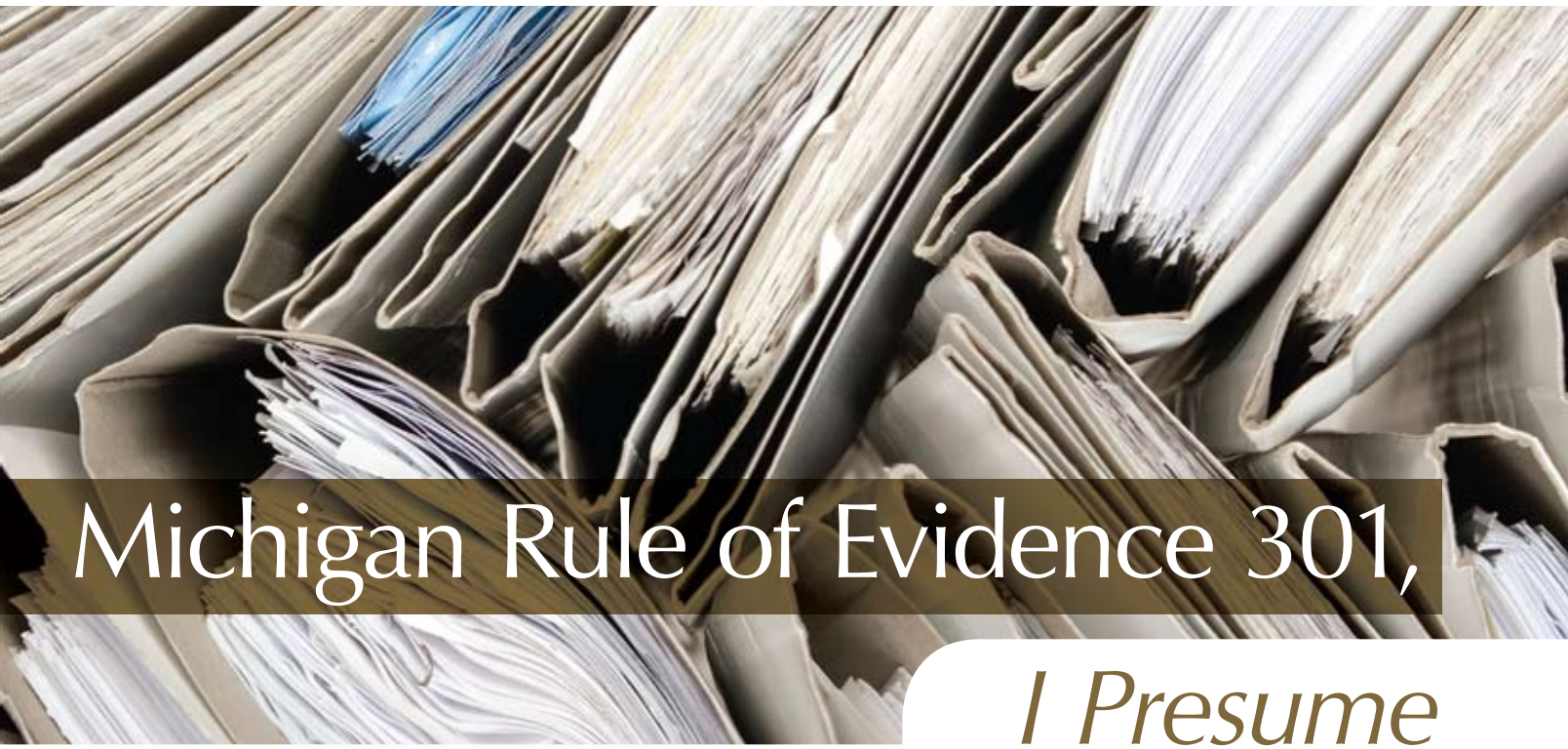

Michigan Rule of Evidence 301, I Presume

By Curt A. Benson

Let my presumption not provoke thy wrath.[1]

It is a rule of evidence, but it could just as easily be a rule of civil procedure. MRE 301 allocates the burden of proof in civil cases. The rule does not define the word "presumption," and by no means does it attempt to enumerate the many presumptions found in the law. It just assumes their existence. The rule's only purpose is to try to impose order on a traditionally chaotic area of law.

