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# CASES NOTED

## TORTS — REAR-END COLLISION — PRESUMPTION OF FAULT

The plaintiff's car, while stopped at a traffic light, was struck from the rear by defendant's automobile; the sole testimony as to the collision was that of the plaintiff. *Held*, evidence of a rear-end collision created a presumption of negligence and in the absence of explanation from the defendant, the trial court properly directed a verdict for the plaintiff. *McNulty v. Cusack*, 104 So.2d 785(Fla. App. 1958).

The distinction between a presumption and an inference is generally made by the courts in terms of its effect upon the evidentiary burdens which the law imposes on adverse litigants.<sup>1</sup> Where the evidence introduced by a proponent of fact is such that it raises a "presumption" the party against whom it is raised must meet it by proof of facts inconsistent with the fact presumed or the facts on which the presumption rests,<sup>2</sup> at the risk of exposing himself to an adverse peremptory ruling by the court (non-suit or directed verdict). "An inference," however, "is a mere deduction from facts which reason dictates,"<sup>3</sup> not one which the law compels. In such a case where the proponent introduces evidence sufficient to *permit* the deduction (have his issue of fact decided by the jury), the burden of going forward with the evidence does not shift to his adversary.<sup>4</sup> The latter's failure to come forward with evidence to rebut the basic facts or the fact to be inferred simply *may* subject him to an adverse verdict by the jury.<sup>5</sup> Professor Wigmore concludes: "So long as the law attaches no legal consequences upon the opponent to come forward with contrary evidence, there is no propriety in applying the term 'presumption' to such facts, however great their probative significance . . ."<sup>6</sup>

The collision of one vehicle with another which is stationary (parked on the side of a highway or stopped in a lane of traffic) has been

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1. *Cogdell v. Wilmington & W.R.Co.*, 132 N.C. 852, 44 S.E. 618(1903); 9 WIGMORE, EVIDENCE, § 2552 (3d ed. 1940); McCormick, *Charges on Presumptions and Burden of Proof*, 5 N.C.L. REV. 291 (1927); McBaine, *Presumptions: Are They Evidence*, 26 CALIF. L. REV. 519(1938).

2. *Cogdell v. Wilmington & W.R.Co.*, *supra* note 1.

3. *Judson v. Bee Hive Auto Serv. Co.*, 136 Oreg. 1, 297 Pac. 1050 (1930).

4. This burden, depending upon the evidence introduced by both parties, may often shift during the course of trial; on the other hand, the more familiar "burden of proof" which refers to the risk of non-persuasion upon all the evidence in a case, once fixed by the pleadings, never shifts. *Behnke v. President & Board of Trustees of the Village of Brookfield*, 366 Ill. 516, 9 N.E.2d 232(1937); *Spilene v. Salmon Falls Mfg. Co.*, 79 N.H. 326, 108 Atl. 808(1920).

5. McCormick, *Charges on Presumptions and Burden of Proof*, *supra* note 1.

6. 9 WIGMORE, EVIDENCE, § 2490(3d ed. 1940).

characterized by some courts as a situation in which the facts shown by the plaintiff's evidence create a "presumption of negligence"<sup>7</sup> on the part of the driver of the vehicle in the rear. Generally, however, they do so without mention of the consequent risk to which the defendant would subject himself by remaining silent. These courts do not state whether a true presumption has arisen (wherein the defendant's silence results in a directed verdict for the plaintiff on the issue of his negligence) or whether the "presumption" is in actuality but an inference, *permitting* the jury to find negligence.<sup>8</sup>

The unexplained rear-end collision, because the type of accident is such ". . . that when due care is taken, . . . no injury ordinarily results,"<sup>9</sup> has been viewed by a significant number of jurisdictions as appropriate for application of the doctrine of *res ipsa loquitur*,<sup>10</sup> permitting the plaintiff to establish the defendant's negligence by circumstantial evidence.<sup>11</sup> In *Merry v. Knudsen Creamery Co.*,<sup>12</sup> where defendant's truck had collided with the rear end of plaintiff's car stopped at a traffic light, the court held that the doctrine applied and that "the jury would have been warranted in drawing the inference of negligence from the unexplained failure of the [defendant's] brakes . . ."<sup>13</sup> Apart from those jurisdictions which expressly reject the doctrine,<sup>14</sup> the almost universal rule among the courts is that *res ipsa loquitur*, per se, permits only the inference of negligence and that a failure on the part of the defendant to assume the burden of going forward with the evidence requires the submission of the question of negligence to the jury.<sup>15</sup> While a few courts adhering to the majority

7. *Bauhofer v. Crawford*, 16 Cal. App. 676, 117 Pac. 931(1911); *Iacino v. Brown*, 121 Col. 450, 217 P.2d 266(1950); *Nielsen v. Pyles*, 332 Ill. App. 574, 54 N.E.2d 753(1944); *Crochet v. A. & P. Truck Lines*, 52 So.2d 265(La. App. 1951); *O'Donnell v. United Electric Rys. Co.*, 48 R.I. 18, 134 Atl. 642(1926).

