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Evidence: Statutory Presumption of a Decedent’s Due Care Denies Equal Protection to Survivors Sued for Wrongful Death

A head-on collision between two vehicles killed one driver and severely injured the other.1 The surviving driver brought suit against the special administrator of the deceased driver's estate,2 alleging that the decedent's negligence caused the accident. The trustee for the decedent's heirs3 subsequently initiated a wrongful death action against the survivor.4 The two actions were consolidated,5 but before trial the trial court, upon motion by the survivor, ordered the survivor's suit tried first, on the ground that Minnesota's statutory presumption of a decedent's due care6 necessitated separate trials. In addition, the trial court certified the questions presented as "important, uncertain, and doubtful."7 The Minnesota Supreme Court granted discretionary review8 of this order and remanded the actions

1. There were also five passengers in the decedent's car. One was killed; the remaining four were injured. Price v. Amdal, 256 N.W.2d 461, 463 (Minn. 1977).
2. An action for bodily injury or death caused by a decedent's negligence may be brought against the personal representative of his estate. MINN. STAT. § 573.01 (1976).
3. Upon written petition by the surviving spouse or one of the next of kin, the court having jurisdiction over a wrongful death action may appoint a trustee to maintain such action. Id. § 573.02(3).
4. At common law, a person's death not only created no cause of action in itself, it terminated any existing cause of action for personal injuries sustained by the decedent before death. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 126 (4th ed. 1971). "The result was that it was more profitable for the defendant to kill the plaintiff than to scratch him . . . ." Id. § 127, at 902. Lord Campbell's Act, 1846, 9 & 10 Vict. 877, c. 93, was the first legislation to remedy this anomaly by creating a cause of action for wrongful death. When the Minnesota territorial laws were first codified in 1851, they included a wrongful death statute. MINN. TERR. REV. STAT. ch. 78, § 3 (1851). For a history of early Minnesota wrongful death legislation, see Cashman v. Hedberg, 215 Minn. 463, 466-67, 10 N.W.2d 388, 390-91 (1943). Minnesota's current wrongful death statute provides that when death is caused by the wrongful act or omission of any person or corporation, a court-appointed trustee may bring an action for damages proportionate to the pecuniary loss severally suffered by the surviving spouse and next of kin as a result of the death of their decedent. MINN. STAT. § 573.02 (1976).
5. Upon motion by the special administrator and the trustee for the decedent's heirs, the trial court approved consolidation of all actions arising out of the collision. Also included in the order were actions by one of the injured passengers against both the survivor and the decedent's estate. No objections were raised at that time. See Price v. Amdal, 256 N.W.2d 461, 463 (Minn. 1977).
8. An order refusing to consolidate cases for trial is not appealable as of right. Id. at 462 n.1 (citing MINN. R. CIV. APP. P. 103.03(d)). The supreme court granted
for consolidated trial, holding that the statutory presumption was unconstitutional because it denied equal protection to survivors against whom wrongful death actions were brought and lacked any rational basis after enactment of the Minnesota comparative negligence statute.\footnote{Price v. Amdal, 256 N.W.2d 461, 469 (Minn. 1977).}

In Minnesota, a wrongful death plaintiff is entitled to a common law presumption that his decedent was exercising due care for his own safety at the time of the occurrence that led to his death.\footnote{"[B]ased upon a law of nature, the universal and insistent instinct of self-preservation," the presumption operates in favor of a wrongful death plaintiff if the defendant claims that the decedent was contributorily negligent.\footnote{Originally, the presumption of due care, like other presumptions, served as a substitute for evidence.\footnote{It could be overcome as a matter discretionary review "in order to consider a troublesome and vexing question."} Id. (citing \textsc{Minn. R. Cw. App. P.} P. 105).} 9. \textsc{Minn. Stat.} § 604.01 (1976). The text of the relevant portion of section 604.01 appears in note 56 infra. 10. \textit{See, e.g.,} Bimberg v. Northern Pac. Ry., 217 Minn. 187, 14 N.W.2d 410 (1944); Aubin v. Duluth St. Ry., 169 Minn. 342, 211 N.W. 580 (1926). The common law presumption has had a rather checkered history. It was rendered largely moot by TePoel v. Larson, 236 Minn. 482, 53 N.W.2d 468 (1952), \textit{discussed at notes 23-29 infra} and accompanying text, and whatever vitality it may have retained in wrongful death actions was pre-empted in 1957 by the enactment of a statutory presumption, \textit{see Act of Apr. 29, 1957, ch. 949, 1957 Minn. Laws 1704 (codified at \textsc{Minn. Stat.} § 602.04 (1976)); notes 30-32 infra} and accompanying text. That the common law presumption has never finally been laid to rest, however, is evidenced by its resurrection in Price v. Amdal, 256 N.W.2d 461 (Minn. 1977). \textit{See text accompanying notes 67-68 infra.}}

