Washington Law Review

Volume 42 | Number 1

10-1-1966

# The Effect of Presumption of Common Carrier Negligence Upon the Burden of Proof

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# RECENT DEVELOPMENTS

## THE EFFECT OF A PRESUMPTION OF COMMON CARRIER NEGLIGENCE UPON THE BURDEN OF PROOF

Plaintiff, a common carrier truck line, sought to recover charges from the United States for transportation of a delicate and expensive camera. The government counterclaimed for damages exceeding plaintiff's charges. The counterclaim was advanced by proof of the camera's delivery to plaintiff in good condition and its arrival in damaged condition. Plaintiff replied by showing that the damage was the consequence of defective packaging by a United States employee. Being unable to prove that, notwithstanding defective packaging, the damage proximately resulted from the carrier's negligence in handling the camera, the United States was denied its counterclaim and adjudged liable for transportation charges. On appeal to the Sixth Circuit, judgment was vacated and the case remanded. *Held:* Once a shipper has proved a prima facie case, the burden of proof shifts to and remains upon the carrier to show both that the cause of damage was not within the scope of carrier liability as an absolute insurer, and that there was no concurrent carrier negligence. *Super Service Motor Freight Co. v. United States,* 350 F.2d 541 (6th Cir. 1965).

By virtue of the Carmack Amendment to the Hepburn Act,[1] the liability of an initial carrier for property damage to an interstate shipment is governed by federal law codifying the common law rule of dual level common carrier liability.[2] The first level of liability, making a carrier an insurer of goods, arises when the shipper establishes a prima facie case by showing damage to the goods while in the carrier's exclusive control.[3] The carrier, at the risk of suffering a directed verdict,

[1] Interstate Commerce Act, ch. 104, pt. I, § 20, 24 Stat. 386 (1887), added by ch. 3591, § 7, 34 Stat. 593 (1906), as amended, 49 U.S.C. § 20 (11) (1964).
For judicial interpretation, see Adams Express Co. v. Croninger, 226 U.S. 491, 505 (1913) (Carmack Amendment pre-empts state laws governing interstate carriers).

[2] For general treatment of the common law rule of common carrier liability, see 52 I.C.C. 671 (1919); DOBIE, BAILMENTS AND CARRIERS, ch. 10 (1914); 10 W. RES. L. REV. 276 (1959).

[3] See DOBIE, *op. cit. supra* note 2, §§ 118, 157. Carrier liability as insurer is a rule of substantive law; it is distinguished from a presumption of carrier liability by its non-rebuttable character. Chesapeake & O.R.R. v. Thompson Mfg. Co., 270 U.S.

then must carry the burden[4] of showing that the damage proximately resulted from an act of the shipper.[5] If successful, the carrier is absolved from liability as insurer but still must avoid a second level of liability, that of a bailee, arising from a presumption that the damage proximately resulted from carrier negligence. The principal case departs from established authority by according this presumption the procedural consequence of placing upon a carrier not only the burden of producing credible evidence of its own due care,[6] but also the risk of non-persuasian, *i.e.*, the burden of proof.

The court in the principal case accepted both the trial court's assumption that the shipper had established a prima facie case, and the finding that the carrier had proved proximate connection between damages and the shipper's defective packaging. Thereby eliminating the issue of first-level insurer liability, the court concentrated on the issue of which party had the burden of proving second-level bailee liability. Although giving footnote recognition to established authority on this issue,[7] the court relied entirely upon *Missouri Pac. R.R. v. Elmore & Stahl*,[8] a United States Supreme Court decision announced after the trial court's ruling in the principal case. *Stahl* was interpreted by the majority opinion in the principal case as taking a position contrary to this established authority, placing upon a carrier the burden of disproving its own negligence. The dissent rejected this interpretation, finding instead that *Stahl* placed upon a carrier only the burden of going forward with evidence, not the burden of proof. As often occurs in litigation when there is a paucity of probative evidence, resolution

416 (1926). Rules of substantive law are often called "conclusive presumptions." This is unfortunate terminology as, "the primary limitation upon the operation of presumptions ... is that they are rebuttable." MEISENHOLDER, WASHINGTON PRACTICE—EVIDENCE § 561 (1965).

