Chapter 21: Evidence

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CHAPTER 21

Evidence

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§21.1. Judicial notice: Conclusiveness of blood-grouping tests. Commonwealth v. D'Avella was a case of first impression in the Commonwealth. In a prosecution for getting the complainant with child in violation of G.L., c. 273, §11, after the Commonwealth had made out a prima facie case by testimony of the complainant, the defendant introduced the report of an expert as to the negative results of blood-grouping tests made under the provisions of G.L., c. 273, §12A, inserted by Acts of 1954, c. 232, and his testimony that on the basis of the tests the defendant could not be the father of the child. The Commonwealth conceded that the tests were properly made by a qualified expert. The Court denied the defendant's requests for a ruling to the effect that he was entitled to a finding of not guilty as a matter of law, and, sitting without a jury, found the defendant guilty.

The question whether, as a matter of law, the scientific principle underlying blood-grouping tests is regarded as conclusive was thus raised. The Supreme Judicial Court rejected the contention of the Commonwealth that, by providing that negative results of such tests "shall be admissible in evidence," the legislature intended to leave the trier of fact free to evaluate the weight to be given them, and held that it was for the court to determine their evidentiary effect. The opinion judicially noticed that the "overwhelming weight of scientific opinion" held the tests to be conclusive, and sustained the defendant's exceptions to the denial of his requests.

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2 Section 12A reads: "In any proceeding to determine the question of paternity, the court, on motion of the defendant, shall order the mother, her child and the defendant to submit to one or more blood-grouping tests, to be made by a duly qualified physician or other duly qualified person, designated by the court, to determine whether or not the defendant can be excluded as being the father of the child. The results of such tests shall be admissible in evidence only in cases where definite exclusion of the defendant as such father has been established. If one of the parties refuses to comply with the order of the court relative to such tests, such fact shall be admissible in evidence in such proceeding unless the court, for good cause, orders otherwise."

As the Court points out, the decision is limited to situations in which there is no issue as to the correctness of the administration of the tests. A further implicit refinement of this restriction should be made express. The terms of the concession made by the Commonwealth, as stated in the opinion, were merely that the tests were properly made by a qualified expert, and the Court in qualifying its decision only specifically limited it to "situations where, as here, there is no dispute concerning the accuracy of the tests." Although neither statement made any reference expressly to the report and testimony introduced at the trial concerning the tests, it is clear that the Court construed the concession to include, and intended its own qualification of the applicability of the decision to require, admission of the accuracy of the report and of the testimony introduced in the trial concerning the tests and their results.

The negative results of such tests were earlier held to be admissible on common law principles of the law of evidence in Commonwealth v. Stappen, a nonsupport case, but there it was held only that the negative test was admissible because it would dissolve the presumption of legitimacy. The holding in the Stappen case clearly foreshadowed the decision in D'Avella, however, for the so-called "presumption" of legitimacy is dissolved only by evidence that persuades the trier of fact beyond a reasonable doubt.

The decision is clearly sound. As the Court said, when a scientific principle is regarded by those expert in the field as established, a ruling that would permit the caprice of the fact-finder to find either in accord therewith or to the contrary would be "egregiously unrealistic." This position appears to be indubitable and, to this writer at least, to entail certain inescapable corollaries, which may here be briefly stated without attempt at documentation.

Whenever a scientific proposition is relevant on an issue, its status among those expert in the field is properly the question, and this should be the subject of judicial notice. The validity of a scientific proposition should not be allowed to be the subject of testimony as to the personal opinion of a witness or witnesses, however expert, nor should it be submitted to the lottery of a fact-finding.

When those expert in the field regard the proposition as established as a valid scientific principle, it should be applied as a matter of law, as was held in the D'Avella case, because to submit it to fact-finding would be absurd. By parity of reasoning, when those expert in the field regard its validity as nil, or as in doubt because of substantial disagree-

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4 339 Mass. at 646, 162 N.E.2d at 21.
6 Thayer categorized the "presumption of legitimacy," together with the "presumption of innocence" of a defendant in a criminal prosecution, as exceptional, and properly, it seems, described them as presumptions coupled with a special rule as to the burden of proof. Thayer, Preliminary Treatise on the Law of Evidence 336, 337, 563, 576 (1898).
ment thereon among the experts, the court should rule accordingly; in such a case, if validity of the proposition as a scientific principle is essential to a party on a particular issue, that party should lose on that issue as a matter of law. The personal opinion of expert witnesses as to the validity of the proposition, whether conflicting or in agreement, should be excluded, since it would be equally objectionable to allow the fact-finder, on the basis of such evidence, to treat as an established scientific principle a proposition that the experts in the field reject or upon which they are in substantial doubt or disagreement.

