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My dog ate your evidence: Shifting the burden of proof in premises-liability cases

A burden shift may occur if there has been a misuse of the defendant's superior control over evidence

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Plaintiffs face many evidentiary problems in premises liability cases due to inferior access to or control over evidence. Plaintiffs may not have access to the property or its historical condition after being injured. The plaintiff may not have the names and addresses of independent witnesses, and existing conditions usually lie within the knowledge of adverse persons. This article suggests ways that the plaintiff in a premises case can shift the burden of proof to a defendant who has, through misuse of their superior control over evidence, made proving plaintiff's claims either difficult or impossible.

Burden shifting

The general rule is that the plaintiff bears the burden to persuade the trier of fact on every fact essential to her claims. Evidence Code section 500 provides:

> Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.

The "except as otherwise provided by law" language is included "in recognition of the fact that the burden of proof is sometimes allocated in a manner that is at variance with the general rule." (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 660-661, citing Cal. Law Revision Com. Comments to Cal. Evid. Code, § 500.) The trial court may choose to shift the burden of proof on certain issues depending on a number of factors:

- the knowledge of the parties concerning the particular fact;
- the availability of the evidence to the parties;
- the most desirable result in terms of public policy in the absence of proof of the particular fact;
- and the probability of the existence or nonexistence of the fact. (*Ibid.*)

To shift the burden, plaintiff must present a prima facie case demonstrating that the above factors justify a shift in the burden of proof. (See *National Council Against Health Fraud, Inc. v. King Bio Pharmacueticals, Inc.* (2003) 107 Cal.App.4th 1336.) A burden shift "rests on a policy judgment that there is a substantial probability the defendant has engaged in wrongdoing and the defendant's wrongdoing makes it practically impossible for the plaintiff to prove the wrongdoing." (*Id.* at 1346.)

Spoliation

Penn v. Prestige Stations, Inc. (2000) 83 Cal.App.4th 336 memorializes a common problem in premises liability cases. In *Penn*, the plaintiff alleged she slipped and fell on water left on the floor of defendant's convenience store. The convenience store erased surveillance video showing how the plaintiff slipped and the condition of the property before she fell.

Pursuant to *Galanek v. Wismar* (1999) 68 Cal.App.4th 1417, 1425-1426, the destruction of surveillance video could warrant shifting the burden to defendant to disprove facts affected by the loss of evidence. In *Galanek*, the plaintiff alleged legal malpractice against the attorney who prosecuted her products liability claim because he allowed the destruction of her defective car. The attorney argued that since his former client could not prove her products liability claims (because of the absence of the car) there were no legal malpractice damages. The *Galanek* court disagreed because "to require [the former client] to establish causation in the instant action would permit Wismar to take advantage of the lack of proof resulting from his own negligence." (*Id.* at 1428.)

> Because [the attorney's] negligence in failing to preserve the car is what made it impossible for [his client] to prove causation, as a matter of public policy it is more appropriate to hold [attorney] liable than to deny [client] recovery, unless [attorney] can prove his negligence did not damage [his client].

(*Id.* at 1426.)

The *Galanek* court was thus concerned that the defendant not benefit from his own negligent loss of evidence. This justification is equally applicable to premises liability cases.

Counsel should seek a shift in the burden of proof by way of jury instruction. *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 12 encourages the use of instructions to remedy spoliation. In support, counsel should present evidence that defendant had superior control over evidence; that defendant lost

the evidence; that plaintiff is otherwise unable to have knowledge of facts shown by the lost evidence; and that it would not serve public policy for defendant to benefit from the loss of evidence that occurred at no fault of the plaintiff.

A proposed instruction in the *Penn v. Prestige* example might read: "Defendant bears the burden of proving that it could not have learned of the water on its floor through the use of ordinary care." Under Evidence Code section 502, "[t]he court on all proper occasions shall instruct the jury as to which party bears the burden of proof on each issue…" If the trial court is unwilling to give a burden-shifting instruction, plaintiff's counsel should still request the jury be instructed that it may draw negative inferences from defendant's loss of evidence. (See Evid. Code, § 413 and CACI 204.)

Poor record keeping

Vague or incomplete maintenance records pose another potential proof problem in premises liability cases. In the case of a plaintiff harmed due to a dangerous condition of a public sidewalk, the plaintiff will want maintenance records to establish whether there was an adequate inspection system. (See Gov. Code, § 835.2(b).) But what if those records lack details showing the precise location and type of inspections performed and the witnesses with knowledge of the inspections are no longer available?

Courts have shifted the burden of proof when the defendant's poor record keeping makes it difficult for the plaintiff to prove an element of a claim. In *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1188 a class of employees sued for violations of a living wage ordinance ("LWO"). (*Id*. at 1170.) Cintas argued that plaintiffs could not prove which employees performed the type of work implicating LWO rights. (*Id.* at 1187-88.) Cintas wage records did not distinguish LWO work from non-LWO work. (*Ibid.)* 1189. Rather than bar plaintiffs' claim for lack of proof, the court shifted the burden to Cintas to prove which plaintiffs were not entitled to LWO benefits "because, as plaintiffs' employer, Cintas is in the best position to know" this information.