[4] "Burden" is used here in the context of Wigmore's phrase, "the risk of non-persuasion," rather than the "burden of going forward with evidence." See 9 WIGMORE, EVIDENCE §§ 2485-87, 2508 (3d ed. 1940). See also Schnell v. Vallescura, 293 U.S. 296 (1934); Wilson & Co. v. Hines, 123 Wash. 643, 213 Pac. 5 (1923).

[5] Examples of acts of the shipper relieving a carrier of insurer liability may be: (a) failure to disclose the value or character of the goods, (b) intermeddling with the goods on route, (c) directing the handling of the goods, (d) unskillfully packing or loading, and (e) providing incorrect shipping orders. See 1 HUTCHINSON, CARRIERS §§ 328-33 (3d ed. 1906).

Other common law exceptions to insurer liability arise when the damage was proximately caused by (a) an act of God, (b) a public enemy, (c) public authority, or (d) the inherent vice or nature of the goods. See *id.* ch. 6.

[6] See DOBIE, *op. cit. supra* note 2, § 118. For leading cases holding that the presumption of carrier negligence shifts to the carrier only the burden of producing credible evidence, see Schnell v. Vallescura, 293 U.S. 296 (1934); Railroad Co. v. Reeves, 77 U.S. (10 Wall.) 176 (1869); Clark v. Barnwell, 53 U.S. (12 How.) 272 (1851.)

[7] 350 F.2d at 543 n.1.

[8] 377 U.S. 134 (1964), 32 TENN. L. REV. 670 (1965).

of this procedural issue in the shipper's favor placed upon the carrier a burden of proof so onerous that it would be a determinative element in the outcome of the case.[9]

The wisdom of the rigorous common law rules of carrier liability[10] has continued vitality in regulation of modern commerce. In *Schnell v. Vallescura*,[11] the Supreme Court emphasized that carriers are required to exercise an extraordinary duty of care[12] arising from the carrier's exclusive control of the goods and its peculiar knowledge of the circumstances of carriage.[13] The two levels of carrier liability are implemented by a rule of law and a presumption of fact, each designed to protect the interests of shippers. Production of a preponderance of evidence by a carrier that damage was caused by an act of the shipper avoids the rule of law that a carrier is liable as an absolute insurer,[14] but does not preclude a presumption of carrier negligence and a finding of bailee liability. Carrier diligence might have avoided the effects of the risk created by the shipper's act, or prevented an efficient concurring cause of damage created by the carrier itself.[15] In such instances the shipper's interests warrant protection, and a presumption of carrier negligence is appropriate.

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[9] The dissent contended that the trial court's findings implied that the judgment for the carrier was supported by substantial evidence of non-negligence. This would mean that the carrier had met even the circuit court's test by carrying the burden of proof. The majority, however, interpreted the trial court's judgment for the carrier to indicate merely that the shipper had failed to carry a reshifted burden of proof.

[10] See Coggs v. Bernard, 2 Ld. Raym. 909, 92 Eng. Rep. 107 (Q.B. 1703). For historical development of carrier liability, see generally Goddard, *The Liability of the Common Carrier As Determined By Recent Decisions of the United States Supreme Court*, 15 COLUM. L. REV. 399 (1915).

[11] 293 U.S. 296, 304, 305 (1934).

[12] Prosser denies that there are degrees of negligence, or corresponding degrees of duty of care, as a matter of law. The conduct required of a carrier is merely that of a reasonable man of ordinary prudence under the circumstances. The circumstances of a common carrier demand an increased amount of care, as a matter of fact. PROSSER, TORTS § 34 (3d ed. 1964).