Objection to the suggested requirement of judicial notice in all such situations on the ground that the judge may not “know” the status of the particular scientific proposition among the experts is not well grounded. The trial judge is not expected nor required to know the answers nor to research the questions. It is the duty of counsel to see that the trial court is informed as to the status of the proposition, so that judicial notice may properly be taken, as in the situation when a party relies upon foreign law. If either party fails to inform the court properly as to the status of the proposition among experts in the field, he cannot as of right complain if judicial notice thereof is not taken, or taken upon an adequate presentation of information by the opponent. In other words, the validity of a scientific proposition should always be determined as a matter of law, and never be allowed to be the subject of fact-finding.

Returning after this frolic to the D'Avella opinion, it is clear that the concession by the Commonwealth was crucial to the decision. However, even when the issues of the correctness of the administration of the tests, and of the accuracy of the report and testimony as to the results thereof are not foreclosed by a concession such as was made in the D'Avella case, it would be proper, as the Court also noted, for the trial or appellate court to set aside a verdict or finding of guilty rendered in the face of evidence of negative results of blood-grouping tests when it is deemed to be against the weight of the evidence, and to order a new trial.

A caveat may, however, here be sounded. There appears to be somewhat of a tendency to “go overboard” manifest in such situations. When they are not conceded, as they were in the D'Avella case, the questions of the correctness of the procedure actually employed in the administration of the tests and of the accuracy of their reporting in the evidence remain in the trial as fact issues upon which the defendant has the burden of proof. Although the validity of the scientific principle underlying blood-grouping tests must rightly be upheld as conclusive, because of its general acceptance by experts in the field, the sanctity of the principle is, of course, no guarantee of its proper application in any particular test procedure.

8 G.L., c. 231, §70.
9 Jordan v. Mace, 144 Me. 351, 69 A.2d 670 (1949).
10 Press sources generally regarded as reliable recently carried a report of widespread scandalous conditions among many of the 425 commercial laboratories in
While it is undoubtedly true that outright fraud in tests made by reputable technicians is extremely unlikely, the possibility of human error, carelessness, or wanton disregard on the part of a particular individual in a procedure involved in making a test, in recording the steps, or in transcribing the results into a report, even under a "foolproof" system, can never be ignored.\textsuperscript{11}

There appears, however, to be a regrettable tendency on the part of appellate courts to slip over this point, usually with a gloss to the effect that "There was no dispute with respect to the integrity of the tests."\textsuperscript{12} It is, of course, true that customarily there is in the case no evidence for the complainant-in the form of a direct attack upon the tests, nor could such evidence be reasonably expected to be available, even when there had been glaring departures from proper procedure in the tests or in the recording or transcription of the results thereof. Such statements of appellate courts have the practical effect, however, of arbitrarily ruling as if the prosecution had admitted or conceded facts upon which the defendant has the burden of proof, in total disregard of the state of the evidence. Whenever the defendant is put to his proof, which, of course, presupposes that the complainant has testified to the effect that the defendant was "the only one," there is in the case evidence that circumstantially attacks the validity of the test procedures or reporting, without involving any disregard of the sanctity of the scientific principle underlying blood tests.

While the stress of the circumstances, the character of the complainant, and the ease of fabrication may rightly render the complainant's testimony subject to suspicion and cautious scrutiny, and such credibility as it might initially warrant may well be easily destroyed, in the judgment of both the jury and the trial court, by impressive testimony as to the systematic care taken in all aspects of the tests, these proper considerations fall far short of warranting statements that in substance amount to rulings that the testimony of the complainant, when met by testimony as to a negative paternity test, is not to be considered by the fact-finder. When the concession made by the prosecution in the D'Avella case has neither expressly nor by fair implication been made, it should not be assumed.

\textsuperscript{11} For who, then, shall check the checkers? See Prudential Trust Co. v. Hayes, 247 Mass. 311, 142 N.E. 73 (1924), a leading case on the evidential effect of testimony as to an institutional or office procedure. See also Anderson v. Town of Billerica, 309 Mass. 516, 36 N.E.2d 393 (1941).

