga of Gracie Terrace*, *infra*.

<sup>46</sup> See, e.g., Walter J. Andrews, Lon A. Berk & Michael S. Levine, *Mold-Related Property Damage: Is It Really Covered Under First Party Property Insurance?*, COVERAGE, Sept./Oct. 2001, at 1.

<sup>47</sup> 275 F.3d 384 (4th Cir. 2001).

<sup>48</sup> See Walter J. Andrews & Michael S. Levine, *Is There Insurance Coverage for Lawsuits Against the Firearm Industry?*, *infra*.