[13] This analysis of the carrier's liability suggests the use of the doctrine of res ipsa loquitur. See, *e.g.*, Lux Art Van Service, Inc. v. Pollard, 344 F.2d 883 (9th Cir. 1965). Prosser, however, maintains that the procedural effect of res ipsa loquitur is merely to get a plaintiff's case to the jury without production of direct evidence. PROSSER, TORTS § 40 (3d ed. 1964). This is at most a "permissive presumption" and probably should be eliminated as a category of presumptions altogether. Wiehl, *Instructing a Jury in Washington*, 36 WASH. L. REV. 378, 386-400 (1961). Presumptions should be mandatory, requiring the trier to assume a fact from another fact. UNIFORM RULE OF EVIDENCE 13.

[14] See note 5 *supra*.

[15] See United States v. Savage Truck Line, 209 F.2d 442 (4th Cir. 1953), wherein a shipper's negligence in failing to properly secure airplane engines onto a common carrier did not preclude carrier liability when the carrier's negligent driving concurred in causing the engines to come loose, and resulted in substantial property damage and death of an innocent party. See also Little Rock Packing Co. v. Chicago, B. & O.R.R., 116 F. Supp. 213, 222 (W.D. Mo. 1953); Comment, 27 TEXAS L. REV. 525, 533 (1949).

The difficulty in the principal case was in determining which party should carry the burden of proof when there is a presumption of carrier negligence. Presumptions should be classified depending upon the purpose they serve in a trial,[16] carrier negligence being placed in one of three classes and accorded procedural consequences designed to implement the purpose of that class. The first class of suggested presumptions is that created purely for procedural convenience. They require assumption of facts which an ordinary man would not hesitate to accept as true without demanding legal proof, thereby avoiding a nonsuit when such facts are not supported by sufficient probative evidence.[17] The procedural consequence is a shift onto the opponent of the burden of producing substantial evidence to contradict the presumed fact. If the judge finds as a matter of law that such evidence has been produced, the fact can no longer be presumed; it becomes an issue for the trier of facts, with the risk of non-persuasion upon the party taking the affirmative.[18]

The second class of suggested presumptions is that based on fairness in apportioning the task of producing evidence. They place the burden of going forward upon the party to whom the facts are most accessible or familiar. The quantum and quality of evidence sufficient to rebut[19] such presumptions differ widely with circumstances, and

[16] This basis for classification of presumptions is justified by differing factual situations which prompt particular procedural consequences. See Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof*, 68 U. PA. L. REV. 307 (1920); McBaine, *Presumptions: Are They Evidence?*, 26 CALIF. L. REV. 519 (1938); McCormick, *Charges on Presumptions and Burden of Proof*, 5 N.C.L. REV. 291 (1927); Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59 (1933) (cited with approval in Bradley v. S. L. Savidge, Inc., 13 Wn. 2d 28, 41, 123 P.2d 780, 786 (1942)); Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906 (1931).

[17] See, *e.g.*, Howard v. Equitable Life Assur. Soc'y., 197 Wash. 230, 85 P.2d 253 (1938) (presumption of death from seven years' unexplained absence); Collins v. Collins, 151 Wash. 201, 275 Pac. 571 (1929) (presumption of receipt from proof that letter was duly mailed). For collection of cases, see MEISENHOLDER, WASHINGTON PRACTICE—EVIDENCE chs. 31 & 32 (1965).

[18] The disappearance of presumptions in the face of substantial contradictory testimony is the Thayer-Wigmore view. See THAYER, EVIDENCE 313-89 (1898); 9 WIGMORE, EVIDENCE §§ 2485-91 (3d ed. 1940). See also Speas v. Merchants' Bank & Trust Co., 188 N.C. 524, 125 S.E. 398 (1924); Chaloupka v. Cyr, 63 Wn. 2d 463, 387 P.2d 740 (1963); Beeman v. Puget Sound Traction, L. & P. Co., 79 Wash. 137, 139 Pac. 1087 (1914).