\textsuperscript{12} E.g., Commonwealth v. D'Avella, 339 Mass. 642, 646, 162 N.E.2d 19, 22 (1959), commenting on Jordan v. Mace, 144 Me. 351, 69 A.2d 670 (1949), in which there was no concession such as that in the D'Avella case.
§21.2. Circumstantial evidence: Inference; probability or possibility. A number of cases decided during the 1960 Survey year dealt with the propriety of an inference in rather interesting fact situations. In two of the cases selected for comment, an inference was held to be warranted. *Pintosopolous v. Home Insurance Co.* held that the discovery of about a quart of fine beach sand in the motor of a tractor that had suddenly stopped working, with testimony of an expert mechanic that the sand could not enter the motor under ordinary working conditions through either the oil or the air intake, warranted the jury in believing that there was a greater probability that the presence of the sand was caused by malicious mischief or vandalism rather than by accidental or negligent means or normal use.

In *Commonwealth v. Norton* there was testimony that the defendant had by armed robbery taken a money bag containing cash and checks in Boston, and that some four months later the money bag was found in a wooded area in Westwood. When found it contained, in addition to some of the checks stolen at the time of the robbery, a letter addressed to the wife of the defendant at their home which, according to the postmark, had gone through the mail about ten days before the robbery. It was held that while the letter alone would not be sufficient to establish the defendant's guilt, its presence in the stolen money bag was admissible as evidence corroborating the testimony as to the defendant's participation in the robbery. The Court adverted to the presumption that the letter had been duly delivered, and to the fact that it must have been deposited or dropped into the bag by the defendant's wife or someone to whom both bag and letter were accessible. The bag and its contents were held to have been properly admitted in evidence.

In other instances litigants were not successful in their attempts to establish facts by circumstantial evidence. Thus, in *Sherman v. Texas Co.*, it was held that a plaintiff who was injured on the premises of a gasoline station that displayed the standard Texaco insignia, color scheme and pump, was not warranted in concluding therefrom that the defendant company held itself out as the proprietor of the station. It was ruled that the display, even with the consent of the company, went no further than the equivalent of a statement that Texaco gasoline was sold therein. The Court noted that it is common knowledge that these trademark indicia are displayed by independent dealers as well as by stations operated by the supplier.

A close question was resolved in the defendant's favor in *Parsons v.*

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5 It should be noted that the Court expressly prescinded from deciding what effect, if any, the representation of control by the company contended for by the plaintiff would have had in this case, had such a finding been warranted.
Ryan. Testimony to the effect that the defendant operator of an automobile, who was suspected of having struck the plaintiff in a hit-and-run accident, had acted evasively and made false statements when questioned, and that there was no other car in the vicinity at the time of the accident, was assumed, without decision, to be sufficient to warrant a finding that the automobile driven by the defendant struck the plaintiff. This evidence, however, was held to fall short of creating a probability of negligent operation as the cause of the accident. Said the Court:

Censurable yielding to the impulse to avoid the inevitable inconvenience of proved involvement and the risk of liability could be taken fully to account for what Ryan did and said. . . . "An implied admission of this sort may turn the scale where the evidence is conflicting. But it forms an insufficient foundation for the erection of an entire case by *mere inference* without other evidence." (Emphasis supplied.)

The decision is, as has been indicated, a close one, and no purpose would be served by quibbling over its merits, even if one were so disposed. A more trenchant observation should, however, be made. The undoubtedly inadvertent use of the adjective "*mere*" in connection with "inference" in the quoted language is understandable in view of the conclusion toward which the Court was heading, but the use of both words in that context is not only incorrect but most unfortunate. How does any evidence, whether circumstantial or testimonial, ever operate as such save through inference? There is already sufficient tendency for defense counsel to argue and trial courts to rule, in effect, that a probability as shown by circumstantial evidence does not suffice to get a question to the jury, even in civil cases. Where that tendency exists it will unfortunately be encouraged by such statements, which may be parroted to prove conclusively the inherent inadequacy of "*mere inference*" as opposed to "evidence," to warrant the finding of a fact in issue. The thought intended in the last sentence in the quotation from the Court's opinion could well be more properly phrased somewhat as follows: But it forms an insufficient foundation for the erection of an entire case, since without other evidence it does not warrant an inference, but only speculation, surmise or conjecture as to the facts required to be proved.

