Wyoming Law Journal

Volume 7 | Number 3 Article 2

December 2019

The Presumption of Decedent's Due Care in Negligence Actions - Its Applicability in Wyoming

Dudley D. Miles

WYOMING LAW JOURNAL

VOL. 7 SPRING, 1953 NO. 3

Published Quarterly in the Fall, Winter, Spring, and Summer by the University of Wyoming School of Law and the Wyoming State Bar.
Subscription Price $2.00 per year; 50c per copy.

Mailing Address: College of Law; University of Wyoming, Laramie, Wyoming.

NOTES

THE PRESUMPTION OF DECEDENT'S DUE CARE IN NEGLIGENCE ACTIONS—ITS APPLICABILITY IN WYOMING

In Wyoming, as in several states, in an action for negligence, contributory negligence is an affirmative defense that must be pleaded and proved by the defendant if he is to rely on it. The Wyoming Supreme Court, in 1940, in the case of *Merback v. Blanchard*,[1] announced the rule: "The burden of proof on issue of contributory negligence was on the defendants." In that case the truck belonging to defendant was parked along the highway at night and was struck from behind by a vehicle being driven by Merback, who was instantly killed in the collision. The driver of defendant's truck saw Merback's vehicle prior to the accident, but did not see it at the time of the collision.

1. Merback v. Blanchard, 56 Wyo. 152, 105 P.2d 272 (1940).

In contrast, eleven years later, in a decision, *Wilhelm v. Cukr*,[2] the Wyoming Supreme Court quoted with approval a rule handed down in a Washington case: "Since no one saw the deceased at the time he approached the crossing, and since there was no evidence to show what he did at or before he attempted to cross the railway track, it must be presumed that he used due care." This statement is but a variation of the rule applied in almost all states, that in negligence actions involving death and in which there were no eyewitnesses to the fatal accident, the decedent will be presumed to have been in the exercise of due care at the time of his death.[3]

The purpose of this article is to determine the different effect of the two rules quoted above, if any such difference exists, or whether they are mere duplications of one another.

The advantages to plaintiffs of the application of the rule applied in *Wilhelm v. Cukr*[4] is apparent in those jurisdictions in which contributory negligence must be overcome by the plaintiff to recover. In those states, the plaintiff is charged with the burden of showing that he was in the exercise of due care at the time of the accident. In other words, he must negative contributory negligence as a condition precedent to recovery. However, in these states which require plaintiff to prove freedom from contributory negligence, the application, in death actions, of the presumption that the decedent was exercising due care amounts to a shifting of the burden of proof. With the plaintiff aided by this presumption, the burden shifts to defendant to show that the deceased was guilty of contributory negligence.

The value of the presumption rule as an aid to plaintiffs can be shown in the following hypothetical case:

A was killed in a collision with B's automobile. There was no eyewitnesses to the accident. C brings an action against B for A's death, charging B with negligence. C proves B's negligence, but nothing is shown by either party as to contributory negligence. If the presumption were applied, C, by showing B's negligence and aided by the presumption of A's freedom from contributory negligence, is entitled to recover. If the presumption were not applied, C, not having proved A's freedom from contributory negligence, would fail to sustain his burden of proof and would be denied recovery.

It is evident that the presumption has a definite and positive effect in those states in which plaintiff is charged with the burden of proving freedom from contributory negligence. Here the presumption amounts to an exception to the general rule regarding burden of proof . It is an invaluable aid to plaintiffs and allows recovery by them in many cases in which they would otherwise be defeated.

2. Wilhelm v. Cukr, 68 Wyo. 1, 227 P.2d 988 (1951).
3. Anderson, An Automobile Accident Suit, Sec. 281.
4. Note 2, Supra.

It is more difficult to see any value in the presumption in those states such as Wyoming, in which the defendant must set up and prove contributory negligence as an affirmative defense, as was announced in the *Blanchard* case. It cannot serve to shift the burden as that burden is already on the defendant. Its value here is questionable.

In the *Blanchard* case,[5] the court did not mention the presumption that the decendant was using due care, being content to base its decision on the rule that defendant must prove contributory negligence. In the *Wilhelm* case,[6] the court took the opposite view, expounding at length the justification of the application of the presumption, and not mentioning the rule of the *Blanchard* case, that defendant must prove contributory negligence as a defense in this state.

