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**Evidence—PRESUMPTION OF DECEDENTS' DUE CARE—Price v. Amdahl, — Minn. —, 256 N.W.2d 461 (1977).**

In an action for wrongful death in Minnesota, the decedent is presumed to have exercised due care at the time of the accident causing his death.<sup>1</sup> This presumption was statutorily adopted by the Minnesota Legislature in 1957.<sup>2</sup> It recognizes the inherent instinct of self-preservation and the decedent's inability to testify regarding his actions.<sup>3</sup> While the presumption of due care may seem straightforward, its proper function and use have been a source of confusion to the courts.<sup>4</sup>

When the Minnesota Supreme Court attempted to apply the statutory presumption to the facts in the recent case of *Price v. Amdahl*,<sup>5</sup> it faced an inherent conflict between the presumption statute and comparative negligence.<sup>6</sup> In *Price*, the initial question before the court was the permissibility of consolidating the wrongful death action with the survivor's negligence suit. Following a two-car collision, the surviving driver had brought suit against the administrator of the deceased driver's estate, the trustee for the deceased driver's heirs had instituted a wrongful death action against the surviving driver, and an injured passenger had brought suit against both drivers. When the trial court denied consolidation of the three cases, the trustee for the decedent's heirs appealed.

The Minnesota Supreme Court first held that there could be no consolidation of the cases as long as the presumption statute, which made

1. See, e.g., *Price v. Amdahl*, — Minn. —, —, 256 N.W.2d 461, 463 (1977) (common law presumption of decedents' due care); *Lambach v. Northwestern Ref. Co.*, 261 Minn. 115, 126, 111 N.W.2d 345, 352 (1961) (Dell, C.J., concurring specially) (statutory presumption of decedents' due care); *Carson v. Turrish*, 140 Minn. 445, 452, 168 N.W. 349, 352 (1918) (common law presumption of decedents' due care).

2. Act of Apr. 29, 1957, ch. 949, § 1, 1957 Minn. Laws 1704 (codified as Minn. Stat. § 602.04 (1976)) provides:

In any action to recover damages for negligently causing the death of a person, it shall be presumed that any person whose death resulted from the occurrence giving rise to the action was, at the time of the commission of the alleged negligent act or acts, in the exercise of due care for his own safety. The jury shall be instructed of the existence of such presumption, and shall determine whether the presumption is rebutted by the evidence in the action.

3. See, e.g., *Lambach v. Northwestern Ref. Co.*, 261 Minn. 115, 125, 111 N.W.2d 345, 352 (1961) (Dell, C.J., concurring specially); *Bimberg v. Northern Pacific Ry.*, 217 Minn. 187, 197, 14 N.W.2d 410, 415 (court approved jury instruction that decedent is unable to testify on the circumstances surrounding the accident), *cert. denied*, 323 U.S. 752 (1944).

4. See *TePoel v. Larson*, 236 Minn. 482, 486, 53 N.W.2d 468, 470 (1952). See generally 44 MINN. L. REV. 352 (1959). The confusion includes uncertainty as to the evidentiary nature of the presumption. See notes 17-18 *infra* and accompanying text.

5. — Minn. —, 256 N.W.2d 461 (1977).

6. See *id.* at —, 256 N.W.2d at 467; *Steinhaus v. Adamson*, 294 Minn. 387, 396, 201 N.W.2d 264, 270 (1972). For a discussion of the effect of the conflict, see note 37 *infra* and accompanying text.

jury instruction on the presumption mandatory,<sup>7</sup> was in effect;<sup>8</sup> however, not consolidating the cases would unduly prejudice the survivor in a subsequent negligence action because of the effect of collateral estoppel.<sup>9</sup> Since the enactment of comparative negligence had destroyed any rational basis for the presumption statute's distinction between decedents and survivors,<sup>10</sup> the court then held that the presumption statute is an unconstitutional denial of equal protection to a survivor defending a wrongful death action.<sup>11</sup> As a result of the decision, a wrongful death action may now be consolidated with a survivor's negligence action, since no instruction concerning the presumption need be given.<sup>12</sup> In addition, the decision reinstated the common law presumption of due care.<sup>13</sup>

The presumption of due care has had a long and diverse history in Minnesota. Initially a decedent's common law presumption,<sup>14</sup> it later became enacted by statute.<sup>15</sup> The presumption statute has been construed narrowly,<sup>16</sup> with the presumption viewed alternatively as evidence to be weighed by the jury<sup>17</sup> or as a procedural device used to allocate the burden of producing evidence.<sup>18</sup> The most recent shift oc-

7. MINN. STAT. § 602.04 (1976).

8. \_\_\_ Minn. at \_\_\_, 256 N.W.2d at 469.