Another case pointed up a salutary warning for plaintiff's counsel in automobile accident and other cases in which the identity of the defendant and the alleged wrongdoer may be challenged. The usual gen-

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7 340 Mass. at 249, 163 N.E.2d at 296. The last two sentences are quoted by the Court from Credit Service Corp. v. Barker, 308 Mass. 476, 481, 33 N.E.2d 293, 295 (1941).
8 Perhaps it must regrettably be admitted that a trial judge, who was reported to have announced that in his court he wanted "evidence, not inferences" had more support in the cases than would be supposed.

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eral denial of course raises the issue, although it is often not insisted upon to the extent possible under the pleadings and the evidence. In *Lodge v. Congress Taxi Assn., Inc.*, the plaintiff was injured in a collision between another automobile and the taxi in which she was riding. The plaintiff sued the corporate defendant as the owner of the cab, and the individual defendant as its operator. The evidence was held to establish ownership of the taxi by the corporate defendant and negligent operation for which it was responsible.

On the issue of identity of the individual defendant and the operator of the cab, however, the only evidence was testimony that the driver gave his address, and his name as "Whitney Rogavey," and the fact that the suit against the alleged operator was brought against one Whitney Rogavey. It was held that such bald identity of name without confirmatory facts or circumstances was not sufficient to prove identity of the persons, although it was conceded that very slight additional evidence would be enough. Thus, the Court noted that, in an earlier case, the return of service on the writ showed that it was served on the defendant by leaving the summons at an address that was the same as that given by the operator, which was held to be sufficient additional evidence to show identity. The action in *Lodge*, unfortunately for the plaintiff, was instituted by service in hand on the defendant Whitney Rogavey.

§21.3. Circumstantial evidence: Presumption; assumption of normalcy of plaintiff's skin. A decision of importance in the field of product liability was *Casagrande v. F. W. Woolworth Co.* in which it was squarely held that when the question involves allergy or sensitivity, the assumption that a human being is normal has the force of a classic or Thayerian presumption only, and not that of an inference alone, nor that of prima facie evidence, which combines the effect of both a presumption and an inference.

The plaintiff's case consisted in substance of her own testimony to the effect that an irritation began in her armpits about an hour after application of a deodorant, "Mum," which she had purchased from the defendant retailer, that she had used the product daily for about twenty years, had never had skin trouble, and was not bothered by nervous or emotional problems at the time. From this evidence, and the assumption that a human being is normal, the Supreme Judicial Court stated, "it could have been inferred that the product was a sensitizer, unmerchantable without a suitable warning." It appears that on this pos-

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10 The hearsay aspects of this testimony were not expressly referred to in the opinion.
12 340 Mass. at 555, 165 N.E.2d at 111-112. The reference here to the process of inference, it seems, would apply only to the fact question as to the credibility of the plaintiff. If the plaintiff was believed by the jury, the conclusion that the product was unmerchantable would be compelled by the presumption that her skin was normal, and thus in this respect would present a question of law and not one of fact.
ture of the case it could at least as well have been inferred that the particular jar of Mum used by the plaintiff contained a primary irritant and was completely unmerchantable as a deodorant. In either case, without more, the plaintiff would be entitled to go to the jury.

However, there was also in the case expert testimony that the contents of the jar used by the plaintiff were true to the formula of “Mum,” and that the formula contained no ingredients which alone or in combination would act as a primary irritant, that is, directly irritate the skin. There was also testimony that any person might in time become sensitive to a particular substance, and that such sensitivity would be exceptional. The Court judicially noticed the general knowledge of allergies reflected in the testimony.

This evidence was held to destroy the plaintiff’s case. “Any presumption of normality disappeared in the light of the evidence which tended to show that the deodorant and its components were not significant irritants.” Absent the presumption, it was held that the evidence would not warrant the inference that the product would have hurt a normal person or a significant number of persons, and therefore the plaintiff was left without a case for the jury. The denial of the defendant’s motion for a directed verdict was therefore held to be error.