There has never been a similar presumption in Minnesota for one merely injured by the negligence of another. \textit{See Carson v. Turrish, 140 Minn. 445, 168 N.W. 349 (1918).} 11. Gilbert v. City of Tracy, 115 Minn. 443, 444, 132 N.W. 752, 752 (1911). 12. The \textit{Price} court stated that the common law presumption "applies to a decedent, whether plaintiff or defendant in a lawsuit."\footnote{256 N.W.2d at 463. The basis for the assertion that the presumption is available to a defendant is uncertain. Apparently, the presumption has never been applied to a wrongful death defendant in Minnesota, and the court's prior descriptions of its scope are susceptible to conflicting interpretations. \textit{Compare} Klare v. Peterson, 161 Minn. 16, 18, 200 N.W. 817, 818 (1924) ("We have often held that one who loses his life in an accident is presumed to have exercised due care for his own safety.")), with Aubin v. Duluth St. Ry., 169 Minn. 342, 348, 211 N.W. 580, 583 (1926) (the presumption "may support all or part of the burden that plaintiff must meet") (emphasis added). Other jurisdictions, however, have addressed the issue explicitly in the context of a wrongful death action against the estate of one who was also killed in the mishap. \textit{Compare} Lorenzen v. Continental Baking Co., 180 Neb. 23, 141 N.W.2d 163 (1963) (common law presumption applies to both decedents), \textit{and} Evjen v. Packer City Transit Line, Inc., 9 Wis. 2d 153, 100 N.W.2d 580 (1960) (common law presumption applies to both decedents), \textit{with} Todd v. Weikle, 36 Md. App. 663, 376 A.2d 104 (1977) (common law presumption applies only in favor of plaintiff's decedent).} \textit{See Luce v. Great N. Ry., 203 Minn. 470, 281 N.W. 812 (1938); Aubin v.}
of law only when "the undisputed evidence so conclusively and un-
mistakenly rebut[ted] the presumption that honest and fair-minded
men could not reasonably draw different conclusions therefrom." In
all other cases, the jury was instructed in the presumption and
weighed it with the available direct and circumstantial evidence of
the decedent’s due care. The presumption could be destroyed, and
the wrongful death plaintiff barred from recovery, if the jury found
by a preponderance of the evidence that the decedent was contribu-
torially negligent.

In Ryan v. Metropolitan Life Insurance Co., however, the Min-
nesota Supreme Court departed from the rule that presumptions
should operate as substantive evidence. Addressing the issue of
whether it was proper to instruct a jury in the common law presum-
ption against suicide, the court determined that a presumption should
have no probative weight. It adopted the Thayer-Wigmore view that
a presumption is a "procedural device" that only shifts the bur-
den of going forward with evidence onto the party against whom it
operates. Failure to satisfy this burden of production mandated a
finding against that party as a matter of law. If the burden was
satisfied, however, the presumption was destroyed, and the issue
went to the jury to be resolved in light of an unaltered allocation of
the burden of persuasion. In short, the jurors’ only proper role was
to draw reasonable inferences from the actual evidence presented at
trial: "[T]hey should not get, ready made from the court, a deduc-
tion to which they are authorized to attach independent probative
value. To allow that would be to assign evidentiary value to that
which is not evidence."

Duluth St. Ry., 169 Minn. 342, 211 N.W. 580 (1926). But see Jasink v. Lombard, 189
Minn. 594, 250 N.W. 568 (1933) (presumption of decedent's due care is only an infer-
ence permitted from appropriate facts).

14. Gilbert v. City of Tracy, 115 Minn. 443, 444, 132 N.W. 752, 752 (1911); see
Olson v. Northern Pac. Ry., 84 Minn. 258, 87 N.W. 843 (1901) (by implication). In such
a case, the issue of a decedent's contributory negligence would be determined by the
court in favor of the defendant.

15. See Jasink v. Lombard, 189 Minn. 594, 250 N.W. 568 (1933).
17. 206 Minn. 562, 289 N.W. 557 (1939).
18. See id. at 566-67, 289 N.W. at 559-60.
19. See J. THAYER, PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON

LAW 339 (1898); 9 J. WIGMORE, EVIDENCE § 2491 (3d ed. 1940).
20. But see Thompson, Presumptions and the New Rules of Evidence in
Minnesota, 2 WM. MITCHELL L. REV. 167, 174 (1976) (arguing that a portion of the Ryan
opinion suggests, contrary to the Thayer-Wigmore approach, that a presumption could
have the effect of shifting the burden of persuasion in circumstances where the jury
rejected all countervailing evidence as incredible).

21. See 206 Minn. at 568, 289 N.W. at 560.
22. Id. at 569, 289 N.W. at 560-61.
The Ryan court's altered conception of presumptions was applied to the presumption of a decedent's due care in TePoel v. Larson. In TePoel the court reasoned that if the function of a presumption was to shift the burden of production, the presumption of a decedent's due care had no purpose in a wrongful death action since the defendant already had the burdens of both production and persuasion on the issue of decedent's contributory negligence. Thus, a jury instruction on a decedent's due care could be justified only if the presumption were evidence or if more than a preponderance of the evidence were necessary to establish contributory negligence. But both of these theories had been repudiated by the court, the former in Ryan and the latter in earlier cases holding that, even when a jury is instructed in the presumption of due care, the defendant's required quantum of proof should remain the same. Thus, although the presumption was not explicitly abolished by TePoel, it was found unnecessary for the protection of wrongful death plaintiffs and inappropriate as a jury instruction. As a practical matter, therefore, no

23. 236 Minn. 482, 53 N.W.2d 468 (1952).