9. See notes 28-30 *infra* and accompanying text.

10. See notes 39-40 *infra* and accompanying text.

11. \_\_\_ Minn. at \_\_\_, 256 N.W.2d at 469.

12. *Id.*

13. *Id.*

14. See, e.g., *Hack v. Johnson*, 201 Minn. 9, 13, 275 N.W. 381, 383 (1937); *Aubin v. Duluth St. Ry.*, 169 Minn. 342, 347, 211 N.W. 580, 582 (1926); *Gilbert v. City of Tracy*, 115 Minn. 443, 444, 132 N.W. 752, 752 (1911).

15. See note 2 *supra* and accompanying text.

16. For example, the clause in the presumption statute which required a jury instruction on the presumption of due care has been held to mean that the jury instruction is not always necessary. If the presumption had been rebutted as a matter of law, the trial court could refuse to instruct on the presumption and could direct a verdict. *Benson v. Dunham*, 286 Minn. 152, 156, 174 N.W.2d 687, 689 (1970); see *Chicago & N.W. Ry. v. Strand*, 300 F.2d 521, 524 (8th Cir. 1962) (Minnesota statutory presumption does not relieve the trial court of its duty to direct a verdict or grant judgment notwithstanding the verdict when the evidence so indicates). In addition, it has been held that the presumption statute did not preclude the trial court from instructing the jury that the presumption had been rebutted as a matter of law. See *Roeck v. Halvorson*, 254 Minn. 394, 399-400, 95 N.W.2d 172, 176-77 (1959).

17. See, e.g., *Jasinuk v. Lombard*, 189 Minn. 594, 597, 250 N.W. 568, 569 (1933); *Dougherty v. Garrick*, 184 Minn. 436, 443, 239 N.W. 153, 155 (1931); *Aubin v. Duluth St. Ry.*, 169 Minn. 342, 347-48, 211 N.W. 580, 582-83 (1926).

18. See, e.g., *Roberts v. Metropolitan Life Ins. Co.*, 215 Minn. 300, 306-07, 9 N.W.2d 730, 733 (1943); *Ryan v. Metropolitan Life Ins. Co.*, 206 Minn. 562, 569, 289 N.W. 557, 560 (1939). This view is often referred to as the "Thayer-Wigmore" doctrine. See *id.* at 567, 289 N.W. at 560. See generally J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 351-52 (1898); J. WIGMORE, EVIDENCE § 2491 (4th ed. 1940).

curred in 1972, when the court in *Steinhaus v. Adamson*<sup>19</sup> returned the presumption to procedural status<sup>20</sup> and called for repeal of the presumption statute.<sup>21</sup>

In addition to construing the statute narrowly and urging its repeal, the court has criticized its effect of duplicating litigation.<sup>22</sup> Thus, in *Price*, the court held that the three cases arising from the collision could not be consolidated while the presumption statute remained in effect.<sup>23</sup> In the wrongful death action only, the decedent would be presumed to have exercised due care;<sup>24</sup> yet the presumption would be unavailable to the decedent's personal representative when defending a negligence action brought by the surviving driver or the passenger.<sup>25</sup> If the actions were consolidated, the jury would be given the statutorily mandated instructions on the presumption,<sup>26</sup> with the warning that the presumption must be disregarded when considering any but the wrongful death claim. As a result, consolidation of cases placing the decedent in two inconsistent and contradictory postures would be confusing to the jury.<sup>27</sup>

The court in *Price* also held, however, that failure to consolidate the cases would prejudice the survivor because of the effect of collateral estoppel,<sup>28</sup> which applies when an issue has been litigated and decided in a prior suit between the parties, even though the subsequent suit may be based on a different cause of action.<sup>29</sup> Thus, if the wrongful death action is tried first, an adjudication of the surviving driver's fault will become binding on the survivor in his subsequent negligence suit. The

19. 294 Minn. 387, 201 N.W.2d 264 (1972).