The decision warrants analysis and discussion. The plaintiff’s affirmative evidence was in substance only that, with no past history of undue susceptibility on her part, the use of a deodorant purchased from the defendant irritated her skin. This does not of itself reach the ultimate issue in a suit for breach of a warranty of merchantability. As the Court said, “Fitness for use by a normal person is a test often stated.” A more practical version of the standard is whether the product, sold without adequate warning, would be injurious to a significant number of persons. The fundamental question then arises, on the issue whether the product would injure a normal person or a significant number of persons, what is the precise evidential effect of the fact that it injured the plaintiff? Earlier cases did not foreclose the question. Two cases in particular, however, appear to set the stage for the Casagrande opinion, and therefore warrant mention.

In Payne v. R. H. White Co., the Court referred to the usual assumption of normalcy with respect to condition of mind and body and the analogous assumption that the conduct of a person is honest, proper, regular, and innocent. It was there held that evidence of injury to the plaintiff’s skin on wearing a dress, with the assumption of normalcy of her skin, made out a prima facie case for the plaintiff in the absence of evidence that she was a person whose skin was abnormally sensitive. The Court, however, expressly prescinded from determining the precise evidential effect of this assumption, pointing out that whether it be

3 §40 Mass. at 555-556, 165 N.E.2d at 112.
4 §40 Mass. at 555, 165 N.E.2d at 111.
deemed to operate as a presumption, an inference, or as prima facie evidence, in any event the defendant was not entitled to a directed verdict on that state of the evidence.

In *Epstein v. Boston Housing Authority,* a suit to determine the value of land taken under eminent domain, in which there was no evidence on the question whether a sale of comparable realty had been free of compulsion, the trial court admitted testimony as to the sale price of the comparable realty over objection on that precise ground. Such evidence is admissible only after a finding, express or implied, that the sale was voluntarily made. The trial court, however, in effect refused to find on the question, treating it as immaterial.

The Court said: “The propriety of an inference, or even of a technical presumption, that the condition of a person or thing, or the conduct of a person, is normal and customary, has often been recognized.” The Court held that there was a presumption of voluntariness in a sale, and that in the absence of evidence to the contrary, the trial court was compelled to find that the sale was not under compulsion, and therefore its ruling admitting the evidence (though not its reason therefor) was correct.

The *Epstein* decision thus necessarily ruled out the possibility that the assumption had the effect only of an inference (which would have required a finding of fact based upon evidence on the issue of voluntariness), but it left open the possibility that the assumption had the effect of prima facie evidence, that of both a presumption and an inference.

The facts of the *Casagrande* case add, to those of the *Payne* and *Epstein* situations, the crucial factor of evidence to the contrary of the assumption. Assuming that the *Epstein* holding on an analogous set of facts was a contra-indication to a ruling in the *Casagrande* case that the evidentiary effect was that of inference alone, which would have gotten the plaintiff to the jury, the Court was left with two alternatives. Consistently with the *Epstein* opinion, it could rule either that the evidentiary effect of the assumption was that of prima facie evidence, in which event the underlying inference would get the plaintiff to the jury despite the dissolution of the presumption, or it could rule that the effect was only that of a presumption, which meant that the plaintiff would lose as a matter of law because of the dissolution of the presumption by the defendant’s evidence, leaving the plaintiff with no evidence on the ultimate issue upon which she had the burden of proof. The Court took the latter alternative.

The determination of such questions is, of course, for the court, “which under its inherent and traditional power must decide what effect is to be given to evidence.” When controlling precedent is lacking, the court must distill its decision from considerations drawn from logic, experience, common sense, and public policy, and from judicial notice of knowledge, both common and scientific.

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8 317 Mass. at 301, 58 N.E.2d at 138.
On the merits, the decision appears to be sound. Under the *Casagrande* holding, if the plaintiff’s testimony is believed by the jury, treating the assumption as a presumption compels a finding in his favor, despite a total absence of evidence on the ultimate issue. To avoid this result the defendant must come forward either with evidence that the plaintiff’s skin is peculiarly sensitive or, as in the *Casagrande* case, with testimony that discloses the formula of the product,\(^ {10}\) together with medical testimony that its ingredients are not harmful to a significant number of persons. Such evidence, without more, entitles the defendant to a directed verdict.\(^ {11}\)

To have ruled that in addition to a presumption, the assumption also created a logical inference, and thus constituted prima facie evidence, would have required a determination that there was a likelihood\(^ {12}\) or a probability\(^ {13}\) that the product would have injured a normal person or a significant number of persons. In the light of the erratic and unpredictable incidence of individual manifestations of allergic reactions to substances that do not, so far as is known, adversely affect significant numbers of other persons (which the Court indicated was general knowledge, of which it took judicial notice), a determination that a logical inference underlies the presumption would not seem to be warranted.\(^ {14}\)

