

## 4.15 Liability Insurance

**Evidence that a person was or was not insured against liability:**

**(1) is not admissible to prove that the person acted negligently or otherwise wrongfully, or that the person should be held strictly liable, or to establish damages;**

**(2) is admissible to prove some other fact relevant to a material issue, such as agency, ownership or control over premises where the accident occurred or the instrumentality that caused the accident, or bias or prejudice of a witness.**

### Note

This rule is derived from well settled New York law governing the admissibility of evidence as to whether a person is or is not insured against liability.

As set forth in **subdivision (1)**, such evidence is inadmissible when offered on the issue of whether an insured acted negligently or otherwise wrongfully, or should be held strictly liable, or to establish damages. (*See e.g. Salm v Moses*, 13 NY3d 816, 817 [2009] [“(e)vidence that a defendant carries liability insurance is generally inadmissible”]; *Leotta v Plessinger*, 8 NY2d 449, 461 [1960] [“(o)rdinarily whether a defendant has or has not obtained insurance is irrelevant to the issues, and, since highly prejudicial, therefore, inadmissible”]; *Simpson v Foundation Co.*, 201 NY 479, 490-491 [1911] [it was improper for plaintiff’s counsel to ask questions suggesting to the jury that the defendant was insured in order to induce the jury to give a larger verdict]; *see also Rendo v Schermerhorn*, 24 AD2d 773, 773 [3d Dept 1965] [“we cannot condone the obvious reference to the lack of defendants’ insurance coverage contained in defense counsel’s summation, a fact which in the circumstances here may very well have engendered sympathy in the jurors’ minds”].)

As stated by the Court of Appeals in *Salm*, excluding evidence of insurance coverage on the issue of liability is premised on two reasons:

“First, ‘it might make it much easier to find an adverse verdict if the jury understood that an insurance company would be compelled to pay the verdict.’ Second, evidence of liability insurance injects a collateral issue into the trial that is not relevant as to whether the insured acted negligently. Although we have acknowledged that liability insurance has increasingly become more prevalent and that,

consequently, jurors are now more likely to be aware of the possibility of insurance coverage, we have continued to recognize the potential for prejudice.” (*Salm*, 13 NY3d at 817-818 [citations omitted].)

“A passing reference to insurance, however, does not necessarily warrant reversal” (*Gbadehan v Williams*, 207 AD3d 418, 419 [1st Dept 2022] [“Two of the insurance references at issue were elicited by defense counsel, from his own client, and counsel lodged no objection to the reference elicited by plaintiff’s counsel. The record indicates no intention on plaintiff’s part to prompt such information”]).

If the reference goes beyond “mere mention of insurance, then a mistrial may be warranted” (*Campbell v St. Barnabas Hosp.*, 195 AD3d 405, 408 [1st Dept 2021]; *but see Grogan v Nizam*, 66 AD3d 734, 736-737 [2d Dept 2009] [a mistrial was warranted here even though “there was only the one mention of insurance by the plaintiffs’ expert (because) it cannot be said that this one instance did not have an influence on the jury. The (trial record) revealed, not only that the jury was aware of the defendants’ insurance coverage, but also that the defendants’ insurance coverage was the subject of its deliberations. Although the trial court gave a curative instruction, in light of the circumstances, the instruction was insufficient to cure prejudice to the defendants”]).

The reference to insurance coverage should be apparent (*Boehm v Rosario*, 154 AD3d 1298, 1298 [4th Dept 2017] [“Contrary to plaintiff’s contention, defense counsel’s . . . statements that defendant should not be held ‘responsible’ for certain medical expenses were in response to plaintiff’s testimony and the arguments of plaintiff’s counsel. Defense counsel never stated or implied that defendant lacked insurance coverage for the accident or would have to pay out of pocket”]).

**Subdivision (2)** recognizes that New York law does not exclude evidence of insurance coverage or lack of insurance when the evidence is offered for a purpose other than to establish liability or fault, such as to establish ownership or control over the premises where the accident occurred or the instrumentality that caused the accident (*see Leotta v Plessinger*, 8 NY2d 449, 462 [1960]), or to show bias or interest on the part of a witness, such as an expert witness retained by the defendant’s insurance company. (*Salm*, 13 NY3d at 818.) The enumeration of potential admissible purposes is illustrative and not exclusive. When such evidence is admissible, however, the Court of Appeals has specifically cautioned that the trial court may exclude the evidence if it determines the risk of confusion or prejudice outweighs its probative value (*Salm*, 13 NY3d at 818; *see Maiorani v Adesa Corp.*, 83 AD3d 669, 671 [2d Dept 2011] [in an action for damages for injuries sustained by contact with the defendant’s electrical fence, an insurance agreement’s language between the defendant and a nonparty fence manufacturer that the “ ‘provider agrees to assume full liability for injuries caused by the system *during closed hours*’ (emphasis added) is admissible, as it relates to a material issue at trial that the defendant had a duty to turn the fence’s electric current off during

business hours and had actual notice of the potential harm of leaving the electric current on during business hours”]).