Referring back to the hypothetical case, it appears that in Wyoming C could recover merely by showing B's negligence, if no contributory negligence were proved by B. Whether the court applied the burden of proof rule of the *Banchard* case or the presumption rule of the *Wilhelm* case, the defendant must prove contributory negligence to defeat recovery. It is difficult to comprehend why in a case such as *Wilhelm v. Cukr*,[7] the court does not rely on the fact that in Wyoming the defendant has the burden of pleading and proving contributory negligence and not concern itself also with the presumption of due care on the part of the decedent, and the various elements involved in the application of that additional rule. The same conclusion would be reached.

Wyoming is not the only state which has approved these seemingly overlapping theories. For instance, in *Madron v. McCoy*,[8] the Supreme Court of Idaho announced both rules. The court in that case after stating that contributory negligence is a defense which must be pleaded by defendant, and after reviewing the decendent's presumed due care rule, said: "Bearing in mind this rule *and* the fact that the burden of proof was on defendant, we are unable to find in the record evidence sufficient to establish contributory negligence on the part of the driver of the overtaking truck." There appears to be no benefit derived from applying both rules at the same time, as either standing alone would have produced the same results.

Several qualifications must be considered before the presumption may be applied. It is usually held that the presumption cannot be indulged in when there are eyewitnesses to the accident.[9] This raises the additional question of "what is an eyewitness whose testimony is capable of denying the use of the presumption?" It has been held that an interested party

5. Note 1, Supra.
6. Note 2, Supra.
7. Ibid.
8. Madron v. McCoy, 63 Idaho 703, 126 P.2d 566 (1942).
9. Foote v. Huelster, 272 Mich. 194, 261 N.W. 296 (1935); Mast v. Illinois Cent. R. Co., 79 F. Supp. 148 (1948).

cannot be considered as a qualified eyewitness.[10] What about the person who is present at the scene but who for some reason is unable to testify, or the one who was present but did not see what happened?[11] These and other situations have given the courts a great deal of trouble in deciding whether or not the presumption would apply.

All available material points out that in those jurisdictions in which the burden of showing lack of contributory negligence is on the plaintiff as a condition precedent to his recovery, the presumption is of a great aid to plaintiffs in those special cases in which it is applicable. It serves a real purpose and should be applied where it is applicable. In such states as Wyoming, however, the use of the presumption seems to serve no good purpose as the plaintiff in a negligence action is already relieved of the burden concerning contributory negligence, and the application of the presumption does no more than that. Rather than to determine whether the prerequisites of the presumption are present, the Wyoming Court could well ignore the presumption and simply apply the rule that in negligence actions, contributory negligence is an affirmative defense which must be pleaded and proved by the defendant. The same results would be reached and the court would not have to justify its ruling as it did in the *Wilhelm* case. The same results could be reached by this much simpler procedure.

DUDLEY D. MILES

ADMISSIBILITY OF VIOLATIONS OF LAW BY CHILD AS EVIDENCE IN PROSECUTION OF PARENTS FOR CRIMINAL NEGLECT

Considerable interest has been aroused by newspaper reports of the efforts of law enforcement officials in Rawlins, Wyoming, to employ a new weapon in the attack on juvenile delinquency.[1] This new weapon is a procedeing against the parents of juvenile law violators under sections 58-101 and 58-104 of Wyoming Complied Statutes, 1945, which make neglect of one's children a misdemeanor, punishable by a fine of $50 to $1,000, or a jail sentence of not more than 12 months, or both.[2] It is the purpose

10. McHale v. U.S., 81 F. Supp. 372 (1948); Collar v. Maycroft, 274 Mich. 376, 264 N.W. 407 (1936) (contra).
11. Fenn v. Mills, 243 Mich. 634, 220 N.W. 770 (1928); Hittle v. Jones, 217 Iowa 598, 250 N.W. 689 (1933); Breker v. Rosema, 301 Mich. 685, 4 N.W. 2d 57 (1942); Hayes v. Stunkard, 230 Iowa 582, 10 N.W. 2d 19 (1943); Peck v. Hampel, 293 Mich. 252, 291 N.W. 648 (1940).

1. Laramie Republican Boomerang, Dec. 18, 1951, Vol. 71, No. 173.
2. So far as pertinent, sec. 58-101 provides that: "It shall be unlawful for any person having or being charged by law with the care or custody or control of any child under the age of nineteen (19) years knowingly to cause or permit . . . the health or morals or welfare of such child to be endangered or injured, or knowingly to cause or permit such child to be in any situation or environment such that the life, health, morals or welfare of such child will or may be injured or endangered . . . or negligently or knowingly . . . fail to provide the necessities of life for such child . . . or in any other manner injure said child."