Michigan Law Review

Volume 51 | Issue 2

1952

EVIDENCE-PRESUMPTIONS-PLAINTIFF'S RES IPSA LOQUITUR AGAINST DEFENDANTS PRESUMPTION OF DUE CARE

Bernard A. Petrie S.Ed.
University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Evidence Commons, Torts Commons, and the Transportation Law Commons

Recommended Citation
Bernard A. Petrie S.Ed., *EVIDENCE-PRESUMPTIONS-PLAINTIFF'S RES IPSA LOQUITUR AGAINST DEFENDANTS PRESUMPTION OF DUE CARE*, 51 MICH. L. REV. 295 (1952).
Available at: https://repository.law.umich.edu/mlr/vol51/iss2/12

This Regular Feature is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

EVIDENCE—PRESUMPTIONS—PLAINTIFF'S RES IPSA LOQUITUR AGAINST DEFENDANT'S PRESUMPTION OF DUE CARE—Plaintiff sued for injuries resulting when an automobile which defendant was driving and in which plaintiff was sleeping left the highway. There was evidence that defendant suffered retrograde amnesia and could not recall the circumstances of the accident. The court, instructing on res ipsa loquitur for plaintiff, told the jury that it might infer negligence from the fact that the automobile inexplicably left the highway. The court also instructed that, if the jury believed that defendant suffered a loss of memory, defendant was presumed to have exercised due care.[1] Verdict for defendant. Plaintiff contended that instruction on the presumption of due care was improper in a res ipsa loquitur case because of the difficulty that the jury would have in weighing an inference of negligence against a presumption of due care.[2] On appeal, *held,* affirmed. The defendant is not to be deprived of the presumption of due care "because of the difficulty jurors would encounter in determining the relative weight of an inference that a thing is black and a presumption that it is white." *Scott v. Burke,* (Cal. App. 1952) 239 P.(2d) 14 at 16.*

Presumptions aid proof. When a litigant has the burden of producing evidence as to the existence of fact *B* to avoid a directed verdict, but can only muster evidence of the existence of fact *A*, he may be rescued by a presumption of the existence of fact *B* (the presumed fact) from the existence of fact *A* (the basic fact). For example, death is commonly presumed from an unexplained absence for seven years.[3] Authorities differ as to the function and effect of presumptions. Refinements and gradations abound, but for present purposes we may stress three approaches. (1) The perhaps orthodox view is that the sole function of a presumption is to shift the burden of producing evidence to avoid a directed verdict. The basic fact *(A)* having been sufficiently established, the trier of fact must assume the presumed fact *(B)* until the opposing litigant produces

* After this note was in type, the California Supreme Court affirmed Scott v. Burke, two judges dissenting. (Cal. 1952) 247 P. (2d) 313. The discussion which follows is applicable to the Supreme Court opinion as well.—Ed.

1 The presumption of due care is applicable as well in loss of memory situations as in wrongful death cases. Beeker v. Rosema, 301 Mich. 685, 4 N.W. (2d) 57 (1942).

2 Plaintiff apparently relied upon Pezzoni v. City & County of S.F., 101 Cal. App. (2d) 123 at 124, 225 P. (2d) 14 (1950).

3 Westphal v. Kansas City Life Ins. Co., (7th Cir. 1942) 126 F. (2d) 76.

evidence sufficient to support a finding of the non-existence of *B*. Therefore the jury will be instructed on a presumption only when it dictates a finding. Otherwise, when the judge is satisfied that counter evidence supports a contrary finding, the presumption, having exhausted its function, like Maeterlinck's male bee, disappears.[4] This view was advanced by Professor Thayer and approved by Dean Wigmore; it has wide support and was adopted in the Model Code.[5] It is easily administered but has been criticized as allowing presumptions, judicial devices usually based upon sound reason and policy, to be overthrown too readily.[6] The lying half-wit by testifying that he saw the insured in Singapore two weeks ago overthrows the presumption of death from seven years unexplained absence, since there is no prerequisite that the jury credit his testimony.[7] Alternatives to the Thayer-Wigmore view seek to meet this criticism. (2) A few states, including California, dissatisfied with the ease by which presumptions may be dispatched, prescribe a rather metaphysical cure that is quite as unfortunate as the malady. In these states presumptions are evidence to be weighed against, or with, or as evidence.[8] The task of the trier of fact appears to be psychologically impossible; the result is that he may give as much or as little weight to the presumption as he chooses. (3) To preserve the efficacy

[4] The simile is Bohlen's. Bohlen, "The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof," 68 UNIV. PA. L. REV. 307 at 314 (1920). Cf. "Presumptions . . . may be looked on as the bats of the law, flitting in the twilight but disappearing in the sunshine of actual facts." Mackowik v. Kansas City, St. J. & C.B. R. Co., 196 Mo. 550 at 571, 94 S.W. 256 (1906).

