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Torts—Burden of Proof

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whether a prima facie case of negligence has been proved.[71] The issue of the plaintiff's intestate's contributory negligence, being clearly a question for the jury, was not elaborated upon by the Court.

Burden of Proof

The Court of Appeals was faced with a difficult problem of burden of proof in an unusual accident case in *Cole v. Swagler*.[72] Here the owner-driver and a passenger were killed when the car went off the highway. The vehicle traveled 177 feet, striking two trees, uprooting one, passing through bushes, and finally broke itself in half before coming to a stop. The pavement was dry, the weather clear, and there were no living eyewitnesses to the accident. The relative positions of the bodies, when found, indicated that Swagler, the defendant's intestate, was driving. The Court reversed the trial court and the Appellate Division, and held there was insufficient evidence to take to the jury the question of defendant's alleged negligence and whether it was the proximate cause of the accident.

In a death case the plaintiff is not held to as high a degree of proof of the cause of action as where the injured plaintiff can himself describe the occurrence.[73] In order to apply this rule, however, there must be a showing of facts from which negligence may be inferred.[74] In the instant case the Court held that in order to hold defendant liable for the death of Cole, the evidence must show (1) that Swagler was in control of the car at the time of the accident; (2) that Swagler was negligent in his operation of the car, and (3) that the negligent operation by Swagler was the proximate cause of the crash in which Cole died.

The first requirement was deemed satisfied, as the only reasonable inference from the relative positions of the bodies after the accident was that Swagler was driving his own car.[75] As to the second requirement, the Court found that the jury had a right to find that the car was travelling at a high rate of speed, due to the physical circumstances surrounding the crash. However, the mere fact that the car left the road did not give rise to a presumption of negligence, as the accident might have occurred due to other causes, such as a mechanical defect.[76] The third requirement of proximate cause was not met by the evidence, as proof of speed alone will not serve as a casual connection between the defendant's

71. *Cohen v. Consolidated Gas Co.*, 137 App. Div. 213, 121 N. Y. Supp. 956 (1st Dep't 1910); *aff'd*, 202 N. Y. 578, 96 N. E. 1113 (1911).
72. 308 N. Y. 325, 125 N. E. 2d 592 (1955).
73. *Noseworthy v. City of New York*, 298 N. Y. 76, 80 N. E. 2d 744 (1948).
74. *Wank v. Ambrosino*, 307 N. Y. 321, 121 N. E. 2d 246 (1954).
75. Where bodies are so scattered as to render impossible a determination of who was driving, the court will not presume that the owner drove. *Towne v. Bunce*, 307 N. Y. 969, 122 N. E. 2d 751 (1954).
76. A guest assumes the risk of mechanical defect in an automobile which is not known to the owner. *Higgins v. Mason*, 255 N. Y. 104, 174 N. E. 77 (1931).

act and the injury. Where the occurrence is one which might result from causes other than a defendant's negligence, the inference of negligence is not fair and reasonable.[77]

The result of this case would seem to work a hardship on the plaintiff, as the lack of eye witnesses and the mystery surrounding the cause of the accident make it extremely difficult to carry his burden of proof. However, by granting a new trial, the Court of Appeals left the door open for the securing of additional evidence to determine the cause of the crash.

77. *Foltis v. City of New York*, 287 N. Y. 108, 38 N. E. 2d 455 (1941).