MRE 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.

To understand MRE 301, we must reacquaint ourselves with a handful of familiar sounding phrases, define a few words, and revisit some old, erudite arguments. Let's begin with the term "burden of proof." This vague little phrase has bedeviled scholars, lawyers, and law students for more than 100 years. But over time we have grown more comfortable with the phrase. Thanks to Harvard Law Professor James Bradley Thayer, writing in 1898, we now appreciate that the term encompasses two distinct concepts: the burden of persuasion and the burden of producing evidence.[2] Thayer's distinction is quite important in analyzing MRE 301.

The party with the "burden of production" on a disputed fact must introduce evidence sufficient to allow a finder of fact to find in that party's favor.[3] If the trial court decides that the party has failed to produce such evidence, the court will direct a verdict against that party on the disputed fact.

The "burden of persuasion" refers to a party's obligation to introduce evidence that persuades the fact-finder, to a requisite degree of belief, that a particular proposition is in fact true.[4] The burden of persuasion has two separate components. First, what facts must a party plead and prove to prevail on a particular issue?[5] And second, by what degree of persuasion must that party prove those facts, i.e., by a "preponderance of the evidence," by "clear and convincing evidence," or by some other standard?

Back and Forth: The Burden of Proof

By filing the civil action, a plaintiff is disturbing the natural order of things. So the law generally (but not always) places the burden of proving the facts of the case on the plaintiff.[6] The law usually allocates the burden of persuasion (sometimes called the risk of nonpersuasion) between the parties on the basis of the pleadings.[7] As the Michigan Supreme Court has said, the party alleging that a fact is true should suffer the consequences of failing to prove its truth.[8] With respect to the burden of production (sometimes called the risk of nonproduction), it initially rests

with the party charged with the burden of persuasion.[9] But, during the course of trial, the burden of production may shift back and forth from one party to the other.[10]

When in the ordinary course of a trial does the burden of production shift? In the abstract, this can be a subtle and difficult question. In practice, it is not always so hard: the burden of production always rests with the party in danger of losing a motion for a directed verdict.

Assume, for example, that a plaintiff is trying a wrongful-death case and the defendant is contesting the cause of death. The burden of production with respect to causation rests with the plaintiff. If, after the close of the plaintiff's proofs, the trial court decides that the plaintiff has failed to offer sufficient evidence to enable a reasonable jury to find by a preponderance of the evidence that the plaintiff should prevail, upon motion by the defendant, the court will direct a verdict against the plaintiff. The plaintiff has failed to meet his or her burden of production. In contrast, if the plaintiff has introduced so much evidence in favor of the proposition that the court decides that no reasonable jury could find otherwise, the burden shifts to the defendant. The defendant is now obliged to produce sufficient evidence to rebut the plaintiff's evidence, or else the court will direct the verdict against the defendant.

So the burden of production can shift back and forth during trial. But, generally, the burden of persuasion does not. Once again, think of it in terms of a motion for a directed verdict. Going back to our example, if the plaintiff has produced so much evidence that the burden of production has shifted to the defendant, and if the defendant has met that burden with enough evidence to rebut the plaintiff's evidence, the trial court will simply submit the issue to the jury. In other words, the burden of persuasion comes into play only after the proofs at trial are closed and the case is presented to the jury. In our hypothetical example, the burden of persuading the jury rests where it rested originally: with the plaintiff.[11]

Inferences vs. Presumptions

In the context of a jury trial, an inference is basically a logical deduction. A jury often determines facts by inference: once a jury accepts as true a certain fact, or a certain set of facts, by the jurors' collective experience and reasoning, they might accept as true a related factual conclusion. In other words, if a jury believes that A and B are true, it might, using the jurors' own rough assessment of probabilities, logically deduce that C is also true.

All true inferences are permissive. The jury might agree with the proponent of the evidence and reach the conclusion he or she urges, but the jury is equally free to reject it. That is the very nature of an inference.