8. *J. Samuels & Bro. v. Rhode Island Co.*, 40 R.I. 232, 100 Atl. 402(1917).

9. *Pearlman v. W. O. King Lumber Co.*, 302 Ill. App. 190, 23 N.E.2d 826(1939).

10. *Cooper v. Agee*, 22 Ala. 334, 132 So. 173(1931); *Pickwick Stages Corp. v. Messinger*, 44 Ariz. 174, 36 P.2d 168(1934); *Merry v. Knudsen Creamery Co.*, 94 Cal. App. 715, 211 P.2d 905(1949); *Iacino v. Brown*, 121 Col. 450, 217 P.2d 266(1950); *Nielsen v. Pyles*, 332 Ill. App. 574, 54 N.E.2d 753(1944); *Harvey v. Borg*, 218 Iowa 1228, 257 N.W. 190(1934); *Crochet v. A. & P. Truck Lines*, 52 So.2d 265(La. App. 1951); *Bryne v. Great Atlantic & Pacific Tea Co.*, 269 Mass. 130, 168 N.E. 540(1929); *Whitwell v. Wolf*, 127 Minn. 529, 149 N.W. 299(1914); *Harke v. Haase*, 335 Mo. 1104, 75 S.W.2d 1001(1934); *Manker v. Shaffer*, 161 Ohio St. 285, 118 N.E.2d 641(1954); *McCloud v. City of La Follette*, 276 S.W.2d 763 (Tenn. App. 1954).

11. PROSSER, TORTS, § 43, p. 211(2d ed. 1955).

12. 94 Cal. App. 715, 211 P.2d 905(1949).

13. *Id.* at 905.

14. *Rebentisch v. Korda*, 331 Mich. 37, 49 N.W.2d 192(1951); *Polikoff v. Shelton*, 193 S.C. 398, 8 S.E.2d 494(1940).

15. U.S.: *Sweeney v. Erving*, 228 U.S. 233(1913); Ala.: *Cooper v. Agee*, 22 Ala. 334, 132 So. 173(1931); Cal.: *Merry v. Knudsen Creamery Co.*, 94 Cal. App. 715, 211 P.2d 905(1949); Conn.: *Levine v. Union and New Haven Trust Co.*, 127 Conn. 435, 17 A.2d 500(1941); D.C.: *Pistorio v. Washington R. & Electric Co.*, 46 App. D.C. 479(1917); Fla.: *Orme v. Burr*, 157 Fla. 378, 25 So.2d 870 (1946);

view have held, in highly unusual situations wholly unrelated to automobile accidents, that the plaintiff was entitled to a directed verdict when the defendant remained silent,<sup>16</sup> it is apparent that the rear-end collision is within the general rule,<sup>17</sup> as creating only an inference of negligence. Similar effect has been afforded by several courts which hold that an inference of negligence arises, without invoking the doctrine of *res ipsa loquitur*.<sup>18</sup> While these decisions are in fact repugnant to any concept of presumption, they are surpassed by the even more conservative view espoused by a minority of courts,<sup>19</sup> namely that *res ipsa loquitur* cannot apply because the mere facts of collision and consequent injury cannot warrant the conclusion that the type of occurrence is one which "in the ordinary experience of mankind would not have happened except for the negligence of the defendant."<sup>20</sup> The plaintiff, under this view, is not only denied the benefit of favorable instructions to the jury but may himself suffer a directed verdict.<sup>21</sup>

In the instant case, one of first impression in Florida, the Second District Court of Appeal noted that in three jurisdictions<sup>22</sup> a presumption of negligence arises on the showing of a rear-end collision in contrast to the view of other courts<sup>23</sup> that a mere inference arises. Adopting the