It was open to the Court to have ruled that the assumption constituted prima facie evidence by judicially creating a legally permissive although not logical inference that would take the plaintiff to the jury. This would have been a strained result, however, justifiable only on the basis of a policy decision that the Court obviously did not choose to make. There is, of course, substantial support for a policy of expanding the liability of manufacturers and dealers beyond generally recognized limits of warranty and fault so as to distribute among all users of a product the burden of an injury or other loss suffered through use by a particular individual. If such a policy is to be followed, however, it should emanate as a change in the substantive law of warranty or tort, and not as an artificial and illogical appendage of the law of evidence.

The *Casagrande* ruling differs from at least the strong intimations

\(^{10}\) This the defendant may be either unwilling or unable to do. Cf. Carter v. Yardley & Co., 319 Mass. 92, 94, 64 N.E.2d 693, 694 (1946).

\(^{11}\) To require that to defeat the plaintiff’s prima facie case, the defendant’s evidence must be believed by the jury would, of course, involve the heresy of holding in effect that the presumption operates to shift the burden of proof on the ultimate issue to the defendant.


\(^{14}\) It might also be added that although the plaintiff was, of course, not bound thereby, the medical testimony introduced by the plaintiff, as well as that of the defendant, not only afforded no basis for such a determination but tended strongly to show the impropriety thereof.

The plaintiff, however, would be concluded to the extent that the facts therein stated would be judicially noticed.
of a number of earlier cases. The opinion expressly overruled the reasoning, although approving the result, of *Graham v. Jordan Marsh Co.*,\(^\text{15}\) in which it was held to be error to direct a verdict for the defendant, on the ground that there was an inference that the plaintiff's skin was normal. In *Casagrande* it was pointed out that the ruling was correct, but upon the ground that an unrebutted presumption, and not an inference of normality, was present.

Exhaustive examination of earlier cases would serve no useful purpose. However, it may be briefly noted that such general references to the possibility, probability, or actuality of an inference of normalcy of the skin of the plaintiff as appeared in earlier leading cases, to the effect, for example, that "In the absence of direct testimony about the sensitivity of her skin, there might be a presumption, or permissible inference, that she was normal,"\(^\text{16}\) and "The jury could infer that the skin of the plaintiff and of each of the witnesses was normal,"\(^\text{17}\) as well as those in the *Payne* and *Epstein* cases set out previously in this section, are no longer indicative of the law of the Commonwealth.

Finally, a word of caution should be sounded concerning projection of the holding in the *Casagrande* case. As was said in the *Epstein* case, with reference to the assumption of normalcy in general, "Much depends upon the degree to which the condition or conduct is likely and to be expected."\(^\text{18}\)

The *Casagrande* opinion dealt with the assumption of normalcy not in general, but only in its application to the skin, an aspect subject to allergy. That this limitation is important is seen in solid decisions in earlier cases dealing with the precise evidential effect of the assumption in other aspects of its application, which differ from the *Casagrande* holding and are not affected thereby. To cite only a few examples, the assumption was held to have the effect not merely of a presumption, but that of prima facie evidence, a combination of presumption and inference, in *Moroni v. Brawders*,\(^\text{19}\) on the issue of regularity and compliance with law in the conduct of officers of a labor union; in *Hobart-Farrell Plumbing & Heating Co. v. Klayman*,\(^\text{20}\) on the issue of the delivery in due course of a letter properly stamped, addressed, and mailed; and in *Krantz v. John Hancock Life Insurance Co.*,\(^\text{21}\) on the issue whether a drowning victim had died as the result of suicide or accident.


General Laws, c. 231, §85A,\(^\text{1}\) although worded ineptly, in substance pro-
vides that when an automobile involved in an accident is registered in the name of the defendant as owner, the burden of proving that it was operated by a person for whose conduct he was not responsible is on the defendant. Two cases decided during the 1960 Survey year dealt with the applicability of the provisions of Section 85A in fact situations that are not uncommon.