A presumption is quite different. A presumption is an assumed fact created by operation of law. Think of it as a mandatory inference. While the number and variety of basic facts that can lead a jury to an inferential conclusion are countless, certain patterns frequently reoccur. Courts and legislatures have singled out many sets of basic facts and given them the status of presumptions.[12] These patterns, these "basic facts," are facts that, if proved, trigger the presumption. When a presumption applies, if a jury accepts as true the basic facts, it is instructed that it must, by law, accept the presumed facts unless the presumed facts have been rebutted by contrary evidence.

It is obvious, then, that a presumption is some kind of procedural device that regulates the burden of proceeding with the evidence.[13] When a presumption is in play, something shifts to the opponent of the presumption. But what, exactly, shifts?

Sometimes it's hard to say. This is where the presumption has earned its reputation as the "slipperiest member of the family of legal terms, after its first cousin, 'burden of proof.'"[14] At a minimum, a presumption shifts to the opponent of the presumed fact the burden of going forward with evidence to rebut the fact presumed. To put this another way, when a party who enjoys the benefit of a presumption establishes the basic facts at trial, it is up to the party's opponent to introduce evidence rebutting the fact presumed, or else the jury will be instructed that it must, by law, find that the presumed fact is true.

What about the burden of persuasion? Does this shift as well? Must the opponent of the presumption convince a jury that the presumed fact is untrue? If so, how should the jury instructions read? If not, should the jury instructions mention the presumption at all?

A little history is in order. There are two basic approaches to presumptions in civil cases. One approach was first articulated by Thayer. Thayer saw presumptions as a procedural device that regulated only the burden of going forward with the evidence and nothing more. Describing what later became known as the "bursting-bubble theory," Thayer believed that once the opponent of the presumption introduces evidence rebutting the presumed

Fast Facts:

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Most commentators agree that MRE 301 embodies the so-called "bursting bubble" approach to presumptions. Count the Michigan Supreme Court among them.

The law creates presumptions for many different reasons, such as procedural fairness, public policy considerations, efficiency, and convenience. As such, the one-size-fits-all approach of MRE 301 is inherently unworkable.

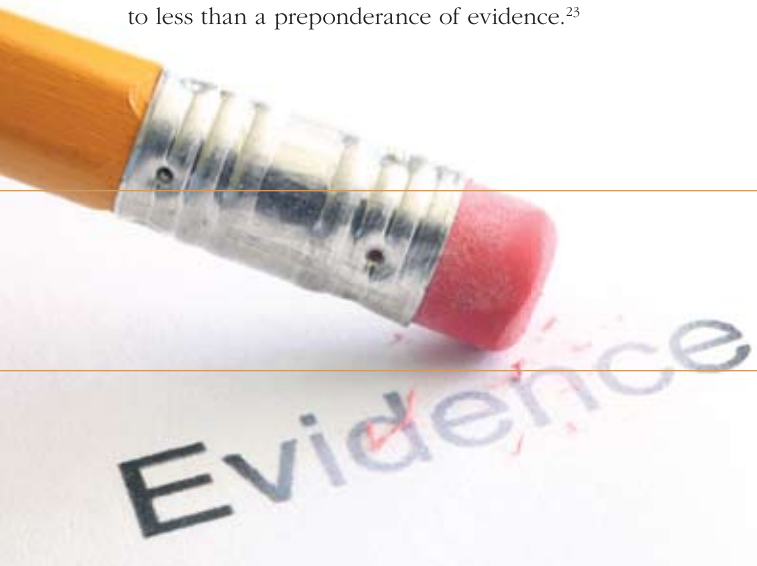
fact, the presumption disappears from the case.[15] In the face of contrary evidence, the jury hears nothing of the presumption. So viewed, presumptions are not very significant at all. They are like "bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts."[16]

Thayer's view carried the day until another Harvard law professor came along a generation later. Professor Edmund M. Morgan rejected Thayer's view as giving presumptions too little weight. Presumptions, Morgan argued, are created for a reason. Oftentimes they exist to promote public policy. They sometimes promote procedural fairness. Often they are created for the convenient and efficient administration of the law. Morgan thought it unwise to casually discard the presumption in the face of sometimes flimsy rebuttal evidence. Accordingly, Morgan advocated pushing both the burden of production and the burden of persuasion over to the opponent of the presumption. Under the Morgan formula, when the party enjoying the presumption establishes "basic fact" A, the court instructs the jury that it must find fact B unless the opponent persuades the jury that the nonexistence of fact B is more probably true than not.[17]