Amaral is remarkable especially because Cintas was under no legal duty to maintain records showing which employees were entitled to LWO benefits. The court nevertheless shifted the burden of proof to defendant because it had superior control over the relevant information and public policy would not be furthered by allowing Cintas to benefit from its imprecise wage records. Similarly, while a property owner may be under no duty to keep clear maintenance records, the owner has a non-delegable duty to keep its property in a reasonably safe condition and it is in the best position to know what maintenance it has performed on its property.

Applying *Amaral* to premises liability cases, plaintiff's counsel should present evidence that defendant was under a legal duty to keep its property in a reasonably safe condition; that defendant retained superior control over evidence of maintenance; that defendant could have documented its maintenance more precisely; that plaintiff has no other access to this information; and that defendant would unfairly benefit from its own poor record keeping.

Multiple negligent parties, single cause

Injuries at multi-employer worksites sometimes involve finger pointing as to which defendant created the injury-producing condition. At the construction of a condo complex, a person delivering appliances was injured when a negligently installed railing gave way, causing him to fall to the ground below. Two different companies were installing railings at the site in the same negligent manner but both denied having installed the one that failed.

One of the most well-known cases of burden shifting under California law is *Summers v. Tice* (1948) 33 Cal.2d 80, 86-87. There, two defendants negligently fired shotguns on a hunting outing but plaintiff could not prove which gun fired the shot that struck him. The Court shifted the burden to the two defendants to absolve themselves.

> The injured party has been placed by defendants in the unfair position of pointing to which defendant caused the harm. If one can escape the other may also and plaintiff is remediless. Ordinarily defendants are in a far better position to offer evidence to determine which one caused the injury.

(*Id.* at 86.)

The alternative liability theory of *Summers v. Tice* could also apply to situations like the failed railing. To support a request for a burden-shifting instruction in such a case, counsel should present evidence that both defendants were negligent; that no other party could have installed the railing; that plaintiff was innocent of any negligence; that defendants had superior knowledge as to which of them caused the harm; and the unfairness of absolving both negligent defendants of any liability.

Defendant's negligence

Sometimes the damages caused by a defendant's negligence include the loss of evidence. In *Haft v. Lone Palm Hotel* (1970) 3 Cal.3d 756, a father and son drowned at a motel swimming pool. The motel had not complied with "any of the major safety measures required by law for pools available for the use of the public" including the posting of a lifeguard. (*Id.* at 762-63.) The Court held that by proving defendants failed to provide a lifeguard, the plaintiffs had shifted the burden to defendants.

> To require plaintiffs to establish "proximate causation" to a greater certainty than they have in the instant case, would permit defendants to gain the advantage of the lack of proof inherent in the lifeguardless situation which they have created.

Plaintiff's counsel should keep *Haft* in mind for any case where the defendant's negligence created an "evidentiary

void." For example, a property owner's negligent maintenance could result in a fire that both injures persons and destroys evidence of the cause of the fire. The defendant's failure to take steps to limit fires such as by maintaining required smoke detectors, fire extinguishers or sprinklers could be used to shift the burden to defendant that such omissions were the cause of injuries.

Beware, however, that burden shifting under *Haft* is only available if defendant's negligence made proving causation a practical impossibility (See *Fagerquist v. Western Sun Aviation, Inc.* (1987) 191 Cal.App.3d 709, 723-726) and if plaintiff does not share responsibility for the loss of evidence (See *McKeon v. Hastings College* (1986) 185 Cal.App.3d 877, 902).

Res ipsa loquitur

Although the doctrine of res ipsa loquitur does not directly fit within the theme of this article, the doctrine deserves a brief mention for what it can and cannot do for premises cases suffering from evidentiary gaps.

Res ipsa loquitur is applicable to certain kinds of accidents that are so likely to have been caused by a defendant's negligence that, in the Latin equivalent, "the thing speaks for itself." (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 825.) If applicable, the doctrine requires the defendant to come forward with evidence to disprove negligence. (*Id.* at 825.) The presumption arises only when the evidence satisfies three conditions: (1) The accident must be of a kind that ordinarily does not occur unless someone is negligent; (2) the accident must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) the accident must not have been due to any voluntary action or contributory fault of the plaintiff. (*Id.* at 825-26.)

However, the Supreme Court in *Brown v. Poway Unified School Dist.*, supra, 4 Cal.4th at 827 significantly limited res ipsa in premises cases by finding that "slips and falls are not so likely to be the result of negligence as to justify [the doctrine.]" The Court reasoned there are usually many explanations for the cause of a plaintiff's fall "and none is inherently more probable than the others." (*Id.* at 827.) Thus, counsel seeking to employ res ipsa in a premises case should be prepared to present evidence addressing these concerns.

For more information on applying res ipsa loquitur to premises liability cases, read the excellent article by Donna Bader, *Applying res ipsa loquitur to premises liability fire cases* Plaintiff Magazine August 2007 (archived at www.plaintiffmagazine.com).

Conclusion

There is currently a dearth of California appellate law on shifting the burden of proof to defendants in premises liability cases. Thus, plaintiffs' counsel has room to argue for novel burden-shifting applications on a case-by-case basis. By emphasizing the defendant's superior knowledge and the judicial maxim that "[n]o one can take advantage of its own wrong" (Civ. Code, § 3517), plaintiffs' counsel can require premises defendants to either preserve and put forth the best evidence under their control or risk an adverse presumption.


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