In jurisdictions where a wrongful death plaintiff has the burdens of production and persuasion on the issue of the decedent's due care, the presumption remains valuable, for it aids the plaintiff in making his prima facie case. In Iowa, for example, wrongful death plaintiffs were formerly required to plead and prove decedents' lack of contributory negligence. See Ames v. Waterloo Transit Co., 120 Iowa 640, 95 N.W. 161 (1903). Iowa employed a common law presumption of a decedent's due care, applicable when there were neither eyewitnesses nor any other evidence to establish what the decedent actually did during, or immediately preceding, the occurrence that caused his death. See, e.g., Hoffman v. Monroe Welding Supply Co., 253 Iowa 591, 113 N.W.2d 237 (1962). The Iowa Supreme Court recognized that the presumption was related to the placement of the burden of proof on the question of the decedent's negligence, see Rickabaugh v. Wabash Ry., 242 Iowa 746, 749, 44 N.W.2d 659, 661 (1950), and when the legislature shifted this burden to the defendant, see Act of Apr. 19, 1965, ch. 490, 1965 Iowa Acts 810 (codified at Iowa Code § 619.17 (1977)), the court abolished the presumption, reasoning that, because the defendant now carried the burden of proof, retention of the presumption would “really [afford] plaintiff two presumptions.” Froman v. Perrin, 213 N.W.2d 684, 687 (Iowa 1973) (emphasis in original).

It is believed that the presumption of a decedent's due care originated in jurisdictions where the burden of proving the decedent's due care was on the plaintiff. See 2 F. HARPER & F. JAMES, TORTS § 22.11 (1956); Falknor, Notes on Presumptions, 15 Wash. L. Rev. & St. B.J. 71, 76 (1940).

25. 236 Minn. at 491, 53 N.W.2d at 473. By suggesting this second alternative, the court implicitly recognized that a jury instruction in the presumption has the practical effect of increasing the burden of persuasion for the party against whom the presumption operates. Accord, Falknor, supra note 24, at 77 n.21, 82.

26. See text accompanying notes 17-22 supra.


28. See 236 Minn. at 491-93, 53 N.W.2d at 473-74.
circumstances remained in which it could have any effect.\textsuperscript{29}

Five years later, in apparent response to the \textit{TePoel} decision,\textsuperscript{30} the Minnesota Legislature enacted section 602.04 of the Minnesota Statutes,\textsuperscript{31} creating a statutory presumption of decedents' due care applicable only in wrongful death actions and requiring a jury instruction in the presumption.\textsuperscript{32} Under the statute, the jury was to determine, apparently in every case, whether the defendant's evidence rebutted the presumption, although the quantum of evidence necessary to do so was not specified.

The new statutory presumption created a number of interpretive problems. In \textit{Roeck v. Halvorson},\textsuperscript{33} the Minnesota Supreme Court ruled that the statute did not preclude a trial court from finding that the presumption was rebutted as a matter of law.\textsuperscript{34} But there remained the more vexing question of whether in all other cases the presumption was to be given evidentiary effect by the jury. Until recently, commentators and the court itself thought that the legislature had intended to restore to the presumption a pre-\textit{Ryan} evidentiary effect.\textsuperscript{35} This view was repudiated, however, in \textit{Steinhaus v. Adamson}.\textsuperscript{36} The \textit{Steinhaus} court reasoned that to give evidentiary

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\item \textsuperscript{29} Subsequent decisions continued to refer to a presumption of the decedent's due care, but, citing \textit{TePoel}, refused to permit it to be the subject of a jury instruction. \textit{See} Lynghaug v. Payne, 247 Minn. 186, 197, 76 N.W.2d 660, 667 (1956); Knuth v. Murphy, 237 Minn. 225, 232, 54 N.W.2d 771, 776 (1952). Nor did the court ever intimate thereafter that the presumption had any other proper role. It was thus a "presumption" in name only.
\item \textsuperscript{30} \textit{See} Price v. Amdal, 256 N.W.2d 461, 464 (Minn. 1977) (Section 602.04 was enacted "for the apparent purpose of preventing restrictions on a decedent's right to the presumption of due care in a wrongful death action where the slightest evidence of his contributory negligence would bar any chance of recovery."); \textit{Roeck v. Halvorson}, 254 Minn. 394, 399, 95 N.W.2d 172, 176 (1959).
\item \textsuperscript{31} Act of Apr. 29, 1957, ch. 949, 1957 Minn. Laws 1704 (codified at MINN. STAT. \textsection{} 602.04 (1976)).
\item \textsuperscript{32} MINN. STAT. \textsection{} 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.
\item \textsuperscript{33} 254 Minn. 394, 95 N.W.2d 172 (1959).
\item \textsuperscript{34} \textit{See} id. at 400, 95 N.W.2d at 177 (to construe section 602.04 as preventing a finding that the presumption had been rebutted as a matter of law would be an unconstitutional deprivation of judicial power).
\item \textsuperscript{36} 294 Minn. 387, 201 N.W.2d 264 (1972).
\end{itemize}
effect to the statutory presumption would be inconsistent with *Roeck* because it would render it "difficult to see how a court [could] ever find as a matter of law that there [was] no evidence justifying recovery." Thus, except for its continuing effect as a jury instruction, the statutory presumption was reduced to a status comparable to that of the common law presumption after *Ryan* and *TePoel*. Stripped of procedural effect by the fact that the burden of production on the issue of contributory negligence rested on the defendant and of evidentiary effect by *Steinhaus*, the remaining vitality and purpose of the presumption were in doubt.