[19] In Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof*, 68 U. PA. L. REV. 307, 312 (1920), it is observed that:

> A presumption is in the strict sense rebutted only when the data on which it rests is not disputed, but where direct or circumstantial evidence is given by him against whom it operates to overcome its effect as sufficient or prima facie proof of the fact presumed. Yet a presumption is sometimes said to be rebutted by proof of the non-existence of the data on which it rests. This use of the term is unfortunate. While the presumption is displaced, it is not overthrown but undermined. Such proof does not destroy a presumption; it shows that there is no presumption to destroy.

are determined on a discretionary basis rather than as a matter of law. A jury, under proper instruction,[20] is allowed to consider the credibility and weight of rebutting evidence in deciding whether a presumption has been overcome.[21] Unlike presumptions of procedural convenience, which disappear upon production of substantial evidence as determined by the judge, these presumptions survive until the jury is satisfied that the party without access to the facts is no longer disadvantaged.[22] This characteristic does not require the opposing party to assume the risk of non-persuasion, but neither does it allow unreliable evidence, such as the testimony of a prejudiced witness, to rebut a presumption and avoid a non-suit.

The third class of presumptions is that used to reach a socially desirable result. Such presumptions require the jury to find a fact which evidence does not necessarily suggest. The social objectives of these presumptions are best achieved if the procedural consequence is a shift of the burden of proof onto the opposing party.[23] The jury is instructed that it must find the presumed facts unless the opposing party produces a *preponderance* of evidence rebutting the presumption.[24]

A presumption of carrier negligence as the proximate cause of damage to a shipper's goods is best classified as a presumption created to place the burden of producing evidence upon the party to whom the facts are most accessible or familiar. Negligence is never assumed, without legal proof, for the sake of procedural convenience, as in the first class of presumptions; nor is carrier negligence, once a carrier is absolved from its insurer liability, an assumption justified by social

[20] See Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59, 80, 81 (1933); Stevens, *Pattern Jury Instructions: Some Suggestions on Use and the Problem of Presumptions*, 41 WASH. L. REV. 282 (1966); Wiehl, *Instructing a Jury in Washington*, 36 WASH. L. REV. 378, 386-400 (1961).

[21] Luna de la Peunte v. Seattle Times Co., 186 Wash. 618, 59 P.2d 753 (1936). See also Burrier v. Mutual Life Ins. Co., 63 Wn. 2d 266, 387 P.2d 58 (1963).

[22] See, *e.g.*, Chaloupka v. Cyr, 63 Wn. 2d 463, 387 P.2d 740 (1963) (presumption of negligence of a bailee); Kay v. Occidental Life Ins. Co., 28 Wn. 2d 300, 183 P.2d 181 (1947) (presumption that false statements on insurance application were made with intent to deceive); Bradley v. S. L. Savidge, Inc., 13 Wn. 2d 28, 123 P.2d 780 (1942) (presumption that driver of car involved in accident was agent of owner).

[23] See, *e.g.*, State v. Burns, 59 Wn. 2d 197, 367 P.2d 119 (1961) (residence once established is presumed to continue); Palmer v. Palmer, 42 Wn. 2d 715, 258 P.2d 475 (1953) (child born in wedlock presumed legitimate); In re Emmans' Estate, 117 Wash. 182, 200 Pac. 1117 (1921) (marriage presumed valid from cohabitation and general reputation).

[24] Steiner v. Royal Blue Cab Co., 172 Wash. 396, 20 P.2d 39 (1933). But in fraud cases, the presumption of honesty must be rebutted by evidence that is clear, cogent and convincing. Luna de la Peunte v. Seattle Times Co., 186 Wash. 618, 59 P.2d 753 (1936); and in criminal cases, the presumption of innocence must be rebutted beyond a reasonable doubt. State v. Tyree, 143 Wash. 313, 255 Pac. 382 (1927).

policy, as in the third class of presumptions. The purpose of a presumption of carrier negligence is to force disclosure by a carrier of the circumstances of carriage. With this otherwise unavailable information, the shipper may be able to form a factually sound claim of carrier negligence, and bear the burden of proving it.