[5] THAYER, A PRELIMINARY TREATISE OF EVIDENCE AT THE COMMON LAW 314, 337 (1898); 9 WIGMORE, EVIDENCE, 3d ed., §2491 (1940); A.L.I. MODEL CODE OF EVIDENCE, Rule 704. Note that the Model Code, Rule 703, excepts the presumption of legitimacy; it shifts the burden of persuasion. See 128 A.L.R. 713 (1940), for the degrees of proof necessary to overcome the presumption of legitimacy.

[6] Morgan, "Presumptions," 12 WASH. L. REV. 255 at 277 (1937).

[7] See the letter in 9 WIGMORE, EVIDENCE, 3d ed., 349 (1940). This is one of many interesting replies to Wigmore's proposals for the future treatment of presumptions. 9 WIGMORE, EVIDENCE, 3d ed., 2498a (1940).

[8] Smellie v. So. Pac. Co., 212 Cal. 540, 299 P. 529 (1931); Speck v. Sarver, 20 Cal. (2d) 585, 128 P. (2d) 16 (1942); Wyckoff v. Mutual Life Ins. Co. of N.Y., 173 Ore. 592, 147 P. (2d) 227 (1944), commented on by Morgan in 23 ORE. L. REV. 269 (1944); Bryan v. Aetna Life Ins. Co., 174 Tenn. 602 at 612, 130 S.W. (2d) 85 (1939), noted in 16 TENN. L. REV. 245 (1940). Vermont reversed its earlier view that presumptions were evidence, Tyrrell v. Prudential Ins. Co. of America, 109 Vt. 6, 192 A. 184 (1937), 115 A.L.R. 392 (1938). The view that presumptions are evidence is based in part, usually, on code provisions like those of California. See CALIF. CODE OF CIVIL PROCEDURE ANNO. (Deering, 1946) §§1957-1963 (§1963 contains a typical list of disputable presumptions). Generally see McBaine, "Presumptions: Are They Evidence?" 26 CALIF. L. REV. 519 (1938), and 95 A.L.R. 878 (1935).

Particular strife has raged over whether the presumption of innocence is evidence. See Coffin v. United States, 156 U.S. 432, 15 S.Ct. 394 (1895), commented upon by Thayer in his PRELIMINARY TREATISE OF EVIDENCE, Appendix B (1898). The better view appears to be that the presumption is not evidence. Agnew v. United States, 165 U.S. 36, 17 S.Ct. 235 (1897); Commonwealth v. Madeiros, 255 Mass. 304, 151 N.E. 297 (1926). In practice, of course, defense counsel use this presumption effectively. See the account of Hall's "scales of justice act" in MARJORIBANKS, FOR THE DEFENSE—THE LIFE OF SIR EDWARD MARSHALL-HALL 262-263 (1930).

of presumptions in the face of incredible counter evidence Professor Morgan makes the somewhat heretical but practical suggestion that we treat the particularly worthwhile presumptions as shifting not only the burden of producing evidence to avoid a directed verdict but also the ultimate burden of persuasion.[9] A variant to this suggestion is to instruct the jury about the presumption and further to disregard it only if they credit the opposing evidence.[10] Professor Morgan's view avoids confusing instructions.

Res ipsa loquitur is a true presumption in some states but in most, including California, the doctrine creates only a permissible inference of negligence.[11] In California, res ipsa loquitur enables a plaintiff to avoid a directed verdict and get to the jury; it does not require the defendant to go forward with the evidence. Therefore the presumption of due care in the principal case operates against a party who already carries the burden of producing evidence. If the Thayer-Wigmore view is adopted, there is no utility in a "presumption" that operates against one who already carries the burden which the "presumption" would shift.[12] However, in California, since presumptions count as evidence, the use of the presumption of due care in the present case is proper.[13]

A more interesting question would be presented if this case arose in a state which treated res ipsa loquitur as a presumption but not as evidence. Then we would have conflicting presumptions, that of negligence against that of due care.[14] Wigmore observed that conflicting presumptions are impossible because

[9] MORGAN, PRESUMPTIONS, THEIR NATURE, PURPOSE, AND REASON (1949) (talk to the Brandeis Society); Morgan, "Instructing the Jury Upon Presumptions and Burden of Proof," 47 HARV. L. REV. 59 (1933); Morgan, "Some Observations Concerning Presumptions," 44 HARV. L. REV. 906 at 931 (1931). Morgan may claim company in heresy. Courts for generations have held that the presumption that a birth in wedlock is legitimate shifts the burden of persuasion. See note 5 supra. Pennsylvania formerly held that presumption shifted the burden of persuasion, Holzheimer v. Lit Brothers, 262 Pa. 150 at 153, 105 A. 73 (1918); 68 UNIV. PA. L. REV. 307 at 308, note 3 (1920). Present authority may have switched to orthodoxy. Watkins v. Prudential Ins. Co., 315 Pa. 497 at 501, 173 A. 644 (1934).