In Decoteau v. Truedsson, an issue was whether the car admittedly registered to the defendant was in fact the car that was in collision with that of the plaintiff, upon which question there was conflicting testimony. The trial judge was obviously in error in charging that it was for the jury to determine whether the defendant had sustained the burden of proving that he was not responsible for the conduct of the operator, while refusing to charge as requested that the plaintiff had the burden of proving that the defendant's car was the one involved in the collision before the statute came into play.

In Pistorio v. Williams Buick, Inc., the corporate defendant lent a car registered under its dealer's plates to another defendant, Dolinsky, to try it out with a view to his purchase or sale of the car to someone else. During the trial period, Dolinsky asked the third defendant, Tradd, who was in the market for a car, to take the automobile and look for a missing dog while trying it out. Tradd and Dolinsky invited the three plaintiffs to go along and help look for the dog. The plaintiffs were injured as a result of grossly negligent operation by Tradd, and it was held that verdicts against Tradd and Dolinsky were proper, Tradd being the agent of Dolinsky.

However, it was held that verdicts were properly directed for the defendant Williams Buick, Inc., because while Section 85A would place the burden on the owner to disprove its responsibility for Tradd's conduct in the operation of the automobile, this responsibility for the operation of the car does not include authorization to the operator to invite third persons to ride in the automobile, upon which issue the plaintiffs had the burden of proof.

Lacking evidence of such authority in Tradd, the plaintiffs were left in the unhappy position of being in a position worse than that of trespassers, in that they had no legal standing whatever in relation to the corporate defendant.5

§21.5. Opinion: Basis; probability or possibility. As usual, a number of cases involving the admissibility of testimony as to opinion reached the Supreme Judicial Court during the 1960 Survey year.

accident or collision it was registered in the name of the defendant as owner shall be prima facie evidence that it was then being operated by and under the control of a person for whose conduct the defendant was legally responsible, and absence of such responsibility shall be an affirmative defence to be set up in the answer and proved by the defendant." The section was enacted by Acts of 1928, c. 317, §1.

Messersmith's Case is a reminder of the fundamental requirement that an expert's opinion is relevant only if supported by proper subsidiary findings. A medical opinion that was essential to the defendant's claim for workmen's compensation benefits had support in facts that were in evidence, and were recited as such in the findings and decision of the single member, adopted by the board, but not in the findings actually made. The case was remanded for clarification of the findings and decision.

The tendency of fact-finders to interweave their findings with recitals of testimony, without discrimination between the two, creates annoying ambiguities. Unfortunately, this fault is by no means limited to fact-finders who are (possibly lay) members of administrative tribunals.

In Milch v. Boston Consolidated Gas Co. there was held to be no support for the opinion of the expert, either in the facts of the hypothetical question propounded or in the evidence as a whole, which was, therefore, inadmissible as mere speculation, surmise, or conjecture.

In Richmond v. Richmond, a master, in making findings as to the value of household furnishings, stated that in addition to considering evidence presented by the parties, he had drawn upon his own experience as a lawyer over the past many years in the settlement of estates, some of which involved the disposal of furniture and furnishings of homes as in the case before him. Objection was made that this was error. The Supreme Judicial Court summarily handled the issue, without citation of authority, by the statement:

Where the value of common articles of household furnishings is at issue, manifestly it is proper for the fact-finding tribunal, whether judge or jury, to have recourse to his or their own knowledge and experience in considering the evidence and determining the value of the property.

While such experience as the master indicated that he had drawn upon might qualify him as a lay expert upon the subject, the difficulty here is that the master is functioning as a fact-finder and not as a witness, who would, of course, be subject to cross-examination.

The holding might be thought to be too broad in that it permits the master to insert in the case, without external manifestation apparent to counsel (and perhaps as the controlling criterion), such experience as he may have had, which may well have been isolated, limited, and unique, and not that which is common and usual in such matters. To that extent, due process is denied.

It may, of course, be doubted whether the distinction between individual and common experience can be effectively implemented as

far as fact-finders are concerned. It appears to be a valid criticism, however, that the holding makes no attempt at the distinction, even as a matter of semantics.

Other cases illustrated the elementary principle that, in order to get to the jury, a plaintiff must establish that the relation between an act or omission of the defendant and the plaintiff's injury must be shown to be that of probability and not mere possibility. The soul-searching required of the expert witness involved in this simple distinction is indicated in *Berardi v. Menicks*, a dental malpractice case in which probability was held to be shown in the opinion testimony, and *Hachadourian's Case*, in which the opinion was held to establish no more than a possibility.