Not only were the benefits conferred by the statutory presumption questionable, but its implementation produced serious problems of both procedural efficiency and fairness to litigants. Wrongful death actions frequently arise out of events that also give rise to survivors' negligence actions. Considerations of convenience and judicial economy dictate that because of shared questions of law and fact such actions be consolidated for trial. Under section 602.04, however, decedents' representatives were entitled to the benefit of the presumption only in wrongful death actions, not as defendants in survivors' actions. Consequently, it proved impossible to formulate jury instructions that simultaneously stated the law accurately and made comprehensible to a jury the subtle distinctions that the statutory presumption would demand in a consolidated trial. Because of this

37. *Id.* at 395, 201 N.W.2d at 270. The court stated, "All the statute did was to require the trial court to inform the jury that there was such a presumption and let the jury decide if it had been rebutted . . . . [I]f they find facts that will rebut the presumption, it has no further place in the case." *Id.* at 395-96, 201 N.W.2d at 270 (footnote omitted).

38. See note 24 *supra* and accompanying text.

39. Embodied in a jury instruction, the presumption still might have had the indirect effect, implicitly recognized in *TePoel*, of raising the survivor's burden of persuasion on the issue of the decedent's contributory negligence. See note 25 *supra*.

40. MINN. R. CIV. P. 42.01 provides,

> When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

41. The text of section 602.04 appears in note 32 *supra*.

42. The presumption of due care of a decedent rests on the theory that the love of life ordinarily will cause a person to exercise due care for his own safety. How is any jury of lay people going to understand that a decedent has such a love of life as to exercise due care when his trustee sues to recover for his death but that he did not have the same love of life when the representative of his estate is sued for his negligence?

Lambach v. Northwestern Ref. Co., 261 Minn. 115, 125, 111 N.W.2d 345, 351 (1961) (Knutson, J., concurring specially); see *Steinhaus v. Adamson*, 294 Minn. 387, 393, 201
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dilemma, the Minnesota Supreme Court denied consolidation of wrongful death and survivors' negligence actions arising out of the same occurrence.43

Separating the trials of these related actions eliminated the confusion of differing jury instructions, but it raised serious questions of fairness when the doctrine of collateral estoppel was applied in the second suit. If the survivor's negligence action was tried after the wrongful death action, the survivor was collaterally estopped from relitigating the issue of the decedent's negligence even though the decedent had been afforded a presumption in the prior suit.44 The survivor, therefore, could never litigate the question of the decedent's negligence free from the shadow of the presumption.45 In contrast, if the survivor's suit was litigated first, the wrongful death plaintiff in the subsequent action was unencumbered by collateral estoppel because he was neither a party to, nor in privity with a party in, the previous action.46 Recovery for the survivor, therefore, might depend

N.W.2d 264, 269 (1972)("How can a jury ever understand such legal legerdemain?").

On the inherent difficulty of instructing a jury in the terms of any presumption, see 9 J. WIGMORE, supra note 19, § 2498a; Falknor, supra note 24, at 82 ("[T]here is . . . difficulty [in] conveying to the jury in simple, accurate and understandable language the nature of a 'presumption', how long it persists and how much evidence it takes to overcome it."); McCormick, What Shall the Trial Judge Tell the Jury About Presumptions?, 13 WASH. L. REV. & ST. B. J. 185, 189 (1938) ("The baffling nature of the presumption as a tool for the art of thinking bewilders one who searches for a form of phrasing with which to present the notion to a jury.").


44. See Lustik v. Rankila, 269 Minn. 515, 131 N.W.2d 741 (1964) (survivor estopped from asserting negligence claim against decedent's estate by finding in prior wrongful death action that decedent was free from contributory negligence).

45. Id. at 528, 131 N.W.2d at 749 (Gallagher, J., dissenting).

46. See Schwalich v. Guenther, 282 Minn. 504, 166 N.W.2d 74 (1969); Lustik v. Rankila, 269 Minn. 515, 131 N.W.2d 741 (1964); cf. Olson v. Linster, 259 Minn. 189, 107 N.W.2d 49 (1960) (prior unfavorable verdict in action by trustee for decedent's heir not binding in subsequent suit involving identical issue brought by trustee as an individual); Schmitt v. Emery, 215 Minn. 288, 9 N.W.2d 777 (1943) (prior unfavorable verdict in action by plaintiff as an individual not binding in subsequent suit involving identical issues brought by plaintiff as a personal representative where second suit was not solely for plaintiff's benefit). Collateral estoppel cannot be invoked in a subsequent action against one not a party to the previous suit, or against one who appeared in a different capacity. It can, however, be invoked against the unsuccessful party in a previous action by one not himself a party to that action. See, e.g., Lustik v. Rankila, 269 Minn. 515, 131 N.W.2d 741 (1964). See generally F. JAMES, CIVIL PROCEDURE § 11.31 (1965). Because the wrongful death plaintiff is a trustee for the decedent's heirs, MINN. STAT. § 573.02(3) (1976), whereas the defendant in a survivor's negligence action is the decedent's personal representative, id. § 573.01, neither is bound by a prior unfavorable verdict against the other. This result is justified by the potentially divergent
upon the order in which the two actions came to trial. The result was an unseemly “race to the courthouse” to obtain the potentially decisive priority.\footnote{47}

Confronted yet again with problems engendered by the statutory presumption after twenty years of attempts to make the presumption workable and fair, the court in \textit{Price v. Amdal}\footnote{48} opted for a solution that offered finality. Although neither party raised the issue,\footnote{49} the court found that the statutory presumption of a decedent’s due care denied equal protection to survivor-defendants in wrongful death actions.\footnote{50} The validity of the court’s equal protection analysis depends upon the degree to which the distinctions between decedents and survivors that the court identified are accurate, substantial, and attributable to the presumption and upon the soundness of the court’s conclusion that there was no minimum rational basis upon which the legislature could rest such distinctions.