American Dist. Electric Productive Co. v. Seaboard Air Line R. Co., 129 Fla. 518, 177 So. 294(1937); Ga.: Bowers v. Fred W. Amend Co., 35 S.E.2d 15(Ga. App. 1945); Ill.: Chestnut v. Louisville & N. R. Co., 335 Ill. App. 254, 81 N.E.2d 660(1948); Iowa: Anderson v. Fort Dodge, D. M. & S. R. Co., 208 Iowa 369, 226 N.W. 151(1929); Me.: Winslow v. Tibbetts, 131 Me. 318, 162 Atl. 785(1932); Mass.: Liberator v. Framingham, 315 Mass. 538, 53 N.E.2d 561(1944); Minn.: Klingman v. Loew's Inc., 209 Minn. 449, 296 N.W. 528(1941); Mo.: Brown-Scott v. Davis, 216 Mo. App. 530, 270 S.W. 433(1925); N.J.: Wildauer v. Rudnevitz, 119 N.J.L. 471, 197 Atl. 252(1938); N.Y.: Foltis v. New York, 287 N.Y. 108, 38 N.E. 2d 455, 153 A.L.R. 1122(1941); N.C.: White v. Hines, 182 N.C. 275, 109 S.E. 31(1921); Ohio: Walker v. Toledo Hotel Co., 59 Ohio App. 229, 17 N.E.2d 422(1938); S.D.: Mid West Oil Co. v. Aberdeen, 69 S.D. 343, 10 N.W.2d 701(1943); Tenn.: Poor Sisters of St. Francis v. Long, 190 Tenn. 434, 230 S.W.2d 659(1950); Tex.: Wichita Falls Traction Co. v. Elliott, 125 Tex. 288, 81 S.W.2d 659(1935); Utah: Zocolillo v. Oregon Short Line R. Co., 53 Utah 39, 177 Pac. 201(1918); Wis.: Rost v. Roberts, 180 Wis. 207, 192 N.W. 38(1923).

16. Magoffin v. Missouri Pac. R.R., 102 Mo. 540, 14 S.W. 76(1890) (unexplained two train collision); Halterman v. Hansard, 4 Ohio App. 268, 22 Ohio C.C.R. (n.s.) 443(1915) (plaster falling from hotel ceiling, no explanation by defendant).

17. See PROSSER, TORTS, § 42, p. 206(2d ed. 1955); 5A AM. JUR. AUTOMOBILES § 928(1956).

18. Wright v. Clausen, 253 Ky. 498, 69 S.W.2d 1062(1934); Meek v. Allen, 162 Pa. Super. 495, 58 A.2d 370(1948); Eickoff v. Beard-Laney, 199 S.C. 500, 20 S.E.2d 153(1942).

19. Penny v. Gulf Refining Co., 217 Ark. 805, 233 S.W.2d 372(1950); Collis v. Ashe, 212 Ga. 746, 95 S.E.2d 654(1956); Dimmick v. Follis, 123 Ind. App. 701, 111 N.E.2d 486(1953); Brehm v. Lorenz, 206 Md. 500, 112 A.2d 475(1955); Thomason v. Ulmer, 274 S.W.2d 103(Tex. Civ. App. 1954).

20. Dimmick v. Follis, *supra* note 19.

21. Brehm v. Lorenz, *supra* note 19.

22. Nielsen v. Pyles, 332 Ill. App. 574, 54 N.E.2d 753(1944); Crochet v. A. & P. Truck Lines, 52 So.2d 265(La. App. 1951); Muhleisen v. Eberhardt, 21 So.2d 235 (La. App. 1945); Douglas v. Silvia, 55 R.I. 260, 180 Atl. 359(1935).

23. Harvey v. Borg, 218 Iowa 1228, 257 N.W. 190(1934); Wright v. Clausen, 253 Ky. 498, 69 S.W.2d 1062, (1934); Meek v. Allen, 162 Pa. Super. 495, 58 A.2d 370(1948).

former position, the court, relying on an earlier Florida dictum<sup>24</sup> to the effect that negligence becomes a question of law when the plaintiff's evidence is undisputed, concluded:<sup>25</sup>

the court could take judicial notice of the fact that it was the duty of both . . . to stop . . . when a traffic light was . . . red. In this day of heavy motor traffic all over the nation, the youngest or the most careless motorist knows that it is negligence to go through a red light . . . . If the defendant had a justifiable reason for not observing traffic rules, then it was his duty to show that he was not negligent and thus, permit the case to go to a jury . . . .