The court in the principal case interpreted *Missouri Pac. R.R. v. Elmore & Stahl*[25] as establishing the law in the United States to the contrary. It found in *Stahl* a social policy requiring the carrier to produce a preponderance of evidence disproving its own negligence, and to bear the risk of non-persuasion. This placement of carrier negligence in the third class of presumptions is defended by authorities who contend that unreliable testimony would frustrate the purpose of the presumption whenever one party had greater access to the facts.[26] Protection of the disadvantaged party is thought to justify the shift of the burden of proof, rather than simply imposing upon a carrier the burden of going forward with evidence.

Reliance on *Stahl* as support for this minority classification of the carrier negligence presumption is unjustified. The issue in *Stahl* was whether a *non-negligent* common carrier was liable for damages when it failed to prove that the cause of damage was within the exceptions to its insurer liability.[27] This was an issue of burden of proof on first-level liability, not second-level liability as in the principal case; yet the majority relied upon a statement in *Stahl,* that once a shipper establishes a prima facie case *"thereupon, the burden of proof is upon the carrier to show both that it was free from negligence* and that the damage to the cargo was due to one of the excepted causes relieving the carrier of liability."[28] The emphasized portion of this statement should have been disregarded as dictum, or, as suggested by the dissent, treated as a careless use of "burden of proof" for "burden of producing evidence." The Supreme Court should not be regarded as having taken an affirmative position in *Stahl* contradicting established author-

[25] 377 U.S. 134 (1964).

[26] MCCORMICK, EVIDENCE § 317, at 661-72 (1954); MORGAN, SOME PROBLEMS OF PROOF 81 (1956); Morgan, *Presumptions,* 12 WASH. L. REV. 255 (1937). That this is the minority position, see Schnell v. Vallescura, 293 U.S. 296 (1934); Railroad Co. v. Reeves, 77 U.S. (10 Wall.) 176 (1869); Clark v. Barnwell, 53 U.S. (12 How.) 272 (1851).

[27] In *Stahl* a shipment of melons was spoiled in transit. The carrier's contention was that in transactions involving perishable commodities a presumption arises that damage resulted from the inherent vice of the goods themselves, relieving the carrier of the burden of proving any "excepted cause." Although this presumption aids a carrier of livestock, North Pennsylvania Ry. v. Commercial Bank, 123 U.S. 727 (1887), it was not found to likewise aid a carrier of melons.

[28] 377 U.S. at 138 (1964). (Emphasis added.)

ity,[29] when the issue on the burden of proving carrier negligence was unlitigated in that case. On several occasions *Stahl* has been cited for the proposition that a carrier bears the burden of proving that the cause of damage was among the insurer liability exceptions.[30] Only twice, however, have other courts given the same interpretation to *Stahl* as the court in the principal case.[31]

The practical effect of the principal case is to place the full risk of damage to goods in transit upon the carrier. The onerous requirement of proof necessary to avoid liability will prompt carriers to protect themselves by assuming the burden of insuring goods, thus relieving shippers of what would seem to be their own responsibility. Carriers may respond to the cost of insuring goods by adding a premium to carrying charges; if competitively feasible, and if acceptable to the Interstate Commerce Commission, this premium would indirectly force shippers to insure goods to a greater extent than if they had assumed this responsibility themselves.[32] Carriers may also respond to the cost of insuring goods by including liability disclaimers in carriage contracts, and by seeking damage releases,[33] practices fraught with dangers of fraud and overbearance. The alternative of placing full risk of damage upon the shipper is equally objectionable because carrier initiative to safeguard goods in transit would be reduced. A compromise suggests the best solution: the risk of damage to goods in transit should be divided. The burden of proving that the cause of damage

[29] For Supreme Court cases holding that the presumption of carrier negligence shifts to the carrier only the burden of producing credible evidence, see Schnell v. Vallescura, 293 U.S. 296 (1934); Clark v. Barnwell, 53 U.S. (12 How.) 272 (1851).