The court found that the statutory presumption discriminated against survivors in two ways. First, despite the legislature’s intent that the presumption apply only in wrongful death actions,\footnote{51} the

interests of these two representatives. \textit{See, e.g., Winona Nat’l & Sav. Bank v. Dahlen Transp. Co.}, 256 N.W.2d 559 (Minn. 1977), \textit{discussed at note 55 infra.}

\footnote{47} Although the court recognized this effect, it reluctantly sanctioned the practice as preferable to consolidation. \textit{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, 352 (1961) (Knutson, J., concurring specially).

\footnote{48} 256 N.W.2d 461 (Minn. 1977).

\footnote{49} The only constitutional issue advanced by the parties was raised in the respondent’s argument that the court should find the statutory presumption an unconstitutional deprivation of judicial power. \textit{See Brief for Respondent at 6, Price v. Amdal}, 256 N.W.2d 461 (Minn. 1977). \textit{See generally Roeck v. Halvorson}, 254 Minn. 394, 400, 95 N.W.2d 172, 177 (1959); note 34 supra.

\footnote{50} 256 N.W.2d at 469. The court also observed that the statutory presumption was overbroad “in that it is inclusive of decedents who are negligent, as demonstrated by the evidence, as well as those who are not negligent at all.” \textit{Id.} This statement is puzzling. Surely the court did not mean to suggest that before a presumption may operate in favor of a party, he must demonstrate that the evidence establishes the fact to be presumed. Such a requirement would destroy the concept of a presumption altogether. Nor could the court have meant that the statute absolutely insulated decedents from a finding of negligence. This would have been the case only if section 602.04 had established an irrebuttable presumption of due care. \textit{But see notes 33-34 supra} and accompanying text.

\footnote{51} \textit{See 256 N.W.2d at 467; MINN. STAT. § 602.04 (1976).} The statute’s legislative history is, unfortunately, of no help in determining legislative intent. Section 602.04 was enacted without amendment and apparently without controversy. Introduced on March 29, 1957, as S.F. 1672, it was signed into law on April 29, 1957, after passing unanimously in the Senate, \textit{JOURNAL OF THE SENATE, 60TH MINN. LEGIS., 1957 SESS. 2597}, and by a vote of 90-11 in the House, \textit{JOURNAL OF THE HOUSE, 60TH MINN. LEGIS., 1957 SESS. 2687}. Because no substantive legislative history exists, legislative intent can be inferred only from the wording of the statute itself and from prior court decisions.
presumption "infect[ed]" the survivor's cause of action and thus unfairly prejudiced those survivors whose suits were not tried first.\textsuperscript{52} Since this injustice was caused by application of the doctrine of collateral estoppel,\textsuperscript{53} however, there is difficulty with attributing the inequity to the statute. Giving prior wrongful death judgments collateral estoppel effect in survivors' suits was not mandated by section 602.04, but by the court itself in \textit{Lustik v. Rankila}.\textsuperscript{44} If the court found that application of collateral estoppel produced unjust results, it should have overruled \textit{Lustik}, rather than declaring the statute unconstitutional.\textsuperscript{55}

\begin{itemize}
\item \textsuperscript{52} 256 N.W.2d at 466-67.
\item \textsuperscript{53} See notes 44-47 supra and accompanying text.
\item \textsuperscript{54} 269 Minn. 515, 131 N.W.2d 741 (1964). The dissenters in \textit{Lustik} argued against application of collateral estoppel precisely because it would produce inequitable results. See \textit{id.} at 528-29, 131 N.W.2d at 749 (Gallagher, J., dissenting) (collateral estoppel should not be invoked against a party where evidentiary rules were "stacked" against him in prior adjudication of liability); \textit{id.} at 529, 131 N.W.2d at 750 (Sheran, J., dissenting) (collateral estoppel should not bar subsequent survivor's suit "when the [prior] adverse determination was reached, or possibly reached, because of a principle of law applicable only because the plaintiff in the prior action [was] given preferential treatment by reason of our statute").
\item \textsuperscript{55} The indirect effect of section 602.04 was to raise the defendant's burden of persuasion on the issue of the decedent's contributory negligence. See note 25 supra. As a general rule, when a party has a "significantly heavier" burden of persuasion on an issue in a prior action, collateral estoppel should not be invoked to prevent relitigation of that issue in a subsequent action. \textsc{Restatement (Second) of Judgments} § 68.1(d)(Tent. Draft No. 4, 1977). Moreover, the Minnesota court has recognized elsewhere that, as an equitable doctrine, collateral estoppel should not be used where it will work an injustice. See \textit{Winona Nat'l & Sav. Bank v. Dahlen Transp. Co.}, 256 N.W.2d 469 (Minn. 1977); \textit{Lundeen v. Hackbarth}, 285 Minn. 7, 171 N.W.2d 87 (1969).
\end{itemize}