The advisory committee for the Federal Rules of Evidence originally drafted a version of FRE 301 that adopted Morgan's view. The United States Supreme Court submitted that version to Congress. Considerable wrangling ensued. Congress ultimately rejected the Supreme Court's version, as well as a compromise version that would have treated presumptions as "evidence" to be weighed by the jury against the rebuttal evidence, and enacted the present version of FRE 301. "Most commentators have concluded that Rule 301 as enacted embodies the Thayer or 'bursting bubble' approach."[18] Count the Michigan Supreme Court among them.[19]

Michigan adopted MRE 301 on March 1, 1978, with language that parallels the federal rule. Before the Court adopted the rule, Michigan had generally followed Thayer's theory until 1965, when it adopted a kind of modified Morgan theory in *In re Wood Estate*.[20] In 1985, the Michigan Supreme Court, citing MRE 301, overruled *Wood* in *Widmayer v Leonard*[21] and once again returned Michigan to the Thayer camp.

As for the quantum of evidence necessary to meet a burden, *Widmayer* did not say. But Michigan courts have repeatedly held the evidence must be "substantial."[22] Substantial evidence consists of more than a mere scintilla of evidence, but may amount to less than a preponderance of evidence.[23]



Conclusion

Because, as Morgan noted, the law creates presumptions for reasons as different as procedural fairness, public policy, efficiency and convenience, the one-size-fits-all approach of MRE 301 is inherently unworkable. Therefore, a short article describing the rule is inevitably simplistic and incomplete. Any lawyer involved in a civil action implicating a presumption should never assume that the court will faithfully apply the pure Thayer theory suggested by the plain language of the rule. Each presumption must be recognized as a distinct creature of law, a rule unto itself. ■

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FOOTNOTES

1. Shakespeare, *Henry VI*, act II, scene 3.
2. James, *Burdens of proof*, 47 Va L R 51 (1961), citing Thayer, *A Preliminary Treatise on Evidence at the Common Law* 355–364 (1898).
3. *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*, 428 Mich 167, 178–179; 405 NW2d 88 (1987).
4. *Id.*
5. *Id.*
6. *Schaffer v Weast*, 546 US 49, 56; 126 S Ct 528; 163 L Ed 2d 387 (2005).
7. *Kar v Hogan*, 399 Mich 529, 539; 251 NW2d 77 (1976).
8. *Id.*
9. *Id.* at 540.
10. *Id.*; see also *Michigan Ed Support Personnel Ass'n v Evart Pub Schools*, 125 Mich App 71, 74; 336 NW2d 235 (1983)
11. *Michigan Ed Support Personnel*, *supra* at 74.
12. Lilly, An Introduction to the Law of Evidence (3d ed), § 3.2, pp 61–62.
13. *Isabella Co Dep't of Social Services v Thompson*, 210 Mich App 612, 615; 534 NW2d 134 (1995).
14. McCormick, Evidence (6th ed), § 342, p 572.
15. See *Widmayer v Leonard*, 422 Mich 280, 286–288; 373 NW2d 538 (1985), citing Thayer, *A Preliminary Treatise on Evidence at the Common Law* 336–337 (1898).
16. *Mackowik v Kansas City, S J & C B R Co*, 94 SW 256, 262 (Mo, 1906).
17. Graham, Handbook of Federal Evidence (5th ed), § 301.6, p 177.
18. *In Re Yoder Co*, 758 F2d 1114, 1119 (CA 6, 1985).
19. *Widmayer*, *supra* at 287.
20. *In re Wood Estate*, 374 Mich 278; 132 NW2d 35 (1965).
21. *Widmayer*, *supra* at 288.
22. *Jozwiak v Northern Michigan Hosps, Inc*, 231 Mich App 230, 238; 586 NW2d 90 (1998).
23. *Id.*

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