20. *Id.* at 395, 201 N.W.2d at 270.

21. *Id.* at 396, 201 N.W.2d at 270.

22. *See Lustik v. Rankila*, 269 Minn. 515, 517, 131 N.W.2d 741, 743 (1964). In addition to duplicating litigation, the presumption statute could cause "an unseemly race to the courthouse," as litigants maneuvered for the tactical advantage of being the first to trial. *See id.* Because the presumption statute only applied in wrongful death actions, injured plaintiffs suing the representative of a decedent's estate, if first to trial, could litigate negligence without the presumption. *See id.*; *Lambach v. Northwestern Ref. Co.*, 261 Minn. 115, 125, 111 N.W.2d 345, 351-52 (1961) (Knutson, J., concurring specially). *But see Lott v. Davidson*, 261 Minn. 130, 142-43, 109 N.W.2d 336, 344-45 (1961) (refusing to find the presumption unconstitutional despite its distinction between wrongful death and other negligence actions).

23. *See note 8 supra* and accompanying text.

24. MINN. STAT. § 602.04 (1976).

25. *See id.*

26. *See id.*

27. *Price v. Amdahl*, — Minn. —, —, 256 N.W.2d 461, 465 (1977); *see Lustik v. Rankila*, 269 Minn. 515, 517, 131 N.W.2d 741, 743 (1964); *Lambach v. Northwestern Ref. Co.*, 261 Minn. 115, 125, 111 N.W.2d 345, 351 (1961) (Knutson, J., concurring specially).

28. *See text accompanying note 9 supra.*

29. *See, e.g., Sachs v. Jenista*, 296 Minn. 535, 537, 210 N.W.2d 45, 46-47 (1973) (collateral estoppel also known as estoppel by verdict); *Travelers Ins. Co. v. Thompson*, 281 Minn. 547, 551, 163 N.W.2d 289, 292 (1968); *Gollner v. Cram*, 258 Minn. 8, 10, 102 N.W.2d 521, 523 (1960).

decedent has the benefit of the presumption of due care as plaintiff in the first suit; he does not have this benefit directly when defending the second suit.<sup>30</sup> Nevertheless, the presumption infects the second suit because of collateral estoppel.

In the 1964 case of *Lustik v. Rankila*,<sup>31</sup> the surviving driver was estopped from asserting a personal injury claim against the decedent's administrator because the survivor had been found negligent in a previous wrongful death action in which the decedent had the benefit of the presumption of due care.<sup>32</sup> While the court was not swayed by the argument that the survivor had no opportunity to litigate affirmative claims without the presumption against her,<sup>33</sup> the court did suggest that trying the survivor's claim first would help the survivor achieve an equal footing.<sup>34</sup>

Despite the problems of consolidation and collateral estoppel, the Minnesota court, before comparative negligence,<sup>35</sup> had at least tolerated the presumption statute.<sup>36</sup> But the court in *Price* recognized an inherent conflict between the two statutes. When the jury determines the relative negligence of the parties, the statutory presumption casts a greater percentage of negligence on the survivor, despite evidence to the contrary.<sup>37</sup> Collateral estoppel then binds the survivor, in a later negligence action, to the relative percentages of negligence in the wrongful death action.

Thus, the presumption of due care statute distinguishes between decedents and survivors. State legislative classifications are violative of the equal protection clause of the fourteenth amendment if unreasonable, arbitrary, and without relevance to the purpose of the law.<sup>38</sup> Before comparative negligence, the classification created by the presumption statute was reasonable because a showing of any negligence on the part of the decedent would prevent the heirs' recovery.<sup>39</sup> There was a rational basis for the statutory presumption, since it was needed to

30. See MINN. STAT. § 602.04 (1976).

31. 269 Minn. 515, 131 N.W.2d 741 (1964).

32. *Id.* at 518, 131 N.W.2d at 743; *accord*, *Schwalich v. Guenther*, 282 Minn. 504, 507, 166 N.W.2d 74, 77 (1969).