For example, in \textit{Dahlen}, decided the same day as \textit{Price}, one woman was killed and another, her passenger, was injured in an automobile accident. The personal representative of the decedent's estate negotiated a settlement under which the passenger agreed to indemnify the estate from any claims arising out of subsequent suits by the passenger against third parties. He therefore had no incentive to offer a defense when subsequently impleaded as third party defendant in a negligence action brought by the passenger against the driver of the other automobile. Perhaps as a result, the jury determined that the decedent had been 65% negligent. The supreme court, however, refused to collaterally estop the trustee for the decedent's heirs from relitigating the question of the decedent's negligence in a subsequent wrongful death action brought against the other driver. Ironically, the court reasoned that, notwithstanding its decision in \textit{Price}, collateral estoppel should not be applied against the trustee because of the court's "prior holdings" that consolidation of wrongful death and negligence actions was prohibited:

\begin{quote}

SURELY, WERE CONSOLIDATION . . . PERMISSIBLE WHEN THE PASSENGER'S ACTION WAS COMMENCED, EVERY EFFORT WOULD HAVE BEEN MADE BY THE TRUSTEE TO PERSUADE THE JURY TO FIND DECEDENT'S CAUSAL NEGLIGENCE PROPORTIONATELY LESS THAN THAT OF THE SURVIVING DRIVER. BUT SUCH ADVOCACY NEVER OCCURRED . . . TO NOW HOLD THAT THE TRUSTEE IS COLLATERALLY ESTOPPED FROM RELITIGATING THE ISSUE OF DECEDENT'S CAUSAL NEGLIGENCE . . . WOULD BE . . . INEQUITABLE . . . .
\end{quote}

256 N.W.2d at 472.
Second, the court found that, in wrongful death actions themselves, the statutory presumption discriminated against survivors because it led juries to attribute to them greater percentages of negligence than were warranted by the evidence.\textsuperscript{56} Apparently the court believed that informing the jury of the presumption altered the process by which the jury allocated negligence so as to alter the balance of percentages in favor of the decedent to a greater extent than the evidence alone warranted.

Perhaps the presumption does produce this result. In theory, however, the jury follows a two-step process in allocating percentages of negligence. The question of apportionment arises only after the jury has decided \textit{whether} each party was negligent.\textsuperscript{57} The presumption of a decedent's due care is relevant only to the existence of negligence,\textsuperscript{58} and when the jury determines that a decedent did not, in fact, exercise due care, it finds, in effect, that the presumption was unwarranted. One must question the contention that the jury, having rejected the presumption in finding the decedent negligent, will resurrect it when considering the apportionment issue. In short, there is little to suggest that an instruction in the presumption will in any way affect the allocation of negligence.

Nevertheless, it is notoriously difficult to determine the thought processes of a jury, and it is possible that the presumption causes the percentages of negligence to be skewed in favor of the wrongful death plaintiff. Even if this is true, however, it is not the statute itself that produces this effect, but imprecise or ineffective jury instructions.

\textsuperscript{56} See 256 N.W.2d at 468. Apportionment of negligence between the parties is required by \textit{Minn. Stat.} § 604.01(1) (1976):

\begin{quote}
Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.
\end{quote}


\textsuperscript{58} It is here that the presumption will in fact have an effect. For instance, suppose the defendant alleged that at the time of the accident the decedent was driving in the wrong lane. The jury must, first of all, determine whether that allegation is true and whether under the circumstances that fact constitutes negligence. In this inquiry, the instruction that decedent is presumed to have been in the exercise of due care may well tend to make it more difficult for the survivor to convince the jury that his allegation is true. See note 25 \textit{supra}. But once the allegation has been accepted as true, the jury is unlikely to give the presumption any continuing effect, for by its conclusion on the initial question, the jury has already found that decedent was \textit{not} exercising due care. Thus, if the jury understands its general function, there is little reason to think that it will carry the presumption over into the allocation stage of its deliberations.
For this defect, remedies less drastic than declaring the statute unconstitutional could have been fashioned.

Having found that the statute had a discriminatory effect, the court proceeded to find that no rational basis existed for perpetuation of this unequal treatment.\(^\text{59}\) The court recognized that, when originally enacted, the presumption served the rational purpose of ameliorating the harsh effects of the contributory negligence doctrine,\(^\text{60}\) but it felt that, even under the loose standards of a minimal scrutiny equal protection analysis,\(^\text{61}\) the enactment of the comparative neglig-

\(^{59}\) The reasons commonly advanced for the creation of a presumption are discussed in C. McCormick, Evidence § 343 (2d ed. 1972). A presumption may be employed to assist a favored contention or handicap a disfavored one. The Price court suggested that this was the original basis for the presumption of a decedent's due care. See notes 60-63 infra and accompanying text. A presumption may also be used to correct an imbalance resulting from one party's superior access to proof. For discussion of that purpose as it relates to the presumption of due care, see text following note 64 infra. A third reason, recognition of a probability inherent in certain factual combinations, was properly rejected by the court. See note 64 infra. A fourth reason, the avoidance of an impasse, has no application to the presumption of a decedent's due care.

\(^{60}\) 256 N.W.2d at 469; accord, Simpson v. Anderson, 33 Colo. App. 134, 136, 517 P.2d 416, 417 (1973), rev'd on other grounds, 186 Colo. 163, 526 P.2d 298 (1974). Simpson found that the purpose of the common law presumption of a decedent's due care was primarily to ameliorate the harshness of the contributory negligence defense in a wrongful death action where the decedent was unable to testify in his own behalf. Since, under comparative negligence, wrongful death plaintiffs representing negligent decedents were no longer automatically barred from recovery, the court ruled that the presumption should be abolished. Simpson is the only case, other than Price, explicitly to consider the merits of retaining the presumption of a decedent's due care in light of the doctrine of comparative negligence.