[10] Gillett v. Michigan United Traction Co., 205 Mich. 410 at 421, 171 N.W. 536 (1919).

[11] Holley v. Purity Baking Co., 128 W.Va. 531, 37 S.E. (2d) 729 (1946); George Foltis, Inc. v. City of New York, 287 N.Y. 108, 38 N.E. (2d) 455 (1941). Prosser, "Res Ipsa Loquitur in California," 37 CALIF. L. REV. 183 (1949); Prosser, "The Procedural Effect of Res Ipsa Loquitur," 20 MINN. L. REV. 241 (1936).

[12] Falknor, "Notes on Presumptions," 15 WASH. L. REV. 71 (1940). See also Brown v. Henderson, 285 Mass. 192 at 196, 189 N.E. 41 (1934). Cf. Worth v. Worth, 48 Wyo. 441, 49 P. (2d) 649 (1935). McCormick, "What Shall the Trial Judge Tell the Jury About Presumptions?" 13 WASH. L. REV. 185 (1938).

[13] The presumption of due care, of course, has significance where plaintiff must show freedom from contributory negligence. Mast v. Illinois Cent. R. Co., (D.C. Iowa 1948) 79 F. Supp. 149.

[14] Inconsistent presumptions arise commonly in multiple marriage situations, e.g., where one spouse remarries within 7 years of the disappearance of the other; it is often held that the presumption of validity of marriage, a policy presumption, prevails over the presumption of continuance of life. See Sillart v. Standard Screen Co., 119 N.J.L. 143, 194 A. 787 (1937), and cases collected, 14 A.L.R. (2d) 7 at 35-45 (1950). Is it not true that within the presumption of death itself we witness a conflict of presumptions, that of continuance of life and that of death, with the triumph of the latter?

presumptions operate successively.[15] Indeed, if the Thayer-Wigmore view of presumptions is accepted this observation is correct. Thus the Model Code in accordance with its adoption of such a view provides that "inconsistent" presumptions nullify each other.[16] On the other hand Professor Morgan urges that conflicting presumptions should be weighed according to the reasons justifying their creation and existence: social policy, procedural convenience, and factual probability.[17] The conflict imagined here, negligence against due care, illustrates the difficulty of classifying presumptions neatly, especially during trial. Admit that res ipsa loquitur rests upon procedural convenience, the particular force and justice of res ipsa loquitur *as a presumption* being that the opponent has better access to explanatory evidence.[18] Still it is difficult to fix the basis for the presumption of due care in order to place it in Professor Morgan's hierarchy.[19] Yet an elementary analysis of these presumptions is possible. Thus it might be said that, since, as observed, the justice of res ipsa loquitur *as a presumption* is that the opponent is usually more able to explain, res ipsa loquitur should not be effective *as a presumption* when opposed by the presumption of due care based upon an excusable lack of knowledge. This analysis yields the orthodox result of cancellation but not by so blind a process. Perhaps a bedrock analysis of conflicting presumptions is not feasible; trial judges demand (so it is said) quick rules of thumb. If so, it is regrettable. An enlightened jurisprudence would appear to require in a battle of presumptions that the strongest survive.

Bernard A. Petrie, S.Ed.

[15] 9 WIGMORE, EVIDENCE, 3d ed., §2493 (1940). Thayer thought the conflicting presumption doctrine an "exotic, ill adapted to an English or North American climate." THAYER, PRELIMINARY TREATISE ON EVIDENCE 343 (1898).

[16] A.L.I. MODEL CODE OF EVIDENCE, Rule 704.

[17] See note 9 supra. Cf. Chafee, "Developments in the Law—Evidence-1932," 46 HARV. L. REV. 1138 at 1143 (1933).

[18] 9 WIGMORE, EVIDENCE, 3d ed., §2509 (1940).

[19] If the presumption of due care rests upon a love of life, 20 PA. B.A.Q. 24 (1948), it rests upon factual probability. Yet there are elements of procedural convenience in the assistance the presumption often affords plaintiffs in wrongful death actions. In addition to Morgan on the respective rank of procedural convenience and factual probability, note 9 supra, see MAGUIRE, EVIDENCE, COMMON SENSE AND COMMON LAW 186 (1947).