33. See 269 Minn. at 528, 131 N.W.2d at 749 (Gallagher, J., dissenting).

34. *Id.* at 517 n.4, 131 N.W.2d at 743 n.4. *But cf.* *Lundeen v. Hackbarth*, 285 Minn. 7, 11, 171 N.W.2d 87, 89 (1969) (collateral estoppel not applied because its application would cause injustice).

35. MINN. STAT. § 604.01 (1976).

36. See *Lustik v. Rankila*, 269 Minn. 515, 523-24, 131 N.W.2d 741, 746-47 (1964) (Murphy, J., concurring specially); *Lott v. Davidson*, 261 Minn. 130, 142-43, 109 N.W.2d 336, 344-45 (1961) (refusing to find the statute unconstitutional).

37. — Minn. at —, 256 N.W.2d at 468.

38. See, e.g., *Reed v. Reed*, 404 U.S. 71, 75-76 (1971); *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920); *Schwartz v. Talmo*, 295 Minn. 356, 363, 205 N.W.2d 318, 323 (1973). See generally *Tussman & tenBroek, The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

39. See *Price v. Amdahl*, — Minn. —, —, 256 N.W.2d 461, 469 (1977).

soften the effects of contributory negligence. The enactment of comparative negligence destroyed this rational basis for the classification, making it an unreasonable and arbitrary discrimination against the surviving defendants.<sup>40</sup>

The court in *Price* apparently not only wanted to consolidate wrongful death and negligence actions to avoid the effects of collateral estoppel,<sup>41</sup> but also wanted to give the trial courts the discretion to withhold instructions regarding presumptions found to be rebutted as a matter of law.<sup>42</sup> Although the court had avoided declaring the presumption statute unconstitutional in the past,<sup>43</sup> when the Minnesota Legislature failed to repeal the statute as urged,<sup>44</sup> the court refused to continue working around a statute that had outlived its purpose and had not been well accepted by the court from its inception.<sup>45</sup>

Without the statute, Minnesota returns to the common law presumption of due care.<sup>46</sup> Although the court did not specify how the presumption will be viewed, it did state that a jury instruction on the presumption is no longer mandatory.<sup>47</sup> Decedents' wrongful death actions and survivors' negligence actions can now be consolidated for trial.<sup>48</sup> Moreover, it can be inferred that the trial courts again have great latitude; they can decide whether the presumption has been rebutted as a matter of law and can so instruct the jury or direct the verdict.<sup>49</sup> However, to what extent comparative negligence will necessitate a modification of the common law presumption of due care is still conjectural. It is doubtful whether the presumption will be considered to be evidence,<sup>50</sup> but whether it will again be referred to as a procedural device is uncertain. If the common law presumption of due care is modified to keep pace with the change to comparative negligence, new terminology may well follow.

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40. *Id.* It is interesting that survivors unable to testify because of their injuries were not given the benefit of the presumption. See *Steinhaus v. Adamson*, 304 Minn. 14, 21-22, 228 N.W.2d 865, 870 (1975); *Ramirez v. Miska*, 304 Minn. 4, 9, 228 N.W.2d 871, 874 (1975); *Dickson v. Bober*, 269 Minn. 334, 340, 130 N.W.2d 526, 532 (1964).

41. See text accompanying note 9 *supra*.

42. \_\_\_ Minn. at \_\_\_, 256 N.W.2d at 469.

43. See *Lott v. Davidson*, 261 Minn. 130, 142-43, 109 N.W.2d 336, 344-45 (1961).

44. See *Steinhaus v. Adamson*, 294 Minn. 387, 396, 201 N.W.2d 264, 270 (1972).

45. See note 16 *supra* and accompanying text.

46. *Price v. Amdahl*, \_\_\_ Minn. \_\_\_, \_\_\_, 256 N.W.2d 461, 469 (1977).

47. *Id.*

48. *Id.*

49. See note 16 *supra*.

50. Cf. *Steinhaus v. Adamson*, 294 Minn. 387, 395, 201 N.W.2d 264, 270 (1972) (recent dissatisfaction and repudiation of presumption as evidence).