\(^{61}\) The court recognized that the class distinctions created by the statutory presumption involved neither "fundamental rights" nor "suspect criteria." 256 N.W.2d at 469 n.7. Thus, only a minimal scrutiny of the statute was warranted, and it should have been upheld if it served any rational purpose. The United States Supreme Court has repeatedly ruled, in interpreting the Federal Constitution, that under a minimal scrutiny analysis a statute does not deny equal protection merely because its classifications are imperfect. See, e.g., Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976); Jefferson v. Hackney, 406 U.S. 535, 546 (1972). So long as the distinctions the statute creates have some basis in practical experience or advance some legitimate state interest, they must be respected. See McGinnis v. Royster, 410 U.S. 263, 276 (1973). Under the rationality test, a legislative classification normally is not set aside if any set of facts rationally justifying it is demonstrated, see United States v. Maryland Sav.-Share Ins. Corp., 400 U.S. 4, 6 (1970), or can be conceived, see Schilb v. Kuebel, 404 U.S. 357, 364 (1971); McGowan v. Maryland, 366 U.S. 420, 426 (1961).

The Price court did not indicate whether it was applying a state or federal constitutional standard. The Minnesota court, however, has previously held that the standards of equal protection under the fourteenth amendment of the United States Constitution are identical to the standards mandated by article I, section 2, and article IV, sections 33 and 34, of the Minnesota Constitution. See Minneapolis Fed'n of Teach-
cence statute\textsuperscript{62} had deprived the presumption of any claim to rati-

Onality\textsuperscript{63} by allowing a wrongful death plaintiff to recover so long as his
decedent's own negligence was not as great as that of the defendant.\textsuperscript{64}

The court did not consider, however, an alternative purpose
served by the presumption that may provide a rational basis suffi-
cient to survive minimal scrutiny. The legislature may rationally
have sought to correct the evidentiary imbalance in wrongful death
actions that arises because the decedent is unavailable. This unavail-
ability can hamper both the preparation and the presentation of the
plaintiff's case. If the decedent had survived the occurrence that
cause his death and had brought suit for personal injuries, he would
have been a valuable witness in his own behalf. In comparison to the
survivor, therefore, the wrongful death plaintiff is disadvantaged in
his ability to marshall evidence, particularly in cases where the survi-
vor is the only eyewitness to the occurrence. The significance of this
imbalance will vary from case to case, but the fact that one of the
parties is dead creates a differential access to evidence that can never
be fully corrected.

The comparative negligence statute did nothing to correct this
imbalance and therefore did nothing to destroy it as a rational basis
for section 602.04. Whether a statutory presumption was the best
remedy for this imbalance is immaterial for purposes of a minimal

\textsuperscript{62} The text of the relevant portion of section 604.01 appears in note 56 \textit{supra}.

\textsuperscript{63} While we have in the past found that the statute was reasonable in light
of our former law of contributory negligence, we cannot find a rational basis
for its existence when we view its operation in conjunction with the law of
comparative negligence which \ldots allows the [wrongful death plaintiff] to
recover even though there may be negligence on the part of the decedent.

\textsuperscript{64} The court alluded to, but rejected, another possible basis for the statutory
presumption—recognition of a probability inherent in a certain factual combination.
The court's summary treatment of this possibility was appropriate. If the basis of the
statutory presumption was a supposed inherent probability that those who die in
accidents are more likely to have been exercising due care than those who survive, the
presumption could hardly be found rational. As the court noted, "[t]o find a love of
life only in [sic] the part of the decedent in a wrongful-death suit but not by the
survivor defies logic and reason." 256 N.W.2d at 469. Although there may be a human
instinct of self-preservation in a life-threatening situation, there is no reason to suppose
that decedents possess it to a greater extent than do survivors. Moreover, the fact of a
decedent's quantitatively greater misfortune is irrelevant to the probability that his
negligence caused the accident.
scrutiny equal protection analysis. Since the statutory presumption had a rational basis, it should not have been voided as a denial of equal protection to survivors.

Nevertheless, the statutory presumption was abolished by *Price*. Somewhat paradoxically, however, the court went on to state, in dictum, that "[w]here applicable, the common-law presumption shall be applied in lawsuits tried in Minnesota after the issuance date of this opinion." In another wrongful death opinion issued the same day, the court asserted, again in dictum, that *Price* had "restored the common-law presumption of a decedent’s due care to its former and traditional procedural status."

Although *Price* clearly did give the common law presumption a renewed vitality, it is unclear what purpose the court expected the presumption to serve and how it was better suited to that end than the statutory presumption that had just been declared unconstitutional. The holding of *TePoel v. Larson*, that it is improper to instruct the jury in the common law presumption, presumably remains good law. Moreover, Rule 301 of the Minnesota Rules of Evidence adopted the *Ryan-TePoel* conception of a presumption as a mere procedural device for shifting the burden of production onto the opponent of the party who receives its benefit. Thus, the common law presumption can have no substantive effect because it cannot be communicated to the jury. Moreover, it can have no procedural effect because the burdens of production and persuasion already rest on the survivor.