The court's cursory analysis of the authorities cited in support of the presumption approach indicates precisely the type of problem that may result when too great reliance is placed on the use of the word "presumption." The decisions cited hardly support the proposition announced in that they: (1) did not deal directly or even by implication with the problem before this court;<sup>26</sup> (2) were all cases in which the issue of negligence had been determined by a jury,<sup>27</sup> by a trial judge sitting as the trier of the facts,<sup>28</sup> or had been precluded by a dismissal of the plaintiff's cause;<sup>29</sup> and (3) clearly indicated, regardless of the use of the term "presumption" that *res ipsa loquitur* applied with all its procedural consequences previously discussed. Since the court placed particular emphasis on the Rhode Island approach, it is worthwhile to examine the source of the "rule" that proof of a rear-end collision makes a prima facie case of negligence—a presumption according to the court. *O'Donnell v. United Electric Rys. Co.*<sup>30</sup> held that it was error for the trial court to direct a verdict in favor of the defendant where the circumstances of the collision were disputed. The court, however, went further approving its earlier decision<sup>31</sup> which had held that even where the collision was *undisputed* the question of negligence still had to be submitted to the jury. The "rule," therefore, of this jurisdiction, like that of the other decisions cited by the Florida court, would seem to uphold the proposition that *only an inference of negligence can arise*. While the court's decision in the instant case epitomizes the procedural consequences that distinguish the true presumption from an inference, its position cannot be reconciled with that of all other jurisdictions which have dealt with the problem. A more recent decision<sup>32</sup> of the Third District Court of Appeal has adopted *Cusack v. McNulty* as the applicable rule, perpetuating a tenuous position.

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24. *Townsend Sash Door & Lumber Co. v. Silas*, 82 So.2d 158, 160 (Fla. 1955).

25. *McNulty v. Cusack*, 104 So.2d 785, 788 (Fla. App. 1958).

26. See note 8, *supra*.

27. *Nielsen v. Pyles*, 332 Ill. App. 574, 54 N.E.2d 753 (1944); *Douglas v. Silvia*, 55 R.I. 260, 180 Atl. 359 (1935).

28. *Muhleisen v. Eberhardt*, 21 So.2d 235 (La. App. 1945).

29. *Crochet v. A. & P. Truck Lines*, 52 So.2d 265 (La. App. 1951).

30. 48 R.I. 18, 134 Atl. 642 (1926).

31. *J. Samuels & Bro. v. Rhode Island Co.*, 40 R.I. 232, 100 Atl. 402 (1917).

32. *Shedden v. Yellow Cab Co.*, 105 So.2d 388 (Fla. App. 1958).

The courts should be reluctant to formulate crystalized, rigid rules of law for an occurrence subject to such infinite variation in its facts as an automobile collision. Its very nature demands that reason weigh and consider all attendant circumstances before any conclusion can be rationally drawn as to their effect upon liability. "No two collisions are exactly alike, and . . . particularly in a rear-end collision, issues of fact are raised, which should be submitted to the jury . . ." <sup>33</sup> (Emphasis added) This underlies, in part, the rationale of the prevailing view that permits the inference of negligence. Moreover, this approach tacitly recognizes that in this situation, negligence can only be established by circumstantial evidence, collision and injury being the "facts" from which reasonable men can infer the ultimate fact, negligence. "Negligence is never presumed; it, or the circumstantial basis for the inference of it, must be established by competent proof, and whether it exists is pre-eminently a question . . . for the jury."<sup>34</sup> *It should remain such.*

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### CONFLICT OF LAWS—NON-JUDICIAL DIVORCES

The petitioner, a non-immigrant alien student, temporarily in the United States, was granted a non-judicial divorce from his wife living in Pakistan, by an Islamic religious official in New York. Although this proceeding was apparently valid in the domiciliary country of Pakistan, New York Law required a "due judicial proceeding" in order to secure a divorce. The petitioner brought an action to review an order denying his application for a change in status to that of a permanent resident alien, by reason of his marriage to an American citizen. *Held*, the marriage was void because of the invalidity of the prior divorce. *Shikoh v. Murff*, 257 F.2d 306 (2d Cir. 1958).

A widely held view is that non-judicial divorces<sup>1</sup> must be authorized by the law of the state wherein they took place; this rule prevails even in situations where such divorces have been obtained in compliance with the law of the nationality or domicile of the parties which generally governs their personal status.<sup>2</sup> The reason for this view is based on primary

33. *O'Donnell v. United Electric Rys. Co.*, 48 R.I. 18, 134 Atl. 642(1926).

34. *Murphy v. Terzako*, 14 N.J. Super. 254, 82 A.2d 1(1951).

1. The casenote will concern itself with a comparative study of the English and American positions on recognition of nonjudicial divorces occurring within their territorial jurisdiction, but valid according to the law of the foreign domicile of the individual parties.

2. 1 RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* 485 (1947); 3 ARMINJON, *PRECIS DE DROIT INTERNATIONAL PRIVE* 34, 35 (1931); WOLFF, *INTERNATIONALES PRIVATRECHT* 132 (1933); NUSSBAUM, *DEUTSCHES INTERNATIONALES PRIVATRECHT UNTER BESONDEN BERÜCKSICHTIGUNG DES ÖSTERREICHISCHEN UND SCHWEIZER-*