[30] See, *e.g.*, L. E. Whitlock Truck Serv., Inc. v. Regal Drilling Co., 333 F.2d 488 (10th Cir. 1964). The principal case cited *Whitlock* as authority that the *Stahl* dictum was the controlling federal rule. *Whitlock*, however, involved carrier liability as an insurer, not a bailee, and therefore made use of the *Stahl* holding, not the dictum. See also Skaggs v. Midland Valley R.R., 233 F. Supp. 1004 (N.D. Okla. 1964).

[31] The first case to so interpret *Stahl* was Mamiye Bros. v. Barber S.S. Lines, Inc., 241 F. Supp. 99 (S.D.N.Y. 1965). *Stahl* was cited as controlling the conclusion that a carrier had the burden of persuasion that damage from Hurricane Donna could not have been avoided by carrier diligence. Another case so interpreting *Stahl* is Continental Can Co. v. Eazor Express, Inc., 354 F.2d 222 (2d Cir. 1965).

[32] For a discussion of this possibility in a similar context, see Poor, *A New Code for the Carriage of Goods by Sea*, 33 YALE L.J. 133 (1923).

[33] Common carriers are prohibited from engaging in interstate transportation unless their rates have been filed with the I.C.C. and published. The Commission will assure that the rates are reasonable and nondiscriminatory. See 1 WATKINS, SHIPPERS AND CARRIERS (5th ed. 1962). This does not preclude classification of rates on the basis of the degree of assumed liability. See UNIFORM FREIGHT CLASSIFICATION 4 ("limited liability" rate is ten per cent lower than that for "common carrier" liability). Nor does it preclude rates established upon the "released value" of the goods, *i.e.*, an undervaluation proposed by the shipper. See Adams Express Co. v. Croninger, 226 U.S. 491 (1913); Michigan Millers Mut. Fire Ins. Co. v. Canadian N. Ry., 152 F.2d 292 (8th Cir. 1945).

was outside carrier insurer liability should be placed upon the carrier, while the burden of proving that the carrier's negligence proximately caused the damage should be placed upon the shipper. While this division of proof has the disadvantage of complicating litigation, it provides a balance between carrier acceptance of responsibility which is properly the shipper's, and preservation of carrier motive to exercise due care. A divided risk of damage was the rule at common law, and, as codified by the Carmack Amendment,[34] should also be that of the United States despite unfortunate intimations to the contrary in the principal case.

## JURY SELECTION—KEY-MAN SYSTEM ELIMINATED

Defendant was indicted by a federal grand jury for perjury. The jury commissioner solicited names of prospective jurors from various "key-men," community leaders who had been instructed in the qualifications which the jury commissioner felt prospective jurors should have. On appeal the Court of Appeals for the Fifth Circuit dismissed the indictment. *Held*: Key-man jury selection violates the standards for jury selection prescribed by the Civil Rights Act of 1957.[1] *Rabinowitz v. United States*, 366 F.2d 34 (5th Cir. 1966).

With passage of the Civil Rights Act of 1957, amending 28 U.S.C. § 1861, the states lost control over qualifications of federal jurors.[2] That act together with the establishment in *Glasser v. United States*,[3] of the rule that a jury must represent a cross-section of the community from which it was selected, set forth the criteria for juror selection.

[34] That the Carmack Amendment codifies the common law rules of carrier liability, see Secretary of Agriculture v. United States, 350 U.S. 162, 165 n.9 (1956).

[1] 71 Stat. 634, 638 (1957), which amended 28 U.S.C. § 1861 (1950) to read:
*Qualifications of Federal jurors*
Any citizen of the United States who has attained the age of twenty-one years and who has resided for a period of one year within the judicial district, is competent to serve as a grand or petit juror unless—
(1) He has been convicted in a State or Federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.
(2) He is unable to read, write, speak, and understand the English language.
(3) He is incapable, by reason of mental or physical infirmities to render efficient jury service.

[2] Before the 1957 Civil Rights Act, section 1861 had a fourth subsection which stated, 28 U.S.C. § 1861(4) (1950):
(4) He is incompetent to serve as a grand or petit juror by the law of the State in which the district court is held.

[3] 315 U.S. 60 (1942).