The only remaining possibility is that the court was attempting

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65. See Minneapolis Fed'n of Teachers Local 59 v. Obermeyer, 275 Minn. 347, 147 N.W.2d 358 (1966); note 61 supra.
66. See 256 N.W.2d at 469.
67. Id.
69. 236 Minn. 482, 53 N.W.2d 468 (1952).
70. See notes 23-29 supra and accompanying text.
71. MINN. R. EVID. 301 provides,
   In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.
72. See id., Comment.
73. See notes 17-22 supra and accompanying text. The statutory presumption of a decedent's due care, MINN. STAT. § 602.04 (1976), was recognized as an exception to Rule 301 because the legislature, by mandating a jury instruction in the presumption, had specifically provided that it should have more than a merely procedural effect. See MINN. R. EVID. 301, Comment.
to acknowledge and effectuate the policy considerations that had supported the statutory presumption: compensation of wrongful death plaintiffs for the testimonial advantage gained by survivors because of the decedent's absence.\textsuperscript{74} If this was the goal, however, simply increasing the survivor's burden of persuasion would have been easier, more intelligible, and more likely to effectuate that goal in a consistent and reasoned manner.

There are difficulties with this approach, however. Given its rationale, the higher burden of persuasion should be imposed, if at all, only when the circumstances indicate that the plaintiff will be significantly disadvantaged by the absence of the decedent.\textsuperscript{75} But this would introduce a new and unsettling element of subjectivity as to when the higher burden should be imposed. Moreover, such a solution does little to solve the problems that have traditionally surrounded the presumption.

Consolidation would be impossible, for the jury would be required to deal with the issue of a decedent's negligence under two different standards depending upon which party's claim it was considering. Thus, the survivor would inevitably be compelled to endure two separate trials, taxing both his resources and those of the judicial system. Moreover, if the doctrine of collateral estoppel were applied to subsequent suits, another undesirable characteristic of the statutory presumption would be reproduced.\textsuperscript{76}

An alternative to this approach, which would accord the law's favor to decedents and their representatives and still permit consolidated trials, would be to impose a higher burden of persuasion on survivors in both wrongful death and survivors' negligence actions. Since decedents would be unavailable as witnesses in both cases, the policy of compensation for evidentiary disadvantage could conceiv-

\textsuperscript{74} See C. McCormick, supra note 59, § 345; Falknor, supra note 24, at 81-82. No court that has abolished the presumption of a decedent's due care has believed it necessary to fill the void by increasing the defendant's burden of persuasion on the issue of the decedent's contributory negligence. See Froman v. Perrin, 213 N.W.2d 684 (Iowa 1973); Jurman v. Samuel Braen, Inc., 47 N.J. 586, 222 A.2d 78 (1966). In Hutton v. Martin, 41 Wash. 2d 780, 790, 252 P.2d 581, 587 (1953), the court stated that "[t]he rule that no person is presumed to have been negligent until the party having the burden of proof establishes that fact by a preponderance of the evidence furnishes adequate protection to a deceased person as well as to a living person."\textsuperscript{75} If there are disinterested eyewitnesses to the occurrence, the decedent's unavailability would probably not put the wrongful death plaintiff at a significant disadvantage. Similarly, when circumstantial evidence relating to the occurrence is strong enough conclusively to demonstrate due care or the lack thereof, the defendant's testimonial advantage might be irrelevant.\textsuperscript{76} In such circumstances relitigation of the issue of the decedent's negligence should be permitted. Although the survivor might not have been able to prove the decedent's negligence by "clear and convincing" evidence, the facts might support a finding of negligence by a preponderance of the evidence in the subsequent suit. See note 55 supra.
ably be extended to justify this alternative. But such a rule ignores the inequity involved in requiring the survivor to sustain a higher burden of persuasion in an action to recover for his own injuries merely because the person who is alleged to have caused those injuries is unavailable. Considerations of fairness require that the same burden of persuasion apply equally to all personal injury plaintiffs.

Thus, the Minnesota court would be ill-advised to impose a heavier burden of persuasion on survivors in either case. Of course, wrongful death plaintiffs will thereby remain somewhat disadvantaged by the unavailability of decedents. But existing safeguards will help to minimize this effect. The allocation of the burden of proof itself affords some protection to the wrongful death plaintiff, for if the survivor cannot make out a prima facie case of the decedent's negligence, the plaintiff is entitled to a directed verdict on that issue. It is only when the survivor does make out a prima facie case and there is an absence of conclusive evidence that the decedent was negligent that decedent unavailability becomes a problem of significant magnitude. Even then, however, the trial process adequately safeguards the wrongful death plaintiff. Techniques of impeachment can be used to undermine the credibility of witnesses and to demonstrate impairments of perception and memory; sincerity can be probed through an examination of bias, interest, and improper motive; and the jury can judge for itself the demeanor and attitudes of testifying witnesses. Moreover, the attorney for a wrongful death plaintiff can remind the jury that the decedent is unavailable and that his testimony will never be heard. That unavailability will then become a factor for the jury to consider in reaching its verdict, and much of the effect of defendant's superior access to proof may be negated.

The foregoing safeguards are better tailored to correct the imbalance that results from a survivor's superior access to the proof in a wrongful death action than is a presumption of the decedent's due care or a higher burden of persuasion as to the decedent's negligence. Thus, in the aftermath of *Price v. Amdal*, outright abolition of all presumptions of a decedent's due care is appropriate. If the Minnesota Supreme Court adopts this approach, it will both simplify an historically complex area of the law and focus the jury's attention where it belongs: on the actual evidence of the decedent's due care.

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77. The existence of these safeguards does not, of course, mean that the problem of unequal access to proof did not constitute a rational basis for section 602.04. See text following note 64 *supra*. Although such safeguards may better resolve all of the competing interests at stake in a wrongful death action, the legislature is entitled to choose any method it sees fit so long as that method is rationally related to the end it seeks to achieve. See note 61 *supra*. As a method for dealing with decedent unavailability, the statutory presumption was clearly not irrational.